Employment Standards TRIBUNAL

An appeal

- by -

Global English College Ltd.
("Global")

- 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: Carol L. Roberts

FILE No.: 2003A/189

DATE OF HEARING: September 18, 2003

DATE OF DECISION: September 26, 2003

DECISION

APPEARANCES:

Global English College Ltd.: Miki Fujimura

On behalf of Ikuko (Yoshiko) Nakayama: S. Tucker, Borden Ladner Gervais

OVERVIEW

This is an appeal by Global English College Ltd. (Global) of a Determination of a delegate of the Director of Employment Standards issued May 14, 2003.

On March 29, 2002, Ikuko (Yoshiko) Nakayama filed a complaint with the Employment Standards Branch alleging that Global had not paid her overtime wages.

Following an investigation, the delegate concluded that Ms. Nakayama was entitled to overtime wages and accrued interest in the amount of $13,922.27, and ordered Global to pay that sum to the Director on Ms. Nakayama's behalf.

Global contends that the delegate failed to observe the principles of natural justice in making the Determination. It also submits that it has new evidence that was not available at the time the Determination was being made.

Ms. Fujimura asked for, and was provided, the services of an interpreter for the purposes of the hearing. Ms. Fujimura complained that she did not understand the interpreter, and the interpreter left. Ms. Fujimura asked that one of her employees, Ruriko Yokoyama, who was present to give evidence, interpret for her rather than adjourn the hearing to attempt to secure another interpreter on short notice. Although she is not a qualified interpreter, Ms. Yokoyama agreed to interpret for Ms. Fujimura and the hearing continued.

ISSUES TO BE DECIDED

1. Whether the delegate failed to observe the principles of natural justice in making the Determination.

2. Whether Global has new evidence that was not available at the time the Determination that was being made.

FACTS

Global operates an English as a second language training and instruction facility. Ms. Nakayama worked as a school support worker from September 2, 1998 to December 26, 2001. After she stopped working for Global, she complained that she had not been paid overtime wages. She contended that she worked in excess of 8 hours per day, for which she was not paid.

Global denied that it owed Ms. Nakayama any money, or, in the alternative, if it did, the amount should be limited to no more than six months prior to her December 21, 2001 termination date.

Global provided the delegate with Ms. Nakayama's daily time sheets, but contended that the hours recorded were used for record keeping purposes only, not for the purpose of determining wages or salaries. Global stated that Ms. Nakayama was told to arrive at work at 9:00 a.m., but that, because she exercised at a facility nearby, from time to time she arrived at work as early as 8:00 a.m. Global submitted that Ms. Nakayama was told that all overtime was to be approved before it was worked.

Global advised the delegate that Ms. Nakayama calculated her own hours for payroll purposes, and all extra time worked was compensated by time off. It asserted that Ms. Nakayama never requested payment for overtime hours.

Ms. Nakayama contended that the May 31, 2002 amendments to the Act had no affect on her ability to recover overtime wages because her complaint was filed on March 29, 2002.

Ms. Nakayama told the delegate that Ms. Fujimura gave her keys to the College so that she could open it each day. Ms. Fujimura also gave Ms. Nakayama a letter of reference dated March 21, 2002, which stated that Ms. Nakayama had never failed to report to work by 8:30 a.m.

Global's information publications stated that Global opened its doors for business at 8:30 a.m. during the period Ms. Nakayama was employed.

Ms. Nakayama stated that the timesheets submitted accurately reflected her hours of work, and disputed Global's claim that she was to take time off in lieu of overtime hours.

The delegate concluded that section 80(1.1) of the Act limited the amount of wages Ms. Nakayama was entitled to an amount that became payable in the period beginning 24 months from the termination of her employment.

The delegate accepted the time sheets as the best evidence of Ms. Nakayama's hours of work since they were the only records submitted, and he concluded they were not inconsistent with Global's hours of operation. He concluded that the time sheets supported Ms. Nakayama's claim that she did work overtime hours. The delegate found no evidence to support Global's position that Ms. Nakayama was instructed not to work overtime, or that her practice of reporting to work before 9:00 was unacceptable. The delegate concluded that Ms. Nakayama began work at 8:30 a.m.

The delegate further found that, because Global did not discipline Ms. Nakayama for working hours in excess of 8 hours per day, it accepted that practice.

In conclusion, the delegate found that Ms. Nakayma worked in excess of 8 hours per day, that Global directly or indirectly allowed her to do so, and that Ms. Nakayama was not paid overtime pay for hours worked as required by section 40 of the Act. The delegate treated days in which no sign out time was indicated as drawing minimum daily pay equal to 4 hours.

ARGUMENT

Ms. Fujimura contends that Ms. Nakayama's working hours were from 9:00 a.m. from January 2000 to July 31, 2001, and 8:30 a.m. from August to December 21, 2001 only. She also submits that Global's hours have changed according to demand, and that Ms. Nakayama was not at work from 8:30 a.m. through the period of her employment. Ms. Fujimura indicated that she had witnesses who could give evidence with respect to Ms. Nakayama's working hours.

Ms. Fujimura also contended that Ms. Nakayama was instructed to start work at 9:00 a.m. in the early period of her employment. She further contended that, when Ms. Nakayama's hours of work changed so that she began work at 8:30 a.m., that change was to accommodate a request from Ms. Nakayama.

Ms. Fujimura disputed the delegate's finding that Ms. Nakayama was not instructed to formally request overtime. It submits that Ms. Nakayama processed her own overtime in December, 2001, and that she was well aware of the requirement to request overtime.

Counsel for Ms. Nakayama argues that the "new evidence" submitted by Global does not fall within the parameters of the legislation, and that I ought not consider it. Counsel further submitted that Global does not say that the information was not available at the time the determination was made, and that, in any event, given the nature of that information, it clearly would have been evidence available to Global at that time.

At the conclusion of counsel's submission, I indicated that I would adjourn the hearing and decide whether Global ought to be allowed to present new evidence. I indicated that I would reconvene the hearing to hear new evidence if I concluded that Global had met the test for presenting new evidence.

As I have concluded that Global's submissions fail to establish that it has new and relevant evidence, the hearing will not be reconvened. I have dismissed Global's appeal for the reasons that follow.

ANALYSIS

Amendments to the Act in 2002 restricted the Tribunal's statutory authority to review Determinations made by the Director of Employment Standards. Before the amendments, the Tribunal had the authority to "decide all questions of fact or law arising in the course of an appeal or review" (s. 108).

As of May 30, 2002, the appeal provision provides as follows:

> Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
>
> a) the director erred in law
>
> b) the director failed to observe the principles of natural justice in making the determination; or
>
> c) evidence has become available that was not available at the time the determination was being made

Legislative evolution of statutory provisions may be relied on to assist interpretation:

> To understand the scope of [a provision], it us useful to consider its legislative evolution. Prior enactments may throw some light on the intention of Parliament in repealing, amending, replacing or adding to a statute (*R. v. Ulybel Enterprises Ltd.* [2001] 2 S.C.R. 867 at para. 33)

It is presumed that amendments to the wording of a legislative provision are made for some intelligible purpose: to clarify the meaning, to correct a mistake, or to change the law (see *Construction of Statutes, Sullivan and Driedger at p. 472)*

The explicit reference to the "fresh evidence" rule in section 112 gives rise to the inference that the Tribunal may reverse findings of fact in instances where new evidence changes either the facts as determined by the Director's delegate, or alters the complexion of those facts. In my view, the amendment is expressly designed to prevent appellants from "re-arguing" cases before the Tribunal on facts that are identical to those before the delegate. I note that, in any event, prior to the amendment, Tribunal jurisprudence was that an appeal was not an opportunity for a party to reargue the merits of a complaint, but a proceeding to determine whether there was an error in the determination.

In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D 171/03 the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:

1. the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;

2. the evidence must be relevant to a material issue arising from the complaint;

3. the evidence must be credible in the sense that it is reasonably capable of belief; and

4. the evidence must have high potential probative value, in the sense that , if believed, it could on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

I am not persuaded that the evidence Global seeks to present to the Tribunal information is evidence that was not available, with due diligence, at the time the delegate was investigating the complaint.

The evidence Global wishes to present to the Tribunal consists essentially of oral evidence of former and current Global employees. That evidence was available at the time the delegate was investigating the complaints. Ms. Fujimura could have asked the delegate to speak to those employees regarding their knowledge about Ms. Nakayama's work hours. Ms. Fujuimua contends, as I understand it, that she did not do so because she did not understand that she could do so, and that her misunderstanding arose out of language difficulties. Global's grounds of appeal also include an assertion that the delegate failed to observe the principles of natural justice. As I am of the view that these arguments overlap, I propose to address them together.

The principles of natural justice require, among other things, that a party to quasi-judicial proceedings has a right to be informed of the case it has to meet, and be given an opportunity to respond.

Although I appreciate that Ms. Fujimura does have limited facility in English, I note that she operates an English language school. I infer that she has sufficient resources available to her to inquire into and respond to the delegate's investigation. I have reviewed her letters in response to the delegate's inquiries, and find no basis for concluding that she misunderstood the delegate, or that the delegate misunderstood her. Global understood that the issue before the delegate was Ms. Nakayama's claim for overtime pay and responded to it. Ms. Fujimura also acknowledged that she could have met with the delegate had she sought to do so, to further expand on her written responses. She did not. I find no basis to conclude that the delegate failed to observe the principles of natural justice.

An employer has a statutory duty to maintain records of the hours of work of their employees. Global provided the delegate with its time records, although Mr. Fujimura suggested they were inaccurate. Where an employer fails to maintain accurate records, the evidence of the employee will be preferred where the delegate finds the employee credible, is satisfied the records were made contemporaneously, and they are consistent with other evidence. Nothing in Global's "new evidence" would, in my view, alter this conclusion.

> Section 35(1) of the Act provides that an employer must pay an employee overtime wages in accordance with section 40 if the employer requires, or directly or indirectly allows, the employee to work more than 8 hours a day or 40 hours a week.

I am also unable to find that, if Global's new evidence was to be considered, it could on its own, or when considered with other evidence, have led the Director to a different conclusion on the issue of whether Ms. Nakayama is entitled to overtime wages.

In my view, there is nothing in the "new evidence" that would have led the delegate to conclude that Global, directly or indirectly, did not allow Ms. Nakayama to work overtime hours. Global does not say it has evidence Ms. Nakayama was told not to work the hours she did. Indeed, all of the evidence suggests that Global either instructed that Ms. Nakayama report to work before 9:00 a.m. (by giving her keys to open the school at 8:30 a.m. and giving her a letter of reference stating that she never failed to come to work by 8:30 in the morning), or condoned her practice of showing up early.

The appeal is dismissed.

ORDER

I Order, pursuant to Section 115 of the Act, that the determination, dated May 14, 2003, be confirmed, together with whatever interest may have accrued since the date of issuance.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal