An appeal

- by -

Chuck's Auto Supply Ltd.
("Chuck'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

ADJUDICATOR:	David B. Stevenson
FILE No.:	2001/9
DATE OF HEARING:	April 24, 2001
DATE OF DECISION:	May 4, 2001

DECISION

APPEARANCES:

on behalf of Chuck's Auto Supply Ltd.	Marcel Therrien
on behalf of the individual	In person

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by Chuck's Auto Supply Ltd. ("Chuck's") of a Determination that was issued on December 5, 2000 by a delegate of the Director of Employment Standards (the "delegate"). The Determination concluded that Chuck's had contravened Part 4, Section 40 of the *Act* in respect of the employment of Linda Hillegeist ("Hillegeist") and ordered Chuck's to cease contravening and to comply with the *Act* and to pay an amount of $6,346.85.

Chuck's says the Determination is wrong and has raised four grounds of appeal in support of their position, which may be summarized as follows:

1. The Determination inappropriately considered a without prejudice communication from the Employer;
2. The Determination failed to consider, or adequately consider, the Employer's records;
3. Because Hillegeist had a duty and responsibility to prepare the payroll, which included a duty to advise the Employer she had a claim for overtime, the Director should not have continued to investigate the complaint as it constituted an abuse of the legislation and an injustice to the Employer; and
4. There were errors in the overtime calculations made in the Determination.

In respect of the last matter, the appeal submission of the Director acknowledged some errors in the calculations and adjusted the amount owing to $6,020.80. Notwithstanding the amendment made by the Director, there remained several alleged errors that were canvassed during the hearing.

In addition to the matters identified in the reasons for appeal, counsel for Chuck's, in a submission to the Tribunal on February 9, 2001, took the position that Hillegeist was a manager under the *Act* and, as such, was not covered by Part 4. In the submission, counsel stated:

> . . . the Determination does not review or canvass the issue as to whether the Claimant was a manager or salaried employee at all. If in fact the Claimant was a

> manager and worked more than 173.34 hours in a month, the Claimant would be entitled to be paid for the extra hours worked but not at overtime rates. The matter must be returned to review this issue.

There are two obvious issues that flow from counsel taking that position: the first is whether I should exercise my discretion to allow this matter to be raised in the appeal; and the second is whether there is any reason to refer the matter back to the Director for further investigation and consideration.

ISSUE

The issues raised in this appeal are as summarized and noted above.

THE FACTS

The Determination describes Hillegeist as being employed by Chuck's from October 13, 1998 to October 13, 1999 as a bookkeeper and payroll attendant. She had some supervisory responsibilities. Mr. Therrien introduced a letter over Hillegeist's signature, date August 29, 1999, in which she identified herself as Office Manager. He said he considered her to be a manager.

The complainant was a salaried employee, earning $2800.00 a month from October 13, 1998 to July 31, 1999 and $3100.00 a month from August 1, 1999 to the end of her employment. Her regular hours of work were 8 hours a day, 9 am to 5 pm with an hour for lunch, 5 days a week. The Determination noted the following findings of fact:

> When the employer advised he did not have a daily record of the claimant's hours worked a calculation based on the claimant's record was completed and provided to the employer. The employer did not deny the claimant worked overtime, but did dispute the amount of hours claimed. The employer advised he had kept a record of the days in which the claimant was absent however the employer has failed to provide this record. Mr. Therrien stated that if the claimant claims she was offered a bonus in recognition of overtime worked that he did not offer it and I should speak to his partner, Mr. Manchur. Mr. Manchur did not return any of my phone messages.

In the appeal hearing, Mr. Therrien, representing Chuck's, acknowledged that Hillegeist had worked some overtime. In light of that acknowledgement, I give no effect to the testimony of Mr. Therrien that all salaried employees submitted their overtime hours on a separate sheet or his assertion that if no additional hours were submitted, it was assumed the employee had just worked his or her regular hours. I prefer the evidence of Hillegeist that both Mr. Therrien and Mr. Manchur knew she was working overtime because they often worked with her, that the

matter was discussed on several occasions and that a pay increase in August, 1999 of $300.00 a month was given, in part, to compensate her for the overtime she worked.

Mr. Therrien said the real issue was the number of hours overtime she claimed to have worked. The Determination contained the following comment:

> I have examined the claimant's record which appears to be genuine, recorded contemporaneously and I might add the only record of the claimant's time worked. I therefore find the claimant's records are credible as there was insufficient evidence brought forward by the employer to refute these records.

Hillegeist's record of hours worked was kept in a daily planner, in which she also kept personal information and appointments. She showed the record to the Director, gave the Director a summary transcript of the hours of work information contained in the record and, with the exception of the record for the week December 13 - 19, 1998, provided the Director with a copy of the daily planner record for her period of employment. The summary transcript and a copy of the daily planner record, except for the week of December 13 - 19, 1998, were provided to Chuck's. The record showed starting time and finishing time, in ½ hour increments, for days on which work was performed. Lunch breaks were not shown on the record, but were routinely deducted by the Director in calculating hours worked for the purpose of determining the amount owed.

ARGUMENT AND ANALYSIS

I will first address the position taken by counsel for Chuck's that Hillegeist was a manager. As noted above, this question was not raised in the appeal, but arose in a reply submission from counsel for Chuck's dated February 9, 2001, which was more than two months after the Determination was issued and six weeks after the time limited for appeal had expired. The statutory scheme for filing appeals is quite straight forward. Subsections 112(1) and (2) of the *Act* provide:

> *112 (1) Any person served with a determination may appeal the determination to the tribunal by delivering to its office a written request that includes the reasons for appeal.*
>
> *(2) The request must be delivered within*
>
> *(a) 15 days of the date of service, if the person was served by registered mail, and*
>
> *(b) 8 days after the date of service, if the person was personally served or served under section 122(3).*

While the filing of the request for appeal was timely, the reasons for appeal did not include any reference to whether Hillegeist fell within the definition manager under the *Employment Standards Regulations*. No request has been made by Chuck's to allow that issue to be included in the appeal after the time for filing had expired. While the Tribunal has been given discretion under Section 109(1)(b) to extend the time period for requesting an appeal, it has taken a principled approach to the exercise of that discretion (see *Re Niemisto*, BC EST #D099/96 and *Re Berg*, BC EST #D212/97).

Additionally, pursuant to Section 109(1)(c) of the *Act*, the Tribunal has established Rules of Procedure specifically dealing with appeals. Among other things, the Rules require an appellant to identify the specific Determination being appealed, to outline the relevant facts and to describe why the Determination is being appealed. One of the purposes and objectives of the *Act* is to ensure the process of adjudication moves quickly, efficiently and with finality. On the other hand, there is a statutory objective and a need to provide a fair and accessible appeal process. The Tribunal has indicated that a balancing of those legislative objectives justifies a strict but not overly technical application of the Rules (see *Re D. Hall & Associates Ltd.*, BC EST #D354/99).

In this case, neither an application of the principles applied to requests under Section 109(1)(b) nor a balancing of the statutory objectives in the context of applying the Tribunal's Rules would justify extending the time limits to allow an appeal on whether Hillegeist fell within the definition of manager under the *Employment Standards Regulations* or adding this question to the matters under appeal.

There are several reasons for this conclusion, including timeliness and the failure to provide any facts relative to the question raised, but the key factor is the complete absence of any apparent merit to the argument that Hillegeist was a manager for the purposes of the *Act*.

Turning to the matters that were stated in the appeal, I do not accept that the reference in the Determination to settlement discussions provides any reason to cancel the Determination. The argument supporting this reason for appeal is based on an allegation that the Director used the without prejudice offer as an admission by Chuck's that it owed overtime wages to Hillegeist. I can find no support for that allegation in the Determination. The Determination records that Chuck's did not deny the claimant worked overtime, but disputed the hours claimed. Mr. Therrien went even further in the hearing before me, acknowledging that Hillegeist worked some overtime. The Determination identifies the source of the amount of overtime hours worked. Both of those matters, the conclusion that Hillegeist worked overtime hours and the number of hours worked, arose independently of the without prejudice offer made on behalf of the employer. There is an allegation of bias against the Director because of the manner in which the information contained in the without prejudice communication was used. This allegation is unsupported by either argument or evidence. I adopt and apply the words of the Court of Appeal in *Adams v. Workers Compensation Board* (1989), 42 B.C.L.R. (2d) 228 (C.A.) at p. 231, to that argument:

> This case is an exemplification of what appears to have become general and common practice, that of accusing persons vested with the authority to decide the rights of parties of bias or reasonable apprehension of it without any extrinsic evidence to support the allegation. It is a practice which, in my opinion, is to be discouraged. An accusation of that nature is an adverse imputation on the integrity of the person against whom it is made. The sting and the doubt about integrity lingers even when the allegation is rejected. It is the kind of allegation easily made but impossible to refute except by general denial. It ought not to be made unless supported by sufficient evidence to demonstrate that, to a reasonable person, there is a sound basis for apprehending that the person against whom it is made will not bring an impartial mind to bear upon the cause.

In response to the second reason for appeal, I do not agree that the Director failed to consider, or adequately consider, the employer's records. In fact, having heard the evidence and reviewed the material on file, I can find no reason for giving any effect to the employer's records at all. Simply put, the employer's records are, by Mr. Therrien's own acknowledgement, incomplete and inaccurate in regards to recording Hillegeist's overtime hours worked. It is quite apparent from the Determination that is also why little or no consideration was given to the employer's records by the Director. Nothing in this appeal has convinced me the Determination was wrong in that respect. As far as using Hillegeist's record of hours worked, the Tribunal made the following comment in *Re Mykonos Taverna operating as Achillion Restaurant*, BCEST #D576/98:

> After the Director has determined that a person has lost wages because of a contravention of the *Act*, the task of establishing what amount of wages are payable can be a difficult one. That task can be made more difficult where the information necessary to determine the amount owed by reason of the contravention is unavailable or incomplete. Consistent with the statutory objective of achieving "efficient" resolution of disputes, the Director has considerable latitude in deciding what information will be received and relied upon when reaching a conclusion about the amount of wages that may be owing. If that decision is sought to be challenged *on its facts*, the burden on the appellant is to show either that the decision was manifestly unfair or that there was no rational basis upon which the conclusions of fact relevant to the decision could be made. This is consistent with the statutory and legal obligation of the Director to adhere to the principles of fairness and reasonableness when exercising her authority under the *Act* (see *Shelley Fitzpatrick operating as Docker's Pub and Grill*, BC EST #D511/98). In this case, the question is whether the appellant has shown the decision is unfair or unreasonable.

The appeal alleged that, generally, the record of hours worked provided by Hillegeist was suspect and questionable. There was no evidence provided or adduced at the hearing, however, to support that allegation. The questions raised in the appeal about the credibility and

authenticity of the record were, in my view, adequately answered by Hillegeist. In the appeal, counsel for Chuck's commented that ". . . the Claimant never worked 15 minutes of overtime or 45 minutes of overtime but always worked exact ½ hours or exact hours of overtime. . . . How is it genuine when it is always an exact hour or half hour - the nature of the evidence is contrived." In her reply, and in her evidence, Hillegeist stated that all employee time at Chuck's is recorded in ½ hour or one hour increments. Not only did Mr. Therrien provide no challenge to that evidence or give contrary evidence, he agreed with that statement at the hearing.

On the third ground, Chuck's argued that because Hillegeist had a duty to bring information concerning overtime to the employer and to input overtime hours worked or claimed into the payroll records, her failure to do so in her own case was a breach of that duty and " . . . by hiding this overtime, the Claimant potentially retained employment with the Employer for a longer period of time than that which the Employer would have retained her for if the Employer had been given full information by the Claimant." Counsel has submitted that to allow the claim would provide an unwarranted benefit to Hillegeist, in a sense rewarding her for a breach of duty, and would be an injustice to Chuck's.

There are two answers to this argument. First, it has no basis in fact. I accept the evidence of Hillegeist that she discussed the amount of overtime being worked on several occasions with Mr. Therrien and Mr. Manchur. I also accept that both were aware throughout that Hillegeist was working overtime and, either directly or indirectly, authorized it. There was no "hiding" of overtime worked. Second, it has no basis in law. The *Act* is broad based social legislation, enacted for the benefit of the public, and in particular for employees. The statute imposes positive duties and obligations on employers. Relevant to the circumstances of this case is the statutory obligation to keep payroll records (Section 28 of the *Act*) and the obligation to pay overtime wages (Section 40 of the *Act*). In my view, the alleged failure of Hillegeist to carry out certain employment "duties" related to her job function, even if that was established on the facts, would not release Chuck's from the obligation to obey the *Act*, nor enable them to escape from a statutory obligation arising from application of the requirements of the *Act*.

The final reason for appeal relates to the correctness of the calculations done by the Director. As noted above, the Director based her calculations on the record of hours recorded in Hillegeist's daily planner. I have concluded that no reviewable error has been shown in the decision of the Director to rely on the daily planner record as the basis for the calculation of the amount of overtime owed. In the appeal, there were 11 specific errors identified by Chuck's, totalling 30 hours of overtime. In her reply submission, the Director accepted there were errors made in 6 of the 11 cases and adjusted the Determination. At the hearing, 4 of the other 5 errors were addressed. Chuck's did not pursue the assertion that Hillegeist had not worked 6 hours on her final day of employment, October 13, 1999. Three of the remaining 4 alleged errors raised a question of whether the Director had failed to deduct a one hour lunch break from the hours worked December 31, 1998, January 16, 1999 and July 2, 1999. The record provided by Hillegeist showed she had worked 8 - 3 on December 31, 1998, 7 - 4 on January 16, 1999 and 8 - 5 on July 2, 1999.

The record provided by Hillegeist did not show lunch breaks. In calculating the number of hours worked each day, the Director typically deducted one hour for lunch. For example, on July 2, 1999, one of the days in question, Hillegeist's record shows she worked 8 -5, a total of 9 hours. The Wage Calculation Summary shows the Director recorded that day as 8 hours worked. No error has been shown in respect of that day. In respect of the other two days, in light of the typical approach taken by the Director of deducting an hour for lunch when calculating hours worked in a day and in the absence of some explanation in the Determination for taking a different approach, I find it was not fair and reasonable to have calculated hours worked on these two days as if no lunch break was taken. The Determination should be adjusted by deducting those two lunch hours from the hours worked.

The last matter raised concerned the week of December 13 - 19, 1998. Chuck's argued that a copy of the daily planner record was not provided. In reply, the Director indicated that while a copy of the record was not given because it included personal information, a transcript, based on the daily planner record and which showed the regular and overtime hours worked in that week, was prepared and provided to Chuck's. Chuck's had not established there is any basis upon which to interfere with the overtime calculation for that week.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination #071-314, dated December 5, 2000, be varied to show an amount owing of $6,020.80 less two hours at the applicable overtime rates, together with any interest that has accrued on the resulting amount pursuant to Section 88 of the *Act*. In all other respects the Determination is confirmed.

DAVID B. STEVENSON

David B. Stevenson
Adjudicator
Employment Standards Tribunal