Employment Standards TRIBUNAL

An appeal

- by -

Mountainside Day Care Ltd.
(the "Appellant")

- 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: W. Grant Sheard

FILE No.: 2003A/171

DATE OF DECISION: September 24, 2003

DECISION

OVERVIEW

This is an appeal based on written submissions by Mountainside Day Care Ltd. (the "Appellant"), pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), of a Determination and Reasons for the Determination issued by the Director of Employment Standards (the "Director") on May 9, 2003 wherein the Director's Delegate (the "Delegate") found that the Respondent was entitled to annual vacation pay, overtime, and accrued interest for a total due of $1,402.10.

ISSUES

1. Did the Director observe the principles of natural justice in making the Determination?

2. Were the Delegate's calculations regarding overtime correct?

3. Ought the Appellant be required to pay interest on wages due from the date employment was terminated?

ARGUMENT

The Appellant's Position

In an appeal form dated and filed June 16, 2003 along with a 4 page written submission the Appellant asserts that the Director erred in law and failed to observe the principles of natural justice in making the Determination. The Appellant seeks to vary the Determination by reducing the amount found owing by $260.00 in respect of "errors and adjustments", and reducing the balance of overtime hours found owing by 63%. The Appellant says that, although the Respondent did work more than 8 hours a day on many occasions, she asked for these hours and was told that there was no budget for them and there were other part-time employees who could work at the regular pay rate when necessary. The Appellant says that it was agreed that she would be provided these hours but only at the regular hourly rate. Further, the Appellant says that the extra hours worked were with a special needs child whose wages for care were paid for by the Ministry of Children such that this was separate employment. The Appellant also submits that the Respondent took a lot of time off due to ill health and a lot of her extra hours were to make up for this time off. The Appellant says that the Respondent never asked for overtime throughout her employment and, if she had at the outset, the Appellant would have declined these extra hours and avoided the issue entirely.

In respect of the assertion that the Director failed to comply with the principles of natural justice, the Appellant says that, after submitting its initial material and response to the complaint to the Delegate, the principal of the Appellant requested that the matter be dealt with expeditiously as he required surgery. The Appellant says that it was only after this principal returned from hospital that he received an initial assessment from the Delegate and requested an extension to respond to this assessment. The Appellant says that, although an extension was granted, it was shorter than was requested such that the Appellant had to pay for extra help to respond to the assessment. The Appellant says that the Delegate issued a series of assessments on December 11, 2002, January 24, 2003, January 31, 2003, February 12, 2003 and May 9, 2003 in the amounts of $3,026.00, $4,145.00, $1,576.00, $1,326.00, and $1,292.00 respectively.

The Appellant says that during the course of these assessments and submissions by the Appellant in response the Appellant sent a corrected schedule and faxed it to the Director on February 19, 2003 but did not receive a response until April 16, 2003. The Appellant says that it was very difficult to respond as the Appellant's principal was then in the middle of preparing tax returns and filing annual reports for the Compensation Contribution Plan.

The Appellant says that it had no control over the hours and amount of work allocated by the Ministry of Children for the special needs children which the Respondent worked extra hours caring for and, as such, the hours she worked for the special needs children should not be considered overtime hours. The Appellant says that the Director therefore erroneously created over 63% of overtime by lumping these hours with regular daycare hours. The Appellant further says that the Determination should be amended by deducting $260.00 of errors and adjustments and that the interest charged should be from the end of September 2002 when the Employment Standards office called the Appellant for the first time until October 7, 2002 when all the information requested of the Appellant was provided. The Appellant says that any delay was not on its part.

In a supplementary submission dated June 30, 2003 the Appellant says that the Delegate made an error in calculating overtime based on pay-periods of 12 days or 11 days when there are 96 or 88 maximum of regular hours, rather than bi-monthly pay-periods as the Delegate determined.

In a further written submission dated July 18, 2003 the Appellant provides a supplemental submission enclosing a fax from the Delegate dated February 12, 2003 titled "Final Calculations", a letter from the Appellant to the Delegate dated February 19, 2003 showing the "correct overtime hours" and a schedule purporting to show errors in the Delegate's schedule of February 12. The Appellant says that the schedule illustrates that for many pay-periods the Respondent was unable to complete regular 80, 88 or 96 hours and had to recover some of these hours when she was feeling well.

The Respondent's Position

In a letter dated July 28, 2003 filed with the Tribunal July 30, 2003 the Respondent seeks that the Determination be upheld. The Respondent says that she did not request extra hours to pay for medication as was asserted by the Appellant and she would have no reason to do so as she had extended medical health coverage through her then fiancée, now husband. She says that during the extra 2 hours of overtime that she worked each day, her wages decreased from $11.00 to $9.50 which she felt was an abuse as she had been offered the position to work this overtime with special needs children and did not request the position. The Respondent says that she did request overtime during the course of her employment but was not willing to pursue the issue at that time because it was a serious threat to her job which she needed to retain.

The Delegate's Position

In a written memorandum dated July 9, 2003 the Delegate maintains that the Determination should be upheld. The Delegate notes that the verbal agreement asserted by the Appellant between it and the Respondent not to pay or be paid overtime wages offends against Section 4 of the *Act* and, as such, is unenforceable. With respect to the Appellant's assertion that the Respondent's work with special needs children should be considered separate employment, the Delegate says that no evidence was presented to indicate this work was separate from the Respondent's regular work with the day care or that the work was done for a separate employer. The Delegate says that, on the contrary, the Appellant agrees the work was for the same employer.

The Delegate says that although the care for special needs children was distinct from the other day care work in that it was subsidized by the Ministry of Children, it was work performed for the same business and the hours of work can not be divided between special needs and other children.

With respect to the Appellant's complaint about the number and differing assessments provided by the Delegate prior to issuing the Determination the Delegate says that these varying calculations were prepared and presented to the Appellant through the course of the investigation as information was made available to the Delegate. However, once all of the Employer's records were presented, the Delegate created a spreadsheet showing the hours of work and overtime worked by the Respondent.

Regarding the "banking of overtime" the Delegate says there was never any mention by either the Appellant or the Respondent of a request for "banked hours" nor was a written request presented as evidence. In any event, the Delegate says this would not have any effect on the outcome of the Determination as the hours worked as overtime would still be paid out at the appropriate overtime rates pursuant to Section 42(2) of the *Act*.

With respect to the assertion that the Delegate failed to observe the principles of natural justice in making the Determination the Delegate says that the Appellant does not provide any evidence in support of this assertion. In any event, the Delegate says that the Appellant was well aware of the allegation of overtime claimed against it and given a fair and reasonable opportunity to answer the allegation and present evidence to support its position. The Delegate notes that the investigation began in September 2002 and the Determination was not issued until May 9, 2003. The Delegate notes that requests for extensions by the Appellant were granted.

With respect to the issue of interest the Delegate notes Section 88 of the *Act* which requires interest to be paid on wages from the earlier of the date of the employment being terminated and the date the complaint about the wages or other amount is delivered to the Director to the date of payment.

In a second written submission and memorandum dated August 1, 2003 the Delegate responds to the supplemental submission of the Appellant dated July 18, 2003 and the attachments and schedule which the Appellant had sent therewith. The Delegate notes that, regardless of the actual hours worked by the Respondent in a pay period, the Appellant ignores the actual hours worked by the Respondent in any given day. The Delegate notes that Section 40 of the *Act* requires overtime be paid for work over 8 hours in a day. The Delegate notes that she repeatedly attempted to explain this to the Appellant.

THE FACTS

The Respondent worked for the Appellant daycare from February 2000 until April 26, 2002 when the Respondent quit. Following her resignation, the Respondent filed a claim with the Employment Standards Branch for overtime which she claimed had not been paid. She had worked from Monday to Friday starting at 7:15 a.m. and finishing at various times in the afternoon. The Respondent was hired as an assistant supervisor and her initial rate of pay was $10.00 an hour increasing in October 2000 to $11.50 an hour and once again increasing in February 2001 to $11.75 per hour. The Respondent was paid straight time for all her hours worked.

The Respondent claims that the Appellant asked her if she wanted to work with special needs children following her regular shifts at the daycare and the Respondent agreed to do this. The Respondent kept track of her hours over her last 7 months of employment and submitted copies of those documents to the Delegate. She also submitted pay-stubs corresponding to those pay periods.

The Appellant gave evidence acknowledging that the Respondent worked extra hours with special needs children at the daycare, but insisted that the Respondent was told that the Appellant did not pay overtime because they could get someone else to work the hours which would not require overtime. The Appellant also asserted that the work with special needs children was a "different" job because the care for special needs children was funded by the Ministry of Children and Families. Further, the Appellant says that the Respondent asked to be allowed to bank her hours when she needed to take time off for appointments, illness or other reasons.

In a Determination and Reasons for Determination dated May 9, 2003, following an investigation, the Delegate found that the *Act* had been contravened and that the Respondent was owed overtime and annual vacation pay and interest on that overtime for a total amount payable of $1,402.10. The Delegate found that hours worked for the regular daycare and the special needs children were worked on the same day in the same location at the Appellant's daycare. Although the rate of pay may have been different between the two, the Appellant was the employer. Therefore, since the total hours worked in a day exceeded 8 hours, overtime applied. The Delegate noted that, when reviewing the Employer's payroll records, there was evidence that the Employer had failed to keep proper records and/or pay-stub information as required by the *Act*. The Delegate used the information submitted to create an Excel spreadsheet displaying the days and hours worked by the Respondent (which was attached as Exhibit K to the Determination) calculating overtime, holiday pay and interest due accordingly.

ANALYSIS

1. Did the Director observe the principles of natural justice in making the Determination?

Natural justice may require or consist of many things, but at a bare minimum the parties must be given an opportunity to present evidence, question the evidence of the opposing party litigant and make a submission to the adjudicating body with respect to what it ought to find (see *re Rudowski,* [2000] BCESTD #476 (QL), (9 November 2000), BCEST #D485/00 (Love, Adj.); reconsideration of BCEST #D316/00.).

As the Delegate noted in her submission, this investigation began in September 2002 and a Determination was not issued until May 9, 2003. Also, the Delegate noted that requests for extensions by the Appellant were granted. Regarding the Appellant's complaint about the number and differing assessments provided by the Delegate prior to issuing the Determination, these varying calculations were prepared and presented to the Appellant through the course of the investigation as information was made available to the Delegate. Once all of the Employer's records were presented, the Delegate created a spreadsheet showing the hours of work and overtime worked by the Respondent which the Appellant was given prior to the Determination with an opportunity to comment upon.

In this case I cannot find that the Appellant has demonstrated that it was not given an opportunity to present its evidence, question the evidence, or make a submission to the Delegate or any other failure to adhere to the principles of natural justice. Therefore, I find that the Appellant has failed to meet the onus upon it to demonstrate on a balance of probabilities that the Delegate failed to meet the principles of natural justice in investigating and arriving at the Determination.

2. Were the Delegate's calculations regarding overtime correct?

In respect of the Appellant's assertion that it was agreed that the Respondent would work extra hours at a regular hourly rate and that it was separate employment I agree with the findings of the Delegate in the

Determination that this was employment with the same employer and that, even if the parties had agreed to all time being paid at straight time, Section 4 of the *Act* provides that the requirements of the *Act* and Regulations are minimum requirements and an agreement to waive any of those requirements are of no effect. There is no error established in the finding of the Delegate with respect to the calculation of overtime in this regard.

With respect to the Appellant's assertion that the Delegate's calculations are in error in view of the varying assessments that were issued over time and on the basis of calculating overtime on pay-periods of 12 or 11 days rather than bi-monthly pay-periods, the Appellant appears to ignore the evidence of the actual hours worked by the Respondent in any given day. I find that the Delegate correctly applied Section 40 of the *Act* which requires overtime to be paid for work over 8 hours in any one day. The Appellant has failed to establish an error in the Determination on this ground as well.

Regarding the "banking of overtime" it is apparent that no written request was presented in evidence for such a request and the Respondent denies such a request. In any event, as the Delegate noted, this would not have an effect on the outcome of the Determination as the hours worked as overtime would still be paid out at the appropriate overtime rates pursuant to Section 42(2) of the *Act* and I find that the Appellant has failed to demonstrate an error in the Determination on this ground as well.

Although it was not argued by the Appellant and no submissions were made by any of the parties, I note that Section 80 of the *Act* provides a limit on the amount of wages required to be paid. Section 80(1) provides as follows:

> *The amount of wages an employer may be required by a Determination to pay an employee is limited to the amount that became payable in the period beginning*
>
> *a) in the case of a complaint, six months before the earlier of the date of the complaint or the termination of the employment, and*
>
> *b) in any other case, six months before the Director first told the employer of the investigation that resulted in the Determination,*
>
> *plus interest on those wages.*

Section 80(1.1) provides as follows:

> *Despite section (1)(a), for the purpose of a complaint that was delivered before May 30, 2002, to an office of the Employment Standards Branch, under an accordance with Section 74, the amount of wages an employer may be required by a Determination to pay an employee is limited to the amount that became payable in the period beginning 24 months before the earlier of*
>
> *a) the date of the complaint, and*
>
> *b) the termination of employment.*

In the present case, the Respondent quit her employment on April 26, 2002 and filed her complaint on May 24, 2002. Therefore, pursuant to Section 80 (1.1) the Delegate was correct in calculating overtime due for the period 24 months before the Respondent terminated her employment.

I find that the Appellant has failed to demonstrate any error in the Determination regarding the calculation of wages due.

3. Ought the Appellant be required to pay interest on wages due from the date employment was terminated?

As the Delegate noted in her submission, Section 88 of the *Act* requires interest to be paid on wages from the earlier of the date of the employment being terminated and the date the complaint about wages or other amount is delivered to the Director to the date of payment. Notwithstanding that the Appellant complains that it was not responsible for the time in which it took after providing its initial information in the investigation until the Determination was actually issued, interest is nonetheless due pursuant to Section 88 of the *Act.* The Appellant has failed to demonstrate that the Delegate made any error in this regard.

ORDER

Pursuant to section 115 of the Act, I order that the Determination of this matter, dated May 9, 2003 and filed under number ER115112, be confirmed.

W. Grant Sheard
Adjudicator
Employment Standards Tribunal