Employment Standards TRIBUNAL

An appeal

- by -

Dr. Kevin Orieux, Inc.
operating as Clover Dale Dental Clinic and Aararat Consulting

- 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: Lorne D. Collingwood

FILE No.: 2002/638

DATE OF HEARING: March 25, 2003

DATE OF DECISION: April 29, 2003

DECISION

OVERVIEW

Dr. Kevin Orieux, Inc. ("the Appellant" and "the employer" in this case), pursuant to section 112 of the *Employment Standards Act* ("the *Act*"), appealed a Determination issued on November 29, 2002 by a delegate of the Director of Employment Standards ("the Director"). The employer, by that Determination, is ordered to pay Cherl Bergquist and Dana Lamoureux $3,977.18 and $4,578.60, respectively.

Matters between the employer and Ms. Bergquist have been settled. The subject of this decision is the order to pay Ms. Lamoureux (who will henceforth be referred to as "the employee"). The Determination is that Ms. Lamoureux is entitled to $4,045.22 in regular and overtime wages plus $120 that was paid for uniforms. The employer has also been ordered to pay interest.

The Determination stems in the main from four decisions, namely, that the employee was not on a flexible workweek which is permitted by the *Act*, the employer's record of hours worked is not credible, information provided by the employee in respect to hours worked and training in the employer's office is credible and, finally, the training was "for the employer" and so the employee is entitled to be paid for the training.

The employer, on appeal claims the Determination is unfair and the delegate biased, in part because the delegate placed unreasonable time limitations on filing an appeal. The employer claims that the delegate failed to observe principles of natural justice in that it was denied access to information. The Tribunal is asked to conduct investigations. The Appellant complains of the order to pay interest. The appeal is in essence however a claim that the delegate has erred in law in that there are not facts to support the Determination. In this respect it is argued there is information to establish that the employee only worked an eleven hour day and it appears to have been ignored by the delegate, the employee did work a flexible workweek which is permitted by the *Act*, and what is said to be training is socialising and training which was not for the employer.

I have decided to confirm the Determination. The delegate had to decide credibility. The appeal itself goes to credibility. And the issues are complex. It was decided, therefore, that the Tribunal would hold an oral hearing, but the plan to hold a hearing was thwarted by the Appellant who decided that it was not worth its while to attend the hearing. The appeal is dismissed as if abandoned and also on the basis that the Appellant has failed to show through its written submissions a bias, or any unfairness, or an error or errors which call for the Determination to be varied or cancelled, or a matter or matters referred back the Director.

ISSUES TO BE DECIDED

Fairness is an issue in this case. According to the Appellant, the delegate is unfair and biased, in part because it is believed that the delegate placed unreasonable time limitations on filing an appeal. The Appellant also speaks of a failure to observe principles of natural justice. In that regard, Dr. Orieux claims that he was unable "to fully state (his) defence" because he was denied access to "telephone conversations, personal interviews, facsimiles, (and) emails, etc.". In a later submission, the Appellant

goes on to indicate a particular interest in the delegate's notes and any information which they may contain.

Credibility is an issue. Dr. Orieux is unable to understand why the delegate has decided to believe the employee and he claims that "ruling against me is further demonstrated evidence of this determination's unfair bias."

The Appellant asks that the Tribunal conduct its own investigation. It asks that the Tribunal review the delegate's notes for evidence of lunch breaks. It also calls for the Tribunal to inquire into the integrity of the employee, at a hearing held in absence of the Appellant, should that be allowed.

The appeal, in essence, is a claim that the delegate has erred in law because there are not facts to support the Determination. According to the employer, there are records which show that the employee only worked an eleven hour day and it appears that those records were ignored by the delegate, the employee did in fact work a flexible workweek which is permitted by the *Act*, and Lamoureux's training was not for the employer in that one of the trainees went on to work for another employer, the training has been recognised and accredited by a professional body, the employer could not employ everyone that enrolled in the training, and a great deal of what has been found to be training for the employer is nothing more than what the employer calls "social interaction" and "social activities".

The Appellant complains of being ordered to pay interest in that the delegate was slow to investigate the complaint and issue the Determination.

FACTS & ANALYSIS

The Tribunal may conduct an appeal in the manner it considers necessary.

> **107** Subject to any rules made under section 109 (1) (c), the tribunal may conduct an appeal or other proceeding in the manner it considers necessary and is not required to hold an oral hearing.

Some cases can be decided on the basis of written submissions. And parts of cases can be decided on the basis of written submissions. But certain cases, by their very nature, require that the Tribunal proceed by way of an oral hearing. There may be complex legal or factual issues. Credibility may be an issue. And there are parties who are unable to express themselves except through oral hearings and to proceed on the basis of written submissions would be unfair.

The Appellant in this case raises issues which are complex and the appeal goes to credibility. It is the very sort of case that requires an oral hearing.

There was to have been an oral hearing in this case on the 25th of March, 2003. While the Appellant was notified of the hearing, it did not attend the hearing even though it was told that the Tribunal will normally consider an appeal to be abandoned where the Appellant fails to attend the appeal hearing.

The Tribunal will normally consider the appeal to have been abandoned when an appellant does not attend the appeal hearing, then fails to provide a reasonable explanation for its absence. In this case, the Appellant received four weeks notice of the hearing. Then, three working days before the hearing, it objected to the decision to hold a hearing, citing loss of income as an excuse and a belief that its written submissions made a hearing unnecessary. The Tribunal's response was to tell the Appellant that the

Tribunal had decided that a hearing was necessary and it again warned the Appellant to send a representative to the hearing. The Appellant did not attend the hearing.

I am prepared to accept that Dr. Orieux's attendance at the appeal hearing would have meant a loss of income for the Appellant but that does not justify the failure to send someone to the hearing, the appeal going to credibility as it does, and it raising complex issues as it does. This is an appeal to dismiss as if it had been abandoned.

The appeal can also be dismissed on the basis that the Appellant has not met the onus for showing that there is reason to vary or cancel the Determination, or send a matter or matters back to the Director.

Reinvestigating Matters

It is the hope of the Appellant that the Tribunal might reinvestigate the complaint. Dr. Orieux states, "I understand from … Ms. Robertson that I am not entitled to her notes" and "request that the Tribunal review (the delegate's) notes to see if there is other evidence that Ms. Lamoureux contradicted herself … " (This is in regard to lunch breaks.). In the last of his submissions, he states that "Should the purpose of the oral hearing be to question the intent and/or integrity of the complainant, then the tribunal should indeed question the complainant."

It is the role of the Tribunal to hear appeals of Determinations and to decide whether the appellant has or has not shown that a Determination contains an error in law, or a delegate failed to observe a principle of natural justice, or there is new evidence, such that the Determination should be cancelled or varied, or a matter or matters sent back to the Director. The Tribunal does not investigate complaints. It has neither the resources, nor the inclination to do so. That said, I cannot imagine circumstances where the Tribunal would want to conduct a hearing in the absence of the Appellant. And there are no circumstances in which the Tribunal would want to conduct an inquisition into the integrity of the employee in absence of the employer. It is up to the Appellant to challenge the integrity of the respondent, not the Tribunal.

Fairness & Credibility

The Appellant complains of bias and a lack of fairness without realizing that it is to call for another investigation by the Director or a delegate. I find this to be rather confusing in that my reading of the Appellant's submissions is that it has no appetite for another investigation. That said, the Appellant may be relieved to know that I fail to see any evidence of bias or any lack of fairness.

The Appellant is not claiming a reasonable apprehension of bias but actual bias, the demonstration of bias.

The Appellant speaks of a failure to observe principles of natural justice. In making the latter point, Dr. Orieux makes a vague reference to "telephone conversations, personal interviews, facsimiles, (and) emails, etc.", then claims that he was unable "to fully state my defence against the allegations of the (employee)". [That is in the first of his three appeal submissions.] In the last of Dr. Orieux's submissions to the Tribunal, the employer indicates a specific interest in the delegate's notes and information which they may contain in respect to lunch breaks.

The Appellant also claims that bias and/or a lack of fairness is shown by the unreasonable time limitation which the delegate placed on filing an appeal, the omission of pertinent information on hours worked and

a previously registered variance of hours worked, her failure to recognise discrepancies and contradictions in statements by the employee, her acceptance of the complainants' information as credible, the decision that training at Aararat Consulting is work for the employer, her decision to prefer the evidence of some people over that of other people and, finally, the mere fact that she rules against the employer. In the last of its submissions, the Appellant is more narrowly concerned with hours worked information provided by employees and the delegate's decision that it is credible while the employer's record of hours worked is not.

> "I am personally surprised and disappointed at the determination issued by Ms. Robertson in this case. … While I have been critical of Ms. Robertson's due diligence, this critique is not personal, but procedural. Ms. Robertson is expected to make a subjective decision in a complex case, and having played an [adjudicative] role between complainant patients and doctors as the Vice President of the British Columbia Dental Association, I am sympathetic to the expectations of Ms. Robertson's position, but I have to question whether or not she has a personal bias, insomuch that I can't understand how she would professionally feel that the complainants' representation of hours worked are "credible" considering that the complainants' submitted documents of hours worked … should not stand up to objective scrutiny, and that (specifically) the assertion of Ms. Lamoureux that she did not receive any lunch breaks throughout a 12 hour period (in spite of contradictory information submitted in her statement in her original complaint form) over a 4 month period is incredulous."

The delegate has responded to the employer by letter dated January 23, 2003. In doing so, I find that she addresses all of what are said to be shortcomings of the investigation. I am satisfied that the delegate did consider the employer's evidence of hours worked, she makes mention of that in the Determination. I find that the employer did not provide the delegate with evidence to show that the employee worked a flexible workweek which is permitted by the *Act*. I also find that the employer was asked to prove that its training program is accredited or recognised and show that it offered some type of certificate or diploma, it is just that the employer did not do so.

The delegate notes in her letter that the time limit for appeals is set by statute. She is correct on that.

The delegate has ruled against the employer and, in doing so, decides that the employee is credible and the employer is not. It hardly follows from the mere fact that a delegate has decided against a party that the delegate is biased or unfair, however. It could simply be that the delegate is wrong. It may also be that the delegate is correct in his or her decision to rule against an employer and that it is reasonable to believe the employee and not the employer.

The delegate in this case faced two very different versions of the truth. The employer was claiming that its employees did not work, or were at least not allowed to work, beyond 11 hours a day and that the training was by Aararat Consulting, not required by the employer but training which the employee made the decision to take, something that could be done anywhere, a form of self-directed study that had no set curriculum or course materials, and training over which the employer had no real control. The employee, on the other hand, was claiming that there were numerous occasions where she worked in excess of 11 hours, that the training was required, that the training was about working in a dental office, that she was often sent to work in the Clover Dale Dental Clinic ("the clinic") on the days that she was to be receiving training and that she was not paid for that work.

Deciding credibility can be a most difficult task as there are many factors to consider in deciding credibility. The manner of a witness is of some interest (Is the witness clear, forthright and convincing or

evasive and uncertain?) but of greater importance are factors like the ability of the witness to recall details; the consistency of what is said; reasonableness of story; the presence or absence of bias, interest or other motive; and capacity to know. As the Court of Appeal in *Faryna v. Chorny* (1952) 2 D.L.R. 354, B.C.C.A., has said, the essential task is to decide what is most likely true given the circumstances.

> "The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities that a practical and informed person would readily recognize as reasonable in that place and in those conditions."

The delegate is the decision-maker in the first instance. She is the first to hear what people, witnesses, have to say.

It is not for me as an Adjudicator to second guess a finding of credibility but to decide whether it is or is not reasonable to reach such a conclusion on the basis of the evidence which was before the delegate. I am satisfied that it is. A significant number of people provided the delegate with reason, clear reason, to believe the employee both in respect to hours worked and the employer's training program. I note that even persons who support the employer, one of which was interviewed for a second time at the insistence of the employer, indicated that employees worked more than 11 hours at the clinic.

The Appellant fails to show that bias is demonstrated. I am given no reason to believe that the delegate is or was closed to a conclusion or predisposed to a particular result such that she did not exercise the duties and functions of the Director in an impartial manner.

I am not shown that the Determination is inconsistent with natural justice. The delegate would not turn her notes over to the employer but I am not shown that there was any failure to advise the employer of a material issue or important evidence. On the contrary, I am shown that the employer did know the case against it through letters, not the least of which is one sent to Dr. Orieux on May 1, 2002. In that long letter, the employer is at first reminded of Lamoureux's claim; that she responded to an ad for "on-the-job-training"; that she worked more than 11 hours a day but was only paid for 11; that she was required to be in uniform for training sessions at Aararat Consulting or, at least, bring her uniform, so that she could be sent to the clinic if necessary; that she was never paid for training, even when she was sent to work in the clinic on a training day; and that she was required to buy uniforms. The delegate went on to advise the employer that her investigation had revealed that Aararat Consulting and Clover Dale Dental Clinic are both operated by Dr. Orieux, Inc. and in the same building; that the training program offered by Aararat Consulting is not recognized or accredited by any professional body or training institute, does not provide for any sort of certification, and does not have a curriculum or schedule of study; that she was only able to find two people that had 'graduated' from the training program, both of which were employed by Clover Dale Dental Clinic; that all but two of the persons interviewed by the delegate were "adamant" that they were required to attend the training that was by Aararat Consulting; that Dr. Orieux spent considerable time with the participants on training days, and outside of office hours, and that he coached and assisted them in their studies to the extent that it appeared that he was quite involved in directing their training; that there was no evidence to show that employees were on flexible workweek which is permitted by the *Act*; and that it had been alleged by the complainants that there was a pressure to work more than 11 hours, indeed, as much as 15 hours a day. The employer was told that the delegate had reached preliminary findings, namely, that the employees are entitled to be reimbursed for uniforms

and pay for all hours spent at the clinic and all training, that the employees did not always work an 11 hour day at the clinic but longer days on occasion and that the employees are entitled to overtime for all work after 8 hours in a day and 40 in a week. The delegate, in closing, invited the employer to pay Lamoureux $4,477.58 or, if it wanted to dispute her findings, make one last submission on the issues.

The employer was given many opportunities to respond to the employee's complaint and evidence as it was uncovered by the delegate. I am satisfied that the Appellant was given an adequate opportunity to respond.

Support for the Determination

The appeal is, in essence, a claim that the delegate has erred in law in that there are not facts to support the Determination. As noted above, the delegate has concluded that the employee was not on a flexible workweek which is permitted by the *Act*, the employer's record of hours worked is not credible, information provided by the employee in respect to hours worked and training in the employer's office is credible and, finally, the training was not separate from the employer but "for the employer" and so it follows that the employee is entitled to be paid for the training. The employer, in taking issue with the delegate's factual findings, claims that there is information to establish that the employee did in fact work eleven hour days, the employee did work a flexible workweek which is permitted by the *Act*, and the training by Aararat Consulting was not for the employer because one of the trainees went on to work for another employer, the training is in fact recognised and accredited by a professional body, the employer could not employ everyone that enrolled in its training program, and a great deal of what has been found to be training for the employer is not training at all but what the employer calls "social interaction" and "social activities".

The matter of whether there is or is not information to establish eleven hour days has already been dealt with to some extent. I have already found that the delegate had to decide credibility and the decision to believe the employee appears to be reasonable.

In deciding credibility as she has, the delegate has found that the employee did not work as set out in the employer's record of work but more than 11 hours a day, and that the employer knew that the employee was working more than 11 hours, indeed, that it encouraged employees to work more than 11 hours.

The employer did in fact tell the employee that the work was voluntary and that she would not be paid for any work after 11 hours but an employee cannot agree to working for his or her employer for no wages.

> **4** The requirements of this Act or the regulations are minimum requirements and an agreement to waive any of those requirements, not being an agreement referred to in section 3 (2) or (4), has no effect.

I fail to see any error with respect to hours worked.

In regard to the matter of whether or not the employee was on a flexible workweek which is permitted by the *Act*, I also find that the employer failed to produce evidence to support its position.

In the relevant period, only a few forms of modified workweeks were allowed by *Employment Standards Regulation* and workweek which consists of 3 eleven hour days is not one of them. It was a requirement of the *Act*, moreover, that the workweek be approved by at least 65 percent of the employees affected and the employer provide the Director with a copy of the flexible workweek schedule, or obtain permission to

work a flexible work week through what is called a "variance". It was and still is the employer's claim that it obtained a variance or permission to work a flexible workweek but it has never submitted the variance or anything else to show that the employee was on a flexible workweek which is permitted by the *Act*. I note that it was the discovery of the delegate that variances were issued to the employer but that all have expired and a variance was never issued for the schedule worked by the employee.

On the matter of the training, I again find that there are facts to support the Determination. The employer does not dispute that Aararat Consulting and Clover Dale Dental Clinic are not legally separate entities but simply other names under which the employer operates: that all of the trainees worked for the employer, and that the training was in an office of the employer. Beyond that the delegate has found that the training program had an extremely high rate of attrition and two graduates. And in deciding credibility as she has, the delegate has found that the training did not lead to a diploma or certification; the training, while unstructured and involving much self-study, had the purpose of teaching skills that are of use to a dentist; that Dr. Orieux spent a considerable amount of time with the trainees; that he had important input into the training and that, to a great extent, he directed the training; that the training was required by the employer; that the employee was required be in the employer's Aararat Consulting office on training days and bring or wear the clinic's uniform; that the employee was "on call" during the training; and that she was called into work at the clinic on days that she was to be training but was not paid for that work.

The employer has still not produced evidence to show that the training is in fact recognised and accredited by a professional body. I am not shown that there is any failure to distinguish between time spent training and time off from the training or work. There is no record on point. And while the employer speaks of social interaction and activities, the uncontradicted evidence before me is that the employer made social activities like the celebration of a birthday, and a matter as personal as whether or not to kiss a person, a part of the training.

I am given no reason to believe that the employer's training program is anything but 'in house' training which employees were required to take. In my view, training "for the employer" is any training which an employee is required to take by his or her employer.

Adding to my conviction that the training was for the employer is the fact that the training program was established by the employer and in the employer's office, the fact that it is the employer that decided who would receive the training, and the degree of control and supervision which the employer exercised over the trainees. In *Surrey (City)*, BCEST No. D077/98 and the reconsideration of that decision, BCEST No. D433/98, the Tribunal found that there is training for the employer if the individual who receives the training is subject to the employer's direct or indirect supervision and control during the training.

Adding to my conviction that the employee is entitled to be paid for time spent at the employer's office on training days is evidence that the employee was on call. As the term "work" is defined in the *Act*, an employee that is on call is deemed to be at work.

> "**work**" means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.
>
> (2) An employee is deemed to be at work while on call at a location designated by the employer unless the designated location is the employee's residence.

Interest

The Appellant complains of being ordered to pay interest in that the delegate was slow to investigate the complaint and issue the Determination. In fact, the Determination is consistent with the *Act*.

The payment of interest is set by statute.

> **88** (1) If an employer fails to pay wages or another amount to an employee, the employer must pay interest at the prescribed rate on the wages or other amount from the earlier of
> (a) the date the employment terminates, and
> (b) the date a complaint about the wages or other amount is delivered to the director
> to the date of payment.

In summary, the Appellant acted to prevent the Tribunal from holding a hearing in a case that required a hearing and the appeal is therefore dismissed as if abandoned. I have also found that while the Appellant complains of bias and a lack of fairness and its suggests that the delegate has erred in law in that there are not facts to support the Determination, it does not show bias, or an unfairness, or an error or errors which call for the Determination to be varied or cancelled, or a matter or matters referred back the Director.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated November 29, 2002 be confirmed in respect to the decision to award Dana Lamoureux $4,578.60, and to that amount I add whatever further interest is owed pursuant to section 88 of the *Act*.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal