Employment Standards TRIBUNAL

An appeal

- by -

Provident Security and Event Management Corp.
("Provident")

- 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.: 2001/10

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 Provident Security and Event Management Corp. ("Provident") of a Determination which was issued on November 20, 2000 (Addendum issued December 5, 2000) by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded that Provident had contravened Part 2, Section 18(1), Part 4, Section 40 and Part 5, Section 46 of the *Act* in respect of the employment of Nicholas Peszel ("Peszel") and ordered Provident to cease contravening and to comply with the *Act* and to pay an amount of $518.64.

During the investigation, Provident submitted that the Director should exercise discretion under Section 76(2)(c) of the *Act* to discontinue investigating the complaint because it was not made in good faith. The Director did not stop investigating the complaint, providing the reasons for that decision in the Addendum to the Determination issued December 5, 2000.

In the appeal submission, counsel for Provident says:

> Provident appeals mainly on the ground that the Delegate did not consider key evidence and failed to interpret and apply s. 76(2)(c) correctly.

In fact, that is the only ground of appeal.

ISSUE

The issue in this appeal is whether the Provident has demonstrated the Director should have discontinued investigating the complaint because it was not made in good faith.

FACTS

The Addendum to the Determination sets out the following findings of fact on the matter now under appeal:

> Prior to the claimant's termination and at the time the claimant realized he did not receive overtime or payment for statutory holidays he approached his employer and requested payment. The claimant's father confirmed this and also that he himself had requested payment of overtime and statutory holidays for his son, prior to the claimant's termination.
>
> After reviewing the employer's payroll records it is apparent that overtime and statutory holiday pay was not paid according to the requirements of the Act.

> In a letter from the employer's solicitor, Davis & Company, dated October 2, 2000 the employer acknowledges that overtime and statutory holiday pay was not paid to the claimant before or after he was promoted to Shift Supervisor (see Exhibit 1).
>
> The claimant did not file his complaint after any charges were laid or any court proceedings commenced. The claimant was fired on February 29, 2000 and filed a complaint with the Branch on March 6, 2000.

Counsel for Provident alleges there is an error in the findings of fact, asserting that while Provident acknowledged in the October 2, 2000 letter that it was responsible for any amounts outstanding for overtime and statutory holiday pay before Peszel was promoted to Shift Supervisor, it was not aware whether there were any such amounts owed to Peszel. I disagree there was any error in that finding of fact.

A fair reading of the letter from counsel in its entirety would lead any reasonable person to the conclusion reached by the delegate. The letter from counsel for Provident was a reply to a September 13, 2000 letter from the delegate, which enclosed a complete calculation of what the delegate felt was owed to Peszel, an amount of $1,688.04. The calculations were based on the payroll records provided by Provident. The letter from counsel specifically acknowledged responsibility "for any amounts outstanding for overtime and statutory holiday pay" before Peszel's promotion. There is simply no argument that the letter, when read in its entirety, acknowledged Peszel was not paid overtime or statutory holiday pay after he was promoted.

It is also clear from the October 2 letter that Provident had done its own analysis of their payroll records for any errors or omissions, as suggested by the delegate. Provident's only direct reply to the calculation of overtime and statutory holiday pay done by the delegate was to note that Peszel had been paid twice in the pay period ending February 25, 1999. The logical presumption is that Provident accepted the balance had not been paid, in effect, acknowledging Peszel had not been paid overtime and statutory holiday pay, even before he was promoted to Shift Supervisor. Other defences were raised in respect of the balance. In the summary of the October 2 letter, counsel for Provident stated, among other things:

> 2. Mr. Peszel was employed in a managerial capacity and was not eligible to receive statutory holiday pay or overtime pay. Consequently, the only amounts owing to Mr. Peszel are those amounts accruing before he was promoted to Shift Supervisor over and above the wages overpayment.

Even if I had concluded the delegate had made an incorrect finding of fact, it is not clear in the appeal submission what relevance that has to the subject matter of the appeal. Nowhere in the material can I find that Provident ever denied Peszel had not been paid overtime and statutory holiday pay. The Determination concluded Peszel had not been paid overtime and statutory holiday pay. That conclusion has not been appealed. That seems to me to confirm the validity and correctness of the factual finding made by the delegate.

Counsel for Provident also says:

> In its submission, Provident explicitly requested that if the Delegate found Provident was liable for any amounts, it be given the opportunity to review her calculations before the Determination was issued.

In fact, that opportunity had been provided. In her reply to the appeal submission, the Director noted that on October 30, 2000, the delegate notified counsel for Provident that the amount of $1,688.04 had been adjusted downward by $875.04 and asked whether Provident was interested in resolving the matter voluntarily on that basis. The response was that Provident did not wish to resolve the matter voluntarily and that the delegate should proceed to issue a Determination. Counsel for Provident did not contradict or challenge that statement in her final response. Once more, however, I am uncertain of the point being made or its purpose in the context of the appeal since none is apparent in the appeal submissions, but to the extent it bears on this appeal, the position of counsel for Provident is given no effect.

The Addendum to the Determination concluded:

> Section 76 is a matter of discretion for a delegate. A delegate must base a Determination on findings of fact and not on a presumption of a person's likely intent. There is no evidence to find that the claimant filed his complaint in bad faith therefore it is my determination that the claimant is owed wages as per my original determination . . . .

On the matter raised by this appeal, Counsel for Provident identifies the following facts, which were not referred to in the Addendum to the Determination, as being relevant:

The Employment Standards complaint was filed two weeks after Peszel had engaged in criminal conduct and had caused damage and expense to Provident far in excess of the amount owed for unpaid overtime and statutory holiday pay.

At the time Peszel engaged in the criminal activity he was angry with his employer and believed he was owed money by them.

The conduct and damage referred to occurred on February 23, 2000. Peszel was terminated from his employment on February 29, 2000. He filed his complaint with the Director on March 6, 2000.

ARGUMENT AND ANALYSIS

Section 76(2)(c) of the *Act* reads:

76. (2) The director may refuse to investigate a complaint or may stop or postpone investigation if:

. . .

(c) the complaint is frivolous, vexatious or trivial or is not made in good faith;

There is no disagreement in this appeal that the Director has a discretion under Section 76(2) of the *Act*. The onus is on Provident to show the Tribunal would be justified in interfering with the manner in which the Director exercised discretion in this case. The appeal process is not simply an avenue for second guessing the decision of the Director to continue investigating the complaint.

The following statement, from *Joda M. Takarbe and others*, BC EST #D160/98 outlines the approach taken by the Tribunal when asked to interfere with an exercise of discretion by the Director:

> In *Jody L. Goudreau et al* (BC EST # D066/98), the Tribunal recognized that the Director is "an administrative body charged with enforcing minimum standards of employment . . ." and ". . . is deemed to have a specialized knowledge of what is appropriate in the context of carrying out that mandate." The Tribunal also set out, at page 4, its views about the circumstances under which it would interfere with the Director's exercise of her discretion in administering the Act:
>
> > The Tribunal will not interfere with the exercise of discretion unless it can be shown the exercise was an abuse of power, the Director made a mistake in construing the limits of her authority, there was a procedural irregularity or the decision was unreasonable. Unreasonable, in this context, has been described as being:
> >
> > > . . . a general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably". *Associated Provincial Picture Houses v. Wednesbury Corp.* [1948] 1 K.B. 223 at 229
> >
> > Absent any of these considerations, the Director even has the right to be wrong.
> >
> > Section 81 of the Act requires the Director to include, in a determination, the reasons for it. When assessing an argument that the Director has considered immaterial factors or failed to consider material factors, the

> Tribunal will confine itself to an examination of the relevant determination.
>
> In *Boulis v. Minister of Manpower and Immigration* [(1972), 26 D.L.R. (3d) 216 (S.C.C.)] the Supreme Court of Canada decided that statutory discretion must be exercised within "well established legal principles". In other words, the Director must exercise her discretion for bona fide reasons, must not be arbitrary and must not base her decision on irrelevant considerations.

In the Addendum to the Determination, the Director noted two findings of fact supporting the decision. First, that both Peszel and his father had approached Provident before either his termination or the criminal conduct occurred and asked he be paid for overtime worked and for statutory holidays. And second, that Peszel's claim was valid. The material supports both of those findings of fact.

Counsel for Provident has attacked the Director's exercise of discretion in two ways. Initially, she says that the Director did not properly consider evidence that ought to have led her to the conclusion the complaint was filed in bad faith, specifically the proximity of the complaint to "criminal conduct by Peszel causing damage and expense to Provident" coupled with a suggestion that such conduct was motivated by anger toward Provident. She contends that the Director's view of the available "evidence" was patently unreasonable and a proper assessment of the facts should have led to a conclusion that Peszel's criminal conduct, which occurred on February 23, 2000, was motivated by anger and done in retaliation.

Based on the available evidence, it was not unreasonable for the Director to conclude there was no evidence showing the complaint filed by Peszel was improperly motivated or had an improper purpose. In fact, the Director is quite correct in her view that, whatever motivated Peszel's conduct on February 23 (and there is some ambiguity about that in the information received by the Director), there is no evidence linking his activities of February 23 to his claim for overtime and statutory holiday pay under the *Act*.

Second, counsel for Provident says the Director incorrectly took into account the merits of the complaint, arguing the merits are irrelevant to an exercise of discretion under Section 76(2)(c). Counsel says that including a consideration of the merits of a complaint would render the provision meaningless. I disagree. That argument ignores two points. First, it ignores that the Director is not compelled or required by the *Act* to refuse to investigate or stop or postpone an investigation even if there is "bad faith" on the part of the complainant. It is a matter of discretion. Bearing in mind the purpose of the *Act* and the statutory mandate of the Director to ensure employees receive at least minimum employment standards and that employers comply with the minimum requirements of the *Act*, it is consistent with that purpose for the Director to give consideration to the merits of a complaint before denying a complainant their rights under the statute. As noted by the Director in her submission, the *Act* is remedial legislation and should be given such fair, large and liberal construction as best ensures the attainment of its

objects: (see in that regard *Helping Hands Agency Ltd. v. British Columbia (Director or Employment Standards)*, (1995), 131 D.L.R. (4th) 336 (B.C.C.A.)). I would add that the *Act* can be characterized as benefits - conferring legislation and as such, any ambiguities ought to be resolved in favour of the claimant. If there is any ambiguity in whether the complaint was not filed in good faith, the ambiguity should be resolved in favour of the complainant. An employee should not be denied the protection of the *Act* unless the facts clearly compel that result.

Second, the argument ignores that, under Section 76(2)(c), two of the bases upon which investigation of a complaint may be refused or discontinued is that the complaint is *"frivolous . . or trivial"*. It defies common sense to suggest that the merits of a complaint is not relevant to a conclusion of whether it is *"frivolous . . . or trivial"*. There is nothing in Section 76(2)(c) to suggest different considerations apply when considering if a complaint is *"not made in good faith"*.

This agrees substantially with what the Director has stated in her submission on the appeal:

> The Employment Standards Act is in place to ensure that employees receive at least basic standards of compensation and conditions of employment. The Act requires overtime must be paid in accordance with Section 40. There was a shortfall in Mr. Peszel's wages and he is entitled to receive payment for that shortfall. In order for a complaint to be dismissed under Section 76, there must be some compelling reason for denying someone the minimum standards of the Act.

The purpose of Section 76(2)(c) of the *Act* is not to refuse or discontinue investigation of valid employment standards claims. The purpose and objective of that provision is to allow the Director to prevent abuses of the legislation, where it is apparent that a complaint has been filed not for proper purposes, but as a means of vexation or oppression or for ulterior purposes, or, more simply, where the process is misused. In *Re Health Labour Relations Association of British Columbia et al v Prins et al*, (1982) 140 D.L.R. (3d) 744 (BCSC), the Court stated, at page 748:

> It would take the clearest kind of language to exclude the right of any citizen to the direct remedy furnished by this [the *Act*] legislation.

The same considerations would apply in Section 76(2)(c). It would take the clearest kind of circumstances to deny an employee the basic standards of compensation and conditions of employment provided by the *Act*.

I have not been persuaded the Tribunal is justified in interfering with the Director's exercise of discretion in this case. The appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated November 20, 2000 (Addendum issued December 5, 2000) be confirmed in the amount of $516.64, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal