Employment Standards TRIBUNAL

An appeal

- by -

Penguin Contracting Inc.
("Penguin")

- 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: Lorne D. Collingwood

FILE No.: 2001/790

DATE OF HEARING: March 25, 2002

DATE OF DECISION: April 8, 2002

DECISION

OVERVIEW

Penguin Contracting Inc. (I will use "Penguin" and "the employer" for ease of reference.) has appealed, pursuant to section 112 of the Employment Standards Act ("the Act"), a Determination issued by a delegate of the Director of Employment Standards (the "Director") on July 9, 2001. The Determination orders Penguin to pay Ian Foster $434.96 in overtime wages, vacation pay and interest.

The Determination is that the employer did not pay overtime wages as the Act requires. The employee worked a form of flexible work week but its particular modified work week is not allowed by the Act and the Employment Standards Regulation ("the Regulation").

The employer appealed the Determination but the appeal was late by several weeks. That led to consideration of whether the Tribunal should exercise its power extend the time limit for the appeal [a power which stems from section 109 (1)(b) of the Act]. In Penguin Contracting Inc., BCEST No. D616/01, it was decided that the time limit for the appeal should be extended but in just one respect, namely, the matter of the number of overtime hours worked. The employer was again seeking to argue that the employee was on a flexible work schedule and that no amount of overtime wages were owed but that argument was found to be without merit, the Act being what it is.

A hearing has been held in this case. The delegate submits that his overtime wage calculation is in error: The employee worked 44 hours of overtime, not 52.5. The employer stands ready to pay overtime wages, vacation pay and interest on that basis. The employee has shown me, however, that the delegate has failed to take into account some of his overtime and the matter of the total number of overtime hours worked is referred back to the Director so that the delegate can recalculate what is owed in the way of overtime wages.

APPEARANCES:

Michael Rogge	On behalf of Penguin
Ian Foster	On his own behalf

ISSUES

The only issue which is properly before me is the matter of the number of overtime hours worked. What I must decide in that respect is whether it is or is not shown that the Determination ought to be varied or the matter referred back to the Director for reason of an error or errors in fact or law.

The employer would have me revisit Penguin Contracting Inc., BCEST No. D616/01. I will not as it is not an application for reconsideration which is before me but an appeal as noted above.

The employer raises other matters. Mr. Rogge believes that the Act is wrong and that the Tribunal should have the power to amend the law or over-ride the law whenever and wherever it sees fit but especially where the failure to comply with the law is by agreement and based on good intentions. I have already taken the time to explain to the employer that those are not issues for me to decide but the legislature of British Columbia. I will not repeat myself here as I believe that it would serve no useful purpose.

FACTS

Penguin Contracting performs building maintenance in the main. Ian Foster worked for Penguin from February 1, 2000 to August 30, 2000 as a general labourer.

The rate of pay is not in dispute. The agreement on pay is that Foster would be paid $15 an hour for his work.

Foster was paid straight-time wages unless he worked more than 80 hours. The Determination is that Foster did not work a flexible work schedule allowed by the Act and that he is therefore entitled to overtime wages after 8 hours of work in a day and 40 hours of work in a week. The delegate, in the Determination, awards pay for 52.5 hours of overtime.

On appeal, the delegate at first stood by his calculations, then he changed his mind. In the last of his submissions to the Tribunal he indicates that he now realises that he made an error and that only 44 hours of overtime were worked by Foster.

The employee, on appeal, claims that the delegate has never been right on the number of overtime hours that he worked. As the employee presented his case, three things became immediately clear. One, the delegate is obviously wrong in his calculations because, for example, he did not take into account the fact that the employee worked 10 hours on January 24, 2000 and he failed to notice that the employee worked more than 8 hours on the 17th of February, 2000 (the record of work shows that he worked form 7:00 to 8:30 on one job, 8:30 to 2:30 on another and 2:30 to 4:30 on a third job, 9.5 hours in all). Two, there is reason to believe that he has made a number of other errors. Three, I could not recalculate the number of hours worked on the basis of the information before me because it consisted of photocopies which are to some extent unreadable.

ANALYSIS

As matters are presented to me, it appears that the delegate has overlooked overtime work and that there is no reason to put any great faith in the most recent of his conclusions, namely, that there were only 44 hours of overtime work.

I am not in a position where I can perform the necessary calculations myself as the employer's original records are not in front of me. While I could order production of the records, I have decided against doing so. In my view, this is one of those cases where it is appropriate that matters be referred back to the Director so that the delegate can himself address his mistakes.

The entire matter of the number of overtime hours worked is referred back to the Director.

ORDER

I order, pursuant to section 115 of the Act, that the Determination dated July 9, 2001 be referred back to the Director so that a delegate can recalculate the number of overtime hours worked.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal