Employment Standards TRIBUNAL

An appeal

- by -

Nahar Sidhu and Parmjit Bhangu operating as Earl's Woodroom

- 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:** Kenneth Wm. Thornicroft

**FILE No.:** 2003A/140

**DATE OF HEARING:** August 6, 2003

**DATE OF DECISION:** August 19, 2003

# DECISION

## APPEARANCES:

| | |
|---|---|
| Claire Pagé, Barrister & Solicitor | for Nahar Sidhu and Parmjit Bhangu |
| Garry Younge | on his own behalf |

## INTRODUCTION

This is an appeal filed by legal counsel on behalf of Nahar Sidhu ("Sidhu") and Parmjit Bhangu ("Bhangu"). This appeal is filed pursuant to section 112 of the *Employment Standards Act* (the *"Act"*). The appellants appeal a Determination that was issued by a delegate of the Director of Employment Standards (the "Director") on April 4th 2003 (the "Determination").

The appellants were partners in a firm that was known as "Earl's Woodroom"; it is my understanding that the firm--a producer of wood mouldings and other value added lumber products--was formerly located in Langley, B.C. but has now ceased operating.

Following an investigation, the Director's delegate determined that Messrs. Sidhu and Bhangu owed their former employee, Garry Younge ("Younge"), the sum of $14,225.23 on account of unpaid wages and section 88 interest. The award in favour of Mr. Younge reflects unpaid overtime wages, vacation pay and six weeks' wages as compensation for length of service

I heard this appeal in Abbotsford, B.C. on August 6th, 2003. The appellants testified on their own behalf and, in addition, called one other witness, Mr. Gurmail Thandi. Mr. Younge testified as the sole witness on his own behalf. In addition to the *viva voce* evidence, I have also considered the various documents and submissions submitted by the parties to the Tribunal.

## ISSUES ON APPEAL

Counsel for the appellants says that the Determination ought to be cancelled because the delegate erred in law and failed to observe the principles of natural justice in making the Determination. In addition, counsel says that there is new evidence that was not available at the time the Determination was being made.

I shall address these issues in turn.

## ANALYSIS

***Natural Justice and New Evidence***

I propose to address the above-noted two issues together since counsel, in effect, advanced a single submission with respect to these two grounds of appeal. In short, counsel says that the delegate failed to make full and complete disclosure to the appellants about the nature of Mr. Younge's claim and, accordingly, the appellants--who were not legally represented during the investigation--did not provide certain information to the delegate.

Counsel conceded that if I accepted the appellants' "new evidence" then the "natural justice" issue would be moot since whatever breach there may have been would be cured by the appeal hearing. Two documentary items of so-called "new evidence" were tendered; first, an agreement of purchase and sale of the assets of the Earl's Woodroom operation and second, Mr. Younge's "job application" seeking continued employment with Earl's Woodroom after the asset sale.

While these latter two documents may not have been provided to the delegate they simply corroborate submissions that were, in fact, made to the delegate (and these issues were discussed in the delegate's Reasons for Determination). These documents do not concern entirely new matters and, in that sense, do not constitute "new evidence". It should also be noted that the delegate did not conduct an oral hearing and, so far as I can determine, never specifically requested the production of these two particular documents from the appellants even though the delegate must have been generally aware of their existence. As noted, the appellants were not represented by legal counsel during the investigation and may not have fully appreciated that these documents should have been provided to the delegate even though the substantive content of the documents was disclosed. In light of the foregoing, I am satisfied that these two documents are properly before me. Having said that, however, I am not satisfied that this appeal turns on the admissibility of these two documents. In other words, whether or not these documents are properly before me, I would allow the appeal, at least in part.

Each of these documents is relevant to the errors of law that the delegate is alleged to have made in issuing the Determination. Accordingly, I now turn to those latter matters.

***Error of Law: Length of service***

Counsel for the appellants says that the delegate erred in two fundamental respects.

First, it is asserted that Mr. Younge was not entitled to vacation pay at a rate of 6% nor to six weeks' wages as compensation for length of service given that he was only employed by the appellants during the period from May 2001 until May 3rd, 2002. The appellants concede that Mr. Younge's employment was terminated without cause and that he is thus entitled to compensation for length of service; the appellants submit, however, that the delegate erred in awarding Mr. Younge compensation based on his having over six consecutive years of service.

"Earl's Woodroom" was operated by an incorporated firm, "Earl's Woodroom Inc." for many years. The firm was founded by Earl Young--Garry Younge's father--and Garry Younge worked at the firm for several years commencing in October 1995. During the years of his father's stewardship, the firm never had more than a few employees and Garry Younge's main operational task apparently was running a

machine known as a "moulder" (a type of planer) although he also had some sort of supervisory responsibilities.

The appellants formed a partnership for the purpose of acquiring the assets of Earl's Woodroom Inc. Mr. Sidhu was to be the "operating" partner whereas Mr. Bhangu's role was of a much more limited nature--he characterized himself as more of a "silent" partner in the enterprise. A rather rudimentary asset sale agreement was concluded sometime in April 2001 (the agreement is dated "the ____th day of April 2001") between the appellants and Earl's Woodroom Inc. The effect of the agreement was that the appellants would acquire all of the business assets of the corporate vendor and continue to operate the business in the same location and under the same trade name. Paragraph C(e) of the agreement states that "Earl's Woodroom Inc. will terminate all employee's [sic] as of close of business May 11, 2001".

The latter clause, of course, represents a contractual obligation on the part of the corporate vendor and if that obligation was not satisfied that is a matter between the appellants and the corporate vendor (Mr. Garry Younge was not, so far as I can determine, a principal of the vendor corporation).

There is no credible evidence before me that Mr. Younge's employment was formally severed in accordance with the provisions of section 63 of the *Act* prior to the completion of the asset sale and that he was subsequently independently rehired by the appellants. The appellants clearly expected that Mr. Younge would continue on as an employee of the business; indeed, Mr. Younge's continued employment was critical to the continued success of the business.

Mr. Bhangu testified that he was well aware of Garry Younge and that the appellants expected he would continue on and provide an ongoing connection to the customer base and, in addition, train Mr. Sidhu in the business operations. In Mr. Bhangu's words, the appellants wanted Mr. Younge's "experience" and that their intention was to "keep him on as manager" of the business since he would provide the requisite business continuity.

Mr. Sidhu testified that he provided "job application" forms to the employees of Earl's Woodroom, including Mr. Younge, and asked the employees to fill out the forms and return them to him. All of the employees who completed applications were "rehired", including Mr. Younge. The evidence before me is that Mr. Younge's employment continued uninterrupted by the asset sale although, clearly, he ceased, in a formal or technical sense, to be employed by the corporate vendor and then immediately was rehired by the appellants. Mr. Younge's employment ended with the corporate vendor on Friday May 11th, 2001 and he continued on the following Monday (May 14th) formally in the employ of the appellants.

The Director's position is that Mr. Younge's service should be credited as and from his original date of hire by the corporate vendor by reason of section 97 of the *Act.* This latter provision states that in the event of an asset sale, the employment of the employees of the business is deemed to be continuous and uninterrupted by the sale.

In light of the uncontradicted evidence that Mr. Younge's employment continued uninterrupted by the sale--and this continuance was entirely consistent with the appellants' expectations, it might be pointed out--I am not persuaded that the delegate erred in law in crediting Mr. Younge's service (for purposes of calculating his entitlement to vacation pay and compensation for length of service) as and from his original date of hire by the corporate vendor. The delegate's decision in this regard appears to be entirely in line with previous Tribunal decisions such as *Columbia Recycle Ltd.*, B.C.E.S.T. Decision No. D070/96; *Gray*, B.C.E.S.T. Decision No. D151/96; *510321 B.C. Ltd.*, B.C.E.S.T. Decision No. D014/97;

*B.J. Heatsavers Glass and Sunrooms Inc*., B.C.E.S.T. Decision No. D131/97; and *Kim*, B.C.E.S.T. Decision No. D367/97.

***Error of Law: Mr. Younge's status and his claim for overtime pay***

Second, counsel for the appellants submits that the delegate erred in awarding Mr. Younge any overtime pay since he was a "manager" as defined in section 1(1) of the *Employment Standards Regulation.* "Mangers" are excluded from the hours of work and overtime provisions (Part 4) of the *Act*--see section 34(1)(f) of the *Employment Standards Regulation.*

Alternatively, counsel says that even if Mr. Younge was not a manager, the delegate erred in calculating his overtime claim in that Mr. Younge was credited for substantially more overtime hours than he actually worked.

For purposes of this appeal, the following definition of "manager" applies (the definition, below, was amended on November 30th, 2002):

> "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 appellants' position before the delegate is set out at page 2 of the "Reasons for the Determination":

> Since Younge was paid a monthly salary, the Employers believed that Younge was a Manager for their business and therefore not eligible for overtime as the other employees were. They also allege that Younge, due to a medical condition, took a lot of sick days and his salary was not reduced for this time off.

Mr. Younge's position on this issue, as communicated to the delegate, is as follows (Reasons for Determination, p. 3):

> Younge continued to work at Earl's in the same capacity as he had when before it was sold. His job title was that of Grinder man, Moulder Operator and Supervisor. Younge states that he was not a Manager and that the Employers were aware of the overtime hours he worked.

The delegate concluded that Younge was not a "manager" as defined in the *Regulation* (Reasons for Determination, p. 5):

> In this case, Younge's primary employment duties consisted of operating the moulder and grinder; his secondary duties may have been to supervise the other employees.

The above-quoted statement represents the sum total of the delegate's analysis regarding the question of Mr. Younge's status.

The evidence before me is that Mr. Earl Younge, Garry Younge's father, was very ill and was residing in Duncan, on Vancouver Island, prior to the asset sale. The day-to-day business affairs of Earl's Woodroom were being managed by Garry Younge (although he was in regular contact with his father by telephone). Prior to the asset sale, Mr. Sidhu had a full-time job and he continued in that position

following the sale; Mr. Bhangu was never actively involved in the day-to-day business affairs of Earl's Woodroom; his role was more akin to that of a mere investor. Thus, Garry Younge was the one employee that the appellants particularly relied on to ensure that the business operations continued apace after the sale.

I now turn to Mr. Younge's own testimony about his role in the business after the sale. First, however, there are some uncontested facts to be noted. Mr. Younge completed an "Application for Employment" in which he sought continued employment as the "Production Manager". It should be noted that this latter job title was of Mr. Younge's own choosing and while titles do not determine actual status, it should be remembered that Mr. Younge was asked to submit an application--as were all employees--for the very same position he held before the sale. Second, Mr. Younge was the only employee, after the sale, who was paid a salary--again, while the form of payment is not determinative of status, in this case it suggests that he was being placed on a separate footing from the other employees. I also note, in this latter regard, for example, that while other employees were regularly paid overtime for their extra hours, Mr. Younge was not (he did receive sporadic, and rather small, "bonuses" to compensate for some additional hours worked).

Mr. Younge conceded that he alone prepared the quotations for any new business the firm solicited or was otherwise asked to bid on. He agreed that if there was a safety issue in the plant he would have taken it upon himself to discipline the employee in question. He agreed that while he was employed by the appellants he never submitted any time cards claiming overtime even though he knew that other employees did so--in my view, his actions in this regard are entirely consistent with his subjective view that he was not entitled to claim overtime since he was, in fact, the on-site manager of the business. He applied for the "production manager" position and was never told that his application was unsuccessful; indeed, he was rehired at the very salary level he sought in his application. Mr. Younge agreed that Mr. Sidhu was not in a position to direct and control other employees because Mr. Sidhu, unlike Mr. Younge, did not have the requisite knowledge or experience to do so. Further, Mr. Sidhu was only infrequently on-site. Mr. Younge set up the equipment, did troubleshooting and repairs and on at least one occasion told an employee--who appeared to be intoxicated--to stop working. Even Mr. Younge conceded that he "managed" the business if only because no one else was willing or able to do so. My note of his submission on this point is as follows:

> They [referring to the appellants] weren't there. I managed by default. I didn't let everyone stand around. Someone had to say what to do.

The uncontradicted evidence of the appellants is that Mr. Younge made recommendations about acquiring new equipment--which were accepted; he prioritized the work to be done each day in the plant; he directed employees to work overtime if that was required (sometimes in consultation with Mr. Sidhu, other times on his own motion); he made the necessary arrangements to call in other staff if an employee called in sick. Mr. Younge dealt with the firm's clients and was a primary contact between them and the business. There were several occasions when Younge left work early or simply didn't report for work due to his medical condition and his pay was never docked for these absences; any other employee who missed a shift due to illness would not have been paid for that day.

Mr. Gurmail Thandi worked at the plant during the period from April to October 2002. His evidence was that "Garry told us [the employees] what to do" each day; that his overtime was authorized by Younge; that he was, on some days, sent home early (by Younge) if there was not enough work to do; that Younge

sometimes called in extra staff if demanded by the day's work load. In general, Mr. Thandi characterized Younge's role as "running the shop".

Undoubtedly, and not atypically for a small plant with few employees, Younge carried out non-managerial work tasks. Mr. Younge did not spend the bulk of his workday supervising other employees and, indeed, Younge had his own independent labouring work to do each day (e.g., operating the moulder machine). Nevertheless, someone had to manage the plant (and indeed, the entire business) on a day-to-day basis and that someone was Mr. Younge; neither appellant had the time or the capability to do so.

Further, although the total amount of time spent supervising other employees is a factor in determining "manager" status, that one factor is not determinative--see *Amelia Street Bistro*, B.C.E.S.T. Decision No. D479/97. "Mangers" typically exercise some or all of the following authorities--making final decisions regarding the business; hiring and firing; disciplining employees; authorizing overtime; calling employees in to work or sending them home; altering work processes and training employees (see *Anducci's Pasta Bar Ltd.*, B.C.E.S.T. Decision No. D380/97). The evidence before me is that, other than hiring or firing employees, Mr. Younge exercised each and every one of the aforementioned managerial prerogatives.

I am of the view that the delegate erred in law in concluding--because "supervising other employees" was only a "secondary duty"--that Mr. Younge was not a "manager". In my view, the delegate took an overly narrow view of the matter by considering only one aspect of the managerial function, namely, direct employee supervision. Since, in my opinion, Mr. Younge was a "manager" during the term of his employment by the appellants, he was not entitled to be paid--absent an express contractual agreement--overtime in accordance with Part 4 of the *Act.*

Accordingly, I would allow the appeal, in part, by cancelling the award made in favour of Mr. Younge on account of overtime pay.

In the event that I have erred with respect to the issue of "manager" status, I should perhaps note that I would not have otherwise varied the Determination with respect to the amount of overtime pay awarded. In my view, the delegate properly accounted for those overtime hours that were claimed but not actually worked and I see no basis for any further reduction.

There is one further adjustment, however. The delegate made a deduction from the total wages otherwise payable on account of "Salary paid on days Younge was absent from work". The evidence of the appellants was that they were well aware of Mr. Younge's health issues before the sale and that an offer of continued employment was made to him on the understanding that Younge would find it necessary to be away from work on occasion because of his health. The agreement between the parties was that Younge would be paid his salary in full and that there would not be any deductions on account of days (or partial days) not worked due a health-related absence. In light of the contractual agreement between the parties, the delegate should not have deducted wages to account for any so-called "sick days".

**ORDER**

Pursuant to section 115 of the *Act,* I order that the Determination be varied by cancelling the award made in favour of Mr. Younge on account of overtime pay ($9,811.34).

Further, the Determination must be varied so that the adjustment on account of "Salary paid on days Younge was absent from work" ($753.95) is deleted.

The total award must similarly be varied to account for concomitant adjustments in vacation pay and interest.

In all other respects, the Determination is confirmed.

**Kenneth Wm. Thornicroft**
**Adjudicator**
**Employment Standards Tribunal**