Employment Standards TRIBUNAL

An appeal

- by -

Robert H. Thon
("Thon")

- 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.: 2001/384

DATE OF DECISION: September 18, 2001

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by Robert H. Thon ("Thon") of a Determination of the Director of Employment Standards (the "Director") dated April 18, 2001.

Thon had filed a complaint with the Director alleging his employer, the Village of Fraser Lake ("Fraser Lake") had contravened several provisions of the *Act*. The Determination concluded that Fraser Lake had not contravened the *Act*.

Thon says that the Director has made errors of fact, has made errors in the interpretation of the available facts and has made errors in calculating and deciding what amounts were owed.

ISSUE

The issue in this appeal is whether Thon has demonstrated the Determination was sufficiently wrong in its conclusions of fact, in its interpretation of the facts or in its conclusions and decisions in respect of amounts owed to justify the Tribunal exercising its authority under Section 115 of the *Act* to vary or cancel it.

FACTS

The Determination set out the following findings of fact:

- Thon worked for Fraser Lake from May 12, 1997 to July 6, 2000.
- Thon held the position of Public Works Superintendent.
- Thon was a "manager" for the purposes of the *Act.*
- Thon was terminated without cause (and without notice or compensation in lieu of notice) on July 6, 2000.
- At the time of termination, Thon was offered a severance package consisting of the equivalent of 24 weeks' wages, wages owing and accumulated entitlements owing. This offer was rejected by Thon.
- Since his termination, Thon has received an amount of $34,194.57 from Fraser Lake.

The Determination, applying the requirements of the *Act* to the matters raised in the complaint, accepted that Thon was statutorily entitled to annual vacation pay in the amount of $6,640.06, length of service compensation in the amount of $3,451.32 and, without detailed scrutiny, an amount equivalent to no more than 640 hours worked in addition to his regular hours of work. In result, the Director found the amounts owed to Thon under the *Act* did not exceed the amount paid to Thon by Fraser Lake following his termination and that no further amounts were owed.

The conclusion about the number of extra hours worked by Thon followed an analysis that considered Fraser Lake's policy on overtime for Thon's position, Thon's knowledge of the policy, that Thon raised no issue of overtime during his employment with Fraser Lake, the absence of detail and lack of precision in the overtime record provided by Thon during the investigation, some conflict between the extra hours claimed and the actual work performed and the general improbability that Thon could have worked all the extra hours claimed. It is apparent from the Determination that one of the key concerns with the claim for extra hours worked related to the acceptance by the Director of the record provided by Thon. The Determination noted several concerns about the record provided:

- the absence of any reference in the record to a time frame showing the period during which the overtime was alleged to have been worked;
- the absence of any description of the work being performed;
- the absence of any identification of the location where the work was performed;
- that the documented hours were often written in a different colour of ink or pencil than what was used to describe the activities of the day;
- that all hours worked were rounded off to the hour, except for one day (July 5, 1998); and
- that Thon acknowledged his claim for overtime one hour every day from October 1, 1999 to March 23, 2000 for "shift call" related to receiving a telephone call every day during that period, some of which he was not at home to receive and which, when personally received, ranged in length from "a few minutes to a lengthy period of time".

The Determination indicated a preference for the evidence submitted by Fraser Lake:

> On the balance of probabilities I prefer the evidence submitted by the Village of Fraser Lake, which were documents in some cases, completed by the complainant. In the documents Robert Thon, shortly after the work was performed, clearly records his hours and submits them to the employer for administrative purposes. Yet, in the evidence submitted to me after termination, the hours recorded are different.

The Determination also noted:

> . . . There was a documented process in place for approval of overtime. Robert Thon was familiar with this process and used it for employee's [sic] under his supervision . . . .

In the appeal, Thon has introduced additional material that was not made available to the delegate. It is not necessary to decide whether Thon should be allowed to introduce this material in the appeal as I do not find that information to be helpful in considering the issues raised.

ARGUMENT AND ANALYSIS

The burden is on Thon in this appeal to persuade me that the Determination is wrong in law, in fact or in some combination of law and fact (see *Re World Project Management Inc.*, BC EST #D134/97 (Reconsideration of BC EST #D325/96)). An appeal before the Tribunal is not a re-investigation of the complaint. It is a proceeding to decide whether there is any error in the Determination, as a matter of fact, as a matter of law or as a matter of mixed fact and law, sufficient to justify intervention by the Tribunal under Section 115 of the *Act*.

It is not the function of the Tribunal to substitute its opinion for that of the Director without some basis for doing so.

Where an appellant is challenging a conclusion of fact, the appellant must show that the conclusion of fact was either based on wrong information, that it was manifestly unfair or that there was no rational basis upon which the findings of fact could be made (see *Re Mykonos Taverna, operating as the Achillion Restaurant*, BC EST #D576/98).

Thon's appeal contains an outline of facts and circumstances related to his termination and his claim for additional compensation. Much of the outline identifies matters about which there is no dispute, such as the assertion that Thon was terminated without cause by Fraser Lake on July 6, 2000, or which have no apparent relevance to issues arising under the *Act* or in this appeal, such as indicating there were taxpayer demonstrations for which Thon was blamed. I see nothing in the appeal challenging the conclusion that Thon was a "manager" for the purposes of the *Act* and, while he was entitled to be paid at straight time for all hours worked, was not entitled to overtime pay. There are, however, two general assertions which bear directly on the Determination, first, that the submissions made by Fraser Lake to the Director are untruths and misrepresentations of the actual events and that the delegate chose to side with Fraser Lake.

The latter assertion is, in its effect, either an allegation that the delegate allowed herself to be misled by the alleged untruths or is an allegation of dishonesty and bias against the delegate. If it is intended to suggest the delegate was acting dishonestly or was bias, such allegation is a serious accusation which is not supported in the appeal by either argument or evidence. On that basis, I will put to rest any further consideration of such a suggestion by adopting and applying the words of the Court of Appeal in *Adams v. Workers Compensation Board* (1989), 42 B.C.L.R. (2d) 228 (C.A.) at p. 231:

> This case is an exemplification of what appears to have become general and common practice, that of accusing persons vested with the authority to decide the rights of parties of bias or reasonable apprehension of it without any extrinsic evidence to support the allegation. It is a practice which, in my opinion, is to be discouraged. An accusation of that nature is an adverse imputation on the integrity of the person against whom it is made. The sting and the doubt about integrity lingers even when the allegation is rejected. It is the kind of allegation easily made but impossible to refute except by general denial. It ought not to be

> made unless supported by sufficient evidence to demonstrate that, to a reasonable person, there is a sound basis for apprehending that the person against whom it is made will not bring an impartial mind to bear upon the cause. I see nothing in the appeal that would.

One other matter should be addressed at this point. In his appeal, Thon says the statement in the Determination that he had received at total of $34,194.57 following his termination was wrong. Thon says that he has received and cashed only $28,879.57. In his appeal, he states:

> The actual paid out gross to date July 6th 2000 to Jan 24th 2001 has only been $28,879.57 there is a difference here of $5,315.40 why? Does any body care or can the employer just lie whenever and wherever they want? Apparently, the Employer can Lie when ever they chose [sic] because the Delegate has chosen to believe this untruth without any proof from the employer.

In its reply to the appeal, Fraser Lake does not dispute that Thon may have cashed only $28,879.57 but he had received $34,194.57. They state:

> Mr. Thon has left out the payment of $5,315.00 made on 7 November 2000 which was the reissue of his final payment which included the additional 10 days of lieu time missed on the original cheque, this has not been cashed.

That cheque, with some adjustments, was issued once again and delivered to Thon on or about August 1, 2001 and acknowledged as received by Thon in a letter dated August 7, 2001. In a submission to the Tribunal received August 10, 2001, Thon claims that the amount of $5,315.00, which he received, was $439.21 short of what it should have been if the cheque was a reissue of the July 7th, 2000 cheque with an additional amount for 10 days of lieu time. He points to two areas of difference and dispute, the amount of wages paid for his last 4 days of employment, the period from July 2 to July 6, 2000, and the amount of holiday pay earned to the date of his termination.

There would appear to be some error in the calculation made by Fraser Lake of the wages owed for the last 4 days wages based on the statement in the Determination that:

> Both the Village and Robert Thon agree to the following:
>
> | | |
> |---|---|
> | Life Insurance | $117.00 |
> | Sick day pay-out 10% of 14.5 days | $333.63 |
> | last days worked (after cut-off period) | $1,012.40 |

Fraser Lake has not appealed any aspect of the Determination. I must therefore conclude the statement in the Determination is correct and there was agreement on their part that Thon was owed $1,012.40 for the last days worked, not $920.00 as included in the cheque provided to

Thon on or about August 1, 2001. Fraser Lake must pay Thon the amounts they agreed he was owed for the last days worked.

Whether there was a shortfall in respect of the amount of holiday pay earned by Thon to the date of his termination will depend on the merits of Thon's appeal on that point. There is, however, no longer any issue about whether Thon has received $28,879.57 or $35,194.57 since his termination. He has received the latter amount.

Turning to the substance of the appeal, I shall first address the matter raised concerning the finding that Thon was entitled to three weeks length of service compensation. Thon questions why the Director chose to "repeal" the six months severance that Fraser Lake indicated it was prepared to pay him, and "make it only 3 weeks". The answer is simple, although it may not be the answer Thon wishes to hear. The jurisdiction of the Director under the *Act* is limited to enforcing the minimum requirements of the *Act*, with some authority to regulate and enforce the clear terms of the employment relationship, including elements of the employment relationship that exceed minimum standards (see *Dusty Investments c.o.b. Honda North*, BC EST #D043/99 (Reconsideration of BC EST #D101/98)). The Director has no jurisdiction, however, to award damages for wrongful dismissal and the offer made by Fraser Lake, which I note was not accepted by Thon, was not a term of the employment relationship that could be regulated or enforced by the Director. The conclusion of the Director on the length of service compensation was correctly limited to what the Director had jurisdiction to decide. Thon is correct when he says the length of service provisions in the *Act* are the minimum, not the maximum. However, a complaint under the *Act* is not the forum in which to address a claim at law for wrongful dismissal that exceeds the minimum requirements of the *Act* or does not arise clearly from the terms of the employment relationship.

Thon's concern about this matter does not raise a valid ground of appeal.

Thon challenges the conclusions reached in the Determination on his overtime claim. He claims the overtime policy/process submitted by Fraser Lake and accepted by the Director was a fabrication, as no policy manual was in place until June, 1998. It may be that the particular policy relied on by Fraser Lake was not in place when Thon was first hired, but he does not deny the knowledge of the overtime policy attributed to him. He responds to several aspects of the analysis done by the Director on the overtime claim. His responses, however, never get past generalities. He says, with respect to the various overtime references:

- there was hourly overtime worked on the sidewalk project and he was there for every hourly overtime hour worked;
- as well, he was responsible for the engineering, material listing, cost estimating and scheduling for the project;
- the water and sewer overtime claim related to capital projects and maintenance call-outs in addition to the overtime claimed for the tri-weekly checks;

- he was made responsible for completing a sewer lagoon upgrade in 1998, including all the extra work required in completing that project;
- the 417 hours of overtime claimed for completing a correspondence course for a Power Engineers 5th Class Certification with Refrigerant was a requirement of employment in order to comply with provisions of the *Boiler and Pressure Vessel Act* and Regulations;
- through 1997, 1998 and 1999 there were upgrades to the arena and curling rink that were undertaken by him and entailed extra work;
- in 1999 the CN Sewer Project was engineered and scheduled by him and entailed extra work; and
- in 1999, the Chowsunket Sidewalk Project was engineered and completed by him and required extra work.

He also says that the Director was wrong to assume the overtime hours recorded by him were "rounded up". He submits that had he been asked, the Director would have learned the hours were always "rounded down". Whether the hours were rounded up or down was not the concern raised by the Director. The concern was that all overtime hours claimed, with one exception, were rounded to the nearest hour. I agree with the Director that the manner in which Thon recorded the overtime hours was a legitimate consideration when analysing the accuracy of the overtime record. This consideration was made quite relevant, in my view, by Thon's acknowledgement that the one hour claimed for taking the "shift call" often involved no more than a few minutes and sometimes involved no time at all. This also bears on his assertion in this appeal that overtime hours claimed were always "rounded down". If that were so, then the record should show "0 hours" on many of the occasions he claimed 1 hour for a shift call.

Regardless, that concern was only one of several factors that led the Director to discount the record of overtime provided by Thon and nothing else in the appeal submissions addresses the other concerns with the overtime record provided by Thon that are raised in the Determination.

In reply to this area of the appeal, Fraser Lake submits that nothing new has been added to the information that was provided during the investigation. That appears to be a valid comment. They contend, among other things, that the Determination properly addressed the records provided by Thon and correctly concluded they did not accurately show the number of overtime hours worked.

I have read the Determination and the material provided by the parties to this appeal and I have concluded that, overall, Thon has not satisfied the burden that is on him, which is to demonstrate there is an error in the Determination sufficient to justify the Tribunal exercising its authority to cancel or vary the Determination. There is nothing in the material that has persuaded me, to the degree of probability required, that the Director was wrong in the conclusion that 640 hours is a reasonably accurate reflection of the amount of extra time worked by Thon during the period covered by the complaint or that Thon has received more from Fraser Lake than they could be statutorily required to pay.

Finally, Thon says that Fraser Lake should, at least, have been found to have contravened the *Act* and been fined. The Tribunal has no original authority to levy penalties for a contravention of the *Act*. That authority belongs to the Director. Accordingly, the Tribunal is unable to accede to that suggestion.

The appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated April 18, 2001 be confirmed. I reiterate what was said above. Fraser Lake had agreed Thon was owed $1,012.40; they have only paid $920.00 of that amount and must pay the difference.

David B. Stevenson
Adjudicator
Employment Standards Tribunal