Employment Standards TRIBUNAL

An appeal

- by -

Osiris Canada Inc.
("Osiris")

- 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 (as amended)

TRIBUNAL MEMBER: David B. Stevenson

FILE No.: 2007A/123

DATE OF DECISION: December 19, 2007

DECISION

SUBMISSIONS

Samir Kulkarni	on behalf of Osiris Canada Inc.
Mary Walsh	on behalf of the Director

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") brought by Osiris Canada Inc. ("Osiris") of a Determination that was issued on August 31, 2007 by a delegate of the Director of Employment Standards (the "Director"). The Determination found that Osiris had contravened Part 3, Sections 17 and 18 and Part 7, Section 58 of the *Act* in respect of the employment of Dennis Jaeger ("Jaeger") and ordered Osiris to pay Jaeger an amount of $1050.77, an amount which included both wages and interest.

2. The Director also imposed administrative penalties on Osiris under Section 29(1) of the E*mployment Standards Regulation* (the "*Regulation*") in the amount of $1500.00.

3. The total amount of the Determination is $2550.77.

4. In this appeal, Osiris says the Director erred in law and failed to observe principles of natural justice in making the Determination. Osiris also challenges the imposition of three administrative penalties.

5. None of the parties have asked the Tribunal for a hearing on the appeal. The Tribunal has a discretion whether to hold a hearing on an appeal: Section 36 of the *Administrative Tribunals Act* ("*ATA*"), which is incorporated into the *Employment Standards Act* (s. 103), Rule 16 of the Tribunal's Rules of Practice and Procedure and *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575. In this case, the Tribunal has reviewed the appeal, the submissions and the material submitted by all of the parties, including the Section 112 (5) record filed by the Director, and has decided an oral hearing is not necessary in order to decide this appeal.

ISSUE

6. The issues in this case are whether the Director erred in law by disregarding relevant facts and imposing three administrative penalties and whether the Director failed to observe principles of natural justice by deciding an issue that Osiris says was not before the Director and on which Osiris had no notice.

THE FACTS

7. Osiris is a national retail chain which operates 7 stores in the province. Jaeger was employed by Osiris as a store manager at one of these stores from September 7, 2006 until December 24, 2006 at a rate of pay of $32,000.00 a year. There was no written contract of employment. The parties agreed Jaeger's wage was based on his working a 40 hour week. After leaving his employment with Osiris, Jaeger initiated the complaint process. The Section 112(5) record which has been filed by the Director indicates the

complaint process was commenced in mid January 2007 and included an attempt to mediate a resolution of the claim, a Demand for Employer Records and a complaint hearing on June 7, 2007 which was attended by Mr. Kulkarni, on behalf of Osiris, and Jaeger, on his own behalf.

8. The Determination identifies two issues: whether Jaeger, in respect of his employment with Osiris, was a manager for the purposes of the *Act*; and whether he was owed wages.

9. The Determination outlines the evidence and argument provided to the Director by both parties at the complaint hearing.

10. The Director found that Jaeger fell within the definition of manager in Section 1 of the *Employment Standards Regulation* (the "*Regulation*") and was, by application of Section 34 of the *Regulation*, excluded from Part 4 of the *Act*. In spite of that finding, the Director found that Jaeger had worked hours in excess of the 40 hours a week which was covered by his salary, that Osiris had "directly or indirectly" allowed him to work hours in excess of 40 hours a week and that he was entitled to receive wages for the additional hours worked.

11. The Director made findings relating to the number of additional hours Jaeger worked. Those findings, and the reasons for them, are found at pages19 through 23 of the Determination.

12. The Director considered, and rejected, an argument that Jaeger's alleged substandard job performance and inefficiency in scheduling his work should impact on the number of additional hours he worked, or adversely affect his claim under the *Act*.

13. The Director imposed three administrative penalties. The reasons for imposing those penalties are set out in the Determination.

14. Except as it relates to the argument that Jaeger's poor job performance and inefficiency should impact the additional hours claimed by him, Osiris has taken no issue with the Director's finding that Jaeger often worked more than 40 hours in a week and has not challenged the calculation of the number of those hours.

ARGUMENT AND ANALYSIS

15. As a result of amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are statutorily limited to those found in Subsection 112(1) of the *Act*, which says:

> *112. (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:*
>
> *(a) the director erred in law:*
>
> *(b) the director failed to observe the principles of natural justice in making the determination;*
>
> *(c) evidence has become available that was not available at the time the determination was made.*

16. The Tribunal has consistently indicated that the burden in an appeal is on the appellant to show an error in the Determination under one of the statutory grounds. In particular, and in the context of one of the grounds raised in this appeal, the burden of showing the Director failed to comply with principles of natural justice in making the Determination is on Osiris (see *James Hubert D'Hondt operating as D'Hondt Farms*, BCEST #RD021/05 (Reconsideration of BCEST #D144/04)).

17. I will address the grounds of appeal raised by Osiris in the order they are raised in the appeal submission.

Failure to Observe Principles of Natural Justice in Making the Determination.

18. Osiris says the Director breached the duty of fairness and failed to comply with principles of natural justice by deciding an issue that was not before the Director and which the Director had not been asked to decide. Osiris says the claim by Jaeger was for overtime wages; the Director decided he was a manager under the *Act* and was not entitled to overtime wages, but decided, based on the evidence which showed Jaeger worked hours in addition to the 40 hours a week for which he was paid, that regular wages were owed.

19. Osiris says the Director was required to give them a reasonable opportunity to respond to the complaint and that opportunity is only meaningful if they were aware of the issues in dispute. They say the lack of notice also offends Section 7 of the *Charter of Rights and Freedoms*.

20. Osiris says the Determination should be cancelled.

21. In response, the Director says Osiris had notice of the case which had to be met and an opportunity to meet it. The Director says, in sum, that the notices provided to Osiris, which generally spoke to the complaint process being related to "general compliance" with the *Act*, were sufficient to alert them to a claim for regular wages for additional hours worked, even if it was not specifically identified in that way.

22. The Director suggests there was simply a misunderstanding on the part of Osiris about how the wage provisions in the *Act* can apply to managers and that misunderstanding does not warrant granting the appeal and the remedy sought.

23. The final reply from Osiris takes issue with the adequacy of the notices given by the Director to provide "reasonable notice".

24. At the outset, I will note that under Section 45 of the *ATA*, the Tribunal has no jurisdiction over constitutional question relating to the *Canadian Charter of Rights and Freedoms*, although if I had the authority to do so, I would find that Section 7 of the *Canadian Charter of Rights and Freedoms* has no application to the circumstances of this case.

25. There is no question that the Director was under a Section 77 duty of fairness to disclose sufficient details of the complaint to give Osiris a reasonable and effective opportunity to respond to the essentials of the case they had to meet. I also accept that Osiris was not alerted to the possibility that even if Jaeger was not entitled to overtime because he was a manager under the *Act*, he could still be entitled to regular wages for hours worked in excess of 40 hours in a week.

26. The question, however, is what effect this had on the ability of Osiris to respond and whether this was a failure to comply with the statutory requirements of Section 77 or principles of natural justice. On this

point, I adopt, and am guided by, the following comment from *J.C. Creations Ltd. o/a Heavenly Bodies Sport*, BC EST #RD317/03:

> As we have tried to be careful to note, neither section 77 of the Act nor procedural fairness in administrative law is intended to be formal and burdensome. That is particularly true in the employment standards context which, as has also been noted, is designed to be "a relatively quick and cheap means of resolving employment disputes" *Danyluk*, *supra*. However, even in investigations, there are minimal fairness requirements, in this case those set forth in Section 77 of the Act. Basic fairness requires those charged with the responsibility of making statutory decisions to ensure that a party who may be adversely affected by a decision is given notice of and a chance to respond to the essentials of the case they have to meet.

27. Based on my examination of the Determination and the Section 112(5) record, I am satisfied that Osiris had a reasonable opportunity to respond to the essentials of the case they had to meet.

28. I am influenced in my view of this ground of appeal by the fact that there are only three essential elements of the case which Osiris had to meet, and only two that were in dispute: the claim that Jaeger worked as an employee of Osiris for a period of time; that during that time he worked 103 hours for which he was not paid; and that he was statutorily entitled to overtime wages for those hours. Osiris had notice of each of the essential elements of the case and a full opportunity to respond to them.

29. The first was not in dispute. The second was disputed, but Osiris was not particularly successful in persuading the Director to their view on the number of additional hours Jaeger worked, or should have been credited with working. The third issue was disputed and Osiris was successful in convincing the Director that Jaeger was a manager under the *Act* and not entitled to overtime wages.

30. There is some merit in the submission of the Director that this aspect of Osiris' appeal is grounded more in their failure to appreciate how the wage provisions in Part 3 of the *Act* apply to managers than in procedural fairness.

31. I do not accept the statement by Osoris that the Director made findings of fact that "penalized" them without notice that the subject of those findings of fact was at issue. The only findings of fact necessary to support the Determination is that Jaeger was an employee of Osiris who worked 63 hours for which he did not get paid. From this perspective it is of little relevance that he was not entitled to be paid these additional hours at overtime wages rates; he is entitled under the *Act* to be paid for all hours worked. That is a basic employee entitlement, and a corresponding employer obligation. The conclusion that Jaeger was entitled to wages for the additional hours he worked is only a function of applying the requirements of the *Act* to the facts as found. It is difficult to perceive how Osiris can say that meeting a statutory obligation to pay wages is a penalty.

32. I am not persuaded that the Director failed to comply with the requirements of Section 77 or failed to observe principles of natural justice in making the Determination.

33. In any event, and even if I accepted the complaint process was procedurally unfair, that unfairness has, in my view, been cured in this appeal, where Osiris has challenged the Director's calculation of the number of additional hours Jaeger worked. Osiris has revisited the argument that Jaeger's alleged inefficiency and incompetence should be factored into the calculation of the additional hours claimed and has raised a new argument relating to "averaging" the 40 hour work week. This takes me to the next ground of appeal.

The Director Disregarded Relevant Facts

34. It is curious that the appeal heading asserts the Director "disregarded relevant facts", while the opening paragraph of the supporting argument states:

> 11. Osiris submits that the director committed a reviewable error of law by paying insufficient attention to the following facts . . .

35. The argument then revisits an argument that was raised in the complaint process and addressed in the Determination – that Jaeger's incompetence and inefficiency should not oblige Osiris to pay for the additional hours – and raises a new argument – that the 40 hour work week should have been treated as an "average" of 40 hours a week, because while Jaeger might have to work more than 40 hours a week during some periods of the year, he would have worked less in other periods.

36. I will deal first with the new argument. My opening comment is that I view this argument as an attempt to resile from the agreement made in the complaint process: that Jaeger's salary was based on his working a 40 hour work week. The reference in the Determination to that agreement is not framed in terms of an "average" of 40 hours a week calculated over some indeterminate period of time. My second comment is that in terms of the selected ground of appeal, and the arguments relating to this ground, the Director can hardly be said to have "ignored" evidence that was not adduced. Osiris says this is evidence they "would have adduced" if they had been given notice that non-overtime wages were an issue. The problem for Osiris on this point is that the evidence they describe is equally applicable to the claim of overtime wages, where it wasn't provided, as to the question of wages payable for additional hours worked. In every respect this is evidence that was available to Osiris during the complaint process and could have been provided. Finally, there are statements of Osiris' position, given in the sworn testimony of Mr. Kulkarni, and findings of fact in the Determination that are inconsistent with this argument. At page 10 of the Determination, the following summary of Mr. Kulkarni's evidence is found:

> He [Mr. Kulkarni] stated that at no time did the employer authorize the complainant to work **any** overtime. In fact, this was reiterated with the complainant on numerous occasions. He was told that as store manager, he was **expected to work 40 hours per week** and anything over that needed approval from the district manager. . . .
>
> Moreover, given the volume of the Capilano store's sales, it would **not be necessary for him to work over 40 hours a week**. . . . It was not one of the busier stores. . . .
>
> . . . the employer questions the legitimacy of the complainant's claim and asserts that his hours of work and calculations were never documented until after he resigned and decided to file a complaint.
>
> (emphasis added)

37. The Determination refers to Osiris' overtime policy. In the complaint process, Osiris said this policy applied to Jaeger. The policy contains no reference to "averaging" overtime for any employee. The Determination also refers to the failure of Osiris to keep records of the hours worked by employees on a daily basis and to their record keeping system as a "quasi-default" system, where the complainant's hours of work are presumed to be forty in a week.

38. An administrative penalty was issued for failure to produce the records required to be kept under Section 28 of the *Act*.

39. In light of that evidence and those findings, it strains credulity to suggest there is some kind of agreement to "average" hours of work.

40. In any event, and even accepting there was some notion of averaging in Jaeger's employment agreement (which I do not), there is no merit to this argument under the *Act*. Although Jaeger's employment was exempted from Part 4 of the *Act*, all other provisions of the *Act* and the *Regulation* applied to his employment, including Part 3. The following statement from the Tribunal's decision in *Fabrisol Holdings Ltd. operating as Ragfinder*, BC EST #D376/96, describes the scheme of the *Act* in respect of the payment of wages:

> As a matter of law, the *Act* identifies wages in the context of work performed by an employee. Simply put, wages are earned when work is performed. The *Act*, with minor exceptions, requires wages to be paid relative to the time they are earned. Section 17 requires an employer to pay its employees at least semi monthly and within 8 days of the end of a pay period all wages earned by the employee in the pay period. The only exceptions to this requirement are banked overtime wages, banked statutory holiday pay and vacation pay. . . .
>
> Also, Section 18 requires all wages owing to an employee to be paid within 48 hours if the employment is terminated by the employer, or within 6 days, if it is terminated by the employee.

41. The effect of the statutory scheme outlined above required Osiris to pay Jaeger all wages earned for each week no later than 8 days following the end of the applicable pay period. Pay period is defined in the *Act*. While the *Act* allows agreements between an employer and an employee to average hours of work and to bank overtime, those provisions fall in Part 4 of the *Act* and do not apply to Jaeger's employment. Accordingly, Osiris could not legally ask Jaeger to agree to an "averaging" agreement. Further, such an agreement, if made would not be given any effect under the *Act*: see Section 4.

42. In respect of the incompetence/inefficiency argument, there is no basis for asserting that the Director ignored this argument. The Determination clearly indicates the Director considered it and, correctly in my view, rejected it. The *Act* requires an employer to pay an employee for all hours worked. There is nothing in the *Act* that suggests an employee's statutory wage entitlements can be adversely affected by the employer's perception of that employee's competence and/or efficiency. There is no error of law in the Director's conclusion that where an employee performs work, that employee is entitled to wages under the *Act* whether or not a more efficient employee could have accomplished that work in less time.

Administrative Penalties

43. Osiris says the Director erred in imposing three administrative penalties. The following arguments have been raised:

i. The issue of unpaid wages was not before the Director; the penalties issued for a contravention of Sections 17 and 18 of the *Act*, which relate to unpaid wages, should be set aside;

ii. Because Sections 17 and 18 both relate to the failure to pay wages, Osiris is penalized twice for what is essentially one delict, or failure. Osiris cites *R. v. Kienapple*, [1975] 1 S.C.R. 729 in support of this argument;

iii. Osiris was unaware of its contravention of Section 18 of the *Act*;

iv. The responsibility for the failure to maintain proper employee records belonged to the complainant. Osiris should not pay for his nonfeasance.

44. Each of these arguments can be quickly answered.

45. In *Director of Employment Standards (Re Summit Security Group Ltd.)*, BC EST #RD133/04, the Tribunal commented on the statutory scheme of administrative penalties under the *Act*:

> . . . administrative penalties generated through provisions of the Employment Standards Regulation are part of a larger scheme designed to regulate employment relationships in the non-union sector. Such penalties are generally consistent with the purposes of the *Act*, including ensuring employees receive at least basic standards of compensation and conditions of employment and encouraging open communication between employers and their employees. The design of the administrative penalty scheme under Section 29 of the *Employment Standards Regulation*, which provides mandatory penalties where a contravention is found by the Director in a Determination issued under the *Act*, meets the statutory purpose providing fair and efficient procedures for the settlement of disputes over the application and interpretation of the *Act*. Such an interpretation and application of the *Act* is also consistent with the modern principles of, or approach to, statutory interpretation noted by Driedger, Construction of Statutes, 2nd ed. Toronto: Butterworths, 1983, p. 87 ff. and the nature and purpose of employment standards legislation as explained by the Supreme Court of Canada in *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, which was cited by the Tribunal in *J.C. Creations Ltd. o/a Heavenly Bodies Sport*, BC EST # RD 317/03 (Reconsideration of BC EST # D132/03).

46. See also, *Virtu@lly Canadian Inc. operating as Virtually Canadian Inc.*, BC EST #D087/04, *Marana Management Services Inc. operating as Brother's Restaurant*, BC EST #D160/04. In the *Marana Management Services* decision, the Tribunal stated:

> Once the delegate finds a contravention, there is no discretion as to whether an administrative penalty can be imposed. Furthermore, the amount of the penalty is fixed by Regulation. Penalty assessments are mandatory . . .

47. In this case, contraventions were found, the penalties imposed are mandatory.

48. The Tribunal has considered the application of the principle in *R. v. Kienapple* and has found it does not apply to permit the Director to decline to impose an administrative penalty once a contravention has been found, regardless of how many contraventions have occurred (see *Kimberly Dawn Kopchuk*, BC EST #D049/05 (Reconsideration denied BC EST #RD114/05).

49. The statutory responsibility for maintaining those records pertaining to employment and hours of work described in Section 28 of the *Act* belongs to the employer, not to any employee. It is the employer's responsibility to structure its affairs to comply with the Act. An employer cannot abrogate those responsibilities by attempting to place the responsibility for record-keeping onto its employees (see *478125 B.C. Ltd.*, BC EST #D279/98).

50. Osiris says it is inequitable to impose an administrative penalty for what they say was Jaeger's fault. The answer to that argument was provided by this Tribunal in *R. Girn Enterprises Inc.*, BC EST #D077/05:

> . . . in considering an appeal of administrative penalties, as with an appeal of any other aspect of a Determination, an appellant is limited to the grounds of appeal set out in Section 112(1) of the

> Act, above. That provision does not include considerations of "fairness" or whether the employer has acted in "good faith" or with "best efforts" as providing grounds for appealing the mandatory administrative penalties imposed under Section 29 of the Regulation (see *Actton Super-Save Gas Stations Ltd.*, BC EST #D067/04).

51. For the above reasons, the appeal is dismissed.

ORDER

52. Pursuant to Section 115 of the Act, I order the Determination dated August 31, 2007 be confirmed in the total amount of $2550.77, together with any interest that has accrued under Section 88 of the Act.

David B. Stevenson
Member
Employment Standards Tribunal