BC EST #D569/97

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 -

Tricom Services Inc.
("Tricom")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Sherry Mackoff

FILE N0.: 97/526

DATE OF DECISION: December 9, 1997

DECISION

OVERVIEW

This is an appeal by Tricom Services Inc. ("Tricom" or the "employer") pursuant to section 112 of the *Employment Standards Act* (the "*Act*") from Determination CDET 006467, dated June 20, 1997, issued by a delegate of the Director of Employment Standards.

In her Determination the delegate found that the employer had contravened section 40 of the *Employment Standards Act.* Section 40 of the *Act* provides for payment of overtime wages for employees who are not on a flexible work schedule.

The Determination ordered the employer to pay $34,076.82. The delegate found that twenty-eight employees, working as station operators and station supervisors, were owed unpaid wages, plus interest, totalling $34,076.82.

The employer seeks to have the Determination cancelled. Counsel for the employer advances several grounds of appeal which are set out below. It is important to note that the Director of Employment Standards also requests that the Determination be cancelled.

Of the twenty-eight employees named in the Determination, one employee, Mike Stefiuk, sent a written submission to the Employment Standards Tribunal (the "Tribunal"). Mr. Stefiuk supports the delegate's finding that he is owed wages in the sum of $808.65.

The Telecommunications Workers Union (the "union") was notified of this appeal by the Tribunal and given an opportunity to make written submissions. All employees covered by the Determination were members of the bargaining unit certified to the union. It is the union's position that the Determination should be confirmed.

FACTS

Tricom is a company that provides security services. On September 11, 1995, the Director of Employment Standards granted Tricom a variance with respect to shift schedules affecting employees working as station operators at 6929 Royal Oak Avenue, Burnaby, B.C. The variance, which concerned hours of work and overtime, had an expiry date of October 1, 1996.

In the Determination the delegate found that Tricom had abandoned the variance as of January 14, 1996. At page two of the Determination the delegate states: "It was noted that the employer had effectively abandoned the Variance as of January 14, 1996 by eliminating

the afternoon shift that was inherent in all schedules approved for use in the Variance. The employer also began using schedules that were not approved in the variance, such that some employees were working longer hours with less time off between shifts."

The delegate also found that the station supervisors employed by Tricom were not "managers" as defined in section 1 of the *Employment Standards Regulation,* and were therefore not exempt from the hours of work and overtime provisions set out in Part 4 of the *Act.* The delegate concluded that 28 employees were entitled to "Unpaid wages resulting from the abandonment of the variance granted September 11, 1995, effective January 14, 1996 and unpaid wages for the employees identified as Shift Supervisors, as per the attached summary." The amounts awarded to the 28 employees range from a low of $60.56 to a high of $5430.45. The total, including interest to June 20, 1997, comes to $34,076.82.

As of December 1, 1995, the union became the certified bargaining agent for all of the employees covered by the Determination. The union and Tricom entered into a first collective agreement that is dated October 4, 1996. The collective agreement was made retroactive to the date that the union became the certified bargaining agent. Article 29 of the collective agreement provides that the term of the collective agreement is from December 1, 1995 to November 30, 1998.

The collective agreement negotiated by the employer and the union contains provisions dealing with hours of work and overtime. Article 8 of the collective agreement is titled "Hours of work and overtime". It is divided into seven subsections: 8.01 "Work Week"; 8.02 "Work Day Duration"; 8.03 "Operations Schedule"; 8.04 "Overtime Authorization"; 8.05 "Overtime Banking"; 8.06 "Overtime Rates"; and 8.07 "No Pyramiding or Compounding of Premiums". Article 8.03(5) sets out the schedule for "Group 1 employees". Station supervisors and station operators are Group 1 employees. Articles 6.02 and 6.03 provide that station supervisors and operators "shall be referred to as Group 1 employees". The collective agreement also covers employees other than station operators and station supervisors.

It is convenient to note here, for reasons that will become apparent, that the collective agreement contains a Letter of Understanding (Appendix E) titled "Group Scheduling", dated October 4, 1996. It provides, in part, that: "The Employer agrees to implement the Group 1 (12 hr. shift) employees' Schedule as per Article 8.03 (5) within one month ratification of the Collective Agreement."

The Determination under appeal is not the result of a complaint initiated by the union to the Employment Standards Branch. Nor is it the result of an employee complaint that the variance was not being adhered to or that station supervisors were owed overtime. The Determination is the result of an audit performed by the delegate. As stated in the Determination: "It came to the attention of the Delegate during the investigation of another complaint that the employer may not be correctly using the variance that was granted on September 11, 1995."

SUBMISSIONS

In his written submissions, counsel for the employer sets out several grounds of appeal. In

summary form they are as follows. First, that the delegate's "decision reflected in the Determination is biased". Second, that the delegate, contrary to section 77 of the *Act*, failed to give Tricom an opportunity to respond during the investigation leading to the Determination. Third, that by virtue of section 43 of the *Act*, the delegate lacked jurisdiction to make the Determination because the employees named in the Determination were covered by a collective agreement with hours of work and overtime provisions which "meet or exceed" the requirements of Part 4 of the *Act*. The employer maintains that where there is a collective agreement in force, any dispute concerning hours of work and overtime must be dealt with by means of the grievance procedure set out in the collective agreement. Fourth, that the delegate misconstrued the terms of the variance, and that the employer, in fact, complied with the variance and "paid overtime according to the Variance when required." Fifth, that as the Determination does not specify how the unpaid wages were calculated, Tricom is unable to ascertain the basis of its alleged liability. Finally, that Tricom's station supervisors are "managers" for the purposes of the *Act.*

It is the union's position that the delegate had jurisdiction to make the Determination. The union submits that the collective agreement provisions with respect to scheduling for station operators and station supervisors were not in force during the period January 14, 1996 to September 30, 1996, which is the period when the employer was found by the delegate to have abandoned the variance. In support of its position the union relies on Appendix E to the collective agreement, the Letter of Understanding titled "Group Scheduling". In particular, the union relies on the following: "The Employer agrees to implement the Group 1 (12 hr. shift) employees' Schedule as per Article 8.03(5) within one month ratification of the Collective Agreement."

On the issue of station supervisors, it is the union's position that station supervisors are not "managers" for the purposes of the *Act*. The union points to the fact that the station supervisors are part of the bargaining unit.

As stated at the outset of this decision, the Director requests that the Determination be cancelled. In a submission, dated October 10, 1997, requesting that the Determination be cancelled, the delegate writes in part:

> Upon further review of the evidence in this matter and discussion with interested parties, we recommend that the most appropriate party for dealing with the issues of the Determination is the Telecommunication Workers Union. The TWU entered into a Collective Agreement with the employer in October of 1996 which was retroactive to December of 1995.

ANALYSIS

I have carefully reviewed all of the material on this file, including the Determination of the delegate, the submissions of counsel for the employer, the delegate's submissions, the union's submission and the letter submitted by Mr. Stefiuk.

I have come to the conclusion that the employer's appeal must succeed. I base my decision

on the employer's argument that because there was a collective agreement in force, the delegate, by virtue of section 43 of the *Act*, had no jurisdiction to make the Determination.

Section 43 is contained in Part 4 of the *Act*. Part 4, which embraces sections 31 to 43, sets out minimum requirements with respect to hours of work and overtime. It deals with numerous matters including maximum hours of work, hours free from work and overtime wages.

Section 43 of the *Act* specifically deals with hours of work and overtime standards for those employees covered by a collective agreement. Section 43 reads:

> *43(1) If the hours of work, overtime and special clothing provisions of a collective agreement, when considered together, meet or exceed the requirements of this Part and section 25 when considered together, those provisions replace the requirements of this Part and section 25 for the employees covered by the collective agreement.*
>
> *(2) If the hours of work, overtime and special clothing provisions of a collective agreement, when considered together, do not meet or exceed the requirements of this Part and section 25 when considered together,*
>
> *(a) the requirements of this Part and section 25 are deemed to form part of the collective agreement and to replace those provisions, and*
>
> *(b) the grievance provisions of the collective agreement apply for resolving any dispute about the application or interpretation of those requirements.* (emphasis added)

Section 43 is one of four "meet or exceed" sections in the *Act*. The other sections are section 49, which deals with statutory holiday standards for employees covered by a collective agreement; section 61, which deals with annual vacation and vacation pay standards for employees covered by a collective agreement and section 69, which deals with standards in the area of individual termination of employment, including layoff and right of recall provisions, for employees covered by a collective agreement.

Section 4 of the *Act* provides that the requirements set out in the *Act* and the *Employment Standards Regulation* are minimum requirements, *"and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61 and 69."*

Turning to the facts of this case, there is no dispute that the station operators and station supervisors are in a bargaining unit represented by the union. There is also no dispute that the station operators and station supervisors are covered by a collective agreement that was negotiated by the union and the employer. The term of the collective agreement is from December 1, 1995 to November 30, 1998. In this case the delegate found that the employer failed to pay overtime to twenty-eight employees. She determined that the employer had abandoned its variance from January 14, 1996 to September 30, 1996. During that relevant

period those twenty-eight employees were represented by the union which negotiated a collective agreement on their behalf that was retroactive to December 1st, 1995.

It is clear that when a collective agreement is in force any dispute about its provisions must be brought through the grievance procedure set out in the collective agreement. Moreover, any dispute about whether the hours of work and overtime provisions contained in a collective agreement "meet or exceed" the requirements of Part 4 of the *Act*, must, by virtue of section 43, be brought through the grievance procedure and is ultimately a question for an arbitrator. If an arbitrator decides that the provisions of a collective agreement do not "meet or exceed" the requirements of Part 4, then the requirements of Part 4 are "deemed to form part of the collective agreement" and section 43(2)(b) stipulates that *"the grievance provisions of the collective agreement apply for resolving any dispute about the application or interpretation of those requirements."*

I find support for my view in the decision of adjudicator Thornicroft in *Dave Wardrope* B.C. EST #D130/97. At page 3 of that decision the adjudicator stated: "... the Legislature has further provided that in the case of a dispute regarding the "meet or exceed requirements", the dispute is to be resolved through the grievance arbitration process rather than through the Determination/Appeal process set out in Parts 10 and 13 of the Act."

I would also note the recent decision of the British Columbia Labour Relations Board in *The Vancouver Island Haven Society* BCLRB No. B359/97. In that decision the majority of the panel set out the approach that an arbitrator should take "to the interpretation and application of the meet and exceed test." The panel was reviewing a decision of an arbitrator who had been called upon to apply the meet or exceed provisions contained in section 49 of the *Act*. (Section 49 deals with the statutory holiday provisions of a collective agreement.) During the course of their decision, the majority of the Labour Relations Board panel stated: "It is the arbitrators who are chosen by the Legislature to interpret and apply Section 49 of the Act and it is within his or her jurisdiction to make this determination." (at page 7)

As set out earlier in this decision, it is the union's submission that the "collective agreement was not in force regarding scheduling for the affected group" and therefore the delegate had jurisdiction to make the Determination. The union relies on the "Group Scheduling" Letter of Understanding where the employer agreed "to implement the Group 1 (12 hr. shift) employees' Schedule as per Article 8.03(5) within one month ratification of the Collective Agreement." The crux of the union's position is that because Article 8.03(5) was not in effect until after the time period covered by the delegate's audit, she had jurisdiction to issue a Determination that covered a time period prior to its implementation.

I do not agree with the unions's submission for the following reasons. The delegate found that the employer had abandoned its variance during the period January 14, 1996 to September 30, 1996. However, during that period the collective agreement was in force because it was made retroactive to the date of the union's certification, namely December 1, 1995. The fact that the scheduling provisions set out in Article 8.03(5) were to be implemented within one month of ratification does not detract from the fact that a collective agreement was in force that contained hours of work and overtime provisions. I would note also that the commencement date of a particular collective agreement provision would fall within the ambit of an arbitrator's inquiry into whether the collective agreement provisions concerning hours of work and overtime "meet or exceed" Part 4 of the *Act.*

If the Employment Standards Branch had jurisdiction whenever a provision concerning hours of work or overtime was specified to take effect later than the commencement date of the collective agreement, the result would be as follows. Prior to the date the provision in question was to take effect, the Director would have jurisdiction under the *Act.* After implementation of the provision, the grievance procedure set out in the collective agreement would become operative. This would create an anomalous result not in accord with section 43 of the *Act.*

In light of the employer's success on the issue of jurisdiction, I need not address the other grounds of appeal.

ORDER

I order, pursuant to Section 115 of the *Act*, that the Determination, dated June 20, 1997, be cancelled.

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Sherry Mackoff
Adjudicator