



An appeal

- by -

New Vision Enterprises Ltd. carrying on business as Quality Hotel

- 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: Carol L. Roberts

FILE No.: 2008A/121

DATE OF DECISION: December 17, 2008

DECISION

SUBMISSIONS

Fadia Sorial	on behalf of New Vision Enterprises Ltd.
Sherri Wilson	on behalf of the Director of Employment Standards
Carlo Magno	on his own behalf

OVERVIEW

1. This is an appeal by New Vision Enterprises Ltd. (“New Vision”), pursuant to Section 112 of the *Employment Standards Act* (“the Act”), against a Determination of the Director of Employment Standards (“the Director”) issued September 19, 2008.
2. Carlo Magno worked as a front desk clerk for New Vision Enterprises Ltd. carrying on business as the Quality Hotel (“New Vision”), from January 23, 2007 until February 4, 2008. Mr. Magno filed a complaint alleging that New Vision had contravened the Act in failing to pay him overtime wages, vacation pay and compensation for length of service. Mabinty Kanu worked as a housekeeper for New Vision from November 15, 2005 until December 10, 2007. Ms. Kanu filed a complaint alleging that New Vision had terminated her employment without notice and that she was entitled to compensation for length of service, overtime pay and statutory holiday pay.
3. The Director’s delegate held a fact finding session into the complaints on April 17, 2008. The employer was represented by Vijay Kanna, the night supervisor. Following the session, the hotel manager, Fadia Sorial, in a letter dated May 10, 2008, advised the delegate that the hotel had been sold and that the existing management would only be able to participate in the investigation until June 15, 2008.
4. After investigating the complaints, the delegate concluded that New Vision had failed to pay Mr. Magno overtime, statutory holiday pay and vacation pay. She determined that his employment was terminated for cause and that he was not entitled to compensation for length of service. She awarded Mr. Magno wages and interest in the total amount of \$628.37. The delegate concluded that Ms. Kanu was entitled to statutory holiday pay, overtime wages as well as compensation for length of service in the total amount, with accrued interest and vacation pay, of \$1,155.18.
5. The delegate imposed a \$2,500 penalty on New Vision for contravening Sections 27, 40, 45 and 63 of the Act and section 46 of the *Employment Standards Regulation* (the “Regulations”) pursuant to section 29(1) of the *Regulations*.
6. New Vision argues that the delegate failed to observe the principles of natural justice in making the Determination. It also asserts that evidence has become available that was not available at the time the Determination was being made.
7. Section 36 of the *Administrative Tribunals Act* (“ATA”), which is incorporated into the *Employment Standards Act* (s. 103), and Rule 17 of the Tribunal’s Rules of Practice and Procedure provide that the tribunal may hold any combination of written, electronic and oral hearings. (see also *D. Hall & Associates*

v. Director of Employment Standards et al., 2001 BCSC 575). This appeal is decided on the section 112(5) “record”, the submissions of the parties, and the Reasons for the Determination.

ISSUES

8. Did the delegate err in
 - a. Calculating Mr. Magno and Ms. Kanu’s overtime wage entitlements,
 - b. Imposing penalties for contraventions of the *Act*, and
 - c. Calculating Ms. Kanu’s entitlement to statutory holiday pay and compensation for length of service.

FACTS AND ARGUMENT

9. After the fact finding session, the delegate issued a Demand for Employer records on April 23, 2008. Those records were to be produced on May 14, 2008. New Vision was unable to comply as a result of a computer malfunction. New Vision provided the delegate with evidence in the form of a receipt for computer repair that indicated that the computer’s memory had been compromised. However, it gave the delegate details of the total regular and overtime hours for each pay period for Mr. Magno between August 1, 2007 and February 15, 2008 and for Ms. Kana from April 16, 2007 and December 15, 2007. New Vision also provided Mr. Magno’s daily work schedule and Ms. Kanu’s records of work in the form of hard copies of her housekeeping assignments.
10. Ms. Kanu stated that she called the hotel each day at 6:00 a.m. to determine what her hours of work would be. When she arrived, she was given an assignment sheet and was required to sign in and out. She said that on the day she was fired, she had just cleaned the floor when the hotel manager told her she was fired. She said that she was a very good employee and a hard worker. She said she had received many compliments from guests and did not know why her employment was terminated.
11. The delegate noted that the employer was initially reluctant to provide any information regarding its relationship with Ms. Kanu. However, in a subsequent written submission, it stated that it chose to lay her off rather than fire her because of a “decline in her mental welfare” and detailed eight examples of minor misconduct. On May 10, 2008, New Vision provided the delegate with Ms. Kanu’s ROE. It indicated that her employment had been terminated for “shortage of work”.
12. The delegate found that although Ms. Kanu had originally been hired to work from May through October, 2007, she continued to work until December. She also noted that although New Vision had sent a letter to Ms. Kanu indicating that it could not guarantee her hours beyond October, it did not say that she had been laid off and did not give her a certain end date. The delegate found that Ms. Kanu was not hired for a definite term. She also concluded that Ms. Kanu’s employment had been terminated without notice or cause and that she was entitled to compensation for length of service. The delegate noted that the only letter New Vision sent to Ms. Kanu about her performance was dated one month after her employment had been terminated. Further, she noted that at the fact finding session, Mr. Kanna testified that Ms. Kanu was a diligent worker and a good housekeeper. The delegate concluded that, in the absence of any

evidence that New Vision had communicated to Ms. Kanu a reasonable standard of performance, it had no basis to terminate her employment for cause.

13. On appeal, New Vision argues that Ms. Kanu was employed in a seasonal capacity and that she was given verbal notice of her termination on November 2, 2007, one and one half month's prior to her actual lay off. It says that it only communicated with her orally because she was incapable of reading or writing. It argues that in the circumstances, Ms. Kanu was given more than one month's notice.
14. The delegate found that Ms. Kanu was entitled to overtime wages, noting that New Vision did not pay her 1 and ½ times her regular rate for at least seven hours each pay period. The delegate determined that Ms. Kanu was entitled to 36.5 hours of overtime. The delegate also determined that Mr. Magno had not been paid one and one half times his regular rate for at least seven hours each pay period. She calculated that he was entitled to overtime wages for 90 hours for the last six months of his employment in the total amount of \$585.00.
15. New Vision appeals the delegate's overtime calculations for both employees, contending that they were not entitled to additional wages.
16. The delegate found that Ms. Kanu was entitled to statutory holiday pay for BC Day and Remembrance Day, 2007. New Vision argues that the delegate erred in finding that Ms. Kanu worked on BC Day and in concluding that Ms. Kanu was not paid statutory pay for Remembrance Day. As a result, it also contends that the delegate erred in imposing penalties for these contraventions.
17. Finally, New Vision seeks to have the imposition of penalties for contraventions of section 27 of the *Act* and section 46 of the *Regulations* "waived" because it was unable to produce wage statements through no fault of its own. It says that it provided the delegate with reliable information that, while not in the prescribed format, was sufficient to determine what wages had been paid.
18. The delegate relies on the record and the Determination. She says that the appeal is without merit and that the Determination ought to be confirmed.
19. The delegate also submits that Ms. Sorial has no standing to appeal the Determination because she was neither an officer nor director of New Vision at the time the complaints were before the Director and has no current connection with New Vision.

ANALYSIS

20. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
 - (a) the director erred in law
 - (b) the director failed to observe the principles of natural justice in making the determination; or
 - (c) evidence has become available that was not available at the time the determination was being made

21. The burden of establishing the grounds for an appeal rests with an Appellant. New Vision must show clear and convincing reasons why the Tribunal should interfere with the delegate's decision on one of the three stated grounds of appeal
22. New Vision's appeal is a disagreement with the delegate's determination of wages as well as her conclusion that Ms. Kanu's employment was terminated without just cause. The appeal documentation does not describe how New Vision was denied natural justice and does not set out any new evidence.
23. In *J.C. Creations Ltd. (Re)* (BC EST #RD317/03), a reconsideration panel of the Tribunal determined that the Tribunal should consider the substance of the appeal regardless of whether an appellant has checked off the correct boxes:

Given the purposes and provisions of the legislation, including Section 77 of the Act – which is a statutory requirement - it would in our view be inappropriate to take the overly legalistic and technical approach of refusing to consider a procedural fairness ground because the party ticked the “error of law” box instead of the “natural justice” box on the appeal form. The substance of the appeal should be addressed both by the Tribunal itself and the other parties, including the Director.

...

Consistent with the nature and purposes of the legislation, we should, as much as possible, approach these potential complexities with a common sense and plain language orientation. That includes addressing the substance of appeals which are filed, as opposed to the form. ...

24. As explained in the letters of appeal, the substantive grounds for appeal are alleged errors of law even though they are not expressed as such. I have considered the appeal on that basis.

Preliminary Issue

25. The delegate takes issue with New Vision's appeal being filed by Ms. Sorial. Ms. Sorial says that she was offered, and accepted, continued employment with New Vision to execute unfinished business. Her letters are on New Vision letterhead and I accept that she is authorized by the employer to file the appeals.

Error of Law

26. The Tribunal has adopted the factors set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)* (1998] B.C.J. (C.A.) as reviewable errors of law:
1. A misinterpretation or misapplication of a section of the Act;
 2. A misapplication of an applicable principle of general law;
 3. Acting without any evidence;
 4. Acting on a view of the facts which could not be reasonably entertained; and
 5. Exercising discretion in a fashion that is wrong in principle.

27. In a separate appeal filed by Mr. Magno, I have referred the matter of Mr. Magno's overtime wage calculation back to the delegate for a reasoned analysis of her award. (BC EST #D121/08) I said as follows:

It is difficult to discern, from the section 112 record, how the delegate arrived at her conclusion on [the overtime wage] issue. .. No calculation sheet is attached to the Determination and there is no analysis of the records provided.

28. The same deficiency appears in the Determination as it relates to Ms. Kanu. The record shows that New Vision provided the delegate with the details of Ms. Kanu's total regular and overtime hours each semi monthly pay period as recorded by Ms. Sorial, the operations manager of the hotel. In addition, New Vision provided Ms. Kanu's daily work schedule.

29. I am unable to determine, from either the Determination or the section 112 record, how the delegate determined Ms. Kanu's overtime wage entitlement. In *R. v. Walker*, [2008] 2 S.C.R. 245, 2008 SCC 34, Binnie J. summarized the duty to give adequate reasons:

To justify and explain the result;
To tell the losing party why he or she lost;
To provide for informed consideration of the grounds of appeal; and
To satisfy the public that justice has been done. (at para 19)

30. I find that the delegate erred in law in failing to provide adequate reasons and I refer the matter back to the delegate for a reasoned analysis of Ms. Kanu's claim in this respect.

31. In addition to setting out her reasons for the overtime wage awards, I expect the delegate to address the fact that the employees were paid semi-monthly rather than bi-weekly. The parties will have the opportunity to respond to her decision after it is issued.

32. I would also allow New Vision's appeal with respect to the delegate's award of statutory holiday pay to Ms. Kanu. The record appears to indicate that Ms. Kanu did not work on BC Day but was paid straight time, and was paid 1 ½ times her regular wage for Thanksgiving Day, contrary to the findings of the delegate. I refer the matter back to the delegate for a review of her Determination in this respect.

Compensation for length of service

33. I dismiss New Vision's appeal with respect to the delegate's conclusion that Ms. Kanu was entitled to compensation for length of service.

34. New Vision's response to Ms. Kanu's complaint was inconsistent. At first, it stated that it laid Ms. Kanu off for a decline in her "mental welfare". Later, and well after her termination, it attempted to justify termination for cause, despite Mr. Kanna's evidence at the fact finding hearing and notwithstanding the reasons for ending her employment on her ROE was a "shortage of work". Finally, New Vision also suggested that Ms. Kanu was hired as a seasonal employee and the season ended in October 2007.

35. For the first time on appeal New Vision says that Ms. Kanu was in fact given notice, but the notice was verbal.

36. An employer is statutorily liable to pay compensation for length of service. That liability is discharged if the employee is (a) given *written* notice of termination (s. 63(3)(a)) (my emphasis). There is no evidence or even any suggestion that Ms. Kanu was given written notice. Although New Vision says that it gave Ms. Kanu verbal notice because she was unable to read or write, I note that it gave her written notice in October that it could not guarantee her work. I also note that Ms. Kanu submitted her complaint to the Employment Standards Branch in writing.
37. I find no merit in this ground of appeal.

Penalties

38. Section 98 of the *Act* provides that a person in respect of whom the Director makes a determination and imposes a requirement under section 79 is “subject to” a monetary penalty prescribed by the *Regulations*:

(1) In accordance with the regulations, a person in respect of whom the director makes a determination and imposes a requirement under section 79 is subject to a monetary penalty prescribed by the regulations.

(1.1) A penalty imposed under this section is in addition to and not instead of any requirement imposed under section 79.

...

39. Section 29(1) of the *Regulations, B.C. Reg 396/95* sets out a schedule of monetary penalties for “a person who contravenes a provision of the *Act* or this regulation, as found by the director in a determination made under the *Act* or this regulation”.
40. 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.
41. In *Actton Super-Save Gas Stations Ltd.* (BC EST #D067/04) the Tribunal concluded that the *Act* provides for mandatory administrative penalties without any exceptions: “The legislation does not recognize fairness considerations as providing exceptions to the mandatory administrative penalty scheme.” Therefore, while I accept that New Vision could not produce employer records in response to the Director’s Demand because of a computer malfunction, the penalties are mandatory and I have no jurisdiction to “waive” them.
42. Although I am referring the matter of overtime wages, statutory holiday pay and vacation back to the delegate, if contraventions of the *Act* are found, the delegate must impose administrative penalties. Where I have upheld the delegate’s conclusion that New Vision has contravened the *Act*, as I find with respect to the employer’s failure to produce employer records and its failure to pay compensation for length of service, I have no basis to set aside, or “waive” the penalties. I dismiss the appeal on this ground.

ORDER

43. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated September 19, 2008, be referred back to the delegate for a reasoned analysis of Ms. Kanu's overtime wage calculation and statutory wage entitlement.

Carol L. Roberts
Member
Employment Standards Tribunal