Employment Standards TRIBUNAL

An appeal

- by -

Merlin W. Thompson
("Thompson")

- 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: David B. Stevenson

FILE No.: 2000/868

DATE OF HEARING: March 26, 2001

DATE OF DECISION: April 18, 2001

DECISION

APPEARANCES:

on behalf of the individual	Merlin W. Thompson
on behalf of Lorne W. Camozzi Co. Ltd.	Terrence P. Matte, Esq. Elton Thompson

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by Merlin W. Thompson ("Thompson") of a Determination that was issued on December 4, 2000 by a delegate of the Director of Employment Standards (the "Director").

Thompson had filed a complaint with the Director under the *Act* and the *Skills Development and Fair Wage Act* (*"SDFWA"*) alleging his former employer, Lorne W. Camozzi Co. Ltd. ("Camozzi"), had contravened the regular and overtime wage provisions of the *Act* and the annual vacation and statutory holiday pay provisions of the *SDFWA*. The Determination concluded that Camozzi not contravened the *Act* or the *SDFWA*, ceased the investigation of the complaint and closed the file.

Thompson says the refusal of the Director to accept his assertion that he had to work 15.5 hrs a day but was paid for only 10 hours a day is an error in the Determination.

ISSUE

The sole issue in this case is whether the Director was wrong to have concluded Thompson did not have to work 15.5 hours a day.

THE FACTS

There were very few facts added to the record of this matter at the hearing. The Determination notes that the investigation of the complaint included receiving verbal or written statements from eight persons in addition to a substantial body of material provided by Thompson and Camozzi. The basic facts are as follows:

Thompson worked for Camozzi on a road building project at Union Inlet from July 19, 1999 to September 11, 1999 as a cook and first aid attendant at the rate of $20.90/hour plus $4.00 benefits.

The project was worked under the *SDWFA*. The project superintendent was Elton (Al) Thompson, the complainant's brother.

During the investigation, Camozzi corrected two errors in Thompson's wage payments, adjusting the rate of pay from the first aid attendant rate to the cook rate and adjusting the amount of overtime wages paid.

Thompson was paid for 10 hours a day. No daily record of hours worked by Thompson was kept by Camozzi. Thompson maintained a diary which he produced during the investigation and which formed part of the material provided by the Director in this appeal.

Thompson cooked for the crew, which varied in number over the period of his employment from three to eight, and frequently he made meals and/or coffee for persons visiting the camp.

Thompson was also one of two first aid attendants. The other first aid attendant was Dave Gibson. He arrived on site on July 30, 1999.

The position taken by Thompson, in the complaint and during the investigation, was that he had worked 15.5 hours a day every day during the time he was employed on the project. The position of Camozzi was that he was hired to be the cook and one of the two first attendants on the project, worked a split shift totalling eight hours a day, from 5:30 am to 9:30 am and from 3:30 pm to 7:30 pm, and was paid for 10 hours a day. There were several conflicts in the respective positions of the parties during the investigation and many of those conflicts were re-visited during the hearing of this appeal. The following comment was made in the Determination:

> The material submitted by each party presents a conflicting and sometimes confusing picture of the complainant's workday. As well, E. Thompson and several witnesses have pointed out that some of the witnesses, the complainant and E. Thompson have other interests in the outcome of this investigation and therefore their information must be viewed with care. E. Thompson and M. Thompson are brothers; Brenda Graham is daughter to E. Thompson and niece to the complainant and Walter Jarc is a son-in-law to E. Thompson.

In dealing with the "conflicting and sometimes confusing picture", the information provided by Brenda Graham was given more weight than information provided by others. The rationale for taking that approach to that information was stated in the Determination:

> . . . Brenda Graham has direct knowledge of the complainant's job. I believe that despite her interest her information has value to this investigation. She is a cook and did work in this camp after the complainant left. All other witnesses were observers, not cooks and could only give their impression of what they saw. Graham was very clear that she had no difficulty cooking three meals a day for up to 8 people and cleaning the bunkhouses and camp area with time to spare. I note that she has also said that she was serving up to 8 people for meals rather than the 5-6 people that her father had stated.

The complainant, on his own behalf, and Elton Thompson and Walter Jarc, on behalf of Camozzi, gave evidence in the appeal hearing. As well, I received a further written statement from Larry Chipman, who worked at the site as an equipment operator for approximately six weeks, from about mid-July to the end of August, 1999.

ARGUMENT AND ANALYSIS

Thompson, as the appellant, has the burden in this appeal of persuading the Tribunal that the Determination was wrong, in law, in fact or in some manner of mixed law and fact. This burden has been described by the Tribunal in *Re World Project Management Inc.*, BC EST #D134/97 (Reconsideration of BC EST #D325/96) as the "risk of non-persuasion":

> Rules about the legal burden, called by Wigmore "the risk of non-persuasion", define who is to lose if at the end of the evidence the tribunal is not persuaded. Various tests have been advanced over the years in various situations but as one writer (E.M. Morgan, "How to Approach the Burden of Proof and Presumptions" (1952-53) 25 Rocky Mountain L.Rev. 34 puts it, "the allocation (of the burden of proof) is determined according to considerations of fairness, convenience and policy". In most cases, convenience suggests that the party with the most ready access to the means of proof should have to produce it. One of the goals of proof is the production of reasonably accurate information and therefore there should be an obligation on the party having most access to such information to provide it or bear the risk of non-persuasion. Considerations of fairness suggest also that the party seeking change should bear the risk of non persuasion in that the status quo would otherwise prevail. Of course concerns of convenience and fairness may be affected by particular circumstance and, for example, may depend upon an assessment of the respective resources of the parties. Ultimately the notion of "burden of proof" is only of significance where the tribunal has not been persuaded.

Placing the risk of non-persuasion on an appellant is consistent with the scheme of the *Act*, which contemplates that the procedure under Section 112 of the *Act* is an appeal from a determination already made and otherwise enforceable in law, and with the objects and purposes of the *Act*, in the sense that it would it be neither fair nor efficient to ignore the initial work of the Director or to require the Director and the individual to re-establish the validity of the claim. As I advised the parties at the outset of the hearing, an appeal is not a re-investigation of the complaint where it is open to the Tribunal to substitute its opinion on the merits of the complaint for that of the Director without the appellant showing an error in the Determination sufficient to persuade the Tribunal it ought to be varied or cancelled.

Where it is only a conclusion of fact that is being challenged, the appellant must show that the conclusion of fact was simply based on wrong information, that it was manifestly unfair or that there was no rational basis upon which the findings of fact could be made (see *Re Mykonos Taverna, operating as the Achillion Restaurant*, BC EST #D576/98).

At the outset of the hearing, Thompson provided me with what was, in essence, his argument in the appeal. His main point on the appeal was expressed in the following question:

> Does anybody believe that I would have left Prince George BC for Union Inlet if I would have been informed that Lorne W. Camozzi Co. Ltd. was only going to pay me an 8 hour split shift?

Included in the argument were a series of questions that, presumably, Thompson felt were relevant to his claim. While the questions provide to me may not have been asked in exactly the same terms during the investigation, they were all raised and answered (with one notable exception) either expressly or implicitly in the Determination. As indicated above, Thompson's task on appeal is to show the answers given by the Director were wrong, not to simply raise them again and see if I am prepared to answer them differently.

Overall, except for that "notable exception", which arose from the evidence provided at the hearing, and which I will address later in this decision, I am not persuaded there is any error in the Determination sufficient to justify the intervention of the Tribunal. Were it not for that one matter, I would dismiss this appeal in its entirety.

Thompson did argue there were statements made during the investigation that were not true. Even accepting that was the case, he did not show any of those allegedly untrue statements formed the basis for the conclusion reached in the Determination. As indicated above, the Determination noted the material provided by the respective parties presented a "conflicting and sometimes confusing picture". Ultimately, the conclusion in the Determination that Thompson worked a 10 hour work day relied heavily on the information provided by Brenda Graham and was substantially based on an acceptance of her description of the hours of work she needed to carry out the responsibilities of the cook position. The Determination made the following conclusion:

> I prefer to give more weight to Brenda Graham's information as it speaks directly to the complainant's job. As well I take into account that the complainant had other duties such as being one of the first aid attendants. I believe the complainant worked hard. But after examining the available information I have to find that on the balance of probabilities a 10-hour workday in this camp is consistent with the complainant's expected duties and therefore with the wages he was paid are correct.

While Thompson did not challenge the truthfulness of the information provided by Brenda Graham, he argued that there was no comparison between the job he had done and the job done by Brenda Graham, asserting that the Director was wrong to have concluded her information "speaks directly to the complainant's job". He cited four main differences:

(1) she was not a first aid attendant;

(2) she stated she did not have to work before 5:30 am;

(3) she was able to take time off; and

(4) she did not have to cook for visitors to the camp.

Thompson said in his evidence that Brenda Graham had only cook's duties while he also had the responsibilities of a "bull cook". The inference was that there was a greater amount of responsibility, and longer hours of work, for the "bull cook" than for the cook. When asked to describe the difference in the context of this case, Thompson said only that as the bull cook you are the first person to work in the morning, re-stating the position he took during the investigation that he started work at 4:00 am every morning. Overall, the evidence presented on this point at the hearing added nothing to what was raised and considered during the investigation. All of the "differences" identified by Thompson were also identified during the investigation. The same assertion was made by Thompson that he started work at 4:00 am every day (although I also note, as the investigating officer may have, that Thompson stated in his complaint, "I was on duty from 5:00 a.m. till [sic] 8:30 p.m. and sometimes longer every day"). The same denials were made and many of the same conflicts arose in the evidence that were described in the Determination.

The one area of concern I have with the Determination arises in the context of Thompson's duties as a first aid attendant. As already indicated, in reaching the conclusion that a 10 hour work day was consistent with duties Thompson was expected to perform, the Determination took into account that Thompson was "one of the first aid attendants". Brenda Graham was not one of the first aid attendants and could have had no knowledge whatsoever of either the requirements of the first aid attendant or the legal responsibilities on Camozzzi under WCB Regulations to have first aid coverage on the site. Based on the material and the evidence, the other first aid attendant employed on the project with Thompson was Dave Gibson. Evidence provided to me by Camozzi also indicated, however, that Mr. Gibson was not on site until July 30, 1999 and until that time Thompson was the only first aid attendant on site. Part the information provided during the investigation was a letter dated November 27, 2000 over the signatures of Bill Bolton and Reynold Lockerby, written by Mr. Bolton. In the appeal, Thompson raised the following point:

> If anybody wishes to question about the first aid attendant being on duty continuously they should read Bill Bolton's of the Workers Compensation Board letter of support.

The Determination made reference to the letter, which stated:

> This note is in response to Merlin Thompson's request to confirm that OSO Reynold Lockerby and myself were at the Union Inlet camp of Lorne W. Camozzi Co. Ltd. on Aug 19/99 and Oct 8/99.
>
> Merlin was the First Aid Attendant on site, he also served us coffee and soup at approx 2 pm each afternoon.

> First Aid Attendant requirements and responsibilities are in Part 33 of the WCB OH&S Regulation. I have attached sections of the Regulation that would apply to Merlin's case.
>
> At this camp, if Merlin was the only person there with a WCB first aid ticket, he is basically providing first aid coverage around the clock.
>
> If you would like any other information, do not hesitate to contact me . . .

Regardless of the factual improbability that Thompson could have served Mr. Bolton and Mr. Lockerby coffee and soup on October 8, 1999, this statement was important to a full consideration of the complaint because of the reference to the WCB Regulations and the opinion expressed by Mr. Bolton that if Thompson was the only person on site with a WCB first aid ticket, he was "basically providing first aid coverage around the clock". There is no indication in the Determination that this information was considered when the conclusion was reached that Thompson had a 10 hour work day and he had been correctly paid. In light of the potential implications of that information on the claim made by Thompson, it should have been considered and addressed in the Determination. It is not only an aspect of the statutory requirements for a Determination (see also Section 81 of the *Act*), but also an aspect of the objective of fairness found in the purposes of the *Act*. It may be that on those occasions when Thompson was the only first aid attendant on site, he would, for the purposes of the *Act*, be considered working and entitled to wages during those hours he has claimed entitlement (see *Re Knutson First Aid Services (1994) Ltd.*, BC EST #RD095/01 (Reconsideration of BC EST #D300/00)). That possibility is implicit in the letter from Mr. Bolton. In the absence of a full understanding of the circumstances, however, I will not make any final judgement about that in this decision. Rather, it is appropriate in this case that the Determination will be referred back to the Director to allow consideration of this matter.

I neither confirm nor cancel the Determination at this time.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination, dated December 4, 2000, be referred back to the Director.

DAVID B. STEVENSON

David B. Stevenson
Adjudicator
Employment Standards Tribunal