Employment Standards TRIBUNAL

An appeal

- by -

Rite Style Manufacturing Ltd.
("Rite Style" or "Employer")

- 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: Paul E. Love

FILE No.: 2002/160

DATE OF DECISION: May 30, 2002

DECISION

OVERVIEW

This is an appeal by the employer of a Determination dated March 19, 2002. I dismissed the appeal as the Employer did not show that the Delegate erred in the Determination. The Determination made by the Delegate rested primarily on the Delegate's assessment of the credibility of the parties. The Employer filed an appeal, without any supporting document, alleging an error by the Delegate in the facts found. This was a case where the Employer neglected or refused to provide documents, and respond to letters sent by the Delegate to the Employer setting out the preliminary findings based on information supplied by the parties and their witnesses. The Employer was given an adequate opportunity to participate in the investigation. The Employer demonstrated no errors in the Delegate's fact finding process. This was a case where the Employer clearly breached the overtime pay provisions of the *Act*, by paying for hours of overtime worked at straight time rates. This appeal can also be characterized as a frivolous appeal, as the appeal was so bereft of detail as to the errors of fact alleged to be made by the Delegate.

ISSUE TO BE DECIDED

Did the Delegate err in determining that the employee was entitled to an overtime premium on hours worked during the meal break and on Saturdays following a five day, 8.5 hour work week?

FACTS

This appeal proceeded on written submissions, without an oral hearing. Satnam K. Dhoot worked as a receptionist for Rite Style Manufacturing Ltd. between April 1996 and June 26, 2000. She worked 8.5 hours per day, Monday to Friday, and on Saturdays. Her final rate of pay was $10.00 per hour. Rite Style is engaged in the cabinet manufacturing business, in Richmond, British Columbia.

The Delegate found that Ms. Dhoot and four other ex employees were expected to stay in the office during the meal break, which the Employer established as 12:30 pm to 1:00 pm.. The Delegate found that Ms. Dhoot did not get an uninterrupted lunch break. During the lunch break "all front end staff" including Ms. Dhoot were expected to answer telephone calls, and serve customers dropping in to place orders or obtain quotes, while the remainder of the operation was shut down.

During the course of the investigation, on November 30, 2001, the Delegate sent to Mr. Ajit Singh Gill, the president of Rite Style, a letter setting out his findings. Mr. Gill did not send any additional responsive information. The Delegate issued a "final investigation findings letter" on December 12, 2001 along with a copy of a relevant tribunal authority. The Employer did not respond to this letter. The Delegate issued a further letter to the Employer on January 23, 2002, which the Employer chose not to respond to. The Delegate issued the Determination on March 19, 2002.

During the course of the investigation the Delegate considered the argument presented by the Employer that he did not authorise overtime to be worked by Ms. Dhoot, and that he only paid for the lunch break because Ms. Dhoot exaggerated her time sheet, and he signed the cheques that she prepared, without reading the cheques. The Delegate, however, also considered the other evidence from employees which

was to the effect that the Employer had a long standing practice of paying for 8.5 hours per day, which included payment for the lunch break, at straight time. The Delegate found as a fact that:

> There is significant evidence that supports Dhoot's allegations that the payment of a working lunch break was a long standing practice that the employer was well aware of.

In the Determination, the Delegate also notes that Mr. Gill could view the receptionist accounting area, as there was a large glass window overlooking this area, from Mr. Gill's office. The Delegate found that Mr. Gill was in a position to observe Ms. Dhoot and others working over the lunch break. The Delegate further noted that Mr. Gill had not reported the alleged fraud to the police. The Delegate found that Mr. Gill's signature on the cheque was an authorization for the working of overtime. The Delegate did not accept Mr. Gill's evidence that he "blindly" signed the cheques that were presented to him by Ms. Dhoot, and there was evidence before the Delegate that Mr. Gill took an active part in comparing the cheque stubs, to the company log books containing the time clock records.

As a result of the investigation the Delegate determined that Ms. Dhoot was entitled to the sum of $3,820.11 which consisted of the premium rate on overtime hours worked, and vacation pay. It is unnecessary to set out the particulars of the calculation as the Employer has not particularized the errors that he suggests were made by the Delegate in the calculations.

Employer's Argument

The entire appeal submission of the Employer consists of the following paragraph:

> There has been an error in the facts. Dhoot worked 8.5 hours per day, and she paid herself for 8.5 hours per day. I didn't know she was paying herself for her lunch period. Sometimes she worked on Saturdays, and I paid her. I feel the facts have been misunderstood with regard to any overtime due. Dhoot has miscalculated her time worked to show overtime when, in fact, these figures have been inflated.

In filing out the appeal form, the Employer indicated the reasons for the appeal, by "checking" the various boxes of the appeal form: that there was an error in the facts, a different explanation of facts and other facts that weren't considered during the investigation. The Employer indicated that the matter required an oral hearing to "clarify facts". The Employer indicated that he wanted the Tribunal to "change to reflect true amount owed or further investigate".

Employee's Argument

The Employee submits that there is no error in the Determination. She says that the Employer had a long standing practice, which pre-dated her arrival, of paying all the "front end" office staff for the lunch break, at straight time rates. She says that she was required to serve customers during the meal break. She says that Mr. Gill carefully checked over all the paycheques before he signed a cheque.

Delegate's Argument

The Delegate submits that the Employer was given an adequate opportunity to participate in the investigation, but the Employer chose not to participate. The Delegate says that he determined the information on the basis of the material which was provided, and that the Employer has not demonstrated

any error in the findings that he made. Further the Delegate submits that the employer's appeal is devoid of merit, with no evidence to challenge or controvert findings, and should be dismissed as frivolous, vexatious or trivial or not brought in good faith.

ANALYSIS

The burden is on the appellant, in this case the Employer, to demonstrate that there is an error in the Determination such that I should vary or cancel the Determination. The Delegate issued a lengthy (12 pages) reasoned Determination. The investigation revealed that Rite Style paid overtime at straight time rates, in violation of s. 40 of the *Act*, for the daily lunch break, and for work on Saturdays. The investigation also revealed that the Employer required, either directly or indirectly, the Employees to work through their lunch break. This case rested on the Delegate's assessment of the credibility of the parties. The Delegate preferred the evidence of the Employee with regard to the requirement to work through the lunch break.

I note that s. 32(2) the *Act* places the burden on the Employer to ensure that an Employee takes an uninterrupted break:

> 32(2) An employer who requires an employee to be available for work during a meal break must count the meal break as time worked by the employee.

If an Employer fails to take any steps to manage the Employees to ensure that an Employee does take a break, that Employer will be found liable for paying the wages of the Employee. In this case, the Delegate did not accept the Employer's evidence, given that there was a long standing practice of paying straight time (and not premium overtime rates) for the lunch hour, and that Mr. Gill was in a position to stop the practice, which was in his plain view, if he chose to do so.

With regard to overtime payments, s. 40 of the *Act* clearly specifies that an employer must pay an employee at 1.5 times the regular wage for hours worked over 8 per day, and 40 hours per week, where the Employee works overtime. This case does not appear to involve the double time premium rate. The correct rate of pay for the meal break, and for hours worked on Saturday, was the premium rate of 1.5 times the regular wage, as set out in 40(1)(a), and 40(2)(a) of the *Act*.

This was a case where the Employer neglected or refused to provide records to the Delegate concerning other employees, in a similar position to Ms. Doot, after a Demand for Employer records was made by the Delegate. This is a case where the Employer, in effect, either neglected or refused to participate in the investigation by the Delegate. Further this is a case where the Employer's appeal submission is so bereft of detail, that the appeal and falls within definition of a frivolous appeal. I refer in particular, to the definition of frivolous appeal referred to in *Online Curbing and Concrete Ltd.*, BC EST # D589/97 at page 3:

> ...Section 114(1)(c) of the Act allows the Tribunal to dismiss an appeal if it is "... frivolous, vexatious or trivial or is not brought in good faith. Black's Law Dictionary (6th edition) defines "frivolous as: A pleading (which) is clearly insufficient on its face and does not controvert the material points of the opposite pleading, and is presumably interposed for mere purpose of delay or to embarrass the opponent. A claim or defence is frivolous if a proponent can present no rational argument based upon the evidence or law in support of that claim or defence.

For all the above reasons, I am satisfied that the Employer has shown no error in the Determination.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination dated March 19, 2002 is confirmed.

Paul E. Love
Adjudicator
Employment Standards Tribunal