Employment Standards TRIBUNAL

An appeal

- by -

Penguin Contracting Inc.
("Penguin")

- 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: Lorne D. Collingwood

FILE No.: 2002/471

DATE OF DECISION: November 21, 2002

DECISION

OVERVIEW

Penguin Contracting Inc. (I will use "Penguin" and "the employer" for ease of reference.) appealed, pursuant to section 112 of the *Employment Standards Act* ("the *Act*"), a Determination issued by a delegate of the Director of Employment Standards (the "Director") on July 9, 2001. The Determination orders that Penguin pay Foster overtime wages plus vacation pay and interest.

The appeal was late but an Adjudicator decided that the Tribunal should exercise its discretionary power to extend the time period for the appeal in one respect, that being the matter of the whether the delegate's overtime calculations are correct or not (See *Penguin Contracting Inc.*, BCEST No. D616/01). The employer had also sought to argue that overtime wages are not owed because the employee was on a flexible work schedule but the Adjudicator found that there was no need to hear from the employer on that particular issue because "the concept of a flexible work schedule is defined in the *Act*, and there is no room for the Appellant's interpretation of the *Act*". The employer had also sought to argue that overtime wages were not owed for reason of an agreement or understanding that the employer would not pay overtime wages unless there was more than 80 hours of work in a two week period. The Adjudicator found that the Tribunal should not hear from the employer in that respect because "the *Act* in its present form, provides for minimum standards, and employers and employees are not at liberty to make an enforceable agreement which is contrary to the *Act*".

The parties were invited to make submissions in respect to the delegate's overtime calculations. Michael Rogge, the owner of Penguin, saw this as an opportunity to make submissions to the Tribunal which have to do with the law in general and D616/01 in particular. (I will in this decision refer to decisions by their number alone.)

It fell to me to decide what remained of the appeal. An oral hearing was conducted. In *Penguin Contracting Inc.*, BCEST No. D119/02, I decided that the delegate's overtime calculations were in error and that the matter should be referred back to the Director. I had at the hearing said that I would not revisit D616/01 and I made note of that in the decision, pointing out that it was not an application for reconsideration that was before me. Rogge was at this point also wanting to argue that the *Act* is wrong and also that the Tribunal should have the power to amend the law or over-ride the law whenever and wherever it sees fit but especially where the failure to comply with the law is by agreement and based on good intentions. I went to considerable lengths at the hearing to explain that those are not matters for an Adjudicator to decide but the legislature of British Columbia. I also made note of that in the decision.

Penquin filed an application for reconsideration of D119/02. That application was dismissed. (See letter decision dated September 5, 2002, BCEST No. RD394/02.) The Adjudicator in that case decided that there was no reason to reconsider D119/02. Penquin was wanting to revisit issues that have already been decided, to reargue its case, and to elicit a second opinion on the merits of its contention that the *Act* is rigid and inflexible.

The Director, acting on D119/02, assigned a delegate the task of recalculating the amount of overtime. Submissions were invited. Foster produced a detailed analysis of timesheets which shows 47 hours of overtime and that led the delegate to decide that the employee did work 47 hours of overtime. The

employer did not cooperate. The employer was asked to respond to the employee's submission but it did not do so.

The delegate reported back to the Tribunal. Copies of his report, a letter dated August 9, 2002, were sent to the parties and they were invited to make submissions on the report. The employer has filed a submission in which it is argued that the delegate should not have relied on time sheets as he did because they are wrong or misleading. The employer raises new issues and the employer goes on to argue matters that are decided in D616/01. I have decided that the employer may not make submissions that could have, and should have, been made to the delegate and that it may not raise any new issues or revisit D616/01.

ISSUES

The employer is seeking to argue that the delegate should not rely on time sheets as he did because the time sheets are misleading. According to the employer, the time sheets cannot be trusted because they were kept by the employee, start times are inconsistent, Foster took a "multitude of days off", the time sheets do not account for lunch breaks and other breaks that the employee took and "Foster has wrongfully recorded time sheet entries from February 22 and 23, twice". The employer also claims that the time sheets are inconsistent with what a current employee, Mark Maksemuik, has had to say.

The employer seeks to argue that the Determination as amended is somehow wrong because it is significantly retroactive. This is a new issue.

The employer seeks to argue that the Determination as amended is wrong because the overtime was not authorized. This is an entirely new claim. The employer has previously indicated that it approved of the overtime: It is just that the employee was told that he would be paid straight-time wages for the overtime unless he worked more than 80 hours in a two week period.

The employer is seeking to revisit an old issue, the matter of whether an employee can waive his or her right to overtime. According to the employer, it was understood that overtime wages would not be paid unless the employee worked more than 80 hours in a two week period. The employer submits that "It is reasonable for me to believe that when Mr. foster worked longer on occasion, he was doing so to make up for hours that he missed on other days, with the full knowledge that overtime pay would not be paid. On that basis, it was reasonable for me to let him work those overtime hours but credit him with regular pay on his cheque."

What I must ultimately decide is whether there is or is not reason to cancel or vary the amended Determination or again refer a matter or matters back to the Director.

FACTS

The employer's appeal was late. The Tribunal considered whether to exercise its discretionary power to extend the time period for the appeal. An Adjudicator decided that the time limit should be extended but in just one respect, that being the matter of the whether the delegate's overtime calculations are correct or not (D616/01).

The employer had also claimed that overtime wages are not owed because the employee was on a flexible work schedule and, secondly, because the employee in effect agreed to work overtime for straight time wages in that he had been told that overtime wages would not be paid unless more than 80 hours were worked in a two week period. Those arguments were found to be without merit. The Adjudicator said that it cannot be that overtime wages were not owed for reason of a flexible work week because "the concept of a flexible work schedule is defined in the *Act* and there is no room for the Appellant's interpretation of the *Act*". The Adjudicator also found that it cannot be that the employee waived his right to overtime pay because "the *Act* in its present form, provides for minimum standards, and employers and employees are not at liberty to make an enforceable agreement which is contrary to the *Act*".

Submissions were invited in respect to the one issue that remained, the matter of the delegate's overtime calculations. An oral hearing was then conducted. The employer saw this as an opportunity to make submissions which are to do with the law in general and also matters that are addressed by D616/01. I advised the employer at the hearing that I would not revisit D616/01 and I made note of that in *Penguin Contracting Inc.*, BCEST No. D119/02, pointing out that it was not an application for reconsideration that was before me. Michael Rogge, owner of Penguin, was at this point also wanting to argue that the *Act* is wrong and also that the Tribunal should have the power to amend the law or over-ride the law whenever and wherever it sees fit but especially where the failure to comply with the law is by agreement and based on good intentions. I did my best to explain at the hearing and I noted in the decision that such matters are not for Adjudicators to decide but the legislature of British Columbia.

In D119/02, I referred the matter of the delegate's overtime calculations back to the Director. The delegate in reviewing his decision had decided that it contained an error. The employee led me to believe that the Determination contained other errors. And I could not decide matters on the basis of the information before me.

A delegate was in due course instructed to recalculate Foster's overtime. The delegate invited submissions from both employee and employer. Foster is said to have "painstakingly and meticulously analysed the timesheets" and concluded that he worked 47 hours of overtime. The delegate reports that Michael Rogge, Penquin's owner, was sent Foster's submission but the employer did not cooperate with his investigation. He merely made it clear that he had no intention of paying the employee any overtime pay at all.

ANALYSIS

This employer just doesn't get it. He does not appreciate the appeal process and it appears that he does not understand or will not accept what the *Act* requires.

It has been explained to Mr. Rogge that the employee is not allowed by the *Act* to accept less than what the *Act* provides.

It has been explained to Mr. Rogge that section 40 the *Act* requires that employers pay a premium for all overtime worked after 8 hours in a day and 40 hours in a week.

> **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
> (a) 1 1/2 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 1/2 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.

It is but one single issue that I sent back to the Director, the matter of the delegate's addition of the overtime worked by Foster.

I am not prepared to revisit matters that are decided in any decision, be it D616/01, D119/02 or RD394/02. Those are decided matters.

I will not allow the employer to raise new issues. It is seeking to raise matters that should have been raised long ago.

I will not allow the employer to argue quantum at this stage. That task was assigned to a delegate. The delegate gave the employer an opportunity to make submissions on that very point but it chose not to cooperate with the delegate. The Tribunal will not allow itself to be used for the making of cases that could have been and should have been made to a delegate. As another Adjudicator has put it, appellants cannot be allowed "to 'sit in the weeds', failing or refusing to co-operate with the delegate in providing reason for the termination of an employee and later filing appeals of the Determination when they disagree with it" [*Tri-West Tractor Ltd.* (1996) BCEST #D268/96].

I accept that it is not 52.5 hours of overtime pay that the employer owes Mr. Foster but 47 hours of overtime premiums. The Determination dated July 9, 2001 is therefore varied.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated July 9, 2001 be varied. It is not 52.5 hours of overtime pay that the employer must pay Ian Foster but 47 hours of overtime pay plus vacation pay and interest pursuant to section 88 of the *Act*.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal