

BC EST # D503/98

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 -

Dr. Marko Nenadic Inc
("Dr. Nenadic or the employer")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Paul E. Love

FILE NO.: 98/592

DATE OF DECISION: November 6, 1998

DECISION

OVERVIEW

This is an appeal by Dr. Marko Nenadic Inc. (“Dr. Nenadic” or the “employer”) of a Determination dated August 19, 1998 . The delegate found that Dr. Nenadic failed to pay to an employee, overtime wages. Another delegate assessed a penalty in a zero dollar amount. The appeal was directed to the issue of overtime pay. The grounds for the appeal were that the employee agreed to accept straight time pay, and that there was a breach of natural justice by the delegate during the course of the investigation. There was no error demonstrated in the Determination and no breach of natural justice, and I confirmed the Determination.

ISSUES TO BE DECIDED

1. Was the employee entitled to overtime wages?
2. Was there a breach of natural justice in the investigation conducted by the delegate?

FACTS

Ms. Kimberly Morris was employed by Dr. Marko Nenadic Inc. as a certified dental technician. Following her discharge from employment she made a complaint to the Director of Employment Standards that she had not been paid for overtime wages by the employer.

The complaint was investigated and during the course of the investigation the Director’s delegate made a demand to the employer for the production of payroll records. The employer produced the records. From the records produced the delegate determined that the employee had worked overtime and while the employee had been paid for all hours worked at straight time, the employee had not been paid in accordance with the *Act*.

The delegate found that the employee was entitled to the sum of \$1,497.21, based on a review of the employer’s records.

The employer argued in its written submission that it had an oral agreement with the employee to work overtime at straight time rates. It says that the agreement was witnessed by two colleagues. It says that this agreement came about because it intended to hire another certified dental assistant

and the employee objected and agreed to work overtime at straight time rates. Ms. Morris disputes the agreement as alleged by the employer.

The employer further argued that it did not receive the employee's written statement to the Director, that the delegate failed to interview the witnesses who confirmed his version of the agreement and that therefore it was denied natural justice. The employer characterized the investigation as sloppy and unpleasant.

The employer was advised by the delegate of the substance of the complaint made, and was provided with the opportunity to participate in the investigation by supplying records pursuant to a demand, and by meeting with the delegate prior to the issuance of the Determination. The relevant portion of the complaint, filed on March 12, 1998, reads as follows:

My former employer refused to pay me overtime pay, claiming I agreed to straight pay, which I did not, I feel he should pay me correctly for my hours worked. I tried to handle the situation myself with as much tact & politeness as possible but he refused, I informed him I would be filing a complaint.

ANALYSIS

The burden is on the employer in this case to show that there was an error in the Determination such that I should vary or cancel the Determination. In this appeal conducted on written submissions the employer has not demonstrated any error.

Issue #1: Entitlement to Overtime Wages:

It is clear that Ms. Morris was an employee of Dr. Nenadic. The employer's records demonstrate that Ms. Morris worked more than 40 hours per week on occasion. On the occasions when the employee worked more than 40 hours per week the employee was paid only at the straight time hourly rate. The delegate has properly calculated the amount owing based on the *Act*, and the employer has not demonstrated any error in the calculation.

I will assume, for the purposes of this appeal that the employer is correct and that he reached an agreement with the employee that all overtime would be worked at straight time rates. This is an agreement which would deprive the employee of a minimum employment standard which is set out in section 40(2) of the *Act*:

40(1) An employer must pay an employee who works over 8 hours a day and is not on a flexible work schedule adopted under section 37 or 38

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- (a) 1 ½ times the employee's regular wage for the time over 8 hours, and
- (b) double the employee's regular wage for any time over 11 hours.

(2) An employer must pay an employee who works over 40 hours a week and is not on a flexible work schedule adopted under section 37 or 38

- (a) 1 ½ times the employee's regular wage for the time over 40 hours, and
- (b) double the employee's regular wage for any time over 48 hours.

Ms. Morris was not an employee who was excluded by regulation from the operation of the *Act*. The *Act* clearly notes that the requirements of the *Act* are minimum requirements. Any agreement to waive any of the minimum requirements is of no effect as outlined in section 4. The employer's assertion of an agreement, therefore, does not afford it any defence to the complaint by the employee that she was not paid overtime pay in accordance with the *Act*.

Issue #2 Breach of Natural Justice

In this appeal the employer alleged that the delegate did not afford it natural justice because the delegate failed to provide the employer with a copy of the employee's complaint, and it failed to investigate the employer's case by neglecting to interview two witnesses.

It is apparent that the employer was made aware of the substance of the complaint concerning overtime. The employer was also given an opportunity to participate in the investigation by supplying records and meeting with the Director's delegate. It was unnecessary for the Delegate to interview witnesses on the issue of whether an agreement, unenforceable pursuant to the *Act*, was reached. It is also apparent that the employer did not accept the delegate's assessment of the law which applied to the agreement he alleged:

During the meeting between Ms. Talwar and myself, Ms. Talwar stated that even though Miss Morris entered into the verbal agreement not to receive overtime pay, she still was entitled to this pay. I am very surprised that an officer working for this government would say something like that. I am ready at any point to confront both Ms. Morris and Ms. Talwar with their allegations because I have said nothing but the truth, and have tried to deal honestly with this ordeal.

The delegate was correct in her application of the *Act* to the undisputed facts. There appears to have been no breach of natural justice, although the investigation and findings were not to the liking of the employer. In my view the conduct of the delegate in handling the investigation, did not amount to a denial of natural justice or procedural fairness. A neutral interpretation of the facts as alleged by the employer,

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leaves me with the impression that the employer did not understand correctly its legal obligations with regard to the employee. Following through with the further investigation suggested by the employer was unnecessary, as the agreement alleged by the employer did not, at law, afford it any defence to a breach of the *Act*. The employer clearly violated its statutory obligations in respect of this employee.

In this appeal the employer alleged that the delegate was unpleasant during the course of her investigation. I make no findings in this regard as it is clear that the function of the Tribunal is to adjudicate appeals, not to otherwise supervise the conduct of an investigation of a complaint by a delegate.

“Unpleasantness” arising during the course of an investigation is not grounds for an appeal. The failure to consider relevant evidence or consider the employer’s side of the case might in certain circumstances amount to a breach of natural justice or procedural fairness, resulting in a decision by an adjudicator to cancel or vary a determination, or refer the matter back for further investigation. A delegate is entitled to use the tools at her disposal in order to obtain compliance with the *Act* including making a demand for documents, and advising an employer that a Determination, enforceable in the Supreme Court of British Columbia, will issue if the employer fails to rectify its breach of the *Act*. Here there was a clear breach of the *Act*, and the employer advanced a “defence”, which was not a defence at law to the employee’s claim.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination in this matter, dated August 19, 1998 be confirmed.

Paul E. Love
Adjudicator
Employment Standards Tribunal