EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act R.S.B.C. 1996, C.113

- by -

Stephen Hooke
(“ Hooke ”)

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Dave B. Stevenson

FILE No.: 2000/287

DATE OF DECISION: May 19, 2000

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) by Stephen Hooke ("Hooke") of a Determination that was issued on March 30, 2000 by a delegate of the Director of Employment Standards (the "Director"). The Determination addressed two aspects of a complaint that had been filed by Hooke against his former employer, Polar Refrigeration sales and Service Ltd. ("Polar"): a claim for overtime pay for a period between August 24, 1998 and May 13, 1999 and a claim for length of service compensation. The Determination concluded that for the period of time relevant to the claims made by Hooke, Polar was bound to a collective agreement with a trade union and the Director had no jurisdiction over the subject matter of the claims.

ISSUES TO BE DECIDED

The issue here is whether the Determination was correct in concluding Hooke's claims were not within the Director's jurisdiction.

FACTS

The Determination sets out the following facts:

1. Hooke was hired by Polar on February 2, 1998 as Installation Manager at an annual salary of $55,000. He was terminated from this position on August 21, 1998. A Record of Employment was issued to him by Polar.

2. On, or about August 21, 1998, Vern Badry, an officer/director of Polar, asked Hooke to continue working for Polar on an hourly basis. Hooke accepted. He continued to work for Polar until May 13, 1999. at an hourly rate of $26.44[1]. A Record of Employment, not issued to him by Polar until November, 1999, identified his occupation as "sheet metal worker".

3. The complaint was filed on October 21, 1999. In the complaint, Hooke indicated on the complaint form that his employment was not covered by any collective agreement.

4. During the investigation, Polar explained that Hooke was covered by the collective agreement from August 24, 1998, when he changed from salary to hourly rate. Polar advised that the Union with whom it had the collective agreement, the Sheet Metal Workers International Association, Local No. 280 (the "Union"), had issued a permit that allowed Hooke to work as a sheet metal worker/installer because he was not certified in this trade and that Polar was paying $50.00 a month for this permit. Polar also indicated that Hooke was working alongside a journeyman sheet metal worker who was a member of the Union. Presumably, although it does not say so directly in the Determination, this person was covered by the collective agreement between Polar and the Union.

[1] Hooke advised the Director in one submission that this hourly rate represented his yearly wage, $55,000.00, converted to an hourly wage rate by dividing it by 2080 hours a year, in other words, by dividing the yearly wage by the product of 52 times his normal weekly hours of work (40 hours a week).

5. A representative of the Union, Jim Paquette, confirmed that the collective agreement was in force and effect during the relevant period and verified that Hooke had been provided with a permit to work as a sheet metal worker/installer because he was not "ticketed".

Hooke does not seriously challenge the above conclusions of fact. In his appeal, he makes the following assertions:

> Vern Badry . . . asked me to come back to work and do all of the sheet metal make-up in shop and installations. He offered to pay me an hourly rate and I asked him about problems with the union. He stated he was not overly concerned about the union, he just needed to complete all the outstanding jobs on the books so Polar Refrigeration could be paid.
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> . . . Deal was made with the union that Polar would pay the union $50/month and the union would issue a work permit for me to work on sheet metal. Constant hassle between the union and Polar because I was working and the union did not have their own indentured journeyman working any more. . . . I talked with Jim Paquette . . . concerning this claim. He stated that this was basically my problem and the union would not be very willing to deal with this as I had not stated to them at the time I was working that I was not being compensated for overtime and, also, if the union was to do anything at all - it would only be concerned with actual installation time.

In their reply to the appeal, Polar makes the following submission:

> Mr. Hooke had been employed by Polar Refrigeration in the position of Installation Manager from the period Feb2/98 up to and including May of '99. During his employment he had full control of the installation department, including hiring, firing and disciplining all employees under his management. Effective August 22nd, 1998 Mr. Hooke's pay switched from salary to hourly, at no time did Mr. Hooke's job description or responsibilities to Polar change in any way.

ANALYSIS

In the Determination, the question of whether the claims were within the jurisdiction of the Director was considered as a threshold issue. That question was stated as follows:

> . . . the issue that should be verified first is whether or not the Employment Standards Branch has Jurisdiction over this matter, given that the Employer has been and is currently bound by a collective agreement.

In answering that question, the Director noted that Hooke's claims included claims for overtime pay and length of service compensation, the former a matter included in Part 4 of the *Act* and the latter a matter included in Part 8 of the *Act* and that Sections 43 and 69 of the *Act* were directly relevant to those claims.

Section 43 reads:

43. (1) If the hours of work, overtime and special clothing provisions of a collective agreement, when considered together, meet or exceed the requirements of this Part and section 25 when considered together, those provisions replace the requirements of this Part and section 25 for the employees covered by the collective agreement.

(2) If the hours of work, overtime and special clothing provisions of the collective agreement, when taken together, do not meet or exceed the requirements of this Part and section 25 when considered together,

(a) the requirements of this Part and section 25 are deemed to form part of the collective agreement and to replace those provisions, and

(b) the grievance provisions of the collective agreement apply for resolving any dispute about the application or interpretation of those requirements.

Section 69 reads:

69. (1) If the provisions of a collective agreement relating to an individual termination of employment, including the layoff and right of recall provisions, when considered together, meet or exceed an employee's entitlement under section 63, those provisions replace section 63 for the employees covered by the collective agreement.

(2) If the provisions of a collective agreement relating to an individual termination of employment, including the layoff and right of recall provisions, when considered together, do not meet or exceed an employee's entitlement under section 63, that section is deemed to form part of the collective agreement and to replace those provisions.

(3) An employee's entitlement, under a collective agreement or under this section, on group termination of employment is in addition to the employee's entitlement on an individual termination of employment.

(4) The grievance provisions of a collective agreement apply for resolving any dispute about the application or interpretation of a provision deemed by this section to form part of the collective agreement.

(5) Subsections (1 and (2) do not operate to provide any remedies that would not be otherwise available under the grievance provisions of the collective agreement.

(6) If an employer is in receivership or is subject to an action under section 427 of the Bank Act (Canada) or to a proceeding under an insolvency Act, subsections (1) to (5) do not apply and the employee is entitled to the greater, as determined by the director, of

> *(a) the amount payable for an individual termination under the collective agreement, and*
>
> *(b) the amount payable to the employee under section 63.*

The Director concluded that the effect of paragraph 43(2)(b) and subsection 69(4) was to "stipulate or specify the requirement of the grievance provisions of the collective agreement as the mechanism through which issues such as the one at hand should be remedied" and that Hooke was compelled to use that vehicle to resolve his claims. The actual conclusion reached by the Director was stated in the following paragraph:

> Given that the Employer is bound by a collective agreement with the Union, I have determined that the Employment Standards Branch does not have the jurisdiction to make decisions pertaining to the claims made by the Complainant.

There is no disagreement with the conclusion that Polar was bound by a collective agreement with the Union. That conclusion, however, represents only one half of the equation. The above provisions only apply for those *"employees covered by the collective agreement"*. The weakness of the Determination is that it contains no specific conclusion that Hooke was an employee covered by the collective agreement and, more critically, no findings of fact that point unequivocally to such a conclusion. I don't discount the possibility that the absence of a specific conclusion that Hooke was covered by a collective agreement was simply an oversight. If the only reasonable inference from all the facts and the material on file was that Hooke was covered by a collective agreement, I might be pursuaded to draw an inference from the result of the Determination without any specific conclusion to that effect. However, the facts, as I have outlined above and as they arise from the material on file, are at best ambiguous.

On its face, the Determination seems to rely on three circumstances as determinative: first, that on or about August 22, 1998 Hooke's wage changed from a yearly salary to an hourly rate; second, that Polar paid the Union a $50.00 a month permit fee; and third, that he worked alongside a journeyman sheet metal worker who was a member of the Union.

In respect of the first circumstance, there was no suggestion or conclusion that Hooke, before August 21, 1998, when he was employed as the Installation Manager and being paid a yearly salary, was covered by the collective agreement. If he was, then the change from salary to hourly is basically irrelevant. If he was not, there is no indication in the Determination how paying him an hourly wage instead of a salary contributes to a conclusion that his employment was covered by the collective agreement. As noted earlier, the hourly wage paid to Hooke after August 24, 1998 ($26.44 an hour) was simply a translation of his yearly salary to an hourly rate and was accomplished by dividing his yearly salary by his normal annual hours of work ($55,000.00/2080). Based on the material on file, it is reasonable to conclude that the change in salary from yearly to hourly reflected nothing more than a concern on Polar's part that there might not be sufficient work to justify continuing to pay Hooke his regular annual salary.

In respect of the second and third circumstances, the Determination indicates that Polar paid a fee of $50.00 a month to the Union for Hooke to work as a sheet metal worker because he was not certified in this trade. It also notes that the Union advised the investigating officer they issued a permit allowing Hooke to work as a sheet metal worker because he was not "ticketed as a sheet metal worker". Both of these references suggest that the work Hooke was doing was work that

Polar and the Union agreed ought to have been done by a journeyman sheet metal worker under the terms of the collective agreement. In Hooke's appeal submission, he asserts that there was "constant hassle" between the Union and Polar because he was working and a journeyman sheet metal worker was not. He says that the permit allowed him, in effect, to work in place of a journeyman sheet metal worker. Those assertions also suggest that Hooke was doing work that ought to have been done by a journeyman sheet metal worker under the terms of the collective agreement.

Based on those circumstances, however, the payment of the fee by Polar to the Union is as consistent with a conclusion that Hooke was not covered by the collective agreement than that he was. It is a familiar practice for trade unions to allow a person who is neither included in the bargaining unit nor covered by the collective agreement to work "in the jurisdiction" of the Union in return for the payment of a fee, politely referred to by some as a "permit fee" and, less politely, by others as "doobee (as in dubious) dues". The point is that payment of such a fee keeps the individual on whose behalf the fee is paid out of the bargaining unit and, consequently, outside of the terms of the collective agreement. Nothing in the Determination discounts the possibility that the arrangement between Polar and the Union was anything other than an application of that familiar practice and, consequently, was evidence that Hooke was not covered by the collective agreement. I also note that the deal to pay the permit fee was not made until October 22, 1998, almost two months after Hooke was moved to an hourly wage rate, which would suggest that those two events were unrelated.

On review, there are no other facts in the Determination or apparent in the material on file that would indicate, with the required degree of certainty, Hooke was, either before or after that date, covered by the collective agreement.

It would have been a relatively simple task to reach some conclusion about that by analyzing the terms of the collective agreement against the terms of Hooke's employment in certain key areas. For example, the investigating officer should have considered whether the collective agreement contained a union recognition clause identifying those employees on whose behalf the collective agreement was concluded and, if so, whether Hooke, as Installation Manager, reasonably fell within that recognition clause; whether the collective agreement contained a union security provision requiring all employees covered by the agreement to be members in good standing of the Union and, if so, whether Hooke was or became a member of the Union; whether the collective agreement required Polar to make dues check-offs for employees working under it and remit those dues to the Union and, if so, whether Polar checked off and remitted dues on behalf of Hooke; whether the collective agreement provided health and welfare and/or pension benefits for employees employed under it and, if so, was Hooke enrolled in such plans; whether the agreement required Polar to contribute to any of the benefits and, if so, were they making those contributions on behalf of Hooke; was Hooke's wage rate identifiable with the wage schedule contained in the collective agreement; and whether there were other requirements of the collective agreement that were not applied to Hooke's employment, such as travel or meal allowances, statutory holiday pay entitlement or overtime and other wage rate premiums.

I also note that Polar stated in their appeal submission that, even though Hooke changed from a salary to an hourly wage, from their perspective he continued as the Installation Manager, with all of the duties and responsibilities that went with that job, until May of 1999, when his employment with Polar terminated. It would have been helpful for the investigating officer to

know whether the bargaining authority of the Union included or excluded managers and whether the collective agreement contained any provision dealing with their inclusion or exclusion.

Without any of the above information, it would have been difficult, if not impossible, to make any reasoned judgment about whether Hooke was an employee covered by a collective agreement. As a result, I conclude there was no rational basis for the Determination and it must be canceled.

Several aspects of Hooke's appeal addressed the merits of his claims for overtime pay, length of service compensation and reimbursement for out-of-pocket expenses. None of these matters were considered in the Determination because of the conclusion reached on the threshold issue. It is still open to the Director to conclude that she has no jurisdiction over the subject matter of the complaint, making it unnecessary to consider or comment on the merits of the claims. However, if the Director concludes that Hooke's employment was not covered by a collective agreement, then the Director is obliged to investigate these claims and make some decision in respect of them. It is inappropriate, and probably incorrect, for the Tribunal to assume a jurisdiction over those claims in the first instance and before the Director has reached any conclusion about their merits. The entire matter will be referred back to the Director.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated March 30, 2000 be canceled and the matter be referred back to the Director.

David B. Stevenson
Adjudicator
Employment Standards Tribunal