Employment Standards TRIBUNAL

An appeal

- by -

Kyle Freney

- 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

TRIBUNAL MEMBER: Frank A.V. Falzon

FILE No.: 2004A/18

DATE OF DECISION: July 26, 2004

DECISION

OVERVIEW

This is an appeal from a January 5, 2004 Determination issued by a Delegate of the Director of Employment Standards, summarily dismissing the Appellant Kyle Freney's complaint that his employer did not pay him any wages for the hours worked.

Mr. Freney filed a complaint with the Employment Standards Branch on December 9, 2003. He claimed that:

1. He worked on jobs in Parksville and Nanaimo as an apprentice painter for "Dave Mosher – Arrowsmith Exteriors – D.N.A. Painting".

2. The employment relationship existed for 8 weeks in total: from July 25 – September 19, 2003.

3. He was paid at the rate of $8 per hour and later $10 per hour.

4. He earned $1522 in wages during this period.

5. He "worked for Dave from end of July to middle of September, worked by Parksville Credit Union, 2 houses in Nanaimo, and Parksville Husky and still haven't seen a cent in my wages."

A claim that one undertook nearly 200 hours of hard work over three months and was not paid is obviously a matter of some seriousness.

Mr. Freney supported his claim by supplying the Branch with his July, August and September 2003 calendar, listing his days and hours worked. The calendar is not an instance of exemplary timekeeping. However, the *Employment Standards Act* is meant to be accessible to lay persons, and allow for evidence to be tendered informally. A close review of the calendar does disclose the manner in which Mr. Freney arrived at the $1522 in claimed wages:

July 2003: 84 hours x $8 /hour ($672)

August 2003: 72.5 hours x 8 /hour [minus $150] ($430)

September 2003: 42 hours x $10 / hour ($420)

There is nothing on the face of the calendar that calls into obvious question the veracity of the wages and hours claimed. Mr. Freney's claim raised a *prima facie* case, and it was clearly for Mr. Mosher to answer it.

The Employment Standards Branch assigned an Investigating Officer, Mr. Krell. On December 15, 2003, Mr. Krell issued the following:

A. Demand for Employer Records. This formal Demand, sent to the Employer, also attached ss. 28 and 85 of the *Act* and 29 and 46 of the Regulation. It plainly required Mr. Mosher to deliver all

payroll records to the Branch no later than December 23, 2003. The Demand states: "Failure to produce these records will result in a Determination being issued".

Nothing in the record before me suggests that the Employer complied with his legal obligation to provide the Branch with the payroll records of Mr. Freney. The result was that the best evidence before the Branch remained the evidence from Mr. Freney.

B. Notice of Mediation Session. This Notice, sent to both parties, established a December 23, 2003 mediation date to explore the possibility of settling the complaint.

Just as the employer refused to produce employment records, he did not attend the scheduled mediation session. It appears however that Mr. Freney did attend; he states in his Notice of Appeal that "I was there for the first meeting with the investigating case officer Mr. Krell, which the fellow that my claim is against Dave Mosher failed to show up for either."

As of the December 15, 2003 date when the Branch issued the Demand for Payroll Records and the Notice of Mediation Session, the Branch had to make a procedural choice regarding how to review the complaint if mediation did not succeed. The nature of its procedural choice is set out in ss. 76 and 77 of the *Act*, set out below:

Investigations

76 (1) Subject to subsection (3), the director must accept and review a complaint made under section 74.

(2) The director may conduct an investigation to ensure compliance with this Act and the regulations, whether or not the director has received a complaint.

(3) The director may refuse to accept, review, mediate, investigate or adjudicate a complaint or may stop or postpone reviewing, mediating, investigating or adjudicating a complaint if

(a) the complaint is not made within the time limit specified in section 74 (3) or (4),

(b) this Act does not apply to the complaint,

(c) the complaint is frivolous, vexatious or trivial or is not made in good faith,

(d) the employee has not taken the requisite steps specified by the director in order to facilitate resolution or investigation of the complaint,

(e) there is not enough evidence to prove the complaint,

(f) a proceeding relating to the subject matter of the complaint has been commenced before a court, a tribunal, an arbitrator or a mediator,

(g) a court, a tribunal or an arbitrator has made a decision or an award relating to the subject matter of the complaint,

(h) the dispute that caused the complaint may be dealt with under section 3 (7), or

(i) the dispute that caused the complaint is resolved.

Opportunity to respond

77 If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.

As the heading to section 76 makes clear, one option was to investigate the complaint. In the past, the Branch investigated all complaints, and it continues to do so in some cases. An investigation process in this case would have allowed Investigating Officer Krell to hear from Mr. Freney and the employer separately, provided the Officer shared the gist of the other party's key evidence with both parties (s. 77). In the circumstances here, Mr. Krell might have been able to hear from Mr. Freney on December 23, 2003, and then issue a Determination after forwarding Mr. Freney's documents to the employer and giving him one final opportunity to respond.

The Investigation option was not chosen. Instead, the Branch followed its relatively new "adjudication" option, a practice whereby a Branch Delegate schedules and convenes a hearing with both parties present, and adopts practices and a posture more akin to that of a judge or adjudicator. (Interestingly, the only reference to "adjudication" in the *Act*'s recent iteration is under the heading "Investigations", and even then is done in a rather backhanded way through the language of s. 76(3)). The decision to deal with this case via adjudication was apparently made on or about December 15, 2004. The Notice of Mediation stated that if the December 23rd mediation did not resolve the matter, an Industrial Relations Officer would conduct a "Branch adjudication" on December 30, 2003 at 10:00 a.m. in Nanaimo.

As noted above, December 23rd arrived, and the employer neither provided the requested records nor attended the mediation. Accordingly, a Branch employee telephoned Mr. Mosher on that date and left him a voice mail. The record before me includes a helpful transcription of that December 23, 2003 voice mail, in which the Branch stated the following to Mr. Mosher:

- Mr. Freney says that, on November 25, 2003, he served Mr. Mosher with the complaint.

- On December 11, 2003, the Branch contacted Mr. Mosher about the complaint by phone, and Mr. Mosher "hung up on our staff".

- On December 19, 2003, the Branch contacted Mr. Mosher reminding him about the mediation session regarding this complaint, as referred to in the documents served on his last known address.

- On December 30, 2003, the Branch adjudication will proceed: "The Adjudicator can be expected to make a decision in regard to Mr. Freney's claim based on information before them at the conclusion of the hearing. Again, I wish to make it crystal clear to you that if you wish to have information considered regarding Mr. Freney's claim you must present it to the adjudicator at the adjudication hearing. Should the Adjudicator conclude that you owe Mr. Freney wages in contravention of the Employment Standards Act, a determination for the wages, along with a $500.00 for each section of the Act contravened by you. [sic] Wage determinations are turned over to a baliff for collection; the costs of the baliff are also paid by you. Should you have any questions you may call me at …."

One week later (December 30, 2003), the hearing date arrived. The hearing was not presided over by Mr. Krell, but rather by a new Delegate, Mr. Wallace.

Neither party appeared for the December 30, 2003 hearing.

THE DETERMINATION

On January 5, 2004, the Delegate issued a Determination and Reasons for Determination. The Reasons state that "a hearing was held on December 30, 2003", that neither party attended, and that "[to] my knowledge neither party contacted the Employment Standards Branch to request an adjournment or offer an explanation for their absence." The Reasons then outline the following Findings and Analysis:

> After reviewing the evidence before me, or more precisely the lack of evidence before me, I find that there is insufficient evidence to prove a claim for wages under the Act. Without further clarification of the record of hours submitted, I was not able to establish which were the actual hours worked or whether any of these hours had been paid.
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> Section 76(3)(e) of the *Act* states:
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> > 76(3) The director may refuse to accept, review, mediate, investigate or adjudicate a complaint or may stop or postpone reviewing, mediating, investigating or adjudicating a complaint if:
> >
> > (e) there is not enough evidence to prove the complaint.
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> In view of the foregoing, I cannot find that the Employment Standards Act has been contravened. Accordingly, no wages are outstanding. No further action will be taken with respect to the complaint filed by Kyle Freney, dated December 9, 2003.

THE APPEAL TO THIS TRIBUNAL

Mr. Freney has appealed to the Tribunal, alleging a breach of procedural fairness. His appeal form makes two points:

1. That the records he provided to the Investigating Officer, and that were before the Delegate, are sufficiently clear regarding the hours and days worked; and

2. That he did not make the December 30, 2003 hearing because his car had starter problems. He states that he did telephone to explain why he was not there. He points out that he was present for the first meeting with the Investigating Officer, but that the Employer did not attend.

Mr. Freney states as follows:

> … I was thinking that for another remedy … we could please possibly set up another date for the adjudication hearing so that based on Mr. Mosher's previous record will be a "No Show" and so that I, who will absolutely positively be there, can explain the evidence to the Director." [emphasis in original]

THE DIRECTOR'S SUBMISSION

The Director states that the appeal should be dismissed. He states that there is no record of Mr. Freney having called the Branch on December 30, 2003. The Director states that there is a record of Mr. Freney having contacted the Investigating Officer a week after the hearing to explain about the starter, and that the Investigating Officer apparently told Mr. Krell that "he should have called in at the time of the adjudication, to which Mr. Freney apparently agreed." The same submission further states that the Adjudicating Officer subsequently spoke with Mr. Freney's mother as part of confirming service of documents, and that in the course of the conversation she told the Adjudicating Officer "that Mr. Freney had simply forgotten about the Adjudication."

The Director points out that the 30 day time limit for this appeal expired on February 12, 2004, and points out that Mr. Freney did not deliver his appeal to this Tribunal until February 13, 2004. Thus, to proceed with this appeal, Mr. Freney would require this Tribunal to extend the time for appeal, under s. 109(1)(b).

The Director concludes:

> Mr. Freney alleges that I did not consider or carefully examine the calendar (exhibit #2) which, according to Mr. Freney shows his hours worked. I did consider the evidence before me, but was unable to determine from that evidence, without further clarification, what hours had been worked and paid and what hours may be owed. With neither of the parties present, a hearing could not be convened and with the lack of evidence available, under Section 76(3)(e) of the Act, the issue was not adjudicated.

ANALYSIS

The reality that natural justice cases are rarely neat and tidy is nicely illustrated by the circumstances of this case.

It is not in Mr. Freney's favour that he did not show up for the December 30, 2003 hearing of his own complaint, of which he had notice. If Mr. Freney had appeared, the Delegate would have had the answers to his questions; the time and trouble of the present appeal proceeding would not have been necessary.

I have considered Mr. Freney's explanation about having starter problems on December 30th, and I have considered his statement that he called the Branch to explain why he did not attend his hearing. I must say that from the way that the latter point is worded in his notice of appeal, it is not clear to me that Mr. Freney is saying he actually made the call on December 30. The Branch states that Mr. Freney telephoned "approximately one week later" to explain about the starter problem. The Branch says it has no record of a call from Mr. Freney on December 30. Mr. Freney did not dispute the statement in the Director's submission that he agreed with Mr. Krell a week later that "he should have called in at the time of the adjudication", nor did he dispute the information Mr. Freney's mother is reported as having later advised the Delegate - that her son had "simply forgotten" about the Adjudication.

Based on the evidence before me, I conclude that Mr. Freney was diligent in pursuing his complaint up until December 30th – including filing his complaint, providing evidence in the form of calendar records and meeting with Mr. Krell on December 15 – but Mr. Freney did not attend and did not call in on December 30th. Mr. Freney forgot about the hearing.

Does the latter lack of responsibility of Mr. Freney's part remove his ability to now advance a procedural fairness argument?

The answer to that question depends on whether the Delegate undertaking the adjudication – who must be taken to have known that Mr. Freney was up to that point diligent in pursuing his claim – was obliged in the circumstances to take reasonable steps to determine the reason for Mr. Freney's absence before summarily dismissing his claim. In answering this question, we must place ourselves in the position of the Delegate as he entered the empty hearing room on December 30th. At that time, the Delegate – who had a choice whether to briefly adjourn the matter and direct office staff to make a phone call - had no way of knowing whether Mr. Freney's absence was due to reasons beyond his control.

I find that, in the particular circumstances here, procedural fairness required the Delegate to undertake a minimal inquiry before taking the dramatic step of summarily dismissing Mr. Freney's claim. Such inquiry required no more than a brief adjournment of the matter while office staff telephoned Mr. Freney to try and determine the circumstances.

The Supreme Court of Canada has repeatedly stated that determining the content of the duty of fairness is a highly contextual exercise. The relevant factors are to be weighed and applied with a view to requiring public bodies to act with courtesy and common sense, in a manner commensurate with the interest at stake, but without imposing unrealistic institutional burdens on the public body: see most recently, *Congregation des temoins de Jehovah v. Lafontaine (Village),* 2004 SCC 48. It is what the English have concisely referred to as "fair play in action".

I do not in this decision say that Delegates are prevented from summarily dismissing complaints until inquiring after complainants who fail to show up for adjudication hearings for which they have received written notice. I do say however that there will be cases, such as the present case, where it would be unfair not to follow up.

As I see them, the relevant circumstances here are as follows:

- Mr. Freney advanced a serious claim that he worked nearly 200 hours without being paid for those hours – a claim for 200 hours of hard work performed without payment is serious, and if valid lies at the very core of claims the *Employment Standards Act* was enact to protect.

- Unlike the employer, Mr. Freney had up to that point been diligent and responsive in pursuit of his complaint. There was no valid reason to leap to any assumption that he did not appear because, for example, he had abandoned his complaint. As noted above, the Delegate could not have known whether the reason for non-attendance was good or bad; it is for this reason that most adjudicators and many judges in this situation – unless there would be prejudice to another party, or the absent party has some sort of track record of absences – will take the step of briefly adjourning the matter to allow staff to follow up with the party before using the hammer of final dismissal. In such instances, even if a party has failed to appear through his own fault, the matter can usually be addressed through some sort of practical resolution (such as, in this case, immediate attendance, telephone evidence, setting a new hearing date, or deciding to conclude the matter by way of investigation).

- Mr. Freney did not advance a naked claim; he previously provided relevant and plausible supporting documentary evidence consistent with his claim, which records showed how he

calculated his claim, and which records (as I have said above) raise a *prima facie* case that the employer should have been required to answer. In such circumstances, summary dismissal of the entire complaint based on lack of evidence is a blunt remedy in the face of other alternatives that might more directly address the Delegate's desire for clarification on amounts. Indeed, as I view those records on their face, it is not obvious that extensive clarification was required in any event, particularly given that the employer did not provide payroll records.

- The employer never contested Mr. Freney's claim. In contrast to Mr. Freney, not one word had been heard from the employer during the entire proceeding. The employer was the only party with the evidence to contradict Mr. Feney's claim. More than that, the employer has by his conduct and omissions made clear that he refuses to participate in the process. The employer did not respond despite a solemn statutory duty to provide payroll records, and it is surely contrary to the *Act* to allow an employer to gain a windfall from such refusal in circumstances such as these. As between the employer and the employee, the balance of interests was still clearly with Mr. Freney despite his absence on December 30th.

- The effort that would have been required of the Branch to contact Mr. Freney's home to determine the circumstances would have been minimal. This was a local matter, the Branch knew Mr. Freney's address and phone number, and the file shows that the Branch did in fact contact both the employer and Mr. Freney over the course of this matter by telephone (both before and after the Determination) to speak to the parties and leave messages.

The above factors having been noted, I return to my opening observation that the facts here are not neat and tidy, and are even less so in light of the fact that Mr. Freney filed his appeal with this Tribunal one day late. However, I have in all the circumstances decided to grant Mr. Freney an extension of time to appeal under s. 109 of the *Act*, and I do so on the basis of the following factors: the appeal form is dated within time, the fax was delivered to the Tribunal only one day late, the correspondence shows confusion as between the Branch and Mr. Freney regarding the appeal period (see January 22, 2004 letter from the Branch to Mr. Freney), the Branch has not objected to an extension of time but addressed the appeal on the merits, the issue raised is serious and demonstrates a jurisdictional error, the notice of appeal makes obvious the Appellant's ongoing intention to appeal and to pursue this matter diligently from now on, and there is no objection from or prejudice to the employer occasioned by the delay *per se*.

I wish to conclude these reasons by emphasizing that I appreciate the circumstances in which the Delegate found himself. It is honestly frustrating for a decision-maker to take the time and effort to convene a hearing only to find that a claimant has "failed to show up for his own party". This is especially so where, as here, it turns out after the fact that the claimant may not have had a good reason for failing to appear. There is a valid legislative interest in finality, and a legitimate interest in ensuring that parties are subject to appropriate discipline in pursuing and documenting their claims. It is, however, part of the beauty of the law of natural justice that it forces decision-makers to look beyond inconvenience, understandable frustration and the need for clarification and efficiency, to a broader conception of fair play in action, which is not far from asking how any of us would reasonably expect to have been treated in similar circumstances.

All of this having been said, Mr. Freney will appreciate from these reasons that his case was close to the line. He will, I trust, appreciate the peril of anything but the most mature, diligent and efficient pursuit of his complaint from this point forward. Fair warning has been given.

ORDER

The appeal is allowed and the Determination is cancelled. The result is that the Director remains under an obligation to review the complaint under section 74 by way of adjudication or investigation.

Frank A.V. Falzon
Member
Employment Standards Tribunal