

An appeal

- by -

Carmichael Engineering Ltd.
("Carmichael")

- 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: M. Gwendolynne Taylor

FILE No.: 2003A/75

DATE OF DECISION: May 27, 2003

DECISION

This decision is based on written submissions presented by Carmichael Engineering Ltd. (“Carmichael”), Toni Russell (“Russell”) and the Director of Employment Standards.

OVERVIEW

This is an appeal by Carmichael from a Determination of the Director dated January 29, 2003, concerning a complaint by Russell, a former employee. The Director’s delegate conducted an investigation and found that Russell was entitled to be compensated for overtime work and ordered Carmichael to pay \$4,799,53, including interest.

Carmichael appealed the Determination, asking that it be referred back to the Director, on the grounds that the Director breached principles of natural justice and that new evidence has become available. Specifically, Carmichael argued that the Director did not afford an opportunity for cross-examination or production of witnesses and evidence, and erred in accepting all of Russell’s evidence. Carmichael alleged that there was new evidence concerning an agreement that Russell had with Carmichael’s local management, which would reduce the compensation owed by Carmichael.

ISSUES

1. Has Carmichael substantiated the claim that the Director breached the principles of natural justice as alleged?
2. Has Carmichael substantiated that new evidence should result in the Tribunal referring this case back to the Director?

BACKGROUND

Carmichael is a commercial heating and cooling company. Russell worked for Carmichael from January 1, 2000 until February 22, 2002. Her rate of pay initially was \$15.25 and increased to \$16.25 as of November 2, 2000. Although there is some dispute over the exact number of hours of overtime Russell worked, there is no dispute that she put in considerable overtime hours. Carmichael’s dispute before the Director was that Russell chose to work overtime but was not required to. There is some suggestion that the local manager attempted to dissuade her on occasion.

The Director’s delegate found that Russell worked overtime on lunches, weekends and after close of business. Russell kept detailed statements of the hours worked throughout her employment, which initially were submitted to head office. The later practice was to provide a summary of the hours worked. Accordingly, Carmichael’s head office payroll department received regular statements of the hours Russell worked.

The record provided by the Director includes the complaint form, correspondence, copies of email correspondence between the delegate and Carmichael’s representative, statements of hours, an excel spreadsheet of hours prepared by the delegate based on Russell’s records, and statements of earnings.

ARGUMENT

To reiterate what is stated above, Carmichael argues that the Director did not afford an opportunity for cross-examination or production of witnesses and evidence, and erred in accepting all of Russell's evidence. Carmichael alleges that there was new evidence concerning an agreement that Russell had with Carmichael's local management, which would reduce the compensation owed by Carmichael. Carmichael did not produce any additional evidence, just the statements contained in the appeal document. Concerning the witness, Carmichael stated they were not given an opportunity to produce a letter from a co-worker because she was hospitalized.

Russell replied to Carmichael's appeal submitting that Carmichael did not make any effort to contact her concerning her allegations of overtime, that the Director gave Carmichael ample opportunity to present witnesses, and the co-worker was not hospitalized until February 2003. She also refuted Carmichael's dispute of the delegate's findings of fact. She submitted that the agreement referred to by Carmichael was for occasional cleaning of the new office in January 2000, which she did "strictly as a gesture of goodwill" with no compensation. She challenged Carmichael to produce evidence of the contract and proof of payment.

In her reply, Russell asked the Tribunal to vary the Determination to include an additional \$1,950 which she submitted should have been accounted for in the delegate's calculations.

The Director replied to Carmichael's appeal stating that Carmichael was made aware of the allegations and given ample opportunity to present its side of the story. It is not always necessary to afford an opportunity for cross-examination, particularly when the process is investigation rather than hearing. The Director outlined the opportunities given to Carmichael between April 11, 2002 and December 13, 2002. In the December 13 email to Carmichael, the delegate specifically requested evidence of their opposing allegations. The representative replied that he would be providing a statement from a co-worker, but this was never received. The Director noted the considerable time between December 13, 2002 and the date of the Determination, January 29, 2003, in which Carmichael could have provided additional information.

The Director submitted that Carmichael was afforded fair representation and fair opportunity to present its case. Concerning the new evidence, the Director submitted that no new evidence was presented, only a statement without details of what evidence there is or who would provide it.

In summary, the Director submitted that Carmichael admitted Russell worked overtime but argued it was not authorized. Carmichael could have taken steps, disciplinary if necessary, to prevent her working the overtime but chose not to. Accordingly, Carmichael condoned the overtime and benefited from it and are required by section 40 of the *Act* to pay compensation.

ANALYSIS

Although an investigation is different from holding a hearing, there is still a requirement that the Director abide by principles of natural justice, or administrative or procedural fairness as it more commonly referred. The main principle is that a party must be given an opportunity to know the case that needs to met or, in other words, what they need to prove or disprove.

I find that Carmichael has not substantiated its claims that the delegate breached the principles of natural justice. It is clear to me from a review of the record that Carmichael had ample opportunity to know what

Russell alleged and how the delegate viewed the case, including the wage calculations. Carmichael also had ample opportunity to present its own case, evidence and witness statements, and legal argument. It was not necessary for the delegate to convene a hearing or arrange for cross-examination, which I note was not requested during the investigation.

I find that the delegate acted in a fair manner and accorded Carmichael and Russell appropriate time to make submissions.

Concerning new evidence, I agree with Russell and the Director that there is no new evidence. I agree that there would have to be some evidence submitted other than a bald statement. Additionally, I find that the allegedly 'new' evidence was knowledge available to Carmichael throughout the Director's investigation so, in fact, it is not new evidence.

For these reasons, I find that Carmichael has not substantiated its appeal.

Russell asked the Tribunal to vary the Determination. I decline to do so because Russell did not file an appeal and, therefore, is not entitled to consideration of a variation.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination dated January 29, 2003, be confirmed in the amount of \$4,799.53, together with any interest that has accrued pursuant to section 88 of the *Act*.

M. Gwendolynne Taylor
Adjudicator
Employment Standards Tribunal