



An appeal

- by -

Dragan Tarailo and Branka Tarailo
("Mr. Tarailo" and "Mrs. Tarailo", respectively)

- 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

TRIBUNAL MEMBER: David B. Stevenson

FILE No.: 2004A/158 and 2004A/159

DATE OF DECISION: November 15, 2004



DECISION

SUBMISSIONS

Dragan Tarailo and Branko Tarailo	on their own behalf
Kim O. LaBelle	on behalf of Wall Financial Corporation
Ivy Hallam	on behalf of the Director

OVERVIEW

This decision addresses appeals brought pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) by Dragan Tarailo (“Mr. Tarailo”) and Branka Tarailo (“Mrs. Tarailo”) of a Determination that was issued on August 6, 2004 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded Mr. and Mrs. Tarailo’s employer, Wall Financial Group (“Wall Financial”), had contravened several provisions of the *Act* in respect of their employment and ordered Wall Financial to pay Mr. Tarailo wages in the amount of \$1577.49 and to pay Mrs. Tarailo wages in the amount of 825.51.

In their appeals, Mr. and Mrs. Tarailo contend the Director erred in law in applying Section 80(1) of the *Act* resulting in errors in calculating the amount of wages owed to them by Wall Financial. They ask that the errors be corrected and the amount of the Determination be varied. They also submit that the Director erred in finding they were resident caretakers during the period April 1, 2002 to July 31, 2002, when both were employed by Wall Financial at a residential high-rise building known as Ambleside Towers. This position was not originally contained with their appeals when they were filed with the Tribunal on September 13, 2004, but was filed with the Tribunal on, or about, October 21, 2004 as a “continuation” of their appeal submissions. This “continuation” submission also raises a natural justice issue, alleging the delegate of the Director who was conducting the complaint hearing treated Mr. and Mrs. Tarailo unfairly during that process.

The Tribunal has decided an oral hearing is not necessary in order to decide this appeal.

ISSUE

The issue is whether Mr. and Mrs. Tarailo have shown any error in the Determination that allows or justifies the intervention of the Tribunal under Section 112 of the *Act*.

THE FACTS

Mr. and Mrs. Tarailo worked for Wall Financial from October 1, 2001 to July 31, 2002. For the period October 1, 2001 to March 31, 2002, they were resident managers at a residential complex known as Greenwood Gardens. They were hired as a couple at a rate of \$3500.00, \$1750.00 each, a month. On April 1, 2002, Mr. and Mrs. Tarailo were transferred to work at Ambleside Towers. Their wage was adjusted to \$3000.00, \$1500.00 each, a month. They worked at Ambleside Towers until July 30, 2002



when their employment with Wall Financial was terminated. They continued on the payroll of Wall Financial until August 21, 2002.

In his complaint to the Director, Mr. Tarailo alleged that Wall Financial had failed to pay him overtime wages and statutory holiday pay during his employment and had inaccurately distributed the amount paid to him and his wife while they were employed at Ambleside Towers. In her complaint, Mrs. Tarailo claimed she was not paid overtime wages and statutory holiday pay while she was employed at Greenwood Gardens and claimed for all hours worked over 16 in a week and overtime hours for hours worked in excess of 8 in a day while she was employed at Ambleside Towers and repayment of an amount of \$500.00 deducted from the couple's total monthly wage when she was on leave from late June to late July 2002.

There was an issue of their status under the *Act* during the time spent at Ambleside Towers. Mr. Tarailo contended he was a maintenance man at that complex and that his wife was a relief caretaker. The Director found, applying the circumstances of their employment to the definition of "resident caretaker" in the *Employment Standards Regulation* (the "*Regulations*"), that both were resident caretakers and as such, each were entitled to the minimum wage for resident caretakers calculated according to Section 17 of the *Regulations*.

Applying Section 80(1) of the *Act*, the Director found that the claims being made by Mr. and Mrs. Tarailo were limited to wages that became payable six months before the date of their termination of employment, or more specifically, to wages which became payable in the period from February 1, 2002 to July 31, 2002.

The complaint process included an oral hearing held over two days.

ARGUMENT

Although Mr. and Mrs. Tarailo filed separate appeals, the submissions accompanying each appeal was identical and, for ease of reference, I will refer to it in the singular as the "appeal submission". I will break down the position of Mr. and Mrs. Tarailo into three parts: disagreement on the findings of fact, disagreement on the law and those matters raised in the "continuation" submission, including the natural justice issue.

Dispute with the facts

The appeal submission of Mr. and Mrs. Tarailo contains several pages of commentary on findings of fact made by the Director in the Determination. It challenges findings of fact in several areas. For reasons which will be provided later in this decision, I do not intend to set out each matter of disagreement with the facts. As well, there are areas where there is no disagreement with the evidence, but Mr. and Mrs. Tarailo argue the Director should have reached other conclusions on that evidence and suggest what those conclusions should have been. Similarly, I do not intend to set out the arguments on each of those areas.

Some of the matters raised in this aspect of the appeal are not so much disputes on the facts but are a reconstruction of the position of Mr. and Mrs. Tarailo relating to periods for which the Director made no findings of fact in the Determination. The clearest example of this relates to whether Mr. and Mrs. Tarailo worked on November 3, 2001 and, if so, why they had to do that. It is apparent from the Determination that the Director did not feel compelled to make findings on such matters as they were



outside what the Director considered to be the wage liability period described in Section 80(1) of the *Act*. If the Director was correct on the application of Section 80(1), it is unnecessary to address these matters as they would have no relevance.

Mr. and Mrs. Tarailo submit the Director failed to address one particular provision in their resident manager contract with Wall Financial. The question is asked whether section (p) of that contract is allowable under the *Act*.

Dispute on the law

Mr. and Mrs. Tarailo submit the Director did not correctly interpret and apply Section 80(1) of the *Act*. That provision states:

80. (1) *The amount of wages an employer may be required by a determination to pay is limited to the amount that became payable in the period beginning*
- (a) *in the case of a complaint, 6 months before the earlier of the date of the complaint or the termination of employment, and*
 - (b) *in any other case, 6 months before the director first told the employer of the investigation that resulted in the determination.*

Mr. and Mrs. Tarailo submit that the Director ignored the words “*that became payable*” in paragraph 80(1)(a) and only included wages which were *earned* in the wage liability period when calculating wages owed. They argue the Director should have included wages which were earned outside of the wage liability period, but which, under other provisions in the *Act*, did not become “payable” until some time within the last 6 months before termination.

They refer to Section 17 of the *Act*, which does not require overtime wages credited to an employee’s hour bank or vacation pay to be paid at least semi-monthly, as other wages are required by that provision to be paid, but allow those wages to be deferred and taken as days off with pay or, if not taken as days off within six months after they are earned, be paid out. They also refer to Section 42 of the *Act*, which sets out provisions for banking overtime wages.

As I read their argument on this point, they say that Wall Financial never paid overtime wages; that they were allowed to “bank” those overtime hours and take days off with pay but only on a one-for-one basis, without regard to the overtime rates set out in the *Act*; and that any “banked” hours that were not taken as time off with pay were payable no later than six months after they were earned. Accordingly, they argue that any overtime wages earned in the six months preceding the wage liability period, but which were not paid, would become payable in the wage liability period. Mr. and Mrs. Tarailo say there is one more day of overtime wages for each of them that is owing under this argument than what was included in the Director’ calculation.

They also argue the Director failed to have regard to Section 46 of the *Act*. At the relevant period of time, that provision required an employer to provide an employee who worked on a statutory holiday with, among other things, a working day off with pay which the employer was required to schedule according to subsection 46(4).



Their argument on this point is similar to the argument on overtime – that they worked statutory holidays and no working day with pay was ever provided by Wall Financial. Mr. and Mrs. Tarailo say there are three more days of wages owing to each of them under this argument.

Mr. and Mrs. Tarailo make an alternative argument on the calculations made by the Director in the event the above argument is not accepted. In calculating overtime wages owed, the Director found Mr. and Mrs. Tarailo had worked on February 2, March 2 and March 31, 2002 during their 32 hour break. The Director also found Mr. and Mrs. Tarailo had been paid for two days taken off in lieu of the days worked in the 32 hour break, February 8 and March 8, 2002. They say the Director should not have treated the days off with pay on February 8 and March 8 as being in lieu of February 2 and March 2 because Wall Financial still owed them days off for working in their 32 hour break on November 3 and December 1, 2001. In other words, Mr. and Mrs. Tarailo say the Director first have applied any wages paid in the claim period to any outstanding wage liability, even if such wage liability fell outside the claim period.

The “continuation” submission

On or about October 21, 2004, the Tribunal received the response of Mr. and Mrs. Tarailo to the submissions of Wall Financial and the Director on the appeal. Included with that response was a 20 page submission marked “continuation” and which dealt with their disagreement with the Determination as it applied to their period of employment at Ambleside Towers. The submission also raised, for the first time, an allegation that they had been treated unfairly at the complaint hearing.

In addition to the natural justice issue, this submission identifies five “issues” concerning their employment at Ambleside Towers. These “issues” can be placed into the following arguments: the Director erred in finding Mr. and Mrs. Tarailo were resident caretakers under the *Act*; the Director erred by failing to properly address their argument concerning the distribution of their monthly wage while employed at Ambleside Towers; the Director erred by not finding Wall Financial had improperly deducted \$500.00 from Mrs. Tarailo’s wages in July 2002; and the Director erred in finding Mr. and Mrs. Tarailo were not owed wages, or more wages as the case may be, for working on days off and on statutory holidays.

Much of the “continuation” submission is concerned with the first two arguments. Twelve pages of the submission is devoted to arguing the findings of fact and conclusions of fact made by the Director.

Reply of Wall Financial and the Director

In reply to the appeal submission, counsel for Wall Financial argues there is no basis upon which Mr. and Mrs. Tarailo may appeal the findings of fact. On the issue of law raised by Mr. and Mrs. Tarailo in their appeals submission, counsel for Wall Financial has separately addressed that matter: first, as it might apply to the overtime claim; and second as it might apply to the claim for statutory holiday pay.

In respect of the former, counsel says that matter was never raised during the complaint process nor was there any evidence presented that an overtime bank had been established for Mr. and Mrs. Tarailo. Counsel submits that the comments made by the Director concerning the claim period could be interpreted as applying to any wages that could be claimed during that period either as earned or payable, not just those which were earned in that period. Counsel says the Section 80 argument requires a significant change in the findings of fact made in the Determination.



On the latter, counsel reiterates that there was no argument or evidence during the complaint process that a time bank was established in favour of Mr. and Mrs. Tarailo.

Counsel objects to the “continuation” submission, saying it is out of time, wholly inappropriate and, in any event, dealing primarily with disputes on findings of fact.

The Director submits the appeals should not be allowed, as Mr. and Mrs. Tarailo are simply seeking to have the Tribunal re-investigate the complaints and reach different conclusions than those reached by the Director. The Director has not made any argument on the issue of law or on the “continuation” submission.

ANALYSIS

The burden is on Mr. and Mrs. Tarailo, as the appellants, to persuade the Tribunal that the Director committed some error in making the Determination and that the Tribunal should intervene to correct that error. An appeal to the Tribunal is not a re-investigation of the complaint nor is it intended to be simply an opportunity to re-argue positions taken during the complaint process. The grounds upon which an appeal may be made are found in Subsection 112(1) of the *Act*, which says:

- 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:*
- (a) *the director erred in law;*
 - (b) *the director failed to observe the principles of natural justice in making the determination;*
 - (c) *evidence has become available that was not available at the time the determination was made.*

I shall first address the “continuation” submission. I will note again that this submission was filed on or about October 21, 2004 – nearly six weeks after the expiry of the appeal period.

To the extent this submission raises a new ground of appeal, which can be characterized as a natural justice issue, it was filed out of time and is denied on that basis (see *D. Hall & Associates Ltd.*, BC EST #D354/99). This submission also raises new, and additional, reasons for appeal, specifically the question of whether Mr. and Mrs. Tarailo were resident caretakers under the *Act*, the matter of the distribution of Mr. and Mrs. Tarailo’s wages while employed at Ambleside Towers and the alleged wrongful deduction from Mrs. Tarailo’s wages. Raising new reasons for appeal at such a late date contravenes the Tribunal’s rules for filing appeals and, on that basis, those new and additional reasons are not accepted.

I will add, however, that having given some consideration to the new and additional reasons, Mr. and Mrs. Tarailo would have been hard pressed to convince me there was any error made by the Director on those matters.

As noted above, a substantial part of these appeals simply represents an attempt by Mr. and Mrs. Tarailo to have the Tribunal review the facts and reach different conclusions than those reached by the Director. The appeal must be confined to those grounds listed in subsection 112(1), above. While in some circumstances errors on findings or conclusions of fact can amount to error of law (see *Gemex Developments Corp. -and- Assessor of Area #12 - Coquitlam*, [1998] B.C.J. No. 2275 (BCCA), these



appeals do not show any such error. In the absence of a demonstrated error of law related to the findings of fact made in the Determination, challenging findings of fact is not a recognized ground of appeal.

This aspect of the appeals is dismissed.

I can see no relevance in deciding whether the Director should have addressed the “legality” of paragraph (p) of Mr. and Mrs. Tarailo’s contract of employment. The facts indicate this paragraph did affect the validity of any claim made by Mr. and Mrs. Tarailo and, in any event, whether “legal” or not, could have no impact on the employment entitlements found in the *Act* (see Section 4).

Turning to the Section 80 arguments, I do not accept the argument as it relates to the overtime wage claims.

There is a single compelling reason for this conclusion. At all material times, Mr. and Mrs. Tarailo were resident caretakers under the *Act*. Section 42 of the *Act* is found in Part 4. Section 35(1) of the *Regulations* (which was not changed in the 2002 amendments to the legislation) says:

35. (1) Part 4 of the Act, other than sections 31, 36 and 39, does not apply to a resident caretaker.

Simply put, Mr. and Mrs. Tarailo could not establish a time bank for overtime wages under the provision of the *Act* upon which they rely. This aspect of the appeal is also dismissed.

I also dismiss their alternative argument on the overtime wage claim. The statutory provision which was contravened by Wall Financial was the requirement to ensure at least 32 hours free from work. The *Act* says the failure to provide 32 hours free from work will require an employer to pay the affected employee double the regular wage for the time worked by the employee during the 32 hour period. There is no requirement to provide an employee with another day off and, as I have already indicated, Mr. and Mrs. Tarailo had no time bank. The statutory obligation on Wall Financial in respect of overtime wages accrued by Mr. and Mrs. Tarailo for working during their 32 hours free from work was to pay those within the time required under Section 17, meaning Wall Financial was required to pay those overtime wages on a pay day in November and December, respectively. While the failure to do so was a contravention of the *Act*, it was a contravention for which Wall Financial is not liable under the *Act* as it occurred well outside the liability period described in subsection 80(1).

The claim for statutory holiday pay, however, stands on a slightly different footing.

During their period of employment, Part 5, Sections 46 and 47 of the *Act* stated:

46. (1) *An employee who works on a statutory holiday must be paid for that day*
 - (a) *1½ times the employee’s regular wage for the time worked up to 11 hours, and*
 - (b) *double the employee’s regular wage for any time worked over 11 hours.*
- (2) *In addition, the employer must give the employee a working day off with pay according to Section 45.*
- (3) *The employee may choose to have the pay for the day credited to the employee’s time bank if one has been established.*
- (4) *The employer must schedule the day off*
 - (a) *before the employee’s annual vacation,*



- (b) before the date the employment terminates, or
(c) if the pay for the day off is credited to the employee's time bank, within 6 months after the date of the statutory holiday.,
whichever is earliest.

47. If a statutory holiday falls on a non-working day for an employee, section 46 (2) to (4) applies.

The rights contained in the above sections had vested in Mr. and Mrs. Tarailo before their employment terminated and before that section was amended in November 2002. It appears the Director correctly viewed their claim for statutory holiday pay fell to be decided under the statutory holiday provisions that were in force at the time their rights vested (see *Selkirk and Marlene Botrokoff operating as The Cleaning Lady*, BC EST #D478/02). In my view, however, the Director overlooked the effect of subsections 46 (2) and (4) and Section 47 on that claim.

Applying Sections 46 and 47, Mr. and Mrs. Tarailo were entitled to, among other things, a day off with pay for any statutory holiday that was worked or which fell on a non-working day. Conversely, Wall Financial was required to give them another working day off with pay in such circumstances. Except where the pay for the day off is credited to an employee's time bank, which Mr. and Mrs. Tarailo could not do, the *Act* does not say the day off with pay must be scheduled within any specified period of time, only that it must be scheduled before the earlier of the employee's annual vacation or the date of termination. Once entitlement to a day off with pay accrues, it remains "payable" until the employer either schedules and pays the employee for the day off or the time for doing so expires.

There is no indication in the Determination that Wall Financial ever satisfied the obligation to schedule another day off with pay for November 12 and December 25, 2001 and January 1, 2002 or that the statutory requirement to do so arose outside of the liability period, that is, before February 1, 2002. The record shows that neither Mr. or Mrs. Tarailo were entitled to an annual vacation during their employment. The Determination suggests all annual vacation pay owing was paid on the termination of their employment.

Therefore, the entitlement of Mr. and Mrs. Tarailo to a day off with pay, and the obligation on Wall Financial to schedule a day off with pay for them, carried into the six month liability period and based on the available evidence was outstanding when their employment terminated. While conceptually, it is difficult to perceive how the requirement to schedule a day off could have survived the termination of employment, it is not at all difficult to appreciate that the obligation to pay the wages associated with the day off would continue to be a statutory wage obligation and be payable as any other wage obligation on termination.

It follows that I accept this aspect of the appeal. The Determination will be varied to provide another three days wages to both Mr. and Mrs. Tarailo for the failure of Wall Financial to meet the obligation to provide another day off with pay for November 12 and December 25, 2001 and January 1, 2002. Based on the calculations done by the Director in the Determination, those amounts are:

3 days x \$80.77 = \$242.31 (Mr. Tarailo)

3 days x \$80.77 = \$242.31 (Mrs. Tarailo)

Both amounts will accrue interest under Section 88 of the *Act*.

**ORDER**

Pursuant to Section 115 of the *Act*, I order the Determination, dated August 6, 2004, in the amount of \$1577.49 payable to Mr. Tarailo and in the amount of 825.51 payable to Mrs. Tarailo, be varied by the amount of \$242.31 to each of Mr. and Mrs. Tarailo, together with whatever interest has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal