Employment Standards TRIBUNAL

An appeal

- by -

Mason's APM Services Ltd.
(the "Employer")

- 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.: 2002/021

DATE OF DECISION: May 2, 2002

BRITISH COLUMBIA

DECISION

OVERVIEW

Mason's APM Services Ltd. (the "employer" for ease of reference) has appealed, pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), a Determination issued by a delegate of the Director of Employment Standards (the "Director") on January 7, 2002. The employer, by that Determination, is ordered to pay Shawn Ivens $2,102.77 in wages, vacation pay and interest included.

The Determination is that the employee was not on a flexible work week which is allowed by the *Act* and that he is therefore entitled to be paid overtime wages for work in excess of 8 hours in a day and 40 hours in a week. The employer has appealed that decision. In doing so it claims that the employee is not trustworthy and that he is being allowed to abuse the *Act*. The employer argues that the Determination is overly bureaucratic in that the work week is permitted under the *Act*, its just that it did not file a copy of the employee's flexible work schedule with the Director. The employer notes that as soon as that oversight was realised, the problem was corrected and the flexible work schedule was approved by the Director. The employer also argues that the employee agreed to work the modified work week that he did and that it was to his benefit. I have found, however, that the Determination should be upheld. There is no disputing that the employee worked in excess of 8 hours on some days and that the employer was not legally in a position to adopt the flexible work week that it did.

This case has been decided on the basis of written submissions. The employer asked for an oral hearing. I have considered whether it is or is not necessary to hold an oral hearing in this case and I have found that it is not necessary to do so.

PRELIMINARY ISSUE

The employer has demanded an oral hearing. Is one required?

It is common for the Tribunal to decide appeals on the basis of written submissions. That is consistent with both the need to provide efficient procedures for resolving disputes, a purpose of the *Act*, and section 107 of the *Act*.

> **2** The purposes of this Act are as follows:
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> (d) to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act; … .
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> **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.

As the *Act* is written, it is left to the Tribunal to decide how it will proceed in every case. Section 107 makes that clear. And it is clear that the Tribunal is not required to hold an oral hearing but may decide matters on the basis of written submissions. The Tribunal is subject to rules made under section 109 (1)(c) but there is not a rule which requires an oral hearing in this case or any other case.

There are appeals which do of course require that some sort of oral hearing be held. The question is, Is this one of those cases? I am satisfied that it is not. Contrary to what the employer appears to believe, there is no need to decide credibility in this case, nor is there a complex issue of fact or law to decide. This case can be decided on the basis of written submissions because it is obvious from those submissions that this case can be decided on the basis of facts which are clear and not in dispute.

OTHER ISSUES

The issue is the matter of whether the employee is or is not entitled to overtime wages. What I must ultimately decide is whether it is or is not shown that the Determination ought to be cancelled or varied or a matter(s) referred back to the Director for reason of an error or errors in fact or law.

FACTS

Mason's APM Services Ltd. operates Dundarave Motors.

Mr. Ivens worked for the employer from May 6, 2000 to March 23, 2001 as an automotive technician.

The job that Ivens applied for was advertised as one which offered a four day work week (the "modified work week"). It appears that Ivens opted to work the modified work week over a traditional five day work week. Some of the employer's mechanics worked a five day week.

The employer does not claim, never mind show, that it posted notice of the modified work week of interest such that it could be read by the employee(s) affected by the move to a flexible work week.

The employer does not show me that, in agreeing to working a modified work week, the employee agreed to forego his entitlement to overtime wages for all work in excess of 8 hours in a day.

It is admitted by the employer that it did not file a copy of Ivens' work schedule with the Director.

Ivens enjoyed working the modified work week that he did. Ivens admits that the four day work week suited him.

On or about September 18, 2001, which is to say, several months after the employee was terminated, the employer obtained the approval of employees to work a work week consisting of four 10 hour days followed by four days off. A copy of the work schedule was then filed with the Director and the work week was adopted by a number of employees.

The work week worked by Ivens is the same as that which was approved by employees in September.

ARGUMENT & ANALYSIS

The employer argues that Ivens is not to be trusted. It seeks to argue the circumstances of the employee's termination. It is also seeking to establish whether the employee has filed complaints against other employers. None of that has relevance to the Determination and the matter of whether the employee is or is not owed overtime wages under the Act.

The employer complains that the employee is being allowed to abuse the Act. I see no obvious wrongdoing on the part of the employee. The employer claims that the employee never raised the overtime pay issue at any point during his employment but nothing turns on this. Employees have six months from the date that they are terminated to complain of a failure to comply with the Act and it is not a requirement that an employee take matters up with the employer before filing their complaint.

The really important question is, Has the employer complied with the law?

Ivens' work schedule consisted of four 10 hour days followed by 4 days off. The Determination awards overtime pay for work which is in excess of 8 hours in a day.

The Act requires that overtime wages be paid for all work which is in excess of 8 hours in day and 40 hours in a week unless the employee is on a flexible work week which has been adopted under section 37 of the *Act*.

> **40** (1) An employer **must pay an employee who works over 8 hours a day and is not on a flexible work schedule** adopted under section 37 or 38
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> (a) **1 1/2 times the employee's regular wage for the time over 8 hours**, and
>
> (b) **double the employee's regular wage for any time over 11 hours**.
>
> (2) An employer must pay an employee who works over 40 hours a week and is not on a flexible work schedule adopted under section 37 or 38
>
> (a) 1 1/2 times the employee's regular wage for the time over 40 hours, and
>
> (b) double the employee's regular wage for any time over 48 hours.
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> (3) For the purpose of calculating weekly overtime under subsection (2), only the first 8 hours worked by an employee in each day are counted, no matter how long the employee works on any day of the week.
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> (4) If a week contains a statutory holiday that is given to an employee in accordance with Part 5,
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> (a) the references to hours in subsection (2) (a) and (b) are reduced by 8 hours for each statutory holiday in the week, and
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> (b) the hours the employee works on the statutory holiday are not counted when calculating the employee's overtime for that week.
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> (my emphasis)

It is section 37 of the *Act* which is important in this case, not section 38. Section 38 pertains to union employees. The employee's conditions of employment are not subject to a collective agreement.

Section 37 of the *Act* provides that the employer could adopt a flexible work week for Ivens if four conditions were met. One, the flexible work week is one which is prescribed in the *Act's* regulation. Two, the employer follows the procedure in the *Regulation*. Three, at least 65 percent of the employees who are affected by the flexible work week approve of it. And four, the employer files a copy of its modified work schedule with the Director within 7 days of it being approved by the employees.

> 37 (1) An employer may adopt a flexible work schedule for employees not covered by a collective agreement if
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> (a) the schedule is prescribed in the regulations and is for a period of at least 26 weeks,
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> (b) the employer has followed the procedure in the regulations,
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> (c) at least 65% of all employees who will be affected by the schedule approve of it, and
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> (d) within 7 days after the date of approval by the employees, the employer has provided the director with a copy of the schedule.
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> (again, my emphasis)

In this case it does appear that Ivens worked a modified work week which is "prescribed in the regulations". The *Act's* regulations are known as the *Employment Standards Regulation* (the "*Regulation*"). Appendix One of the *Regulation* lists what are considered to be acceptable forms of flexible work week and a work week which consists of four 10 hours days followed by 4 days off is listed in the appendix. An employer must, however, meet all four of the requirements, not just one. Unless all four of the above requirements are met, the employer is not in a position to adopt a flexible work week under section 37 of the Act. The employer may choose to implement some form of modified work week but it remains a requirement that the employer must pay overtime wages after 8 hours of work in a day and 40 hours in a week.

The procedure which the employer had to follow is set out in regulation 22 and it is as follows:

> 21 (1) For at least 10 days before a flexible work schedule is approved under section 37 of the Act, the employer must display an information bulletin regarding flexible work schedules.
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> (2) The information bulletin must
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> (a) be in a form approved by the director,
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> (b) include the prescribed flexible work schedule the employer proposes to adopt, and
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> (c) be displayed where it can be read by all affected employees.

I have not been presented with evidence that the employer followed the procedure in the *Regulation*. The employer admits that it did not file a copy of Ivens' flexible work schedule with the Director. And while it does appear that that the employee agreed to working 4 days on and 4 days off, it is by no means shown that the employee agreed to waiving his entitlement to overtime wages for work after 8 hours in a day. This indicates that the employer met only one of the four conditions for adopting a flexible work schedule under section 37 of the *Act*.

I find that Ivens was not on a flexible work week adopted under section 37 of the *Act*. There is not evidence to show that the employer was ever in a position to adopt a flexible work week for Ivens.

The employer claims that it was to Ivens' benefit that he was allowed to work the four day work week that he did. The employer also notes that after the employee was terminated, it took steps to obtain the approval of employees to work a flexible work week and was successful. This also has no bearing on the appeal. An employer may gain approval to work a flexible work week but that does not have any retroactive effect, nor may an employee accept less than the Act.

4 The requirements of this Act or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61 and 69.

I am not shown that the Determination is incorrect. I am therefore moved to confirm that Determination. Ivens is entitled to overtime pay for all work in excess of 8 hours in a day and 40 hours in a week.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination which is dated January 7, 2002, and which orders the employer to pay Shawn Ivens $2,102.77, be confirmed and I further order that he be paid whatever further interest has accrued pursuant to section 88 of the *Act*.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal