Employment Standards TRIBUNAL

An appeal

- by -

Harry Martens
("Martens")

- 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.: 2001/556

DATE OF HEARING: October 4, 2001

DATE OF DECISION: October 25, 2001

DECISION

APPEARANCES:

on behalf of Harry Martens	In person, assisted by Sylvie Martens
on behalf Bill McCulloch & Associates Inc.	Stewart Rennie

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by Harry Martens ("Martens") of a Determination that was issued on July 10, 2001 by a delegate of the Director of Employment Standards (the "Director").

Martens had filed a complaint with the Director under the *Act* alleging he was entitled overtime pay earned during his employment with Bill McCulloch & Associates Inc. ("McCulloch"). The Determination concluded that McCulloch had contravened Part 4, Sections 40(1) and 40(2) of the *Act*, ordered McCulloch to ceased contravening and to comply with the *Act* and to pay an amount of $4,967.60.

The appeal says that the Director failed to consider all the facts, misinterpreted some of the facts and incorrectly calculated the amount of overtime owed.

ISSUE

The issue is whether Martens has shown the Director made some mistake in fact or in law in calculating the amount owed to him by McCulloch.

THE FACTS

McCulloch is a bankruptcy administrator. Martens was employed by McCulloch from January 1, 1999 to June 30, 2000. McCulloch was a successor to the business of John W. Venables, for whom Martens had worked until December 31, 1998. Martens was a salaried employee and was paid a rate of $3750.00 a month. McCulloch also paid Martens a bonus in the amount of $12,000.00 for the year 1999. The Determination noted the following in respect of that bonus:

> On January 01, 2000, Bill McCulloch & Associates Inc. retro-actively increased the monthly wages to $4750.00 per month for the period January 1, 1999 to December 31, 1999 and classed the increase as a performance bonus in lieu of overtime.

No such bonus was paid for Martens period of employment in 2000. McCulloch did not retain an accurate record of the daily hours of work for the period of Martens' employment with them. Martens provided the Director with a record of his daily hours of work for his period of employment. The Director accepted that during the period of his employment with McCulloch, Martens had worked 398.5 hours in excess of 8 hours in a day or 40 hours in a week and ordered McCulloch to pay Martens for that number of overtime hours.

The Director decided there was no agreement between Martens and McCulloch on the weekly hours of work and calculated the applicable hourly rate on the basis that the "normal or average weekly hours of work" was more than 40 hours and by applying the formula set out in the definition of "regular wages", Section 1(1)(d). The Determination referred to the Tribunal decision *McIver's Appliance Sales & Service Ltd.*, BC EST #D526/98, to support that approach. Martens takes no issue with the calculation of the "regular wage" rate. I note, however, that the Determination contains no finding about what Martens' "normal or average weekly hours of work" were. In any event, Martens does dispute the conclusion that there was no agreement on weekly hours of work. He contends there was such an agreement. It appears that overtime entitlement was calculated by adjusting the resulting hourly wage rate by ½ and multiplying that adjusted rate by the number of hours in excess of 8 in a day or 40 in a week worked by Martens.

Neither party called any evidence. Both were content to reference and rely on the material in the file and argue about whether the correct factual and legal conclusions had been reached by the Director.

ARGUMENT AND ANALYSIS

Martens, as the appellant, has the burden in this appeal of persuading the Tribunal that the Determination was wrong, in law, in fact or in some manner of mixed law and fact. This burden has been described by the Tribunal in *Re World Project Management Inc.*, BC EST #D134/97 (Reconsideration of BC EST #D325/96) as the "risk of non-persuasion":

> Rules about the legal burden, called by Wigmore "the risk of non-persuasion", define who is to lose if at the end of the evidence the tribunal is not persuaded. Various tests have been advanced over the years in various situations but as one writer (E.M. Morgan, "How to Approach the Burden of Proof and Presumptions" (1952-53) 25 Rocky Mountain L.Rev. 34 puts it, "the allocation (of the burden of proof) is determined according to considerations of fairness, convenience and policy". In most cases, convenience suggests that the party with the most ready access to the means of proof should have to produce it. One of the goals of proof is the production of reasonably accurate information and therefore there should be an obligation on the party having most access to such information to provide it or bear the risk of non-persuasion. Considerations of fairness suggest also that the party seeking change should bear the risk of non persuasion in that the status quo would otherwise prevail. Of course concerns of convenience and fairness may be

> affected by particular circumstance and, for example, may depend upon an assessment of the respective resources of the parties. Ultimately the notion of "burden of proof" is only of significance where the tribunal has not been persuaded.

Placing the risk of non-persuasion on an appellant is consistent with the scheme of the *Act*, which contemplates that the procedure under Section 112 of the *Act* is an appeal from a determination already made and otherwise enforceable in law, and with the objects and purposes of the *Act*, in the sense that it would it be neither fair nor efficient to ignore the initial work of the Director.

This appeal turns on whether the Director correctly applied the provisions of Section 40 of the *Act* to the employment arrangement. That provision says:

40. (1) An employer must pay an employee who works over 8 hours in a day 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 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.

As best I can make out from the result of the Determination, the Director must have found that Martens had been paid straight time for all hours worked, including overtime hours. There are several references in the Determination to the absence of any agreement on the weekly hours of work.

In this appeal, Martens says that part of the agreement he had with McCulloch was that any overtime hours worked would be compensated by allowing time off in lieu of payment. He was informed of this arrangement by Mr. Rennie in January, 1999, shortly after he commenced his employment with McCulloch. He says he understood that "overtime" meant time worked outside of regular working hours, which generally corresponded to the standard office hours - 8:00 am to 5:00 pm. He points out that the Record of Employment given to him by McCulloch on or about June 30, 2000 stated: *"Standard hours and earnings are reported in boxes 15A and 15B. Our policy is to pay a performance bonus in lieu of overtime"* and that Mr. Rennie, in a submission to the Director dated December 11, 2000, stated: *"When I met with Mr. Martens initially in January 1999 I had indicated that the firm policy is to require professional staff to take time off in lieu of overtime payment. Mr. Martens indicated that he would be available to work certain evenings early in the week"*. He says the work days when no overtime was worked was limited to eight hours. He submits that we should infer from that arrangement there was

agreement that a work week would be equivalent to the standard office work week, or forty hours a week.

In response, McCulloch reiterates its position that there was no agreement on the number of hours that would be worked in a week. He says there were, in fact, no standard hours for Martens; that he put in the hours needed in order to do his job and in recognition of the additional hours put in, time off was to be given. He says, as well, the bonus paid to Martens was, in part recognition for additional hours he contributed to the financial success of the business.

The difficulty in addressing the arguments of either party is that the Determination does not indicate how Section 40 came to be applied as it was. While there is obvious reference to the manner in which the "regular wages" were calculated and specific reference, in that context, to the absence of any agreement on weekly hours of work, there is no indication how that analysis and conclusion relates to the apparent conclusion that Martens was not entitled to 1½ times his regular wage for all or some of his overtime hours. Section 81 requires that the Director's Determinations contain the reasons it:

> *81. (1) On making a determination under this Act, the director must serve any person named in the determination with a copy of the determination that includes the following:*
> *(a) the reasons for the determination; . . .*

The requirement to provide reasons is grounded in principles of natural justice. The parties must know the case against them and, in the event of an appeal, the case they have to meet. That is particularly important to an appellant, because the appellant bears the burden of persuading the Tribunal there is some error in the Determination. It does not seem to me that a conclusion there was no agreement on weekly hours of work, for the purpose of calculating "regular wages", readily translates into a conclusion there was agreement that Martens' salary compensated him for all hours worked. However, if that is the decision of the Director, both parties should have the benefit of the reasons for it.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated June 28, 2001 be referred back to the Director.

David B. Stevenson
Adjudicator
Employment Standards Tribunal