Employment Standards TRIBUNAL

An appeal

- by -

Mac's Convenience Stores Inc.
("Mac's")

- 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 (as amended)

TRIBUNAL MEMBER: Frank A.V. Falzon

FILE No.: 2005A/150

DATE OF DECISION: December 5, 2005

DECISION

OVERVIEW

1. Mac's Convenience Store (the employer) appeals to the Tribunal from the July 22, 2005 determination issued by a Delegate of the Director of Employment Standards. The Determination orders the employer to pay $27,276,56 in wages owed to a former manager (also referred to in this decision as "the employee") who was hired to manage the Mac's convenience store in Chetwynd. There is no dispute that the employee's term of employment was from May 13, 2004 to October 10, 2004.

2. The key questions before the Delegate were questions of fact. The first question of fact concerned the terms of the unwritten employment agreement between Mac's and the former manager. The second question of fact concerned the number of hours the employee worked. Mac's took the position that the employee's agreed salary was limited to $600 per week regardless of hours worked. The employee took the position that the $600 salary was based on $15 per hour and a 40 hour work week - if the employee worked more than 40 hours, he would be paid based on the agreed rate of $15 per hour. The number of hours the employee said he worked beyond 40 hours per week was substantial. The average workday recorded by the employee was 17 hours; the employee claimed that, during his five month period of employment between May and October 2004, he worked over 1600 hours for which we was not paid, and during which he took only five days off.

3. The Delegate conducted an investigation, which consisted of receiving records and witness statements provided by the employee, and records and submissions from the employer. The Delegate concluded that Mac's was obliged to compensate the employee for the substantial number of hours he worked over and above 40 hours per week.

ANALYSIS

A Right of a manager to pursue a claim for wages

4. As a manager, the employee did not enjoy the protections of Part 4 of the *Employment Standards Act*, which provides various guarantees dealing with minimum hours of work and overtime. Section 34 of the *Employment Standards Regulation* provides:

> 34. Part 4 of the Act does not apply to any of the following:
>
> (f) a manager.

5. The Delegate properly recognized that managers have no statutory entitlement under the Part 4 of the *Act* to minimum daily hours and overtime. However, the Delegate also recognized that nothing prevents the a manager and his employer from coming to an agreement regarding wages under which a manager would be paid according to the number of hours worked:

> Where there is evidence to support the finding that the employer and employee agreed that a specific number of hours of work would be compensated by a specific amount of wages, the employee would be entitled to extra wages for extra time worked based on their regular rate of pay.

6. If such an agreement does exist, either orally or in writing, it is of course binding, and section 18(b) of the *Act* is therefore in play, requiring the employer to pay "all wages owing" to the employee within 6 days after the employee terminates the employment. The complaint in this case arose because the employer did not pay the employee any wages after he left his employment.

B. The Delegate's finding regarding the terms of employment

7. The Delegate concluded that there was sufficient evidence to establish on a balance of probabilities that there was an unwritten agreement that the $600 per week salary would be paid based on a 40 hours of work per week, and that work done over and above the salary would be paid at an agreed rate of $15 per hour:

> In this situation there is no written employment agreement that explicitly states the terms of employment. However, I find there is sufficient evidence in the Employer's payroll records and [the employee's] testimony that the … salary was to be based on a 40 hour work week.
>
> I find [the employee's] version of what the terms of his employment he agreed to credible, and the employer has not provided any compelling evidence to the contrary. Mac's provided no evidence from Mr. [G], the representative of the employer who set the terms of employment with [the employee].
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> The employer's own internal records and wage statements support [the employee's] position. The wage statements indicate the hours worked by [the employee] as 80 hours every two weeks. The employer's internal records, submitted for this investigation, also list [the employee's] hours as 80 hours every two weeks. These records clearly indicate that the employer based [the employee's] salary on a 40 hour work week.
>
> I do not agree that [the employee's] failure to submit his hours to the employer indicates that [the employee] agreed to be paid $600 a week inclusive of all hours. The employer clearly instructed [the employee] not to submit the hours. This practice was maintained despite the fact that section 28(1)(d) requires an employer to record the hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or salaried basis. I do not find the employer's contravention of the Act, especially as the contravention was mandated by the employer, to be a reliable indication of [the employee's] understanding and acceptance to work for a salary inclusive of all hours.

C. The Delegate's finding regarding the number of hours worked

8. The Delegate's reasons as to the number of hours the employee worked were as follows:

> The employer disputes [the employee's] claim of hours worked on the basis that:
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> - he could have avoided working excessive hours by hiring more staff;
> - that the store was properly staffed at all times, so he did not have to work so many hours; and
> - that [the employee] simply did not work the hours he claims.
>
> However, the evidence indicates that the store was chronically short of staff and that [the employee] worked the hours he claims. In making this finding, I rely on the information provided by Ms. Koenig and Ms. Andres, as they are neutral parties in this dispute and were present to

> witness whether or not the store was adequately staffed or whether or not [the employee] put long hours.
>
> The fact that [the employee] had the authority to hire more staff does not mean that he was able to. Both Ms. Andres and Ms. Koenig stated that, because of the area's labour shortage, it was hard to keep employees and the store was chronically short staffed. The memos between the area manager and head office also indicate that the staff were working large amounts of overtime due to lack of employees, and staff shortages were a continuing problem.
>
> The employer maintains that the store was adequately staffed. However, Ms. Koenig stated that it [sic] the mornings demanded at least 4 employees to run the business and the evenings required three employees, and by the employer's own analysis, there was rarely that much staff working. Further, the employer's position that there was enough staff to avoid overtime is contradicted by the evidence that the employer approved a great deal of overtime for employees of the Chetwynd store.
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> The employer asserts that [the employee] did not work as many hours as he claims. However, because the employer intentionally did not keep any record of the hours [the employee worked] the employer cannot provide any evidence to refute [the employee's] evidence.

D. The Appeal

9. Section 112 of the Act sets out the permissible grounds of appeal to the Tribunal:

> **112** (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:
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> (a) the director erred in law;
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> (b) the director failed to observe the principles of natural justice in making the determination;
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> (c) evidence has become available that was not available at the time the determination was being made.

10. The employer challenges the Delegate's finding regarding the nature of the agreement reached between the parties. The employer submits it was an error of law for the Delegate to fail to recognize that the agreement was $600 per week regardless of hours worked. The employer says that the employee "was hired as the temporary manager of the Chetwynd store as a Dealer trainee who would ultimately become the Mac's dealer in that store". The employer argues that the Delegate erred in law in basing her finding on Mac's breach of the *Act* in failing to record all the hours the manager worked.

11. The employer also challenges the Delegate's finding regarding the number of hours worked, and says that an employee cannot, in law, unilaterally determine his hours of work without the employer's consent.

12. Finally, the employer argues that the investigation in this case breached the employer's right to a fair hearing in two respects. First, natural justice required an oral hearing in order to resolve the credibility issues arising in this case. Second, the Delegate conducted an inadequate investigation because she did not interview the person who hired the employee.

E. The Error of Law grounds

(i) The Finding of fact respecting the Agreement

13. It was not in my opinion unreasonable for the Director on the evidence before her to conclude that the employee's salary was based on 40 hours of work per week, and that work over and above that would be compensated at the same rate.

14. My review of the Delegate's finding of fact in this regard recognizes the deference that must be accorded to a Delegate's factual findings. Such a finding may be disturbed as reflecting legal error only if there is "palpable or overriding error"; if the finding is "clearly wrong"; if it is "unreasonable or unsupported by the evidence". While this is a strict test, the reviewer is entitled to carefully scrutinize the decision; the posture is not one of absolute prostration. If a palpable or overriding error is demonstrated, the appellate body not only may, but must, intervene: see generally *H.L. v. Canada*, [2005] 1 S.C.R. 401, per Fish J. (for the majority) at paras. 55-75 et seq.

15. As noted above, the employer submits it was an error of law for the Delegate to fail to recognize that the agreement was $600 per week regardless of hours worked. The employer says that the employee "was hired as the temporary manager of the Chetwynd store as a Dealer trainee who would ultimately become the Mac's dealer in that store". The employer argues that the Delegate erred in law in basing her finding on Mac's breach of the *Act* in failing to record all the hours the manager worked.

16. The breach of the *Act* referred to by the Delegate was s. 28(1)(d), which provides as follows:

> **28** (1) For each employee, an employer must keep records of the following information:
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> (d) the hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis;

17. The Delegate concluded that the employer could not reliably support its position based on the employee's timesheets, because the employer instructed the employee to complete those timesheets in a fashion contrary to what the *Act* requires. In my view, it was reasonable for the Delegate to find that a document both parties knew to be inaccurate could not reliably be used to support the employer's position as to what were the terms of the agreement.

18. Nor did the Delegate "base" her finding of fact about the agreement on the unreliability of the time sheets. The Delegate looked for evidence that was reliable as to what the agreement actually was. In this regard, there was evidence upon which the Delegate could reasonably rely in arriving at her finding, all of which was consistent with the proposition that employees, even managers, do not generally agree to work long hours for next to no consideration.

19. The Delegate had the employee's evidence that the person who hired him knew that the job involved very long hours. The Delegate also had the employee's evidence that while the employer was holding out the possible carrot of a dealership (and thus higher financial rewards) at some point, and even agreed to train the employee for that position, the employer also made it clear that the $600 salary, while not high, "is not that bad because it works out to $15 per hour". In addition, the Delegate had the employee's evidence that when he sent the employer a fax in fatigue noting that his hours worked equated to $2.50 per hour, the person who hired him phoned him and said "I told you [sic] earn about $15 an hour not $2.50 that you mentioned on your payroll, and he told me that it was only a matter of time." According to the employee,

it was only later (sometime before school was out) that the employer told him "I needed to become a dealer in order to make more money than I was making." The employee "could not see how anyone make [sic] the money he mentioned to me it just did not add up". By September, the employee gave the employer notice that the employer should look for a new person to fill the position. At this point, the Mac's representative who hired him "became very angry and told me that he invested all this time and money and training which was all for nothing, I told him that I was very sorry, but couldn't see making a living out of Mac's, I was honest and I told him to find someone else to run this store, he then told me he will find someone but I should stay till then…."

20. In my view, the employee's evidence does support the employer's position that it was seeking to groom the employee for a possible dealership. However, the evidence falls far short of suggesting that there was an agreement that the employee would, in the interim, work unlimited hours for an undefined time "on spec", and toward an end that was not certain to materialize. In those circumstances, it was not unreasonable for the Delegate to conclude that the employer's representation to the employee that his pay would work out to $15 per hour applied to this interim period, and that in giving this assurance the employer was well aware and foresaw that the manager's job involved very long hours.

21. Over and above the employee's evidence, the Delegate relied on the employer's own records, which record $1200 pay as being based on 80 hours every two weeks. It was not in my view unreasonable for the Delegate to infer that the employer records supported the evidence of the employee. Had the records listed the pay at $600 and accurately set out all hours worked, this might well corroborate the employer's side of the story regarding a set salary for unlimited hours. But the records were framed quite differently, always founded on 80 hours of work every two weeks. It was reasonable for the Delegate to conclude that this did not conflict with, and in fact could be used to support, the employee's version that the $600 payment was predicated on 40 hours of work per week, and the work over and above that was also to be compensated at the agreed rate.

22. The Delegate noted that the employer did not provide any evidence from the person who hired the employee, to contradict the statement of the employee as to the terms of the agreement. Indeed, no witness statement, no statutory declaration, no affidavit was ever provided by Mac's, despite Mac's being represented by counsel, despite Mac's having received the full package of the employee's statements and materials from the Delegate, and despite Mac's counsel having ample time to respond. As reported by the Delegate:

> On March 14, 2005 I faxed all of 61 pages of [the employee's] submissions [to] counsel for Mac's. Counsel told me I could expect their response by April 18, 2005. I received Mac's response on May 2, 2005. In that submission counsel informed me that he had not received 20 pages of [the employee's] evidence. On May 18, 2005, uncertain of what evidence counsel did not receive, I sent all 61 pages again. Counsel responded to the new evidence on June 14, 2005.

23. As this Tribunal has previously held, a lawyer's letter is not evidence: *Re D'Hondt Farms Ltd.* BCEST #21/05 at paras. 20-22; see also *Jace Holdings Ltd. (c.o.b. Thrifty Foods) (Re)* BCEST #D171/98; cf. By *J.C. Creations Ltd. (c.o.b. Heavenly Bodies Sport) (Re)*, BC EST # RD317/03. In this case, the Delegate sent to counsel for Mac's all 61 pages of material from the complainant, including the complainant's written statement, records and witness statements. Mac's, which was represented by legal counsel, was expressly given the opportunity to reply. The responsibility was on Mac's to produce at least *prima facie* evidence, beyond mere assertion, to support its position. Having failed to provide evidence to contest the version of events set out by the employee, it is not open to the employer to now complain that the Delegate did not insist on interviewing its officers and employees.

24. This ground of appeal is, accordingly, dismissed. The employer has in my view failed to demonstrate that the Delegate committed a palpable or overriding error in her finding of fact as to the terms of the verbal employment agreement.

(ii) Finding of fact regarding the number of hours worked

25. The employer also attacks the Delegate's finding of fact accepting the employee's version as to the hours worked. The employer says that the Delegate's acceptance of the employee's position on this is tantamount to a finding that an employee can unilaterally determine his hours of work without the authorization or consent of the employer.

26. The Delegate did not proceed on the basis that an employee may unilaterally determine his hours of work without the employer's authorization or consent. The evidence in this case supported the finding that the person who hired the employee was well aware that the job would involve long hours, and was aware on an ongoing basis of the long hours the employee and other employees at the Chetwynd store were working. There was evidence that could reasonably support the Delegate's conclusion that the employer well understood, foresaw and acquiesced in the long hours the employee was putting in for the benefit of the business. Having been aware that the employee was working long hours over and above 40 hours per week, there is no evidence or even suggestion that the employer took any steps to stop or limit him. Of interest in this regard is the following finding of the Delegate, the truth of which is not contested by the employer:

> [The employee] submitted a time sheet form of his on which he wrote: "store manager worked 100 hours per week, rate $2.50 per hour, isn't that funny". He reported that after he sent that time sheet to head office, he immediately received a call from the employer's payroll department and was told that he should not write anything on his record of hours submitted to the employer.

27. Noteworthy in the above passage is that the employer did not question the hours, or tell the employee to stop working 100 hours per week; he was told instead not to write it on his time sheet.

28. This ground of appeal is dismissed.

F. The Natural Justice Grounds

29. The employer's first natural justice ground is that it was a breach of natural justice not to conduct an oral hearing, because the evidence adduced on behalf of the employee was not subject to cross examination by Mac's.

30. An oral hearing where both parties would be present was not practically possible in this case because the employee was not in the country. While a hearing date prior to that departure was suggested, it was not convenient to Mac's choice of legal counsel. I do not find either party to blame for the circumstance. I find however that in the circumstances that arose in this case, it was reasonable for the Director to decide at that point that it would undertake its traditional approach of proceeding by way of investigation.

31. I accept that in order to do justice in some cases, an oral hearing and cross-examination are necessary in order to make findings of fact on competing evidence, particularly where that evidence is central to the case, depends on one person's word against another's, and there is no other evidence that could help resolve the contradiction. But even here, efficient justice systems do not too readily jump to the

conclusion that cross-examination is essential for justice to be done. Judges deciding civil cases frequently resolve competing evidence on affidavits alone; it is only when they are unable to resolve those inconsistencies on affidavits that cross-examination is ordered: *Re D. Hall & Associates Ltd.*, BCEST #D266/00 at para. 29.

32. This case does not even approach the threshold for concluding that cross-examination was necessary for justice to be done. As noted above, the employer put forward no witness who contradicted the evidence of the employee and his witnesses. Having chosen not to do so, the employer cannot now say that an oral hearing was essential for justice to be done. The existence of records to help corroborate the competing positions, the existence of other witnesses statements and especially the lack of any contradictory evidence provided by Mac's to the statement of the employee, undermines the claim that justice required an oral hearing in this case.

33. The employer's final natural justice ground is that the Delegate failed to conduct a fair investigation because she did not seek out or compel witnesses from Mac's to give evidence with respect to the employee's complaint. The question whether this Tribunal might quash a determination for failure by a Delegate to be sufficiently proactive in an investigation is an interesting question, which need not be decided in this case. That is because, in my view, natural justice did not, in the circumstances of this case, require the Delegate to insist on calling witnesses to effectively shore up Mac's case in circumstances where Mac's had legal counsel, plenty of notice and a full opportunity to put its side of the case forward. In disclosing the complete package of information to the employer and giving the employer a full and fair opportunity to reply, the Delegate in my view demonstrated an even-handed approach to this matter. No breach of natural justice has been established.

G. Postscript

34. The reader of these reasons will note that I have drafted them so as not to identify the employee. I have done this in part because I considered it appropriate to acknowledge that I am aware of the allegation in the employer's submission to the Delegate that Mac's has accused the employee of absconding with approximately $32,000, and that the RCMP had been called to investigate. According to the employee, who filed his submission before the employer filed its submission, the employee was interviewed by the RCMP about a theft: "I personally went into RCMP in Chetwynd and they asked me a few questions, the officer told me that every time that a company complains that they have to look into it. I told them if there was any way that I could help them please let me know." Neither party has since provided any information either to the Delegate or to this Tribunal as to the specific basis for the allegation that money was in fact stolen, that the complainant stole money, what the outcome of the RCMP investigation was or whether charges have even been laid.

35. In these circumstances, the information that an accusation has been made was, without more specific information, not a legitimate basis for the Delegate to question the employee's credibility, especially when the employer did not see fit to adduce contradictory evidence. The Delegate rightly proceeded to decide the matter before her based on the evidence the parties adduced before her, and we have undertaken the exercise of our appellate function on the same basis.

ORDER

36. The appeal is dismissed. Pursuant to section 115 of the *Act*, the Determination is confirmed.

Frank A.V. Falzon
Member
Employment Standards Tribunal