Employment Standards TRIBUNAL

Appeals

- by -

Dundarave Wine Cellar Ltd.
("Dundarave")

- and by -

Martyn Turner
("Turner")

- 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.: 2003A/046 & 2003A/055

DATE OF HEARING: April 29, 2003

DATE OF DECISION: June 13, 2003

DECISION

OVERVIEW

Dundarave Wine Cellar Ltd. (referred to as "Dundarave" and "the employer" in this decision) 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 28, 2003. The employer is by that Determination ordered to pay Martyn Turner $5,123.94 in wages, interest included.

Mr. Turner ("the employee") appeals that same Determination. His appeal is pursuant to section 112 of the *Act*.

The Determination is that Mr. Turner was not a "manager" as that term is defined in the Employment Standards Regulation ("the Regulation"), he was employed from March 28, 2000 to July 28, 2001, and that he is entitled to overtime pay for his work in that period.

The employer, in filing its appeal, said that the Determination contains an error in law in that it fails to account for lunch breaks. Dundarave subsequently announced, at the appeal hearing, that it wanted to amend the appeal and reargue the matter of whether the employee is or is not a manager for the purposes of the *Regulation*.

The employee, in filing his appeal, claimed that new evidence has become available that was not available at the time the Determination was made. Mr. Turner's appeal is in essence, however, a claim that the delegate has overlooked important information and that there are not facts to support the Determination. In that regard it is said that the Determination contains numerous calculation errors; that the decision is wrong in that it covers the period May 1, 2000 to July 28, 2001; and that the delegate has failed to award pay which is due because of work on statutory holidays.

I have in this decision decided that the Determination should be referred back to the Director. The employer and the employee agree that the Determination does not account for lunch breaks and that the employee worked in March and in April of the year 2000. In that the Determination must be corrected for that, I am also ordering that the Determination be corrected for other, less significant errors.

An oral hearing was held in this case.

APPEARANCES

Carol Kurrusk	For the employer
Martyn Turner	On his own behalf

ISSUES

Is this a case where evidence has become available that was not available at the time the Determination was being made?

Is there an error in law such that the Determination should be varied or cancelled or a matter or matters referred back to the Director?

FACTS

There is in this case no new evidence which was not previously available. The "new evidence" to which Mr. Turner refers is evidence which was available at the investigative stage. I find that it was somehow overlooked.

In the Determination or, more specifically, in the Reasons for the Determination ("the Reasons"), it is said that Turner's employment began on the 28th of March, 2000 and ended July 28, 2001. It did not. Turner started work on or about the middle of March, 2000. The parties agree on that.

Attached to the Reasons is a set of detailed calculations. That set of calculations covers the period May 1, 2000 to July 28, 2001. It does not account for work in March and April, 2000. The delegate is prepared to accept that the Determination should be recalculated so as to encompass the entire period of the employment. I agree with that conclusion.

The employer alleges that the Determination is wrong in that the employee had a half hour lunch break on all workdays longer than 5 hours. The delegate explains that the Determination does not account for lunch breaks because the employer's time sheets show only start and finish times but, in a written submission to the Tribunal, the delegate allows that "if the complainant had ½ hr. meal break within this period and he was not required to perform work and could, for example, leave the worksite, the appellant is correct and the wage entitlement should be reduced accordingly". The employee, at the outset of presenting matters to me at the appeal hearing, said that he was prepared to accept that he did take a lunch breaks as the employer was claiming. On the point of lunch breaks, I find therefore that the Determination should be varied so that the workday is reduced by a half hour lunch break in the case of any shift that is longer than 5 hours.

The Determination's set of detailed calculations show no work in the week of November 5, 2000. I am led by the parties to believe that Turner did work in that week as it is his first week as Assistant Manager and that a record of the work can be produced by the employee if not the employer.

The employee claims that he worked more than 4 hours on the 23rd of December, 2000. I am shown that there is not a record of when Turner quit work on that day, only that he reported for work on that day. The delegate has awarded 4 hours of pay for work on the 23rd (the daily minimum). The employee has failed to show me that he worked more than 4 hours on the 23rd and that the Determination should be varied in respect to work on that particular day.

The Determination awards minimum daily pay for work on January 29, 2001. I am shown that that is wrong and that Turner worked 13 hours on that day.

I am shown records of work which show, lunch breaks considered, that the employee worked 9 hours on the 12th of February, 2001, 9 hours on 27th of February, 2001, 7.5 hours on the 9th of March, 2001; 8.5 hours on the 31st of March, 2001 and 7.75 hours on the 16th of June, 2001.

I am shown that the employee worked statutory holidays but I am not shown that the delegate has failed to take that into account in issuing the Determination. The detailed calculations are performed by a

computer program that takes into account work which is performed on statutory holidays and the requirements of the *Act*.

The employer, at the appeal hearing, announced that it wanted to address two issues, the matter of lunch breaks and the matter of whether or not the employee should be considered to be a manager for the purposes of the Regulation. Prior to the hearing, the employer said nothing to indicate a plan to argue that Turner was a manager. Its written submissions raise one issue and one issue alone, the Determination's failure to account for lunch breaks. The employer said, moreover, that it did not think that an oral hearing was even necessary.

I asked the employer to explain why it wanted to amend its appeal. I found that the employer did not have new information, nor did it have any new arguments to make. The employer is merely seeking to replow facts and arguments that are contained and set out in the Determination in the hope that the Tribunal might provide it with a different result.

ARGUMENT AND ANALYSIS

It is not for the Tribunal to second guess the Director and her delegates. The appellant is expected to show that the determination which has been appealed should be varied or cancelled, or a matter or matters referred back to the Director, for reason of either an error in law, failure to observe principles of natural justice, or evidence which was not available at the time the determination was made.

The term "manager" is defined in section 1(1) of the governing Regulation. The definition is as follows:

> "**manager**" means
>
> (a) a person whose primary employment duties consist of supervising and directing other employees, or
> (b) a person employed in an executive capacity.

The delegate considered a leading decision of the Tribunal in deciding that Mr. Turner is not a manager under the *Regulation*. He found that the employee was not employed in an executive capacity and his primary employment duties were not to supervise and direct employees.

In *Director of Employment Standards*, BC EST # D479/97 the Tribunal had the following to say:

> "The task of determining if a person is a manager must address the definition of manager in the Regulation. If there are no duties consisting of supervising and directing other employees, and there is no issue that the person is employed in an executive capacity, then the person is not a manager, regardless of the importance of their employment duties to the operation of the business. That point was made by the Tribunal in *Anducci's Pasta Bar Ltd.*:
>
> > "Many of the duties to which the employer pointed as evidence of Lum's managerial status did not address the definition of manager in the Regulation. Handling of cash, custody of a key, responsibility for checking purchases and the like are all responsible duties, but they are not connected with the supervision or direction of employees."
>
> Any conclusion about whether the primary employment duties of a person consist of supervising and directing employees depends upon a total characterisation of that person's duties, and will

> include consideration of the amount of time spent supervising and directing other employees, the nature of the person's other (non-supervising) employment duties, the degree to which the person exercises the kind of power and authority typical of a manager, to what elements of supervision and direction that power and authority applies, the reason for the employment and the nature and size of the business. It is irrelevant to the conclusion that the person is described by the employer or identified by other employees as a "manager". That would be putting form over substance. The person's status will be determined by law, not by the title chosen by the employer or understood by some third party."

Mr. Turner had the title of Assistant Manager and he performed important duties but, as matters are presented to me, there is not evidence to support a conclusion that he was employed in an executive capacity or that his primary employment duties were to supervise and direct employees. It follows that he is entitled to overtime pay.

It may be that Mr. Turner is entitled to overtime pay as set out in the Determination but, if so, it is merely a coincidence. The Determination fails to account for the fact that the employee regularly took lunch breaks. It grossly overstates the amount of overtime worked such that I am satisfied that the Determination contains an error in law.

I have been shown that the Determination contains other errors. I am here referring to the failure to calculate earnings from the date that the employment began, evidence of a failure to account for work in the week of November 5, 2000 and misstatement of the number of hours worked on the January 29, 2001; February 12, 2001; February 27, 2001; March 9, 2001; March 31, 2001 and June 16, 2001.

Some of the above errors are relatively insignificant and not an error in law in themselves. But an error in law has been shown in this case. There are grounds to vary the Determination. And as the Determination must be recalculated, it failing to account for lunch breaks as it does, I am satisfied that it is only fair that the Director should correct for all of the errors which have been identified in this decision, minor and major, those in favour of the employer as well as those in favour of the employee.

The matter of calculating the amount of wages owed for reason of the Act and work performed is referred back to the Director.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated January 28, 2003 be referred back to the Director so that matters can be reinvestigated and the Determination recalculated.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal