EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act R.S.B.C. 1996, C.113

- by -

Fraser Irvine
(the " Employee ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE No.: 2000/073

DATE OF HEARING: June 30, 2000

DATE OF DECISION: October 12, 2000

DECISION

APPEARANCES

Mr. Michael Korbin	on behalf of Mr. Fraser Irvine ("Irvine", the "Employee or "Appellant")
Ms. Shelley-Mae Mitchell	on behalf of Covenant House Vancouver ("Covenant House" or the "Employer"
Mr. Graeme Moore	on behalf of the Director

OVERVIEW

This is an appeal by the Employee pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director of Employment Standards (the "Director") issued on January 18, 2000. Irvine was employed by Covenant House, a non-profit community service society. He was employed from September 22, 1997 to September 2, 1999 as an overnight team leader and from September 2 to 7, 1999 as an overnight shift supervisor. The Determination concluded that he was not owed overtime wages or compensation for length of service by the Employer.

The issues before the delegate were, first, whether Irvine was entitled to over time wages and, second, whether he was dismissed without cause and, therefore, entitled to compensation for length of service. The delegate resolved those issues as follows.

First, with respect to the overtime wages, the delegate found that Section 34(1)(r) of the *Employment Standards Regulation* (the "*Regulation*") applied. Section 34(1)(r) of the *Regulation* provides, *inter alia*:

> *34. (1) Part 4 of the Act does not apply to any of the following:*
>
> *(r) any of the following who are employed by a charity to assist in a program of therapy, treatment or rehabilitation of physically, mentally or otherwise disabled persons:*
>
> *(i) a counsellor;*
>
> *(ii) an instructor;*
>
> *(iii) a therapist;*
>
> *(iv) a child care worker;*

Briefly put, the delegate accepted the Employer's argument that it met these requirements. The delegate was satisfied that the Employer is a charity, which provides counselling and other services to youth who are physically, mentally or otherwise disabled. He found that Irvine, as a

staff member and counsellor, was an integral part of "this process". The delegate also made an "observation of the premises and clients" of the Employer. In the result, Part 4 of the *Act*, hours of work and overtime, did not apply.

With respect to the second issue, the delegate found that the Employer had given notice to Irvine of certain changes to the terms and conditions of his employment in June 1999 and did not accept that Irvine had been constructively dismissed. In the result, Irvine was not entitled to compensation for length of service.

ISSUES

Irvine takes issue with the delegate's conclusions on the merits. He takes the position that Regulation 34(1)(r) does not apply and says, as well, that he is entitled to compensation for length of service. In addition, Irvine takes issue with, what he says, is the lack of reasoned analysis in the Determination and the delegate's failure to allow him an opportunity to comment on a submission provided to the delegate by the Employer's counsel. This submission, he argues, formed the factual foundation for the Determination.

On June 16, 2000, the Tribunal convened a case management meeting to determine, among others, the issues before me and a most appropriate manner in which they could be addressed. At the meeting, the parties agreed to proceed with the grounds of appeal under Sections 77 and 81(1)(a) first, as preliminary matters. Those were the grounds relating to the "lack of reasons" and "failure to allow an opportunity to comment." A hearing was then held on June 30, 2000, to deal with those matters.

Following the case management meeting, the Director supplied copies of relevant documentation from the delegate's file to counsel for Irvine. In a large measure, the hearing on the preliminary matters, on June 30 was based on the documents that formed part of the appeal file and no witnesses were called to testify.

ANALYSIS

In previous cases, the Tribunal has determined that an appeal is not a *trial de novo* and that the appellant has the burden to prove that the Determination is wrong (*World Project Management Inc*., BC EST #D325/96). I agree with those principles.

I now turn to the "preliminary matters."

Section 77 provides:

> *77. If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.*

Section 81 provides in part:

> *81. (1) On making a determination under this Act, the director must serve any person named in the determination with a copy of the determination that includes the following:*
>
> *(a) the reasons for the determination;*

In order to deal with the parties' arguments, I propose to briefly set out the history of the complaint.

On September 15, 1999, Irvine filed a complaint with the Employment Standards Branch (the Branch"). With the complaint was a letter from Irvine's counsel, dated September 14, 1999, setting out in some detail the particulars of his complaint. The letter described Irvine's employment history with the Employer. The letter explained that Irvine commenced employment on September 2, 1997. After a brief training period, Irvine worked as an overnight team leader between September 22, 1997 and September 1, 1999. For a few days, he was overnight shift supervisor. On September 7, 1999 he advised the Employer that, in his view, he had been constructively dismissed. The complaint attached, as well, job descriptions for Irvine's positions, an organizational chart, and a copy of a pay cheque. The letter from Irvine's counsel set out the particulars of his claim for overtime and took the position that Irvine was entitled to overtime wages because he was neither a manager under the *Employment Standards Regulation* (the "*Regulation*"), nor did he fall within any of the other exceptions provided for in the *Regulation*, in particular, he was not a "residential care worker. The letter did not raise the issue of *Regulation* 34(1)(r). The letter also made reference to the principles that the delegate should apply in his interpretation of the exceptions provided for in the *Regulation*, namely that they should be given the "most narrow" interpretation in order to preserve the intent and purposes of the *Act*. The complaint also claimed that Irvine had been constructively dismissed and attached several pieces of correspondence in support of that position. A subsequent letter added a claim for vacation pay on unpaid wages. In brief, the nub of the complaint is a claim for overtime wages based on employee status and for compensation for length of service based on constructive dismissal.

On November 1, 1999, the delegate wrote to Irvine's counsel. In the letter, the delegate stated that he had "reviewed all the information, which you [Irvine] have provided to me, and also the information and records provided by your former employer." It is not entirely clear to me what the "records and information" from the Employer consisted of. From the documents produced at the hearing, it appears that the delegate spoke with a representative of the Employer on October 26, 1999. He took notes of that conversation and those notes were introduced at the hearing. The November 1 letter set out the delegate's "preliminary findings" as follows:

- The Employer is a charity operating a "crisis intervention center and residence for homeless and runaway kids aged 16 to 24. "These persons can be considered physically, mentally, emotionally challenged." The Employer is open 24 hours a day and provides "shelter, counselling, and referral to other agencies"—"life skills and an outreach program." As such, the Employer's operation, in the delegate's view, fell within the

exception in *Regulation* 34(1)(r) (set out above) and Irvine was not entitled to overtime wages.

- With respect to the second issue, constructive dismissal, the delegate found that the Employer had given notice of the changes to Irvine's employment and that, in the result, he was not entitled to compensation for length of service.

The letter finally advised Irvine to contact the delegate before November 15, 1999 to discuss the delegate's findings, otherwise the file would be closed as "withdrawn."

On November 9, 1999, Irvine's counsel responded to the delegate's letter. He took issue with the preliminary findings that *Regulation* 34(1)(r) applied to the circumstances of Irvine's employment. He explained that Irvine was not employed as a counsellor, instructor, therapist or childcare worker. He was a team leader. From the job description, "it is clear" that his duties were "largely supervisory." His involvement with counselling was "very minor." As well, counsel noted that Irvine was "not employed in any of those capacities to assist in a program of therapy, treatment or rehabilitation." The Employer, according to Irvine, does not provide such programs to its clients. Rather, it refers clients to outside services. The primary mandate was to provide food and shelter. Moreover, the Employer does not provide programs for "physically, mentally or otherwise disabled persons." The clients of the Employer are homeless, runaway and street involved youth. Applying the proper principles of statutory interpretation, Irvine's employment did not fall under the *Regulation*.

With respect to the issue of constructive dismissal, counsel stated:

> "We also submit that your findings with respect to this issue are misconstrued. We do not allege that CHV failed to give Mr. Irvine notice of his constructive termination. Rather, our position is that notice has no effect under the Act by virtue of Section 67(1)(b) which provides that "a notice given to an employee ... has no effect if the employment continues after the notice period ends."

The letter attached various documents, providing details of the Employer's operations.

On December 7, 1999, the delegate responded briefly. The letter assured Irvine's counsel that his submissions would be given the "utmost attention and consideration." As well, the letter promised that a "thorough research and analyses will be conducted on submissions and evidence provided by both parties before a determination will be issued."

On December 9, 1999, Irvine's counsel invited the delegate to contact him if he required further information.

On December 13, 1999, the Employer's counsel responded to Irvine's counsel's letter of November 9. Not surprisingly, the Employer was of the view that *Regulation* 34(1)(r) applied to the circumstances of Irvine's employment and that he, therefore, was not entitled to overtime. Counsel's letter explained that the Employer "runs a program which involves treatment and rehabilitation of troubled youths on the Vancouver streets." This program, characterized as

"very detailed," includes in-take, initial assessment as to treatment, ongoing assessment and treatment, and case management. "The youth are required to follow a plan for treatment." The treatment provided by the Employer includes:

> "... family abuse, post traumatic stress disorder, health problems, schizophrenia, bipolar disorder, chemical addictions, fetal alcohol syndrome, sexual exploitation, suicidal thoughts and a vast array of personal and behavioural disorders ...."

The Employer "provides individual short-term and crisis counselling." The clients of the Employer "almost without exception ... are addicted to alcohol and/or drugs and/or are suffering from some other mental illness." These conditions qualify as disabilities with the meaning of the B.C. *Human Rights Code*. As well, the Employer's counsel noted that Irvine would qualify under any of the occupations listed in *Regulation* 34(1)(r), *i.e.*, he was a "counsellor, instructor, therapist or childcare worker."

With respect to the second issue, constructive dismissal, the Employer's counsel noted that Section 67(1)(b) does not apply to notices of changes in terms and conditions of employment. Counsel noted that it would be "simply illogical to assert that the notice provided by the employer was somehow invalidated by Mr. Irvine's choosing to continue his employment."

There does not appear to be a dispute that the delegate did not provide a copy of the December 13 letter to Irvine's counsel.

On January 18, 2000, the delegate issued the Determination now under appeal. In the Determination, the delegate set out the Employer's position and Irvine's position with respect to the issues. The delegate found as fact, including the following:

- The Employer is a charity.
- The Employer provides services to street youth.
- The services "include providing basic necessities of life to youth, who may be runaways, abandoned by their parents, victims of sexual abuse, suffering post traumatic stress disorder, have health problems such as schizophrenia, bipolar disorder, chemical addictions, fetal alcohol syndrome, sexual exploitation, suicidal thoughts and a multitude of personal and behavioural disorders."
- The Employer provides counselling.
- The Employer directs youths to other agencies.
- Irvine was informed of changes to his employment on June 30, 1999, effective September 1, 1990.

The delegate's analysis of the applicability of *Regulation* 34(1)(r) was very brief and is set out here in its entirety:

> "After reviewing the submissions of both parties, going over the interview notes and other related written material obtained independently, I conclude that the employer Covenant House does meet the requirements set out in the Regulation 34(1)(r)…
>
> I am satisfied that Covenant House, the employer, is a charity, which provides counselling by way of a structured program that has clear boundaries and limitations. It also provides other treatment and rehabilitation services to youth who are physically, mentally or otherwise disabled. The line staff take considerable pain to build their self-image and trust and to determine what other services may benefit the clients.
>
> To satisfy myself I have examined the information on Covenant House to assess that, indeed, if their function is what they are claiming. An observation was made of the premises and the clients of Covenant House. I found that it provides the services, it claims.
>
> A spreadsheet on Covenant House budget shows that one third of the budget is spent on the staff who provides care, counselling, therapy and treatment. The rest of the budget (approximation) is spent on food, shelter and clothing. Covenant House provides counselling and makes efforts at rehabilitation of street youth. It is my conclusion that Irvine, as a staff member and counsellor was n integral part of this process."

The delegate, as well, rejected Irvine's claim for compensation for length of service. In his view, the fact that Irvine had chosen to continue working after the notice did not invalidate it. He did not agree that Irvine had been constructively dismissed.

Irvine argues that the Determination is wrong for two main reasons. First, because of inadequate reasons for the conclusions reached by the delegate. In particular, Irvine says that the Determination sets out conclusions but not the bases for those conclusions. Irvine argues that a determination must include adequate reasons for the decision. Insofar as a decision lacks sufficient reasons it offends both Section 81(1)(a) and fundamental principles of natural justice (see *Hilliard*, BC EST #D296/97 and *Palmer*, BC EST #D339/97). Second, the delegate denied Irvine an opportunity to respond to a submission by the Employer which–in large measure–provided the factual basis for the conclusions. Those facts are in dispute between the parties. In the result, Irvine was denied a fair hearing before the delegate. Specifically, Irvine points to the following in support of his appeal. First, he did not receive a copy of the December 13 letter from the Employer. In the result, he was denied an opportunity to respond to the allegations in the letter which, he says, in large measure formed the factual basis for the Determination. Second, the "other related written material obtained independently"–referred to in the Determination and cited above–consisted of an ad in a magazine, Common Ground, eliciting support and donations for "street kids." In the ad the Employer was described as follows:

> "Covenant House provides shelter, food, clothing and counselling to an estimated 1,000 homeless and runaway youth living on our city's streets."

Third, the "interview notes" were notes of a telephone interview with the Employer on October 26, 1999. Fourth, the "observation" that "was made of the premises and the clients of Covenant House" was, in fact, the delegate's observations from driving by the Employer on his way to or from work.

In my view, the quasi-judicial role of the Director when carrying out an investigation and making a determination is fundamental to the scheme of the *Act*. I agree with the Adjudicator in *BWI Business World*, BC EST #D056/96:

> "... the Director is acting in a quasi-judicial capacity when conducting an investigation and making a determination under the Act [cf. *Re Downing and Graydon*, 21 O.R. (2d) 292 (Ont.C.A.)."

From that principle flow a number of obligations, one being an obligation to provide reasons for decisions. That is expressly provided for in Section 81(1)(a). I agree with the principles referred to in *Hilliard*, *above*. In that case, apparently, the reasons were, indeed, sparse. The Tribunal's decision indicate that the determination in that case simply stated that the complainant was a manager, based on his salary and the job description, and, therefore, not entitled to overtime wages. Quite appropriately, the Adjudicator found that these were not adequate reasons. The Adjudicator noted that the Determination did not relate the facts of the case to the definition of "manager" provided in the *Regulation*. As well, there was no explanation of why the payment of a salary—as opposed to other payment methods—indicated management status. Finally, there was no analysis of the work actually performed by the complainant.

The Adjudicator went on to note:

> "One of the purposes of the *Act*, as set out in Section 2, is to "... promote the fair treatment of employees and employers..." Another purpose is to "... provide fair and efficient procedures for resolving disputes..." In my view, neither of these purposes can be achieved in absence of a clear set of reasons for a decision that either an employee is owed wages or is not owed wages by an employer. In addition, to ensure that the principles of natural justice are met, a person named in a Determination is entitled to know the decision resulting from an investigation and the basis for that decision. Without sufficient reasons, a person cannot assess the decision which includes knowing the case made against them or the case to be met if there is an appeal, and determining whether there are grounds for an appeal."

In my view, these principles are applicable to the instant case. There are, of course, as pointed out by the Director and the Employer, some important differences between *Hilliard* (and, as well, *Palmer*) and this case. One of these differences is that this case contains a more detailed statement of the positions adopted by the parties as well as findings of facts. There is some merit to that argument. However, ultimately, when assessing the "analysis" of the Determination and the conclusions reached by the delegate, I am struck by the lack of reasoned analysis of the basis for the conclusions. I emphasize that I do not make any decision with respect to the merits of the delegate's conclusions, *i.e.*, whether, in fact, Irvine's employment fall within *Regulation* 34(1)(r) Quite simply put, it is not clear to me why he arrived at the conclusions he did. The positions of

the parties with respect to the facts of the matter are set out in the Determination. The parties submissions on the applicable law are set out in their submissions. It is clear that the facts are in dispute as between the parties. As well, it is clear that they draw different legal conclusions from the facts, as they see them. For example, the Employer's position was that it "runs a program which involves treatment and rehabilitation of troubled youths on the Vancouver streets," which is "very detailed," includes intake, initial assessment as to treatment, ongoing assessment and treatment, and case management. As well, the Employer's position was that it "provides individual short-term and crisis counselling." The clients of the Employer "almost without exception ... are addicted to alcohol and/or drugs and/or are suffering from some other mental illness." And that may very well be the case. However, the point is that there are no reasons explaining why the delegate preferred the Employer's evidence over that of Irvine. The delegate is certainly entitled to prefer one party's factual assertions over those of the other but, where that is the case, the parties are entitled to know why. As well, the delegate is entitled–indeed, is required–to decide between "competing" legal arguments in making his determination. In other words, the delegate is required to determine the applicable law. In some cases, that is relatively straightforward; on other cases it may be a more complicated task. The bottom line, in my view, is that a party is entitled to know the reason for the delegate's decision. Finally, the delegate must apply the legal principles to the facts.

In addition, in my opinion, an analysis of *Regulation* 34(1)(r) would include consideration of the following:

1. whether the employee is employed by a charity to assist

2. in a program of therapy, treatment or rehabilitation

3. of mentally, physically or otherwise disabled persons

4. as a counsellor, an instructor, a therapist or a childcare worker.

It is not apparent to me that the delegate went beyond simply stating his conclusions that Irvine fell within this exemption. In this case, there is no dispute over the charitable status of the Employer. However, the other aspects of the requirements under *Regulation* 34(1)(r) are very much in dispute. Reading the Determination, it is not clear what "program of therapy, treatment or rehabilitation" was in place. The Employer's December 13, 1999, submission claims that "Covenant House has a very detailed treatment program in place." What is the nature of this –or these–program(s). That is not clear from the Determination which simply states that the Employer provides "counselling by way of a structured program that has clear boundaries and limitations." Did the target population of the program(s) consist of "mentally, physically or otherwise disabled persons"? The Employer's December 13, 1999, submission states that its clients "almost without exception are addicted" to substances such as alcohol and drugs and suffer from "mental illness." While the Determination concludes that "Irvine, as a staff member and counsellor was an integral part of this process," it is not clear what "process" the delegate is referring to. The analysis does not address the details of Irvine's position and his actual work for the Employer. It may well be that he is ultimately found to fall within one of the four categories described in the *Regulation*. Briefly put, I am of the view that the Determination does not contain adequate reasons. I hasten to add that I agree with the Employer that the reasons are not

required to be elaborate. What reasons are required depends on the facts and circumstances of each case.

Irvine also argues that Section 77 of the *Act* provides that a person under investigation must be given a reasonable opportunity to respond (*Cineplex Odeon Corporation*, BCEST #D577/97). I agree that it does. However, as pointed out by the Director, that provision deals with "a person under investigation"–and Irvine was not under investigation, the Employer was. In my opinion, Section 77 does not assist Irvine.

In any event, in the circumstances, I am inclined to accept Irvine's submission that the failure of the delegate to provide an opportunity to Irvine to respond to the assertions in the December 13, 1999 letter from the Employer's counsel, denied him a fair hearing. I have set out above, in some detail, the process that ultimately resulted in the Determination. In my view, there is no requirement that the complainant employee be provided with a copy of the Employer's letter (or "every bit of evidence" (see, for example, *Jannex Enterprises (1980) Ltd.*, BC EST #200/00)). Nevertheless, it is important for the integrity of the investigatory process that a party be allowed to respond to the substance of the other party's allegations. In my view, that is not only common sense, but also an approach that promotes the purposes of the *Act*, particularly to "... promote the fair treatment of employees and employers..." and to "... provide fair and efficient procedures for resolving disputes..." (see Section 2). In this case, it is clear to me that the delegate relied on the Employer's allegations of fact, in particular those set out in the December 13, 1999 letter. The wording in the Determination is very similar to the Employer's submission. The material submitted by Irvine, not only the submissions, but also the documents appended to those submissions, are not, in my view, given much, if any consideration. I emphasize–again–that I do not make any decision with respect to the merits of the delegate's conclusions, *i.e.*, whether, in fact, Irvine's employment falls within *Regulation* 34(1)(r). It may well be–at the end of the day–that the delegate's conclusions are correct. All the same, in my view, in these circumstances, the delegate, in order to arrive at a reasoned conclusion with respect to the matters before him ought to have put the substance of the Employer's allegations to Irvine and allowed him an opportunity to respond.

In my view, the above is consistent with fundamental principles of natural justice and the cases decided by the Tribunal. As noted by the Adjudicator in *Jack Verburg operating Sicamous Bobcat and Excavating*, BCEST #D417/98, at page 5:

> "There will be cases where the nature of the information received during the investigation will require the Director to provide a party whose interests may be adversely affected by that information with an opportunity to comment on it..."

It follows from the above that I do not agree with the Director's and the Employer's submissions that Irvine simply disagrees with the delegate's conclusions, as opposed to his reasoning.

I add the following comments. In this case, the delegate's "preliminary findings" were made a very short time after the complaint was filed. The complaint was filed, as mentioned above, in mid-September. In the initial complaint, Irvine took the position that he was not a "manager" and that he was not a "residential care worker." The "preliminary findings" were issued on November 1, 1999. In that letter, perhaps based on the delegate discussions with the Employer,

the delegate states his "preliminary findings" that the relevant exemption is provided by *Regulation* 34(1)(r). From my review of the file–and that is limited to the material submitted by the parties–there does not appear to have been much, if any, investigation of the facts of the matter.

I am concerned, as well, that the Determination purports to rely on information that is of little substance. The "observation" the delegate refers to in the Determination can only in the most charitable manner be characterized as such. In reality, he made some–perhaps casual–observations on his way to and/or from work. There are, I note, no particulars of these observations. A "drive-by" investigation of that nature does not satisfy the requirements of the *Act*. In my view, if the delegate made observations that he intended to rely upon, the appropriate course of action would have been for him to relay his observations to the parties and allow them an opportunity to respond. That would likely reduce the chances of factual errors. In any event, it is not clear to me how the delegate's casual observations relate to the issues at hand, *i.e.*, whether or not *Regulation* 34(1)(r) applies to Irvine. As well, the "written material" he referred to is an ad for the Employer. It is unclear to me what conclusions he drew from that.

In brief, in my view, the delegate failed to give adequate reasons for his decision that *Regulation* 34(1)(r) was applicable. As indicated, I am also of the view that the delegate denied the complainant a fair hearing when he failed to allow him an opportunity to comment on the substance of the Employer's submission. In the circumstances, I refer the matter back to the Director for further investigation. I agree with counsel for Irvine that, due to the nature of the appellate process before the Tribunal, i.e., that it is not a trial *de novo*, a referral back is the appropriate remedy in this case.

Most of the above concerns the delegate's conclusions with respect to *Regulation* 34(1)(r). With respect to the second issue, constructive dismissal, I am of the view that the delegate did not fail to give adequate reasons for his conclusion. In the result, the Tribunal will contact the parties to ascertain if a hearing is required and, if not, allow the parties an opportunity to make submissions, should they so desire.

Lastly, I would like to apologize to the parties for the length of time it has taken to write this decision. I appreciate the parties' patience in that regard.

ORDER

Pursuant to Section 115 of the Act, I order that Determination in this matter, dated January 18, 2000 be referred back to the Director.

Ib Skov Petersen

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal