Employment Standards TRIBUNAL

An appeal

- by -

Technident 2000 Laboratory Inc.
("Technident")

- 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: Carol L. Roberts

FILE No.: 2003A/35

DATE OF HEARING: April 8, 2003

DATE OF DECISION: May 27, 2003

DECISION

APPEARANCES:

On behalf of Technident 2000 Laboratory Inc.:	C. Nicole Mangan, Articled student, Richards Buell Sutton, Barristers & Solicitors
On his own behalf:	Miguel Parra
On behalf of the Director:	Written submissions only

OVERVIEW

This is an appeal by Technident 2000 Laboratory Inc. ("Technident") of a Determination of a delegate of the Director of Employment Standards issued December 18, 2002. The delegate concluded that Technident contravened sections 18, 40(1)(a), 45, 46, 58(3) and 63(2) of the *Act* in terminating Miguel Parra's employment without cause, and failing to recall him. The delegate ordered that Technident pay Mr. Parra compensation in the amount of $7,2424.99.

ISSUES TO BE DECIDED

At issue on appeal is whether the delegate erred in law

1. in concluding that sections 40(1)(a), 45 and 46 of the *Act* applied to Mr. Parra;

2. in determining that Technident was liable to Mr. Parra for regular wages, statutory holiday pay; and

3. in determining that Mr. Parra was entitled to compensation for length of service.

Although Technident contended, in its written submission, that Mr. Parra was employed as a high technology professional, and was thus exempted from the *Act* pursuant to s. 37.8(1) of the *Employment Standards Regulations*, it conceded at the hearing that this argument could not be sustained since there was no written contract between the parties.

Techident also contended that Mr. Parra did not "work" as defined in the *Act*, either during regular hours or on statutory holidays, and that he was not entitled to compensation for length of service since he refused to return to work when recalled.

FACTS

Mr. Parra worked as a dental technician assistant for Technident, a dental laboratory, from February 28, 2000 until he was laid off on January 24, 2002.

Mr. Parra alleged that he had not been paid wages in full within 6 days of his leaving or within 48 hours of termination, and that he had not been paid overtime wages. He contended that Technident had always

paid his recorded hours in full, thereby acknowledging his hours of work, but refused to pay him at the overtime rates.

Mr. Parra alleged that he had been temporarily laid off, as noted on his Record of Employment ("ROE"). He claimed that he spoke to Technident about a date of recall and that he was told he could come in from time to time to do small jobs. Mr. Parra was concerned that, because the hours were so limited, he could not take the jobs without jeopardizing his UIC. Upon advising Technident about his concerns, he was told not to return, and advised to return his key, which he did.

Technident took the position that Mr. Parra's hours had been falsified and altered. It contended that there was very little overtime, but that, in any event, all overtime had to be approved. It says that Mr. Parra's overtime was not approved. It also contended that Mr. Parra was paid for all statutory holidays. Technident further alleged that, after Mr. Parra was laid off, it made several calls to him to return to work, and he refused to do so.

At the hearing, Ms. Arndt claimed that there were inconsistencies between her business practises and the facts, and that more weight should be given to her business practises. She testified that, as a specialized dental technologist, she was obliged to supervise Mr. Parra. She claimed that she had to ask employees to work overtime if that was needed, or the employees were to report to her that they worked overtime to obtain her authorization. She alleged that she was not aware Mr. Parra worked overtime until he made his claim. She claimed that she never saw his time cards, but would often complain to him about the number of hours he worked when she signed his pay cheque. She testified that she felt intimidated by Mr. Parra and the bookkeeper, whom she felt had "ganged up" on her to their advantage.

Mr. Parra's evidence was that Ms. Arndt asked him to write down all of the hours he worked, and that she reviewed his record of hours regularly. He claimed that he was never told not to work overtime, or to seek authorization. He said that, in the dental technology business, meeting deadlines was important. He said that, in his job, he made metal framework for bridges, and that Ms. Arndt applied the porcelain to the framework. As a result, he argued, she was always aware of what he did, and when. Further, he alleged that Ms. Arndt gave him keys to the office and the alarm code, so he could be there to open it at 8:00 a.m. daily. He claimed that, on one occasion, he attempted to return the keys to Ms. Arndt, and she refused them, insisting that he continue to open the office.

The delegate concluded that Mr. Parra worked overtime throughout his employment, and that he was never paid overtime as required by the *Act*. The delegate found no evidence to substantiate Technident's allegation that Mr. Parra falsified his records of hours of work.

The delegate also concluded that Mr. Parra had not been paid for statutory holidays as required.

Finally, the delegate concluded that bringing back Mr. Parra for a few hours or a few minutes from time to time as allegedly offered did not constitute a recall, as Mr. Parra would not earn 50% or more of the weekly wages he had earned prior to being laid off. The delegate found no evidence that Mr. Parra was properly recalled, and determined that he was entitled to compensation for length of service.

Ms. Arndt testified that, because business was slow in January, Mr. Parra asked her to lay him off so he could get Employment Insurance. She did so. She claimed that, when she called him back the following Monday, he said he was busy. Ms. Arndt claimed that she had continuous work for Mr. Parra, and that he

"sabotaged" her because she was left without a technician. She claimed that she advertised for a new technician, and that the new employee began working almost immediately.

I asked Ms. Arndt to provide me with a copy of the newspaper advertisement seeking the services of a technologist, and details of his or her employment. Those were provided on April 11, 2003. The documents showed that Ms. Arndt placed an advertisement in the Vancouver Sun that ran January 11, 12 and 13, 2002. Ms. Arndt contended that the advertisement ran while Mr. Parra was on vacation. Her documents also disclose that a new employee was hired effective February 1, 2003 as a result of the advertisement.

These latter documents were provided to Mr. Parra and to the delegate for a response. Neither party made submissions on this new information within the time period provided for them to do so.

ARGUMENT

As noted above, Technident initially contended that the delegate erred in law in finding that Mr. Parra was covered by the *Act.* Technident argued that Mr. Parra was a high technology professional because he was a "scientific technician" a "scientific technologist" or a similarly skilled worker", as defined in the *Regulations.* However, at the hearing, counsel for Technident conceded that, because Technident and Mr. Parra did not have a written contract of employment, their arrangement would not fall under the provisions of *Regulation* 37.8.

Technident also disputed Mr. Parra's overtime wage claim, contending that, although Technident paid Mr. Parra straight time for all hours of work noted on Mr. Parra's time sheets, no overtime work was actually performed. Technident's counsel argued that, at the time of Mr. Parra's employment, Technident's owner, Ms. Arndt, was suffering from some medical problems, and, rather than confronting Mr. Parra about his hours of work, she paid him straight time for those hours. Rather than an admission that Mr. Parra worked those hours, Technident says that the payments represented an unwillingness on the part of the employer to "face an overwhelming situation". Counsel also notes that Ms. Arndt never signed Mr. Parra's time sheets, and thus that little weight should be given to them in light of her evidence about her business practises.

Further, Technident also said that, according to the *Dental Technicians Regulation* Technident was required to supervise Mr. Parra to a greater extent than most employers are required to supervise their employees. As a result, it said that Technident would be aware of the times Mr. Parra was required to work.

Technident also argued that it is not a business which regularly requires overtime and, as a result, overtime hours must be approved. It contends that overtime hours were never authorized.

Technident says that it is closed on statutory holidays, and that, if Mr. Parra did not indicate that he worked statutory holidays on his time card, Technident nevertheless ensured that he was paid for that time. It says that the delegate erred in concluding that Mr. Parra actually worked on those days. It says that, in fact, Mr. Parra was granted days off on statutory holidays and paid in accordance with s. 45(1) of the *Act.*

Technident submits that, because Mr. Parra was subject to professional standards that prohibited him from working without supervision, Technident's evidence on this point ought to be preferred.

The delegate argued that Mr. Parra is entitled to overtime wages as recorded on his time card. He contends that, because Technident paid Mr. Parra on the basis of the hours recorded for almost two years, it could not argue that he did not work those hours. He contends that in those periods, overtime hours recorded were not paid at overtime hourly rates as required by the Act, but were paid at straight time hourly rates. The delegate says that Technident's argument that Ms. Arndt was unable to confront Mr. Parra about his overtime hours ought to be given little weight. He says that the employer stalled and delayed providing records, and that when they were provided, many were incomplete or illegible. He submits that the actual records ought to be preferred over Ms. Arndt's evidence that they are incorrect.

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 is on Technident to demonstrate, on persuasive grounds, that one of the above noted factors exists. I conclude that Technident has discharged that burden in respect of one issue only.

1. Is Mr. Parra excluded from the Act on the basis that he is a high technology professional?

The *Employment Standards Regulations* (Regulation 37.8(1): High Technology Companies) excludes certain employees from all but section 39 of Part 4 and all of Part 5 of the *Act.* It defines a high technology professional to mean a person who

(a) is a computer systems analyst, manufacturing engineer, materials engineer, Internet development professional, computer programmer,…. software engineer, scientific technician, scientific technologist, software developer, software tester, applied biosciences professional… technology sales professional (other than a retail sales clerk)… or any other similarly skilled worker,

(b) in addition to a regular wage, receives a stock options or other performance based compensation package set out in a written contract of employment and

(c) has one of the following qualifications:

(i) a baccalaureate or licenciature degree;

(ii) a related post-secondary diploma or post-secondary certificate;

(iii) equivalent relevant work experience.

As noted, counsel for Technident conceded that the parties had no written contract of employment. Therefore, I find that the delegate did not err in concluding that Mr. Parra did not fall within the definition of "high technology professional" as defined by the *Regulations*.

2. Did Mr. Parra work the hours he claimed he did?

It may be that Ms. Arndt suffers from a health condition that made it difficult or impossible to deal with challenging situations, including disciplining her employees. However, I am unable to accept that the delegate erred in concluding that Mr. Parra worked on the days noted on the records. Ms. Arndt says that she became upset when she saw how much time Mr. Parra worked, yet there is no evidence that she told him to work less, or gave him any less work to do. Further, she did not dispute Mr. Parra's evidence that he was given keys and the alarm password because he was expected to open the office at 8:00 a.m. Given that there were less than 4 people working in the office, Ms. Arndt knew, or ought to have known, Mr. Parra's hours of work. Furthermore, as she was required to supervise his work, she ought to have known how long it took him to do the work she instructed him to do. I find that Ms. Arndt permitted Mr. Parra to work the hours he recorded. There is no evidence she objected to the hours he worked, as she paid him for over two years without any question. Furthermore, there is no evidence she disputed his records, which she has an obligation to maintain under the *Act*. I do not find Ms. Arndt's claim that her mental state prevented her from confronting Mr. Parra to be credible. As the delegate notes, Ms. Arndt ran an otherwise successful business, fulfilled orders apparently on time, and engaged an accountant to perform many services for her. Given her apparent ability to fulfil all other aspects of her business, I am not able to infer that she was incapable of "confronting" Mr. Parra about alleged unauthorized overtime. Therefore, I am not persuaded that the delegate erred in concluding that the documented hours of work reflect Mr. Parra's actual hours of work.

Mr. Parra must be compensated in accordance with the *Act*. I find no basis to conclude that the delegate's findings on Mr. Parra's entitlement to overtime and statutory holiday pay is in error.

There is no evidence Technident attempted to recall Mr. Parra other than Ms. Arndt's own testimony. She alleged that Mr. Parra was recalled, and that he refused to come to work. Mr. Parra's evidence was that, after he was laid off, he returned to work for one day for 6 hours. Ms. Arndt did not dispute this. Mr. Parra testified that, after that day, he was called one day for piece work, and he told Ms. Arndt that he would only come in when a sufficiently large amount of work had accumulated to make it worth while for him to do. The delegate found that Mr. Parra was not unwilling to be recalled, provided there was work available for him.

The evidence is that Technident laid Mr. Parra off on January 28, 2003 to help him obtain EI. The evidence also shows that Technident advertised for a full time replacement employee two weeks prior to that date. There was no explanation for why Technident would lay Mr. Parra off for lack of work while almost simultaneously advertising for another full time employee unless there was sufficient work for that employee.

On the basis of this information, I accept that Ms. Arndt had sufficient work for Mr. Parra that would enable him to earn 50% or more of the weekly wages he had earned prior to being laid off, and that she attempted to recall him to return to work. Therefore, I conclude that the delegate erred in finding that Mr. Parra was terminated without cause, and allow the appeal in this respect.

ORDER

I Order, pursuant to Section of the Act, that the determination, dated December 18, 2002, be varied as follows. I confirm the delegate's conclusion with respect to Mr. Parra's entitlement to overtime and statutory holiday pay. I set aside that portion of the determination that Mr. Parra was not recalled to work. The matter is referred back to the delegate to determine the amount owing to Mr. Parra.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal