

An appeal

- by -

Michael White

- 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: Carol L. Roberts

FILE No.: 2004A/100

DATE OF DECISION: August 11, 2004

DECISION

SUBMISSIONS

Michael White
Ken Elchuk
Andrew Mroz

on his own behalf
on behalf of the Director of Employment Standards
on behalf of Windsor Security Limited

OVERVIEW

This is an appeal by Michael White, pursuant to Section 112 of the Employment Standards Act ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued May 25, 2004. Mr. White alleged that Windsor Security Limited ("Windsor") contravened the Act by failing to pay him wages including overtime wages and statutory holiday pay. The Director's delegate held a hearing on Mr. White's allegations on May 17, 2004. Following the hearing, the delegate concluded that Mr. White was entitled to wages and accrued interest in the amount of \$806.28.

Mr. White alleges that the delegate failed to observe the principles of natural justice in making the Determination, and that he has new evidence that was not available at the time the Determination was being made. He contends that the new evidence supports his allegation that he received a wage increase during the period of his employment, thus entitling him to additional wages.

ISSUES TO BE DECIDED

1. Whether the Director's delegate failed to observe principles of natural justice; and
2. Whether Mr. White has new evidence that was not available at the hearing, such that the Determination should be changed or varied.

FACTS

Mr. White worked as a security officer for Windsor, a security services business, from July 5, 2002 until December 7, 2003. While acknowledging that he had been paid all annual vacation pay and compensation for length of service, he contended that he had not been paid all wages he was entitled to.

Mr. White alleged that Mr. Mroz, Windsor's president, had given him a pay increase from \$10 to \$15 per hour effective September 17, 2002. In support of his allegation, Mr. White submitted copies of two pay statements dated February 2, 2003. One indicated that Mr. White was paid \$10 per hour, the second, a supplementary cheque, indicated he was paid \$5 per hour. Mr. White's position at the hearing was that these statements supported his allegation that he was entitled to wages at a rate of \$15 per hour from September 17, 2002 until December 7, 2003.

Mr. Mroz's evidence was that Mr. White was paid a wage of \$10 per hour. His evidence was that, while he had a discussion with Mr. White about his rate of pay on September 16, 2002, the only agreement was that Mr. White would receive a bonus of \$5 per hour "based on performance", and that this rate would be

effective for a three month probationary period. Mr. Mroz entered into evidence a document signed by Mr. White acknowledging this arrangement, and that it was subject to a review within 90 days. Mr. Mroz's evidence was that a performance based bonus system (Operations Bonus Program) was offered to all employees in January 2003. Under this program, which was reflected in a changed payroll system, all pay statements reflected regular wages, overtime pay and bonus.

The delegate accepted, based on the documentation, that during the last six months of Mr. White's employment, he was paid a base rate of \$10 per hour plus a bonus based on the bonus program. He did not accept Mr. White's contention that his wages increased to \$15 per hour as of September 17, 2002. He further found that the bonus program, implemented after January 2003, was a slightly different arrangement than the agreement Mr. White and Windsor entered into in September. He concluded that the parties' September agreement was replaced by the operations bonus program in January. Furthermore, he determined that, as Mr. White accepted this payment system for over ten months, he could not now contend that he should have been paid at a different rate.

Mr. White and Mr. Mroz agreed that the record of hours worked and the wages owing, were accurate up to the period November 2, 2003 until December 7, 2003. During that period, Mr. White worked 12 hour shifts, and was paid for 10 hours. Mr. Mroz's evidence was that Mr. White was instructed to take four one half hour breaks during that time. Although Mr. White acknowledged he was told to take the breaks and was free to do so, he testified he did not take any breaks because he felt he would be doing a disservice to the client if he did so. He contended that he worked a full 12 hours during those shifts.

The delegate found that it was not open to Mr. White to ignore his employer's direction or to perform unauthorized work, and then claim wages for that work. He determined that Mr. White was only entitled to wages of 10 hours of work.

The delegate also reviewed Windsor's payroll records and determined that Mr. White's full wage entitlement had not been calculated correctly. Consequently, the delegate imposed a \$500 penalty for Windsor's contravention of the Act.

ARGUMENT

Mr. White contends that, since the hearing, he has found further documentation that supports his position that he was given a pay raise of \$5 per hour in September, 2002. Although Mr. White acknowledges that he signed a document agreeing to a \$5 per hour raise based on "performance", he alleges that the word "bonus" does not appear in the document. He argues that all hourly wages are based on performance.

Mr. White also argues that the pay statements show that the \$5 per hour bonus disappeared after 80 hours of work in a two week period. He argues that, for the bonus to cease after 80 hours is a breach of natural justice. He submits that Windsor's payment methodology is unfair and a breach of natural justice, and a creative way to avoid paying overtime.

Mr. White contended that, at the hearing, Mr. Mroz made some unfounded accusations against him, and that the delegate ought not to have allowed him to do so.

The director's delegate argues that all of the evidence presented at the hearing was considered, and that he made determinations of fact based on that evidence and the submissions of the parties. He submits that Mr. Mroz's alleged "groundless accusations" did not form a part of his findings.

Finally, the delegate submits that Mr. White was given every opportunity to present all his evidence at the hearing, including the payroll evidence he submitted with his appeal. He says that Mr. White does not explain why the payroll documents were not presented at the hearing. He further submits that, in any event, the records do not support an alternate conclusion, as they appear to support the finding that Mr. White was paid \$10 as regular wages and \$5 as a performance bonus.

The delegate submits that the Determination should be upheld.

Windsor's submission appears to support the Determination insofar as it relates to Mr. White's entitlement. However, Windsor also contends that the administrative penalty was unfairly imposed.

Given that Windsor has not filed an appeal of the Determination with respect to the imposition of the administrative penalty, I will not address this issue in the context of this decision.

ANALYSIS

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

The burden of establishing that a Determination is incorrect rests with an Appellant. (*Natalie Garbuzova* BC EST #D684/01) On the evidence presented, I am unable to find that burden has been met.

I will address Mr. White's grounds of appeal separately.

Natural justice

Principles of natural justice are, in essence, procedural rights that ensure parties know the case against them, the right to respond, and the right to be heard by an independent decision maker.

Although Mr. White submits that the delegate's conclusion was a breach of natural justice, there is no evidence that Mr. White was not given a fair opportunity to be heard.

Mr. White advanced arguments about the basis of his remuneration at the hearing which the delegate considered, and rejected. The fact that the delegate did not accept Mr. White's arguments does not constitute a breach of natural justice.

Mr. White does not allege that the delegate refused to consider his evidence or submissions, or that the delegate was not an independent decision maker. Although Mr. White suggests that the delegate allowed Mr. Mroz to make some unfounded allegations against him, there is no suggestion that, if indeed those allegations were made, the delegate allowed those allegations to affect his decision on the issues that were before him. The fact is that the delegate made a Determination in Mr. White's favour, and imposed a penalty on the employer.

I find no basis for this ground of appeal.

New Evidence

In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D 171/03 the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:

1. the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
2. the evidence must be relevant to a material issue arising from the complaint;
3. the evidence must be credible in the sense that it is reasonably capable of belief; and
4. the evidence must have high potential probative value, in the sense that , if believed, it could on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

Although the payroll documents are credible and relevant to the issues on appeal, Mr. White does not say why they were not presented to the delegate during the course of the hearing. It is clear that they were available, had Mr. White exercised due diligence.

Having reviewed the documents, I am not persuaded that, had the delegate had the opportunity to consider the material prior to issuing the Determination, he would have arrived at a different conclusion on the issue of Mr. White's rate of pay. The payroll documents show that, in October, November and December 2002, Mr. White was paid a base hourly rate of \$10, with separate cheques issued at a rate of \$5 base hourly rate. The payroll documents for January and February 2003 show no difference in Mr. White's base rate of pay, and he continued to be paid with two separate cheques. These new documents do not support Mr. White's contention that he was paid a base rate of \$15 per hour. I am unable to agree that this new evidence would have led the delegate to a different conclusion, even had they been presented at the hearing.

The appeal is dismissed.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination, dated May 25, 2004, be confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal