Employment Standards TRIBUNAL

An appeal

- by -

Kamloops Golf and Country Club Limited
("KGCC")

- 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.: 2001/148

DATE OF DECISION: May 29, 2001

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by Kamloops Golf and Country Club Limited ("KGCC") of a Determination that was issued on January 25, 2001 by a delegate of the Director of Employment Standards (the "delegate"). The Determination concluded that KGCC had contravened Part 3, Section 18 and Part 8, Section 63 of the *Act* in respect of the employment of Michael Kupchanko ("Kupchanko") and ordered KGCC to cease contravening and to comply with the *Act* and to pay an amount of $9965.40.

KGCC has raised several grounds of appeal. They may be summarized as follows:

1. The Director was without jurisdiction to find KGCC had contravened a requirement of the *Act* by failing to pay Kupchanko wages for work in excess of 8 hours in a day or 40 hours in a week when Part 4 of the *Act* does not apply to managers;

2. The Director erred in calculating Kupchanko's hourly wage rate;

3. The Director erred by looking to the contract of employment between KGCC and Kupchanko for a requirement to pay overtime;

4. Alternatively, if Kupchanko is owed wages, the Director erred in accepting the record of hours provided by Kupchanko as such record was inaccurate, excessive and recreated after the fact;

5. The Director erred in concluding KGCC could not require Kupchanko to take his annual vacation during the period of notice provided by him that he was voluntarily terminating his employment; and

6. The Director erred in concluding KGCC terminated the employment of Kupchanko.

ISSUE

The issues are framed by the above grounds of appeal.

FACTS

KGCC is a golf facility in Kamloops, British Columbia. Kupchanko was employed in the position of Golf Course Superintendent from March 28, 1997 to June 30, 2000. At the time Kupchanko terminated his employment, there was a written employment contract between him

and KGCC, signed and dated March 1, 1999. A number of provisions in the employment contract were referred to in the Determination, including:

> 6. Termination of this agreement by said party of the first part [KGCC] will be accepted upon giving 60 days written notice to the said party of the second part [Kupchanko]. Termination by said party of the second part [Kupchanko] will also be accepted upon giving 60 days written notice to the said party of the first part [KGCC]. . . .
>
> Appendix B - Compensation
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> 1. Salary will be $48,720.00 for 1999, and not less than $52,000.00 for 2000.
>
> 2. Hours of work are expected to vary. High season demands that the Superintendent often works more than the standard 40 hour week. The Superintendent shall be compensated accordingly with time off in lieu during low season.
>
> 3. Four weeks annual vacation with pay per annum shall be granted during the contracted period, at such time as may be mutually agreed upon between the parties, with not more than two weeks vacation taken between the period June 01 and September 30 (note, vacation during that same period shall not exceed seven consecutive days).

Related to paragraph 1 of Appendix B, the Determination concluded Kupchanko's regular wage, for the purpose of calculating wages owed under the *Act*, was $23.42 an hour in 1999 and $25.00 an hour in 2000.

Related to paragraph 2 of Appendix B, the Determination stated:

> Mr. Kupchanko's pay statements show "eighty hours" as the regular number of hours worked during his bi-weekly pay periods. This confirms a normal work week of forty hours.

Related to paragraph 3 of Appendix B, the Determination found that upon termination Kupchanko had been overpaid annual vacation entitlement by one week.

The Determination found that Kupchanko was a manager under the *Act* and, pursuant to Section 34(1) of the *Employment Standards Regulation* (the *"Regulation"*), was excluded from the hours of work and overtime requirement found in Part 4 of the *Act*.

On May 1, 2000, Kupchanko gave KGCC written notice of his intention to terminate his employment effective June 30, 2000. In the same letter he indicated KGCC owed him pay in lieu of five weeks annual vacation not taken through 1999 and up to June 30, 2000 and "payment

for accrued overtime hours worked (to April 30, 2000) totalling a balance of 425.5 hours". KGCC responded on May 10, 2000, accepting the notice of resignation, confirming and accepting the claim for vacation entitlement, requesting Kupchanko take his vacation time during the notice period and declining the claim for overtime hours worked. As well, the letter offered Kupchanko "the balance of the time remaining in your notice period, after allowing for the five weeks vacation, as additional paid vacation time". Kupchanko's last day of work was May 12, 2000. He was paid his regular salary to June 30, 2000.

Kupchanko had kept a daily record of hours worked in day-timers and submitted his day-timers for the years 1999 and 2000 when he filed his complaint with the Branch. KGCC had not kept a daily record of hours worked by Kupchanko.

ARGUMENT AND ANALYSIS

The burden is on KGCC to persuade me that the Determination is wrong in law, in fact or in some combination of law and fact (see *Re World Project Management Inc.*, BC EST #D134/97 (Reconsideration of BC EST #D325/96)). Where an appellant is challenging a conclusion of fact made by the Director, the appellant must show that conclusion of fact was based on wrong information, that it was manifestly unfair or that there was no rational basis upon which it could be made (see *Re Mykonos Taverna, operating as the Achillion Restaurant*, BC EST #D576/98).

I will first address the jurisdictional argument. Counsel for KGCC says the Director had no jurisdiction to find a contravention of the *Act* or *Regulation* for failing to pay Kupchanko for work in excess of 8 hours in a day or 40 hours in a week, when he was found to be a manager under the *Act* and Part 4 of the *Act* does not apply to managers. In the appeal, counsel sets out the following points:

> 15. Part 4 of the *Act* is the part which sets the standards for hours of work and overtime.
>
> 16. There is no provision in the *Act* or *Regulation* which require an employer to pay a manager wages over and above the managers set salary.
>
> 17. The only requirements of an employer with respect to hours of work and overtime are contained in Part 4 of the *Act* from which the manager is exempt.

This identical argument was raised and considered by a panel of the Tribunal in *Re Dusty Investments c.o.b. Honda North*, BCEST #D043/99 (Reconsideration of BCEST #D101/98). The argument was rejected in that case, as it must be here. In that decision, the panel provided the following comments and analysis:

> We find no merit in this aspect of the application for reconsideration. The jurisdictional argument proceeds on two fundamental misconceptions about the

operation and application of the *Act*. The first misconception is that the Director has no jurisdiction to enforce more than minimum standards of employment. As counsel for Honda North says in his submission of January 7, 1999:

> The *Act* does not provide an exhaustive code of employment law for British Columbia, only certain minimum requirements of employment.
>
> The *Act* provides for a complaint, investigation and settlement mechanism by the Director of Employment Standards for circumstances where these minimum requirements of employment as set out in the *Act* have not been complied with.

That statement is not correct. The Director has authority under the *Act* to regulate and enforce the employment relationship, including elements of the employment relationship that exceed minimum standards. There is no doubt that a primary purpose of the *Act* is to ensure employees receive "at least basic standards of compensation and conditions of employment", but the application of the *Act* is not limited to enforcing only minimum standards. A brief examination of the statutory requirements relating to wages and payment of wages easily demonstrates this point. Section 1 of the *Act* defines wages:

"wages" includes

a) salaries, commissions and money, paid or payable by an employer to an employee for work,

b) money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency,

c) money, including the amount of any liability under section 63, required to be paid by an employer to an employee under this Act,

d) money required to be paid in accordance with a determination or an order of the tribunal, and

e) in Parts 10 and 11, money required under a contract of employment to be paid, for an employee's benefits, to a fund, insurer or other person,

but does not include

f) gratuities,

g) money that is paid at the discretion of the employer and is not related to hours of work, production or efficiency,

h) allowances or expenses, and

i) penalties.

There is nothing in that provision that defines wages in the context of the "minimum wage" provisions of the *Act*. Section 16 of the *Act* says:

16. An employer must pay an employee at least the minimum wage as prescribed in the Regulation.

If the *Act* was limited in its application to ensuring compliance with only "certain minimum requirements", as suggested by counsel for Honda North, reference to a requirement to pay "at least" minimum wage would be unnecessary.

Section 17(1) of the *Act* says:

17. (1) At least semi monthly and within 8 days after the end of the pay period, an employer must pay to an employee all wages earned by the employee in a pay period.

That subsection makes no reference to payment of only the minimum wage obligations of the employer, but of a requirement to pay "all wages". Section 18 of the *Act* says:

18. (1) An employer must pay all wages owing to an employee within 48 hours after the employer terminates the employment.

(2) An employer must pay all wages owing to an employee within 6 days after the employee terminates employment.

Again, there is no reference in that section to a requirement to pay only minimum wage. It is noteworthy that the Director concluded in the Determination that Honda North had contravened Sections 17 and 18 of the *Act*. In other words, the Director found Honda North had not paid Downey "all wages owing". In that context, the Director had the jurisdiction to decide whether and what wages had not been paid and was not limited in that task to determining only whether minimum wage had not been paid.

The second misconception by counsel for Honda North is that the Director concluded there was some provision in the *Act* that set the maximum number of hours of work in a day or a week for managers and that managers were entitled under the *Act* to be paid for hours worked in excess of 8 in a day or 40 in a week. In fact, all the Director concluded was that the basic terms of the employment agreement between Honda North and Downey was that Downey would be paid $3200.00 a month (later increased to $3286.66 a month) to work eight hours a day, 40 hours a week. That was a conclusion that was specific to the employment relationship between Honda North and Downey. It was not intended to, and does

> not, have general application to the employment relationship of other managers with their employers. That is simply a question of fact about the terms of the employment relationship and is conceded by Honda North.

In this case, the Director similarly concluded that the agreement between KGCC and Kupchanko was that his normal work week was 40 hours. There was a sound factual foundation for that conclusion in paragraph 2 of Appendix B of the employment agreement and in the pay statements, which showed eighty hours as the regular number of hours worked during Kupchanko's bi-weekly pay period. The logical conclusion, and the one reached by the Director, was that the salary being paid to Kupchanko was based on his working 40 hours a week. If that were not the understanding and the agreement between KGCC and Kupchanko, there would have been no reason to include a provision in the employment agreement compensating Kupchanko with "time in lieu" of hours worked in excess of 40 in a week during the high season.

I will digress briefly to clarify one matter. There was considerable reference in the material, including the Determination and the various submissions, to the extra hours worked by Kupchanko as being "overtime". The use of that term seems to have some confusion about whether Part 4 of *Act* was being applied. It might have been less controversial if the Director had expressed her decision on Kupchanko's wage claim without reference to the term "overtime", which raises an implication that Part 4 of the *Act* is being applied. Notwithstanding that reference, however, it is apparent that the Director was deciding Kupchanko's entitlement under Part 3 of the *Act* - the right of an employee to be paid his regular wages for all hours worked. There is no doubt that Part 4 of the *Act* did not apply to this complaint. The Determination acknowledges that:

> While Mr. Kupchanko is exempt from premium overtime rates, he is still entitled to be paid his regular wage for all hours worked in excess of his "normal work week".

To express the above statement more completely, Kupchanko was an employee for the purposes of the *Act* and as such was entitled to all the rights and benefits provided in the *Act* and *Regulation* unless his employment was specifically exempted from such rights and benefits. By operation of Section 34 of the *Regulation*, Kupchanko's employment was exempted from Part 4 of the *Act*. All other provisions of the *Act* and *Regulation* applied to his employment. The Determination also recorded that the remedy addressed a contravention of Part 3, Section 18 and Part 8, Section 63. In fact, this aspect of Kupchanko's claim was for wages in circumstances where excessive hours have been worked, but not paid.

It follows from the above analysis that I do not accept the Director erred by looking to the employment agreement between KGCC and Kupchanko. The ground of appeal submitted by counsel for KGCC suggests the Director looked at the employment agreement for a requirement to pay overtime. I disagree. The Director looked at the employment agreement for several purposes, including determining Kupchanko's wage rate, the agreed work week on which that

wage rate was based, vacation entitlement and notice period. The Director also considered whether relevant provisions of the employment agreement were inconsistent with Section 4 of the *Act*. The employment agreement set out the terms of employment and, provided they were not inconsistent with the requirements of the *Act*, the Director had the authority to give effect to those terms in the context of the complaint, which was properly before her.

Counsel for KGCC submitted that the Director wrongly calculated Kupchanko's "regular wage" rate, arguing that it should have been calculated on the hours actually worked by Kupchanko in 1999 and 2000. This argument is not supported by the relevant provisions of the *Act*. The Determination set out the applicable part of the definition of "regular wages" in Section 1 of the *Act*:

> *"regular wages" means*
>
> *(e) if an employee is paid a yearly wage, the yearly wage divided by the product of 52 times the lesser of the employee's normal or average weekly hours of work;*

The conclusion, which has not been successfully challenged in this appeal, that Kupchanko's "normal" work week was 40 hours effectively determines this ground of appeal. There was no basis upon which "average"weekly hours could be calculated as Kupchanko's weekly hours of work varied throughout the year. It was appropriate to base the regular wage on the "normal" work week of 40 hours and on that basis, the "product" referred to above is 2080 hours and the Kupchanko's regular wage was as found in the Determination. There is no error and no merit to this ground for appeal.

One of the grounds of appeal alleges the Director erred in accepting the record of hours provided by Kupchanko. Counsel for KGCC argues that the record was inaccurate and excessive and recreated after the fact. Support for this ground of appeal is identified as communications from KGCC to the Director on September 30, 2000 and October 28, 2000. The contents of those communications did not dissuade the Director from accepting the record provided by Kupchanko as a reasonably accurate reflection of his hours worked in 1999 and 2000. The Determination noted that some effort had been made to address the record provided by Kupchanko, that the entire record had been provided to KGCC and had been reviewed by KGCC. It also noted that some initial discussion had taken place between KGCC and the Director and the Director was attempting to arrange a further meeting in early November, 2000, to discuss the specific concerns raised in the October 28, 2000 communication when she was notified through counsel that KGCC was taking the position the Director had no jurisdiction to deal with the complaint. Thereafter, KGCC did not participate in any further discussion with the Director or make any further effort during the investigation to establish the record of hours provided by Kupchanko was unreliable and should not be used by the Director as a basis for determining hours worked. In *Re Mykonos Taverna, operating as the Achillion Restaurant*, BC EST #D576/98, the Tribunal stated:

> 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.

KGCC has not shown that the Director's reliance on the record provided by Kupchanko was manifestly unfair or unreasonable. Nor has KGCC demonstrated the record provided by Kupchanko was "recreated after the fact", as alleged in the appeal.

Equally important to this ground of appeal, and in respect of the reliance in this appeal to the information in the October 28, 2000 communication as evidence, the Tribunal has established that a party cannot fail or refuse to participate in the investigation of a complaint, then later challenge findings of fact with which they disagree. To allow such a process would be inconsistent with the role of the Tribunal as an appeal body and with the statutory purpose and objective of expedience and efficiency in dealing with disputes arising under the *Act*. The following comment, from *Re Tri-West Tractors Ltd.*, BC EST #D268/96, is relevant:

> This Tribunal will not allow appellants to "sit in the weeds", failing or refusing to cooperate with the delegate in providing reasons for the termination, then later filing appeals of the Determination when they disagree with it. An appeal under section 112 of the *Act* is not a complete re-examination of the complaint. It is an appeal of a decision already made for the purpose of determining whether that decision was correct in the context of the facts and the statutory provisions and policies. The Tribunal will not necessarily foreclose any party to an appeal from bringing forward evidence in support of their case, but we will not allow the appeal procedure to be used to make the case that should have and could have been given to the delegate in the investigative process.

See also: *Re Kaiser Stables Ltd.*, BC EST #D058/97.

If there was any basis for the specific concerns identified in the October 28, 2000 communication, it was incumbent on KGCC to provide that to the delegate during the investigation. They did not and may not now raise it as evidentiary support for their position on appeal. KGCC has not established the foundation necessary to support this ground of appeal.

KGCC has submitted the Director erred in concluding KGCC terminated the employment of Kupchanko. In that regard, the Determination noted:

> The *Act* does not require an employee to give notice of resignation. Nevertheless, if an employee does give notice that is equal or more than their entitlement under Section 63 of the *Act*, and the employer does not allow the employee to work out this period, or terminates the employee, the employee would be entitled to compensation equal to the statutory provision.

The above statement should also be read with the conclusion of the Director that, applying Section 67 of the *Act*, KGCC could not require Kupchanko to take annual vacation during his notice period. Section 67 of the *Act* says:

67 (1) A notice given to an employee under this Part has no effect if

(a) the notice period coincides with a period during which the employee is on annual vacation leave, strike or lockout or is unavailable for work due to a strike or lockout or medical reasons, or

(b) the employment continues after the notice period ends.

(2) Once notice is given to an employee under this Part, the employee's wage rate, or any other condition of employment, must not be altered without the written consent of

(a) the employee, or

(b) a trade union representing an employee.

This ground of appeal is allowed.

The implication of the Determination is that Kupchanko was terminated from his employment with KGCC on May 12, 2000. However, I can find no basis for that result. The only event relative to Kupchanko's employment with KGCC that occurred on May 12, 2000 was the implementation of an agreement between KGCC and Kupchanko, that in return for an additional two weeks paid vacation time (which turned out to be an additional 3 weeks paid vacation time), Kupchanko would accede to a request from KGCC to commence this vacation period on May 12, 2000. There is nothing in the material indicating Kupchanko's agreement was anything other than completely voluntary. The letter of May 10, 2000, which offered Kupchanko the additional two weeks paid vacation, stated:

> In consideration of these arrangements we request you return to us at this meeting all keys and any other Kamloops Golf and Country Club property you have . . .

If Kupchanko did not wish to accept the offer made by KGCC to commence a paid vacation period on May 12, 2000, he only needed to reject it. He did not.

The *Act* does not prohibit an employer and an employee mutually and voluntarily agreeing to the particular arrangement made in this case. There is nothing in the arrangement that subverts any of the requirements of the *Act*. Nor was the arrangement contrary to the provisions of the employment agreement. There was no substantial alteration in any condition of employment. The reliance by the Director on Section 67 of the *Act* was misplaced. That provision did not apply in this case. Section 67 speaks only to a notice given to an employee under Part 8 of the *Act* by the employer. The notice in this case was notice of resignation, given by Kupchanko, not KGCC. As the Director correctly points out, there is no requirement in Part 8 for an employee to give notice of resignation and, for the purposes of the *Act*, such notice is a non-event.

Kupchanko's employment was not terminated before June 30, 2000 nor did Section 67 apply.

Generally, Section 63 of the *Act* creates a liability on an employer to pay an employee length of service compensation after three consecutive months of employment. The liability to pay length of service compensation is, in effect, a default position under the *Act*. Subsection 63(3) of the *Act*, however, provides three circumstances where an employer's liability to pay length of service compensation is deemed to be discharged: where the appropriate length of written notice is given to the employee; where a combination of notice and compensation equivalent to the employer's liability is given to the employee; and where the employee terminates the employment, retires or gives just cause for termination. In this case, Kupchanko voluntarily terminated his employment on June 30, 2000 and the liability of KGCC to pay compensation for length of service was deemed to have been discharged under subsection 63(3)(c) by that conduct.

Kupchanko was not entitled to length of service compensation and the Determination must be varied to reflect this conclusion.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated January 25, 2001 be varied in accordance with this decision.

David B. Stevenson
Adjudicator
Employment Standards Tribunal