

An appeal

- by -

Richard Thomas
("Thomas" or "Employee")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Paul E. Love

FILE No.: 2003A/14

DATE OF HEARING: March 19, 2003

DATE OF DECISION: April 1, 2003

DECISION

APPEARANCES:

Richard Thomas

Larry Hesketh, for Summer Breeze Fishing Ltd.

OVERVIEW

This is an appeal by an employee, Richard Thomas (“Thomas” or “Employee”), from a Determination dated December 23, 2002 (the “Determination”) issued by a Delegate of the Director of Employment Standards (“*Delegate*”) pursuant to the *Employment Standards Act, R.S.B.C. 1996, c. 113* (the “*Act*”). The Employee seeks to appeal the finding that he was a manager, and he seeks payment of statutory holidays, and overtime wages. The Delegate failed to make any findings of fact in the Determination, failed to consider the definition of manager, and any associated jurisprudence, and failed to set out in any reasoned basis for the conclusion that Mr. Thomas was a manager. An Adjudicator should not be “guessing” at the facts in exercising the appellate jurisdiction under the *Act*. There must be a decision that can be considered. In this case the Determination was so flawed fundamentally that I cancelled the Determination.

ISSUE:

Did the Delegate err in determining that Mr. Thomas was a manager?

FACTS

I decided this case after an oral hearing, and after a consideration of the oral evidence, documentary evidence and submissions of the Employer, the Employee.

Mr. Thomas (the “Employee”) was employed with Summer Breeze Fishing Ltd. (the “Employer”) at its oyster and clam operation situated on Denman Island. After he was terminated by the Employer, the Employee filed a complaint under the *Act*, on May 14, 2002 alleging that he was entitled to overtime pay, statutory holiday pay, and compensation for length of service. The Delegate’s investigation revealed that Mr. Thomas was paid statutory holiday pay, and was paid compensation for length of service by the Employer, and was paid straight time for all hours worked. The Delegate determined, that Mr. Thomas was a manager, and was not entitled to be paid for overtime pay. It is common ground, that on a number of occasions Mr. Thomas did work hours in excess of eight hours per day.

Mr. Thomas was hired on a work hire program through Human Resources and Development Canada. to work in the employer’s oyster and clam business on Denman Island. At the time of hiring, Mr. Thomas was told by the principals of the business that they were looking for a manager. After Mr. Thomas completed the work hire program, the employer told him that he was the manager. He was given an increase in the hourly rate of compensation. The principals did not attend the work site on a regular basis

and relied on Mr. Thomas to supervise the workers and meet the orders. During a portion of the winter months of 2001, Mr. Thomas only supervised one worker, besides himself.

It is apparent to this adjudicator that Mr. Thomas position seemed to be one of a “working” field supervisor. I do not propose to make any further findings of fact or refer to the evidence, as this is a Determination which must be set aside. I do not wish to influence the Delegate who will investigate this matter again, or make findings which may influence another Adjudicator on the appeal of a subsequently issued Determination.

The Delegate recorded the arguments presented by the parties in a Determination. The Delegate did not make any findings of fact. In the analysis portion of the Determination, the Delegate found, that Mr. Thomas was a manager. The Determination is very brief and not well reasoned. The analysis in the Determination is perfunctory. It is limited to the following on the important issue of whether Mr. Thomas was a manager:

... Under the Act, there is no entitlement for managers to be paid overtime and statutory holiday pay. The evidence of the employer is that the complainant was a manager; the complainant’s own evidence confirms that he supervised employees including hiring. I must conclude that the complainant was a manager and not entitled to be paid overtime or statutory holiday pay. The fact that statutory holiday pay was in fact paid as a matter of company policy does not affect this conclusion.

The Delegate found that as a manager, Mr. Thomas was not entitled to overtime pay. The Delegate determined that the *Act* had not been contravened. He ceased investigation and closed the file. The Delegate has since left the employment of the Branch.

Employee’s Argument:

The Employee argues that he was a worker, not a manager. He says that he did not have anyone’s phone number to arrange for work scheduling. He says that the work was arranged around the tides, and tide charts were given to all employees. He argues that he was entitled to statutory holiday pay, and overtime.

Employer’s Argument:

The Employer argues that Mr. Thomas was a manger and not entitled to overtime wages. The Employer says that the hired him as a manager. The Employer says that Mr. Thomas scheduled other employees for work, hired employees, trained new employees. The Employer says that it supplied its two managers, with cell phones, to keep in touch, and also to arrange for deliveries.

ANALYSIS

In an appeal, pursuant to the *Act*, the burden rests with the appellant, in this case the Employee, to demonstrate an error in the Determination, such that I should vary or cancel the Determination. This is a case where, the appropriate remedy is to cancel the Determination. I would hope that the Branch would look at this case again.

The fundamental issue in this case is whether Mr. Thomas was a manager. In my view the Determination issued in this case is so fundamentally flawed that it can be said that it is not a Determination. Firstly, the

Delegate has not found any facts. The Delegate has not referred to the definition of manager that he used in order to come to his conclusion. The *Act* and particularly the definition of manager in the *Employment Standards Regulation, B.C. Reg 396/95* (the "*Regulation*") was amended. The Delegate has not specified what definition of manager he has applied. He has not referred to the *Regulation*. I note that the "complaint" was filed on May 14, 2002, but was adjudicated by the Delegate after the definition of manager was amended by Order-in-Council 1005, which amended the definition of manager in section 1 of the *Regulation*. In *B.C. Reg. 396/95* manager is defined as:

"manager" means

- (a) a person whose primary employment duties consist of supervising and directing other employees, or
- (b) a person employed in an executive capacity;

The definition of manager changed at the end of day on November 29, 2002 by O.I.C. 1005. The definition now reads:

"manager" means

- (a) a person whose principal employment responsibilities consist of supervising or directing, or both supervising and directing, human or other resources, or
- (b) a person employed in an executive capacity

Given the date of the filing of the complaint, there are some transitional issues, and there is a difference between the "new" and "old" definition of manager. I do not know which definition the Delegate considered, or even if the Delegate considered the definition in the *Regulation*.

The Tribunal has interpreted the definition of manager in the *Regulation*, in a number of cases including 429485 B.C. Ltd. (c.o.b. Amelia Street Bistro), BCEST #D479/97; Ravens Agri-Services & Products Inc., BCEST #D369/96; T & C Ventures Ltd. (c.o.b. Town & Country Motor Hotel), BCEST #D152/96; Choi, BCEST #D066/96; Perfekto Mondo Bistro Corp., BCEST #D205/96, among other cases. It is important to analyze the evidence and find facts relating to the job duties and the employment relationship, in order to come to a conclusion as to whether a person is a manager or an employee. It is often a matter of the "degree" to which duties are performed, which is important to the characterization of a person as a manager. The Delegate has not apparently applied any of the jurisprudence to this matter. In particular, the Delegate has not made any assessment of the "degree" or "importance" of the content of supervisory or direction duties necessary to make a finding that supervisory or direction was either a "primary duty" or "principal responsibility". I note that for the purposes of the disposition of this case it is unnecessary that I come to a conclusion as to which definition applies to Mr. Thomas. Transitional law was not a point addressed by the Delegate, or by the parties, who were unrepresented by counsel at this hearing.

In this case the Delegate has not identified any proper basis for coming to the conclusion that Mr. Thomas was a manager. Unfortunately the "analysis" of the Delegate is so perfunctory, I cannot tell how the Delegate arrived at the conclusion expressed in the Determination.

The function of the Tribunal on an appeal is to review the Determination, including the evidence and submissions of the parties to determine if there is an error that warrants a setting aside of the Determination. It is not for an Adjudicator to guess at the facts found by the Delegate. Without a Determination that sets out facts, and an analysis of the facts and the *Regulation*, and the applicable law,

it is almost impossible to exercise an appellate function. It is not my function to find the facts in the first instance. I cannot review a bare conclusion.

I would echo the comments of the Adjudicator in *Hilliard*, *BCEST #D296/97*:

[para8] One of the purposes of the Act, as set out in Section 2, is to "...promote the fair treatment of employees and employers..." Another purpose is to "...provide fair and efficient procedures for resolving disputes..." In my view, neither of these purposes can be achieved in the absence of a clear set of reasons for a decision that either an employee is owed wages or is not owed wages by an employer. In addition, to ensure that the principles of natural justice are met, a person named in a Determination is entitled to know the decision resulting from an investigation and the basis for that decision. Without sufficient reasons, a person cannot assess the decision which includes knowing the case made against them or the case to be met if there is an appeal, and determining whether there are grounds for an appeal.

[para9] The Determination under appeal is fundamentally flawed. Insofar as it lacks sufficient reasons, it does not meet the requirements of Section 81(1)(a) of the Act. It also offends the principles of natural justice and is contrary to the intent of the Act.

[para10] For the above reasons, I consider this Determination to be null and void.

The Adjudicator in *Hilliard* relied, in part, on section 81(1)(a) of the *Act* for the conclusion reached that the Determination was null and void. Section 81(1)(a) of the *Act* was repealed by the *Employment Standards Amendment Act, SBC 2002 c. 42*, effective May 30, 2002. In my view, the conclusion also stands independent of section 81(1)(a). Section 81(a) is a matter of procedure, and in my view, the new procedure may well govern the investigative process. It is apparent, however, that the Delegate followed the procedure under the "old" *Act* in terms of the issuance of the Determination.

I have considered whether this is a case where I should refer the case back to the Delegate, with directions, rather than cancel the Determination. The Determination in my view is so fundamentally flawed on the major issue, that the appropriate course is to cancel the Decision. In any event, it is impossible to refer this matter back to the original Delegate, as he has left the Branch. Unfortunately any new investigation will involve some delay for the parties. Unfortunately that delay is unavoidable given the quality of the original Determination.

ORDER

Pursuant to s. 115 of the *Act* the Determination dated December 23, 2002 is cancelled.

Paul E. Love
Adjudicator
Employment Standards Tribunal