

An appeal

- by -

Pinnacle Athletic Mats Ltd.
(the “Employer”)

- 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: Yuki Matsuno

FILE No.: 2006A/120

DATE OF DECISION: December 28, 2006

DECISION

SUBMISSIONS

Norman Spence for Pinnacle Athletic Mats Ltd. and for himself
Serina Tipper for the Director of Employment Standards

OVERVIEW

1. Pinnacle Athletic Mats Ltd. and Norman Spence (collectively, the “Appellants”), appeal Determinations of the Director of Employment Standards (the “Director”) issued September 12, 2006 (the “Determinations”), pursuant to section 112 of the *Employment Standards Act* (the “Act”).
2. In one Determination, a delegate of the Director (the “Delegate”), after carrying out an investigation, found that the Pinnacle Athletic Mats Ltd. (the “Employer”) had contravened sections 42 and 58 of the *Act* with respect to the employment of Mark Anderton and Kim Thompson (the “Employees”). The Employer was ordered to pay the Employees the amount of \$7,336.44, inclusive of concomitant vacation pay and interest calculated under section 88 of the *Act*. The Delegate also imposed two administrative penalties on the Employer for contraventions of sections 28 and 42 of the *Act*. The administrative penalties total \$1,000.00. The total amount of the Determination is \$8,336.44.
3. In the other Determination, the Delegate also found Norman Spence, as a Director/Officer of Pinnacle Athletic Mats Ltd. at the time the wages owed to the Employees were earned or should have been paid, to be personally liable for the outstanding amount of \$8,336.44.
4. The Appellants appeal the Determinations on the ground that the Delegate failed to observe the principles of natural justice.
5. Although the Appellants request an oral hearing in the body of their appeal submissions, the Tribunal has determined that this appeal will be decided on the basis of the parties’ submissions and the Record of the documents that were considered in making the Determinations.

ISSUE

6. Did the Delegate fail to observe the principles of natural justice in making the Determinations?

BACKGROUND AND ARGUMENT

Mark Anderton

7. Mark Anderton was employed as a salesperson and shipper with the Employer from November 1, 2004 to June 9, 2006. From November 12, 2005 to March 31, 2006, Mr. Anderton’s regular wage was \$17.50 per hour. From April 1, 2006 until his last day of work on June 9, 2006, his regular wage was increased to \$20.00 per hour. Starting in October 2005, Mr. Anderton tracked his overtime hours on a spreadsheet

which showed the number of the hours he worked each day, the start time and end time, and the number of overtime hours worked each day (the “Spreadsheet”). He says he started the Spreadsheet on the instructions of Mr. Spence, and sent a copy of the Spreadsheet to the Employer’s bookkeeper on a number of occasions.

8. Mr. Spence, on the other hand, takes the position that he was “blindsided” by Mr. Anderton’s claim for overtime hours. He says he had purchased a time clock which Mr. Anderton failed to use on a consistent basis, in spite of being advised to do so on numerous occasions. Because Mr. Anderton did not use the clock on a regular basis, Mr. Spence did not have an accurate record of the hours worked by Mr. Anderton; however, he did agree that some overtime wages were owed to Mr. Anderton. In his submissions to the Delegate, Mr. Spence put forward an estimate of Mr. Anderton’s overtime hours based on an average of the overtime hours worked by other employees and an average of the regular wage that was paid to Mr. Anderton during his time at the Employer. Mr. Spence also submitted copies of time clock time cards, where they were available.
9. In the Reasons for the Determination, the Delegate found that some of Mr. Anderton’s claim was out of time, and considered only the time period from December 10, 2005 to June 9, 2006. She found the Spreadsheet to be an accurate record of the overtime hours Mr. Anderton worked and that it was an ongoing, contemporaneous recording of his hours of work, not created for the sole purpose of his complaint, but created at the request of his employer to track his hours of work. The Delegate preferred Mr. Anderton’s evidence to that provided by the Appellants, and used the Spreadsheet as the basis of calculating the overtime wages owing to Mr. Anderton. She found the total owing Mr. Anderton to be \$6,896.87, comprising overtime wages, vacation pay payable on the overtime wages, and interest.
10. In their appeal, the Appellants argue that there were calculations errors in the Determinations and that the Delegate did not take into account time off with pay taken by Mr. Anderton. In their final appeal submission, Mr. Spence says that he never received a complete copy of the Spreadsheet. It appears that Mr. Spence was sent a photocopy of the Spreadsheet that had the last few days of each month cut off.
11. In response, the Delegate says that what the Appellants say are calculation errors are, in fact, disagreements over the findings of fact made in the Determinations. The Delegate says that there was no denial of natural justice, and that in fact the Appellants had an opportunity to participate fully in the investigation.
12. Mr. Anderton also supplied a response to the appeal that encourages the Tribunal to deny the appeal and points out what he says are errors in the submissions of the Employer and Mr. Spence.

Kim Thompson

13. Kim Thompson was employed as a factory worker with the Employer from November 5, 2005 to May 15, 2006. He filed a complaint for compensation for 46.75 hours of banked overtime wages. From November 5, 2005 to April 12, 2006, Mr. Thompson was paid \$16.00 per hour. On April 13, 2006, he was moved to a salary of \$1600.00 biweekly (based on 80 hours at \$20 per hour). In the course of the investigation, Mr. Thompson submitted a notebook in which he kept a daily record of hours and the work that he did each day, as well as a Record of Employment and pay stubs. In response, Mr. Spence took the position that Mr. Thompson had been paid for all of his banked overtime hours because there were days on which Mr. Thompson did not work but was paid for an eight-hour day. He submitted a spreadsheet which showed the time bank totals between December 6, 2005 and April 11, 2006, as well as another document showing

hours worked, hours paid and time bank hours between April 3, 2006 and May 12, 2006. Mr. Spence also submitted pay stubs and time clock time cards.

14. In the Reasons for the Determination, the Delegate found that the time clock records submitted by the Employer were not an accurate record of the hours worked by Mr. Thompson. She found that Mr. Thompson's notebook recording hours of work and work performed contained authentic information, and she preferred Mr. Thompson's evidence over that of the Employer. She found the total owing Mr. Thompson to be \$439.57, comprising overtime wages, vacation pay payable on the overtime wages, and interest.
15. In their appeal, the Employer and Mr. Spence reiterate their argument that Mr. Thompson has been paid in full for his banked hours of overtime.
16. The Delegate says in response that the Appellants are merely arguing findings of fact and are asking the Tribunal to re-hear the case. She says that there was no denial of natural justice, as the Appellants fully participated in the investigation.

ANALYSIS

17. Section 112(1) of the *Act* outlines the grounds on which a person may appeal a determination:
 - (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 being made.
18. The Employer appeals on the ground that the Director, represented by the Delegate, failed to observe the principles of natural justice in making the Determinations. The burden is on the Appellants to establish the basis of their appeal.

Did the Delegate fail to observe the principles of natural justice in making the Determinations?

19. The principles of natural justice are concerned with fairness of procedure, which encompasses the right to know the case against oneself, to have an opportunity to respond, and to be heard by an unbiased decision maker.
20. For the most part, the Appellants' submissions do not suggest a failure on the part of the Delegate to observe the principles of natural justice in reaching the conclusions expressed in the Determinations. Their submissions express disagreement with the Delegate's factual findings in the Determinations and reiterate the information and evidence that they had presented to the Delegate in the course of the investigation. Regarding Mr. Anderton, the Appellants also put forward the theory that Mr. Anderton has been paid for either 116 or 118 hours of banked overtime because there were days on which he did not work but was not paid. However, they do not provide any evidence to support their assertions.

21. The Appellants, in effect, invite the Tribunal to find errors of fact. However, for the Tribunal to do so would be to act beyond its jurisdiction. An appeal is not an opportunity to have the case re-heard on the merits.
22. The only point made by the Appellants that touches on whether the principles of natural justice were fulfilled is the following excerpt from their final appeal submission:
- . . . I never received a complete copy of Mark Andertons [sic] hours worked. The sheet I received from the delegate of the Director of Employment Standards is the “MA1” sheet I based my figures off and have turned in. Mark Anderton has now supplied an original sheet.
23. I examined the Record and the documents submitted by the parties and it appears that during the investigation, Mr. Spence was sent a photocopy of the Spreadsheet that had the last few days of each month cut off. Specifically, it appears that the version sent to Mr. Spence was missing entries for December 30; January 27, 30, and 31; March 31; and April 28. In their appeal submission, the Appellants suggest that on those missing dates, Mr. Anderton must be presumed to not have worked, but still have been paid, thus decreasing the total amount owed to him.
24. The question that arises is whether this has led to a breach of the principles of natural justice, and in particular, whether it has led to a breach of section 77 of the *Act*, which requires that the Director “...make reasonable efforts to give a person under investigation an opportunity to respond”. The Tribunal dealt with this issue recently in *Inshalla Contracting Ltd.*, BC EST # RD054/06:
- In the case of investigations under the *Employment Standards Act* the duty of fairness will almost invariably require notice to the employer and employee. The general principle is that notice must be adequate in all the circumstances in order to afford those concerned a reasonable opportunity to present evidence and argument, and to respond to the position of the other party. . . .
25. Was the notice to the Appellants, specifically regarding Mr. Anderton’s hours of work, adequate in this case? In my view, the fact that they received a version of the Spreadsheet with six dates cut off did not negate the Delegate’s overall reasonable efforts to give the Employer and Mr. Spence an opportunity to respond. The missing dates comprised only six working days out of the six months and nine days encompassed by the Spreadsheet. It therefore did not take away from the adequate notice given to the Employer and Mr. Spence of Mr. Anderton’s material evidence. Further, the Employer and Mr. Spence had sufficient opportunity to respond to Mr. Anderton’s allegations. During the investigation, the position of the Appellants was that Mr. Spence was “blindsided” by Mr. Anderton’s claims; that the Spreadsheet was a malicious attempt by Mr. Anderton to take advantage of the Employer; and that in the absence of proper time clock records, the only way to assess the amount owing to Mr. Anderton was to take an average of his colleagues’ overtime hours. Nothing in their responses during the investigation turns on the presence or absence of six days in the Spreadsheet. Mr. Spence did not bring forward his notes and allegations regarding the spreadsheet (i.e. that the missing days should be read as days that Mr. Anderton was paid but did not work) until this appeal; he did not mention these allegations during the Delegate’s investigation, even though he had the opportunity to do so.
26. I find that the Appellants have not shown that the Delegate failed to observe the principles of natural justice in making the Determinations. Their appeal is dismissed.

ORDER

27. Pursuant to Section 115 of the *Act*, I order that the Determinations against Pinnacle Athletic Mats Ltd. and Norman Spence, dated September 12, 2006, be confirmed in the amount of \$8,336.44, together with any interest that has accrued under Section 88 of the *Act*.

Yuki Matsuno
Member
Employment Standards Tribunal