

An appeal

- by -

Protect Security Services Ltd.  
("Protect Security")

- 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:** David B. Stevenson

**FILE No.:** 2003A/26

**DATE OF DECISION:** April 15, 2003

## DECISION

### OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) brought by Protect Security Services Ltd. (“Protect Security”) of a Determination that was issued on December 30, 2002 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Protect Security had contravened the provisions of a Variance issued on 12 October 2000 (the “Variance”) and Part 3, Sections 17 and 18 of the *Act* in respect of the employment of David Kennett (“Kennett”) and ordered Protect Security to cease contravening the provisions of the Variance and to comply with the *Act* and to pay an amount of \$2,742.86.

Protect Security has appealed the Determination on the grounds that the Director erred in law and failed to observe principles of natural justice. The reasons for the appeal by Protect Security state:

1. There has been a breach of procedural fairness. The Employment Standards Branch is directing Protect Security to pay monies to Kennett based on a conclusion that Protect Security operated a schedule outside of the approved variance. This conclusion is based on an interpretation of the variance that falls outside of its intended meaning. Since the Employment Standards Branch issued the variance, it should be the only party liable for its misinterpretation and/or incorrect wording. Protect Security should not be made to pay for the mistakes of the Employment Standards Branch. The investigation has taken too long.
2. The conclusions reached by the delegate of the Employment Standards Branch, David Oliver, do not fairly represent the facts. There are different explanations of the facts.
3. There are other facts that were not considered during the investigation.
4. There are errors in the facts in the Determination.

Protect Security has requested an oral hearing on this appeal, but the Tribunal has decided that an oral hearing is not required in this matter and that the appeal can be properly addressed through written submissions.

### ISSUE

The issues in this appeal is whether the Director erred in concluding Protect Security had contravened the provisions of the Variance or, alternatively, whether the Director erred in calculating the amount owed.

### FACTS

Kennett worked for Protect Security from February 28 to July 3, 2001 as a security guard at a rate of \$9.00 an hour. Kennett complained that Protect Security had not kept to the provisions of the Variance under which he had worked during his term of employment. There was no dispute that Kennett was working under a Variance granted by the Director. The terms of the Variance were set out in a Determination dated October 12, 2000, and included the following conditions:

Employees will work an 11 hour shift with one hour of unpaid breaks. Averaging 38.5 hours per week over a two week cycle as follows: 1 shift on, two shifts off, 2 shifts on, 3 shifts off, 2 shifts on, 2 shifts off, 2 shifts on. 77 hours over the two week cycle (38.5 hours per week). The cycle will invert every other period, (1 shift off, 2 shifts on, 2 shifts off . . .).

Daily overtime will be paid at double time after 11 hours.

An employee working on a regularly scheduled day off during any week of the shift cycle must be paid 1½ times the employee's regular rate of pay for all time worked on the first working day and 2 times the employee's regular rate of pay for all time worked on any subsequent days during that week.

The Director found that Protect Security had never inverted the cycle and, as a result, Kennett had worked on regularly scheduled days off and was entitled to be paid for those days according to the formula found in the third paragraph, above.

Protect Security had argued during the investigation that the Variance was incorrectly worded and the intention was never to invert the cycle every other period. The Director rejected that argument.

## **ARGUMENT AND ANALYSIS**

The burden is on Protect Security to show an error in the Determination.

This appeal is dismissed. I do not find any merit in the reasons given by Protect Security in support of their appeal.

The first reason for appeal is grounded in the assertion that the Director failed to observe principles of natural justice, specifically that the timing and conduct of the investigation was procedurally unfair. Protect Security has identified the following aspects of the process as establishing a failure to observe principles of natural justice:

- while Kennett's complaint was filed on September 25, 2001, Protect Security was not notified of the complaint until January 7, 2002, when it received a letter and a Demand for Records from the Branch;
- even though Protect Security responded promptly to the complaint and Demand for Records, they did not hear back from the Branch until March 28, 2002;
- other demands were made by the Branch, to which Protect Security responded;
- on May 17, 2002, Protect Security received some complaints from staff that the delegate was asking questions which "appeared to be leading . . . as though she was 'trying to dig up some dirt'";
- in late May, 2002, the delegate indicated the filed would be concluded the following week and made some comments suggesting her concerns were limited to three overtime shifts Kennett had worked;

- several calls from Protect Security were not returned by the delegate;
- in September, 2002, Protect Security was contacted by another delegate indicating the file had taken over by him;
- the same individual was also responsible for reviewing an application by Protect Security to renew the Variance;
- the delegate indicated it would not be appropriate to renew or re-issue the Variance, but to grant a new Variance that would more accurately describe their schedule and that would not be done until Kennett's complaint was resolved;
- efforts were made to settle the complaint, but the offer made by Protect Security was not accepted;
- on September 23, 2002, the delegate communicated to Protect Security an amount which he calculated was owed to Kennett;
- Protect Security disagreed with the calculation;
- some employees of Protect Security complained that the delegate had suggested they file a claim for overtime hours;
- a new variance was issued on October 2, 2002; and
- the Determination was received by Protect Security in early January, 2003.

The submission also indicates that Protect Security had, for the purposes of the appeal, requested the Director provide copies of the schedules provided by them at the time the application for the Variance was first requested and provide confirmation that those schedules were acceptable.

Nothing in any of the above allegations establish a failure by the Director to observe principles of natural justice in investigating and adjudicating Kennett's complaint. There is no indication that the ability of Protect Security to respond was prejudiced by the brief delay in being notified of the substance of the complaint or by the administrative delays that occurred during the investigation process. The allegations in the appeal relating to the conduct of the delegates involved in the investigation are unsubstantiated. While Protect Security requested an oral hearing in the appeal, there was no reason for it to presume an oral hearing would be granted.. Protect Security was clearly notified, in correspondence from the Tribunal dated January 23, 2003, that the appeal might be decided on written submissions alone and was, at the same time, provided with an information sheet on the appeal process. Under the Tribunal's Rules of Procedure, Protect Security was required to provide all relevant information and evidence with its appeal. No evidence relating to the allegations was included in the appeal. Protect Security was specifically advised on March 13, 2003 that the Tribunal intended to adjudicate its appeal based on the written submissions. There was no indication following that notice that Protect Security wished to supplement its appeal with sworn statements relating to this aspect of the appeal. In any event, in addition to being unsubstantiated, the allegations made are unrelated to whether Protect Security was notified of the substance of Kennett's complaint and provided with a fair and reasonable opportunity to respond.

It is clear from the file that Protect Security was notified by the Director of the complaint. The notice clearly identified one of the elements of Kennett's complaint was that "the conditions of the variance granted by the Branch are not being observed". The notice requested a response to the complaint and a response was submitted and considered by the Director.

Nothing in the appeal has convinced me that the decision of Mr. Oliver to defer a renewal of the Variance was improper and compromised his ability to investigate the complaint and issue the Determination. In light of amendments to the *Act* and the apparent failure and/or refusal of Protect Security to follow the Variance as granted, it was perfectly appropriate for Mr. Oliver to have suggested issuing a new Variance rather than renew one which was apparently not desired by Protect Security.

The other three reasons for appeal challenge findings of fact made by the Director. Protect Security says it was wrong for the Director to assume that Kennett fell under the Variance on his first day worked. While the appeal suggests alternative dates for starting Kennett on the Variance schedule and provides what is referred to as an "alternative Variance start date interpretation", Protect Security has failed to demonstrate that it was wrong for the Director to have concluded Kennett fell under the Variance from his first day worked. It appears that all Protect Security has done is find a pattern that reduces their overtime obligation and suggested Kennett fell within that pattern. In their submission, it says:

A review of his shifts shows that he began the cycle on March 2, 2001.

Such a review shows no such thing. Protect Security has not challenged the finding that they never inverted the cycle and, that being so, March 2, a Friday on which Kennett did not work, ought to have been followed by two more days off, two 11 hour days off and two more days off over the following week. In fact, March 2 was followed by Kennett working two 11 hour days, one 8 hour day, one day off, one 11 hour day and two days off. Those facts hardly 'show' that Kennett began the cycle on March 2. Protect Security also suggests March 4 could be used as the date on which Kennett was included in the Variance schedule. If that date is used, the result is no more compelling. Kennett worked March 4. Assuming he worked under the Variance schedule from that date, that day worked ought to have been followed by two days off, two 11 hour days and three days off in the following week. In fact, that day was followed by one 8 hour day, March 5, one day off, one 11 hour day worked and four days off. As can be seen, both suggestions made by Protect Security fall apart within the first week Kennett supposedly worked under the Variance schedule. Based on the terms of the Variance, it was reasonable for the Director to have concluded that Kennett fell under the Variance schedule to from the first day worked.

Protect Security also contends that the Director failed to consider the schedules that were provided when the Variance application was first requested. The contention presumes the schedules submitted when the Variance was first requested would support the argument that Protect Security never asked for a Variance that would require them to invert the cycle every other period. In reply to the appeal, the Director has provided those schedules, as well as the original application made, and signed, by Protect Security and the affected employees under Section 72 of the *Act*. This application clearly states that "the cycle inverts every other period (1 shift off, 2 shifts on, 2 shifts off . . .)".

There are two responses to this aspect of the appeal: first, the Variance is sufficiently clear in its language that extrinsic evidence of the "intent" of the application would not be allowed to override it; and second, to the extent it might be relevant, the requirement to invert the cycle is consistent with the wording in the original application. The obligation of Protect Security was to comply with the Variance as issued. That

obligation is not altered because some elements of the Variance were required by the Director to be included and may not have been fully understood by Protect Security.

Finally, Protect Security says there is an error in the calculation of hours. I am not convinced any error has been made.

## **ORDER**

Pursuant to Section 115 of the *Act*, I order the Determination dated December 30, 2002 be confirmed in the amount of \$2,742.86, together with any interest that has accrued pursuant to Section 88 of the *Act*.

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**David B. Stevenson**  
**Adjudicator**  
**Employment Standards Tribunal**