Employment Standards TRIBUNAL

An appeal

- by -

City of Fort St. John
("Fort St. John")

- 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.: 2003A/199

DATE OF DECISION: September 2, 2003

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by the City of Fort St. John ("Fort St. John") of a Determination that was issued on June 5, 2003 by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded that Fort St. John had contravened Part 3, Section 17 of the *Act* in respect of the employment of Bryan Collier ("Collier") and ordered Fort St. John to cease contravening and to comply with the *Act* and *Regulations* and to pay Collier an amount of $4186.74.

The Director also imposed an administrative penalty on Fort St. John under Section 29(1) of the *Employment Standards Regulation* (the *"Regulations"*) in the amount of $500.00.

Fort St. John says the Director erred in law.

Fort St. John has requested an oral hearing on the appeal, arguing there are some issues of credibility related to the terms of the employment contract between the parties. Generally, the Tribunal will not hold an oral hearing on an appeal unless the case involves a serious question of credibility on one or more key issues or it is clear on the face of the record that an oral hearing is the only way of ensuring each party can state its case fairly (see *D. Hall & Associates Ltd. v. British Columbia (Director of Employment Standards)* [2001] B.C.J. No. 1142 (B.C.S.C.).

After considering the Determination, the appeal and the material on file, the Tribunal has decided an oral hearing is not necessary in order to adjudicate the appeal.

ISSUE

The issue is whether the Director erred in finding Fort St. John owed Collier the amount ordered to be paid.

FACTS

Collier was employed by Fort St. John as Deputy Fire Chief from August 10, 1998 to December 11, 2002. For the purposes of the Act, Collier was a manager. By operation of Section 34 of the *Regulation*, the provisions of Part 4 of the *Act*, Hours of Work and Overtime, did not apply to his employment.

The Director found no written contract of employment specifying the number of hours Collier was to work for the salary he received, but concluded a regular day for Collier comprised 7 hours of work and a regular work week comprised 35 hours. The Determination set out five reasons for reaching that conclusion. During his last six months of employment, the Director found Collier had worked 172 extra hours and in all of 2002 had worked 295 extra hours

The Determination noted that although there was no written contract signed by Fort St. John and Collier, the letter offering Collier the position (which he accepted) attached a "draft standard management contract". That contract included, in Schedule C, reference to overtime compensation, which stated:

> The Employer recognizes that management employee's [sic] may have to work occasional overtime and the Employer provides one (1) additional week's vacation in lieu of this overtime.

> Where the Employer obligates the Employee to work an extensive amount of excessive overtime, the City Manager has the authority to provide compensation recognition by methods including time off in lieu, flexible work hours, or monetary considerations on the basis of merit.

There was also evidence before the Director that Fort St. John had established an overtime policy for exempt employees that provided, in part:

> . . . an employee who works overtime in excess of 163 hours per calendar year to a maximum of 200 hours per calendar year will be reimbursed for the remaining hours at a 30% ratio of their hourly rate of pay. The maximum number of 163 per year are reflective of the exempt personnel currently receiving one week's vacation in lieu.

On the termination of his employment, Collier received one week vacation payout in the amount of $1354.15, $1532.12 for the hours worked in excess of 163 in 2002 and a $1000.00 "performance bonus". While it is not entirely clear, the Determination and the record appear to indicate that the vacation payout was in lieu of the first 163 hours of extra time worked. Also, in providing the details of his complaint to the Director, Collier indicated the amount he claimed was owing for extra hours worked should be reduced by "35 hours for one week vacation", an amount of $1354.15.

ARGUMENT AND ANALYSIS

The burden is on Fort St. John to show an error in the Determination that justifies the intervention of the Tribunal under Section 115 of the *Act*.

Subsection 112(1) of the *Act* 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.

Fort St. John says the Director erred in law. Four grounds are identified:

1. The Director erred in concluding 7 hours a day constituted a regular work day for Collier;
2. The Director erred in finding there was an agreement between Fort St. John and Collier that his remuneration was for a specific number of hours worked per day or per week;
3. The Director erred in finding Collier was entitled to compensation for hours worked in excess of 7 in a day; and
4. The Director erred in finding the policy of the City to compensate employees for extra hours worked had the potential to contravene the *Act*.

The first three grounds of appeal are predominantly dependent on an interpretation and application of the employment contract between Fort St. John and Collier and raise questions of law. In *Re Kocis*, BC EST #D331/98 (Reconsideration of BC EST #D114/98), the Tribunal stated:

> The relationship between employee and employer is one of contract, and the effect of the Act is to prescribe minimum conditions for contracts of employment. The interpretation of an employment contract is a question of law.

I shall address the first three grounds below. The fourth ground, however, may be disposed of summarily. This ground relates to a statement of fact or opinion made by the Director, which the Director indicated was "separate from the issue at hand". I am not persuaded there is any basis for the Tribunal interfering under Section 112 of the *Act* with that statement and this aspect of the appeal is dismissed.

The appeal submission also says the following errors were made by the Director:

1. finding Collier had a regular work day comprising 7 hours;
2. finding Fort St. John's "overtime" policy indicates an intention to pay exempt employees covered by the policy at straight time for each hour worked in excess of 7 in a day or 35 in a week; and
3. finding Collier was entitled to wages for each hour worked in excess of 7 in a day or 35 in a week.

The main point of contention raised in the appeal is whether the Director erred in finding that a regular day and a regular week for Collier comprised 7 hours and 35 hours of work, respectively. Fort St. John reiterates the position it expressed during the Determination process: that there was no reference in the draft management agreement to a regular work day or week; that Collier was told, and understood, that he would be required to work evenings and weekends; that all managers, including Collier, work the hours necessary to get the job done; and that their decision to use a 7 hour day and 35 hour week to track an employee's time at work, their absences and their use of various leaves and vacation was arbitrary and was never intended to reflect an agreement that a manager's salary was based on a 7 hour day/35 hour week. In sum, Fort St. John says that a regular 7 hour day/35 hour week was never part of the employment contract.

In my view, the Determination identifies a sound factual foundation for the finding made by the Director and I also dismiss this ground of appeal.

I also dismiss the argument that, as a matter of law, managers are not entitled to payment at straight time for hours worked in excess of 40 in a week unless there is an express agreement to that effect. The Tribunal decisions *Devonshire Cream Ltd.* and *UAP Inc.*, which are cited by Fort St. John for that proposition, do not state any such principle of law. As the Tribunal has noted in several of these kinds of cases, the entitlement of managers to be paid for hours worked in excess of a "set" number of hours depends on the terms of their employment contract.

I do agree, however, that the Director has erred in law by not giving effect to the employment contract as it relates to payment for extra hours worked.

The Determination and the record quite clearly demonstrate an agreement between Fort St. John and Collier on how Collier would be compensated for extra hours worked. An employment contract does not need to be in writing and signed by the parties in order to be given effect. The agreement for paying extra hours worked consists of the following components:

- for the purpose of calculating the number of extra hours worked (among other things), a regular work day shall be comprised of 7 hours work and a regular work week shall be comprised of 35 hours work;
- one week's additional paid vacation shall be given in lieu of the first 163 extra hours worked,
- payment for hours worked in excess of 163 (to a maximum of 200) shall be given at a rate which is 30% of Collier's hourly rate of pay; and
- additional compensation in the form of additional time off, flexible work hours or monetary considerations may be given at the discretion of the City Manager.

In this context, I note that even though Collier had issues with some of the terms of his employment contract throughout his employment, there is no indication that he did not agree to the "overtime" terms. His letter of May 28, 1999 (Exhibit 15), demonstrates that he understood and accepted the exempt overtime policy as an operating term of his employment. The record also indicates he accepted the additional week of vacation and understood that it was provided in lieu of the first 163 extra hours worked.

The Director has not given effect to all of the terms of the employment contract relating to payment for extra hours. The Determination addresses the employment contract only in terms of whether it made any mention of the hours which Collier would be working. That is an incorrect approach. The correct approach is to look at all of the terms of the employment contract which relate to issue at hand and, to the extent possible, give effect to them. It is trite that if a provision of the employment contract contravenes the *Act*, it will be given no effect. In *Shell Canada Products Limited, Produits Shell Limitée*, BC EST #D488/01 (Reconsideration of BC EST #D096/01), the Tribunal made the following comments about the proper role of the Director in dealing with private contractual arrangements:

> The legislature has not seen fit to grant the Director a roving mandate to regulate private employment contracts that in all respects satisfy the minimum statutory requirements of the *Act*. The authority of the Director is limited to enforcing such agreements. The Tribunal has also accepted that parties are free to arrange their relationship as they choose provided the terms of a private employment contract do not contravene the requirements of the *Act* and are otherwise consistent with the objectives and purposes of the legislation.

Because Collier was a manager for the purposes of *Act*, he was not entitled to receive overtime; he was entitled to be paid according to the terms of his employment contract, which might include entitlement to be paid for hours worked in excess of a set number of hours. If his employment contract did not meet the minimum standards of the Act, then Collier was entitled to receive the minimum requirements of the *Act*.

In such circumstances, the correct approach for the Director to have taken was first to ask whether there was an agreement to pay for extra hours worked and, if so, what were "extra hours" for the purpose of giving effect to the agreement. The Director found there was an agreement to pay for extra hours and, for the purpose of giving effect to that agreement, "extra hours" comprised hours worked in excess of 7 in a day and 35 in a week. As I have indicated above, there is a substantial factual foundation for making that finding and no error has been shown in respect of it. Next, the Director should have asked whether there was an agreement setting out how much Collier would get paid for working the extra hours. The Director did not directly ask this question. If the Director had directly asked the question, the answer would have been, "yes, the agreement was that he would be paid by receiving one week's additional paid vacation in lieu of the first 163 extra hours worked, 30% of his hourly rate for all extra hours worked in excess of 163 (up to a maximum of 200) and discretionary compensation that could take various forms". The Director should then have asked whether, in the circumstances, any part of the agreement contravened the requirements of the *Act*. The Director did not consider this question, although the following is found in the Determination:

> Separate from the issue at hand, it should be noted that the provisions of the Exempt Personnel Overtime Policy have the potential to contravene the requirements of the *Employment Standards Act*. . . . In addition, the 30% ratio reflects a somewhat arbitrary change to an employee's regular rate of pay. Further, it appears that the policy results in an employee receiving one week's vacation for working up to 163 hours of extra time. The practice of paying exempt employees for extra time worked in a year at the end of a calendar year may also contravene Section 17(1) of the *Act*, which requires employers to pay employees all wages they have earned at least semimonthly and within 8 days after the end of a pay period.

I have a number of notes to make about the above comments. First, while there is undoubtedly a "potential" to contravene the minimum wage requirements of the *Act* in the policy, there was no such contravention of the *Act* when the agreement was applied to Collier's circumstances. Collier worked 295 extra hours in 2002 and was paid $2886.27 for the extra hours worked ($1354.15 for additional vacation in lieu and $1532.12 for extra hours at 30% of his hourly rate)[1]. That works out to $9.78 for each extra hour worked, which satisfies the minimum wage requirements of the *Act*. Second, it is irrelevant that the Director perceives some aspect of overtime policy to be a "somewhat arbitrary change" to Collier's hourly rate. There is no prohibition in the *Act* to an employer and employee agreeing to an arbitrary change to an employee's hourly rate provided the result continues to comply with the *Act*. Third, while the practice of paying for extra hours may contravene Section 17(1), Collier's complaint is not with *when* he was paid for extra time he worked, but *whether* he was fully paid for all the extra time worked. In other words, the timing of payment for extra time worked was not a part of Collier's complaint and the possibility that the timing of the payment for extra hours worked might contravene the *Act*, does not justify a conclusion that Collier is entitled to be paid for all extra time worked at his full hourly rate. Finally, and in any event, the Director made no finding that the Policy contravened the *Act* in any way.

In fact, I can see no contravention of the *Act* in that part of the employment contract between Fort St. John and Collier relating to compensation for extra hours worked and the Director was wrong not to give it effect. The appeal is allowed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated June 5, 2003 be cancelled.

David B. Stevenson
Adjudicator
Employment Standards Tribunal

[1] I have not considered the $1000.00 bonus to be any part of the payment he received for extra hours worked.