Employment Standards TRIBUNAL

An appeal

- by -

Henry Tung
("Tung" or the "employer")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2001/393

DATE OF HEARING: September 17, 2001

DATE OF DECISION: September 26, 2001

DECISION

APPEARANCES:

Bruce C.E. Russell, Barrister & Solicitor — for Henry Tung

Larry Nelson, Law Student — for Edna Labuguen

OVERVIEW

This is an appeal brought by Henry Tung ("Tung" or the "employer") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*) from a Determination issued by a delegate of the Director of Employment Standards (the "Director") on July 12th, 2000 (the "Determination"). This appeal comes back before me for rehearing of a particular issue as a result of a partially successful reconsideration application.

The Director's delegate originally determined that Mr. Tung owed his former employee, Edna Labuguen ("Labuguen"), the sum of $10,793.21 on account of unpaid wages (principally, overtime pay) earned during the period March 1st, 1995 to June 14th, 1996. Mr. Tung, who was represented by legal counsel during the latter stages of the delegate's investigation and throughout the entire proceedings before the Tribunal, appealed the Determination alleging that:

- he was "wrongfully and unfairly prejudiced" by reason of the "unconscionable, inexplicable and/or wholly improper delays" in the investigation and original determination of Ms. Labuguen's complaint;
- Ms. Labuguen's unpaid wage complaint was settled prior to the issuance of the Determination;
- the Director's delegate erred in determining her unpaid wage complaint based on a 13-hour workday since the parties had previously "settled" her complaint on the basis that her unpaid wage entitlement would be calculated based on a 12.5-hour working day; and
- the Director's delegate incorrectly calculated Ms. Labuguen's "regular wage" for purposes of determining her overtime pay entitlement.

I originally heard Tung's appeal on January 8th, 2001 and issued reasons for decision, dated January 23rd, 2001, dismissing the appeal and confirming the Determination (see B.C.E.S.T. Decision No. D028/01).

Mr. Tung applied, pursuant to section 116 of the *Act*, to have my decision reconsidered. That application came before Adjudicator Love who granted the application in part (see B.C.E.S.T.

RD250/01 issued May 22nd, 2001--the "Reconsideration Decision"). Adjudicator Love confirmed my decision with respect to Ms. Labuguen's unpaid wage entitlement. In other words--as originally determined by the Director's delegate and confirmed by me--Mr. Tung owes, subject to the finding on the "delay issue, Ms. Labuguen the sum of $10,793.21 on account of unpaid wages and interest (plus additional accrued interest as and from the date of the Determination). However, Adjudicator Love remitted the matter of "delay" back to me for rehearing. The relevant portions of Adjudicator Love's decision are reproduced below:

> On the issue of delay and prejudice, Counsel for Mr. Tung has raised a serious issue, which falls within the proper scope for reconsideration. At the time of the hearing of this matter the Tribunal had ruled on the delay issue in two cases, and there was some divergence in the views of the Adjudicators...
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> The Adjudicator appears to have been alert to a recent case dealing with the delay issue (*Blencoe v. British Columbia Human Rights Commission* [N.B.: neutral citation omitted; now reported at [2000] 2 S.C.R. 307], which appears to make the employer's submission "an uphill battle" on this point. Neither party referred to *Blencoe* in written and oral submissions. I do not know what the evidence is concerning the prejudice. This was not disclosed in the appellant's material...
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> I am concerned that Counsel for the employer is alleging a lack of opportunity to develop his case, on the very issue which was the subject of detailed analysis by the Adjudicator, on the basis of case law of which the parties do not appear to have been aware. Counsel for the employee appears to confirm that employer's Counsel did not address the issue of laches, but surmises that the evidence would not have been substantial...
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> The employer should have been given an opportunity to develop the "prejudice and delay argument", lead evidence on the point, and should have been given an opportunity to consider and comment upon *Blencoe*. I find that the Adjudicator should have permitted "more scope" to the appellant to develop this argument, and that this is a breach of natural justice. I set aside the portion of the decision was [sic] deals with delay...I refer this matter back to the original Adjudicator to hear and rule on the issue of prejudice and delay by way of an oral hearing.

APPLICATION FOR ADJOURNMENT OF THE REHEARING

The rehearing was held at the Tribunal's offices in Vancouver on September 17th, 2001. At the outset of the rehearing, counsel for Mr. Tung applied for an adjournment so that he could serve a summons on the Director's delegate. This latter application was opposed by Ms. Labuguen's representative. I heard both parties' submissions regarding the adjournment application and indicated that I would issue a written decision on the matter and, if necessary, order that the

hearing continue on a future date so that the delegate could be properly summoned. In the meantime, I indicated that I would hear all of the other evidence the parties wished to present.

Mr. Tung was present at the hearing and testified on his own behalf; I was advised by counsel for Mr. Tung that the delegate was the only other witness the appellant proposed to call. Ms. Labuguen did not avail herself of the opportunity to present any further testimony on her own behalf. Thus, and subject to my ruling on the adjournment application, I now have before me all of the evidence the parties intend to present save for the delegate's testimony.

In my view, this matter ought not to be adjourned to another date in order to hear the delegate's testimony. The appellant's request that the hearing be adjourned to a future date for continuation is refused. Accordingly, in these reasons I will address the evidence and arguments presented at the rehearing with respect to the matter of "delay".

My reasons for refusing the adjournment are essentially threefold. First, I note that the delegate was not summoned to appear at the original hearing and at that time counsel for Mr. Tung did not apply for an adjournment so that the delegate could be summoned to appear before me. In other words, summoning the delegate appears to be an *ex post facto* attempt by the appellant to shore up his case. Second, I am not satisfied that counsel for Mr. Tung has proceeded with due diligence. Notice of the rehearing (for September 17th, 2001) was given to the parties on August 2nd, 2001, however, counsel for Mr. Tung did not apply to the Tribunal for a summons respecting the delegate until September 14th, 2001, *i.e.*, the Friday before the hearing was to reconvene on Monday, September 17th. This summons was issued by the Tribunal but the appellant was unable to have it personally served on the delegate--I understand that the delegate is not currently working for the Employment Standards Branch as she is away on some sort of leave. Third, and most importantly, the delegate's proposed testimony (about an alleged settlement agreement that was reached at a so-called "settlement and fact finding" meeting between the parties held on October 20, 1999 and, possibly, to explain why this case took so long to investigate) is not relevant to the issue that I must address, namely, the prejudice that the appellant suffered as a result of the delay in determining Ms. Labuguen's complaint.

I have already accepted--see my original decision at pages 4 and 6--that the delay in this case was inexplicable. Given that finding, the only question that remains relates to the prejudice suffered by Mr. Tung as a result of the delay. I fail to see how the delegate would be in a position to provide relevant and probative evidence on this latter point. In my view, the delegate could hardly be expected to give probative evidence about whether or not Mr. Tung suffered any prejudice by reason of the delay in this case. Indeed, counsel for Mr. Tung does not assert that the delegate would, in fact, testify about any particular prejudice suffered by Mr. Tung--this summons strikes me as nothing more than a rather ill-conceived "fishing expedition".

THE "DELAY" ISSUE

At the outset, I feel obliged to note that the issue of "delay" was addressed, in some detail, at the original appeal hearing. A review of my previous reasons for decision discloses that "delay" was specifically identified as one of the central issues in the appeal and some three pages of my reasons were devoted to an analysis of that very question.

Laches

Although counsel for Mr. Tung mentioned "laches" in his opening statement at the original appeal hearing, he did not develop that argument in any substantive fashion. Similarly, at the rehearing, counsel did not address the issue of "laches" in any fashion in either his opening or final argument. I must say that I do not find that omission particularly surprising inasmuch as laches is an equitable doctrine that relates to an *individual's* failure to pursue their rights in a timely fashion--see *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 6 where La Forest stated:

> It [laches] is a defence which requires that a defendant can successfully resist an equitable (although not a legal) claim made against him if he can demonstrate that *the plaintiff, by delaying the institution or prosecution of his case*, has either (a) acquiesced in the defendant's conduct or (b) caused the defendant to alter his position in reasonable reliance on the plaintiff's acceptance of the status quo, or otherwise permitted a situation to arise which it would be unjust to disturb.
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> (my *italics*)

In this case, Ms. Labuguen filed her complaint well within the 6-month statutory time frame; the delay at issue here relates to the extraordinarily slow pace of the investigation of that complaint by the Employment Standards Branch. In other words, this case concerns *administrative delay*; it is manifestly not a case about a complainant who failed to initiate a timely claim.

It should be noted that even if Mr. Tung *was* in a legally tenable position to argue that the Determination ought to be cancelled by reason of the equitable doctrine of laches, he still would be obliged to show that Ms. Labuguen either waived or abandoned her right to unpaid wages (clearly not the case since she filed a timely claim) or that Ms. Labuguen's failure to pursue her complaint in a timely fashion caused Mr. Tung to alter his position such that he would be significantly prejudiced if the complaint was to be adjudicated on its merits. In *M.(K.) v M.(H.), supra.*, Justice La Forest, writing for the entire 7-justice panel on this point, observed that:

> ...there are two distinct branches to the laches doctrine, and either will suffice as a defence to a claim in equity. What is immediately obvious from all of the authorities is that mere delay is insufficient to trigger laches under either of its two branches. Rather, the doctrine considers whether the delay of the plaintiff constitutes acquiescence or results in circumstances that make the prosecution of

> the action unreasonable. Ultimately, laches must be resolved as a matter of justice as between the parties, as is the case with any equitable doctrine.

At both the original hearing and at the rehearing, counsel for Mr. Tung submitted that the inordinate delay involved in investigating and determining Ms. Labuguen's complaint was sufficient to justify a cancellation of the Determination. At the original hearing, and once again at the rehearing, I expressed my view that while I was satisfied that the delay in this case *was* inordinate, Mr. Tung was nevertheless obliged to show that he was *prejudiced* because Ms. Labuguen's complaint was not adjudicated in a timely manner.

Evidence of prejudice is relevant whether one is advancing the equitable defence of laches or is challenging an administrative tribunal's decision on the basis of inordinate administrative delay. As I noted in my original reasons for decision (at pages 5-6):

> Counsel for Mr. Tung explicitly submitted that the delay in this case resulted in a denial of Mr. Tung's right to natural justice. "However, delay, without more, will not warrant a stay of proceedings as an abuse of process at common law...In the administrative law context, there must be proof of significant prejudice which results from an unacceptable delay." (*Blencoe,* at para. 101). Prejudice may result where, for example, the delay is such that witnesses no longer have a clear memory of the events in question, key witnesses have died or are otherwise unavailable, or key documents have been destroyed. There is absolutely no such prejudice in the instant case.
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> "To constitute a breach of the duty of fairness, the delay must have been unreasonable or inordinate. There is no abuse of process by delay *per se.* [It] must [be] demonstrate[d] that the delay was unacceptable to the point of being so oppressive as to taint the proceedings" (*Blencoe* at para. 121). While I am of the view that the delay in this case was inordinate (this was not a complicated matter and it ought to have been dealt with considerably more expeditiously), I cannot conclude that this delay "tainted" the proceedings.

Administrative Delay

As can be gleaned from the above-quoted passage from my original reasons, I relied, to a large degree, on the *Blencoe* case in dismissing the appeal. A central issue in the reconsideration application concerned whether or not the appellant was given a fair opportunity to "consider and comment upon *Blencoe*" (see Reconsideration Decision at page 7). Adjudicator Love, at page 6 of the Reconsideration Decision, commented that he was "concerned that Counsel for the employer is alleging a lack of opportunity to develop his case, on the very issue which was the subject of detailed analysis by the Adjudicator, on the basis of case law of which the parties do not appear to have been aware". Mr. Tung's counsel also asserted that he was prevented from making full argument with respect to laches (see Reconsideration Decision at page 3).

It is simply not the case that counsel was denied an opportunity to make submissions with respect to either laches or administrative delay. At the original appeal hearing, I indicated to Mr. Tung's counsel that whether he was relying on laches--a defence that I suggested had no application in the circumstances--or administrative delay, evidence of delay had to be buttressed by evidence of prejudice. As noted above, counsel for Mr. Tung did not accept that position and continued to assert that the inordinate delay in this case, standing alone, was sufficient to justify a cancellation of the Determination.

Surprisingly, at the original appeal hearing neither party specifically referred to *Blencoe* during their submissions. The Supreme Court of Canada's decision in *Blencoe* was issued on October 5th, 2000 to extensive local media coverage. The appeal hearing took place some three months later and, given the nature of the appellant's attack on the Determination, I expected to receive extensive submissions on *Blencoe* at the appeal hearing. Because neither party's representative mentioned *Blencoe*, either in their opening or in their final argument, prior to adjourning the appeal hearing, I raised the case with Mr. Tung's counsel directly and suggested to him that it might well represent a significant impediment to his argument that inordinate delay, of itself, justified a cancellation of the Determination. A discussion with respect to the *Blencoe* case, involving both counsel, ensued.

Counsel for Mr. Tung conceded he was somewhat familiar with *Blencoe* but had not actually read the decision; he did not ask for leave to make further written submissions regarding its application to the appeal nor did Ms. Labuguen's agent. At the conclusion of the hearing, I indicated to the parties that I would be carefully re-reading *Blencoe* before issuing my reasons for decision. Both parties certainly left me with the impression that my proposed course of action was entirely satisfactory to them. Let me reiterate what I have previously stated: at no time did either counsel request that they be given the opportunity to make further written submissions with respect to *Blencoe*. I vigorously take issue with the suggestion, set out in the Reconsideration Decision, that there was an "unfair hearing" because the parties were not given an opportunity to comment on *Blencoe*. That assertion is, so far as I am concerned, without any factual foundation.

Delay and prejudice

At the original hearing, Mr. Tung testified that he suffered prejudice because of the delay involved in this case and I dealt with this latter evidence in my reasons for decision as follows (at page 6):

> Since the Director chose not to appear at the appeal hearing, I am unable to fully understand why this case took so long to conclude. However, it also seems equally clear that the lengthy delay did not result in a procedurally unfair adjudicative process. Mr. Tung was well aware of the allegation against him; he was given a full and fair opportunity to respond to Ms. Labuguen's complaint; and, other than the payment of additional interest, he cannot point to a single

> circumstance whereby he was prejudiced due to the tardiness of the delegate's investigative and decision-making process. For the most part, Mr. Tung's claims of prejudice (appearing at hearings, hiring legal counsel) flow from the fact that he was forced to respond to what, in his view, was a nonmeritorious complaint. As for the matter of interest, I consider this to be, at best, a neutral factor since, it must also be remembered, interest only compensates Ms. Labuguen for the loss of use of money that was owed to her since the summer of 1996. Further, Mr. Tung, for his part, has had the use of money that properly belonged to Ms. Labuguen for several years and he has thus benefited to that extent.
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> ...although I consider the delay here to be excessive, in the absence of evidence of "actual prejudice of such magnitude that the public's sense of decency and fairness is affected" (*Blencoe* at para. 133), the Determination cannot be cancelled solely on the basis of unreasonable delay.

Mr. Tung did not provide any further evidence of prejudice in his reconsideration application. Adjudicator Love states, at page 6 of the Reconsideration Decision, that he does "not know what the evidence is concerning the prejudice" since "this was not disclosed in the appellant's material". As a preliminary point, I do not think it appropriate that a rehearing should be directed on the basis of assertions of prejudice that are wholly unsupported by any evidentiary foundation. In any event, at the rehearing Mr. Tung (who once again appeared as the sole witness on his own behalf) testified--as he could have at the original hearing--about certain other prejudicial effects of the delay. The "new" evidence before me regarding prejudice consists of the following:

- Mr. Tung says that he would not have attended the October 20th, 1999 factfinding meeting if he had known that Ms. Labuguen was seeking compensation for unpaid wages prior to March 1st, 1995;
- the unpaid wage dispute was "settled" at the factfinding meeting and thus a Determination should not have been issued;
- two witnesses, who do not presently reside in the lower mainland and thus are not available to testify in person, support Mr. Tung's position regarding Ms. Labuguen's work day;
- since 1996, Mr. Tung's financial position has deteriorated (his business closed in 1999) and thus paying Ms. Labuguen her unpaid wages is, at the present time, considerably more financially burdensome than it would have been in 1996; and
- this ongoing dispute has been very stressful both for Mr. Tung and his wife.

I am unable to conclude that any of the above matters constitute sufficient prejudice to justify cancelling the Determination. I shall briefly deal with each of the above items in turn.

Complainants are entitled to advance whatever claims they wish, even claims that may not be legally recoverable. However, in this case, I fail to see how Mr. Tung was prejudiced inasmuch as the delegate did *not* award Ms. Labuguen any compensation for unpaid wages that may have accrued prior to March 1st, 1995. Mr. Tung's assertion that Ms. Labuguen's claim was settled in October 1999 has previously been considered and rejected. Mr. Tung, apparently, still believes that this matter was settled but his belief--erroneous as it is--that the Determination ought not to have been issued because the claim was settled does not constitute prejudice. I might add, on this latter point, that the delegate advised Mr. Tung's counsel by letter dated October 25th, 1999 that the dispute was not settled and thus this is not a situation where the appellant was "lulled" into the false belief that the claim would not result in the issuance of a determination due to it having been settled.

The two witnesses are a house guest and his mother who apparently lived with the Tungs, for very brief periods (a few weeks at a time and for no more than six weeks in total), during 1996. Mr. Tung says that these witnesses could have corroborated his position about Ms. Labuguen's work day. Neither witness testified by teleconference before me and I do not have so much as a written statement from either witness that would corroborate Mr. Tung's assertion with respect to the relevance of their evidence. Since neither witness has resided with the Tungs since 1996, even if the matter had proceeded more quickly, neither would have been available to give an "in person" statement to the delegate or to this Tribunal. If their evidence was so critical, why was it not presented--by way of a written statement or via teleconference--at the appeal hearing or at the rehearing? Mr. Tung was aware of this complaint very early on in the proceedings; at any time, he could have (but did not) contacted the witnesses and obtained a statement from them or he could have requested the delegate to contact them.

In essence, I am asked to assume, based on the bald assertion of Mr. Tung, that these two witnesses could have given relevant and probative evidence regarding Ms. Labuguen's workday to either the delegate or to this Tribunal. I have grave doubts about the former and, in any event, there is nothing before me to suggest that even now, these witnesses could not have provided, at least, a written statement with respect to Ms. Labuguen's hours of work. Obviously, given the effluxion of time, it may be that the two supposed witnesses are now unable to give relevant evidence whereas they might have formerly been in a position to do so; nevertheless, that latter suggestion is a matter of pure speculation (see *Blencoe* at paragraph 103).

Even if Mr. Tung has suffered some financial reversals over the years, it also true that if he had properly paid Ms. Labuguen in the first instance, this matter would have been resolved years ago. Indeed, at any time during these proceedings, Mr. Tung could have agreed to pay Ms. Labuguen what she was owed. In fact, correspondence on the file shows that in October 1999 Ms. Labuguen was willing to accept something substantially less than she was owed but Mr. Tung refused (as was his right) to settle the matter on Ms. Labuguen's terms. Finally, even now, it

must be remembered that Ms. Labuguen has still not received nearly $11,000 in unpaid wages and, in terms of relative financial deprivation, it seems to me that she, rather than Mr. Tung, has suffered--to date--the greater prejudice.

Finally, while I accept that being ordered to pay nearly $11,000 in unpaid wages can create a stressful situation, that sort of stress will arise in almost every case where an order to pay is issued. Undoubtedly, this claim has been outstanding for a very long time but I fail to see how the stress associated with the ongoing nature of this case, *per se*, has prejudiced Mr. Tung's ability to defend himself. Finally, I might add that the comparatively private nature of an investigation into an unpaid wage complaint does not create anything like the "stigma" that Mr. Blencoe complained about, namely, a very public accusation of sexual misconduct. If the stress and "stigma" suffered by Mr. Blencoe was not enough to justify a judicial stay (see *Blencoe*, paras. 96, 115 and 133), I am certainly not prepared to cancel the Determination in this case based on a similar argument.

After having reheard the "delay issue" in accordance with the directions set out in the Reconsideration Decision, I see no proper basis for varying the conclusions set out in my original decision or for ordering that the Determination be cancelled.

ORDER

Pursuant to section 115 of the *Act,* I order that the Determination be confirmed as issued in the amount of **$10,793.21** together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act,* since the date of issuance.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal