An appeal

- by -

504169 B.C. Inc. operating as Restaurant Quality Foods
("Restaurant Quality Foods")

- 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.: 2001/306

DATE OF DECISION: June 19, 2001

DECISION

SUBMISSIONS:

Gerry Omstead — on behalf of the Director

John R. McMillan — on behalf of the Employer, Restaurant Quality Foods

No one appearing for the Employee

OVERVIEW

This is an appeal by Restaurant Quality Foods (the Employer), pursuant to Section 112 of the Employment Standards Act (the "Act"), against a Determination of the Director of Employment Standards (the "Director") issued on March 27, 2001 wherein the delegate ruled that the Employer had contravened the Act and owed the Employee overtime wages, statutory holiday pay, and compensation in lieu of notice of termination totaling $8,131.86.

ISSUE

Has the Employer met the onus upon it to establish on appeal, on a balance of probabilities, that the Director's delegate was in error?

ARGUMENT

The Employer's Position

Counsel on behalf of the Employer filed an appeal form dated April 18, 2001 received by the Tribunal April 19, 2001. Along with that appeal form, Mr. McMillan filed a letter dated April 18, 2001 elaborating on the reasons for the appeal and submissions of the Employer. In that letter Mr. McMillan says as follows:

> a) The appellant company says that the Employee received a benefit in the form of trips paid by the appellant company in part payment of the amounts due to the Employee for overtime.
>
> b) The appellant company says that the Employee requested that overtime worked by the Employee be recorded as regular time worked by him on other days. The appellant company complied with the Employee's request and in this fashion the Employee was paid for the overtime hours worked by him.

c) The appellant company says that the Employee is not entitled to termination pay because the Employee quit his position with the company, and the company did not terminate the Employee. Alternatively, the appellant company says, if the company did terminate the Employee's employment, the company had just cause to do so.

d) The appellant company says that it has paid to the Employee all amounts owing by the appellant company to the Employee for overtime, wages, and statutory holiday pay.

Mr. McMillan continues seeking an order that the effect of the termination be suspended pending the appeal and that the termination be cancelled.

The Director's Position

In a written submission dated April 24, 2001 the Director's delegate, Mr. Gerry Omstead, provides submissions corresponding to those made by the Employer, in part, as follows:

a) The Employee had no choice but to take the trip offered to him which was funded through an accumulated fund made up of monies garnered through cost savings over the course of the employers fiscal year. The Employment Standards Act requires an Employer to pay all wages in Canadian currency by cheque, draft or money order. (Section 20 of the Act).

b) The Employer argues for the first time on appeal that the Employee requested overtime worked by recorded as regular time on other days. The Employer has not provided any detail to this statement and the Employee has denied that he requested that this be done. Further, the delegate reviewed the daily time and payroll records and made his calculations and issued his determination based upon them.

c) The delegate notes that his determination speaks for itself with respect to the Employer's claim on appeal that the Employee quit his position. The delegate found in his determination that he had not quit but was terminated. Further, the delegate also dealt with the Employer's suggestion of just cause in his determination finding that no such just cause existed.

THE FACTS

In a determination dated March 27, 2001 the Director's delegate found that the Employer had contravened the Act in terms of overtime, wages, statutory holiday pay and termination without notice or compensation finding the Employer owed $8,131.86 to the Employee.

Restaurant Quality Foods operates a school lunch business for which the Employee worked from September 1995 to November 16, 2000 as a cook/delivery driver at the rate of $12.00 per hour. A complaint was filed within the time allowed under the Act.

In the investigation a Mr. Gerald Thomas R. Bourke made representations on behalf of the company. He indicated that, regarding overtime pay, there was a general agreement amongst employees that they would bank their overtime and those monies would be used in payment for vacations or paid out at times of the year when their income was reduced due to shutdowns. Mr. Bourke also indicated that the Employee had been paid for all work performed.

Regarding termination, Mr. Bourke indicated during the investigation that the Employee was arrested for trafficking and cultivation of a controlled substance. He further indicated that when he discussed this with the school board, they indicated that they would not object to the Employee continuing in his employment provided that there was an admission from the Employee's roommate with respect to guilt for the criminal charges. Mr. Rourke further indicated that he later asked the Employee for a letter to this effect and was advised by the Employee that such a letter would not be forthcoming and that his mother had told him to find a new job which the Employer took as a resignation.

The Employee provided the delegate information that he worked long hours for which he was not paid overtime rates of pay and that he worked statutory holidays for which he received straight wages only. He further indicated that he did receive trips as bonuses due to company cost savings and provided a "Notice to Employees" which the delegate noted confirmed the trip was paid through savings to the company and that Employees must take the trip as offered without any other compensation if they failed to attend.

Regarding termination, the Employee advised the delegate that he had advised the Employer that his mother had suggested to him that "maybe he should look for another job" and that he told Mr. Rourke that she had said this, to which the Employer responded by asking him for the keys to the building which the Employee assumed meant he was terminated.

The Director's delegate interviewed several people from the school board who indicated that they had spoken to the Employer but had not asked him to obtain a latter for the Employee regarding an admission of guilt from his roommate. They further advised the delegate that the Employee was not required to come in contact with the children in the course of his duties. A former employee of the Employer was also interviewed who confirmed that the Employee put in large amounts of overtime and that this former employee had previously done the payroll for the

company. She indicated that there were no T-4A slips issued to employees while the Employer had indicated to the delegate that "other income" was paid to this Employee and provided two T4A slips for1998 and 1999 confirming this.

The delegate expressed concern in the determination that these T4A slips are issued on Canada Customs and Revenue Agency forms for 1998 when the Canada Customs and Revenue Agency was known as Revenue Canada prior to November 1, 1999.

The delegate found that the payroll records provided by the company clearly show that extensive hours were worked by the Employee without the payment of overtime wages as required by section 40 of the Act.

The delegate further found that the trips offered did not comply with section 20 of the Act which requires that all employers must pay wages in Canadian currency by cheque, draft or money order.

The delegate further found that the investigation indicated that the employee's work would not bring him in contact with children, and even if it did, there were other duties which he could have performed which would not have done so. He further found that the Employee had returned to work on two days following the arrest and incident involving controlled substances but prior to his termination which were not consistent with him having quit. In addition, the Employer had indicated that the Employee was "a great Employee" and that there was no evidence to establish that the company had used progressive discipline with the Employee. The delegate concluded that the company did not have just cause to terminate the Employee and found that the company owed him termination pay equal to 4 weeks pay.

ANALYSIS

The onus is on an appellant to establish on a balance of probabilities an error in the finding of the delegate.

A. Benefit in the form of trips paid by the Employer in part payment of overtime.

As noted by the delegate in his written submissions, the Employee had no choice but to take this trip when it was offered. Further, it was funded through cost savings to the Employer through its fiscal year. Most significantly, the Employment Standards Act says at section 20 as follows:

> An Employer must pay all wages
>
> a) in Canadian currency,
>
> b) by cheque, draft or money order….., or
>
> c) by the deposit to the credit of an employees account in a savings institution….

There is nothing in the appellant's material beyond the assertion that this trip was part payment of overtime to bring the delegates determination into question. Section 20 of the Act clearly provides that such a benefit does not amount to payment for wages. Accordingly, I do not find that the appellant has met the onus on it to establish an error in the determination in this regard.

B. That the Employee requested overtime be recorded as regular time worked on other days such that he was paid appropriately.

As noted by the delegate, the Employer raises this argument for the first time on appeal. The Employee has denied that he requested overtime be recorded as regular time on other days and paid accordingly. As the Employer has not provided any detail to support this argument I cannot find that the determination was in error in this regard. Indeed, the determination was based on the employment records as provided and no error has been identified in these daily time and payroll records or the calculations based upon them. On this point as well, I cannot find that the appellant has met the onus on it to establish an error in the determination.

C. That the Employee resigned or in the alternative was terminated with just cause.

The Director's delegate dealt with these issues in his determination. It is apparent he found that the Employee did not quit as he had continued to attend work for 2 days after the incident allegedly giving rise to just cause. It is apparent that, where the Employer and the Employee differ as to what occurred when the Employee left the Employers premises, the delegate preferred the evidence of the Employee noting that there were irregularities with respect to the T4A slip relied upon by the Employer and assertions of fact made by him in respect of the School Boards position as compared to the evidence obtained from employees of the School Board. Once again, beyond asserting that the Employee quit or was fired with just cause, there is no material in the appeal beyond that assertion to support this claim or to demonstrate on a balance that the delegate's determination was in error in this regard. Accordingly, I cannot find any error in the determination in this regard.

D. That the Company has paid all amounts owing to the Employee.

Once again, there is nothing offered in support of this assertion beyond the assertion itself. The determination was made by a review of the daily time and payroll records provided to the delegate. Indeed, those records were attached to the delegate's determination. No error in the delegates findings in respect of these records or his calculations based upon them is identified. Here too, I find that the appellant has failed to establish on a balance of probabilities that any error was made by the delegate.

In light of the above decision it is not necessary to consider the application to suspend the effect of the determination.

ORDER

Pursuant to section 115 of the Act, I order that the Determination of this matter, dated March 27, 2001 be confirmed in the amount of $8,131.86, together with any interest that has accrued pursuant to section 88 of the Act.

W. Grant Sheard
Adjudicator
Employment Standards Tribunal