An Application for Reconsideration

- by -

Larry Higginson
(the "Applicant")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE No.: 2011A/19

DATE OF DECISION: May 25, 2011

DECISION

SUBMISSIONS

Larry Higginson	on his own behalf
Alissa Macpherson	on behalf of Babine Forest Products Ltd.
Hans Suhr	on behalf of the Director of Employment Standards

INTRODUCTION

1. This is an application brought by Larry Higginson (the "Applicant") pursuant to section 116 of the *Employment Standards Act* (the "*Act*") for reconsideration of Tribunal Decision BC EST # D016/11 issued by Tribunal Member Roberts on February 8, 2011. Tribunal Member Roberts cancelled a Determination, issued on September 24, 2010, ordering Babine Forest Products Ltd. ("Babine") to pay the Applicant $7,605.85 on account of unpaid wages, concomitant vacation pay and section 88 interest.

2. The Applicant's position, simply stated, is that Tribunal Member Roberts' decision cannot stand because it does not recognize that he had an outstanding balance in some form of time bank ("accumulated time off") that has now been rendered valueless by the Tribunal's order cancelling the Determination.

3. I am adjudicating this application based on the parties' written submissions and in addition to the Applicant's brief (less than 1 full typed page) "reasons for reconsideration", I also have before me submissions from Babine's legal counsel (opposing the application) and from the Director's delegate (supporting the application). I have also reviewed the materials that were before Tribunal Member Roberts including the original Determination and accompanying "Reasons for the Determination", Babine's appeal submissions, the respondent parties' reply submissions and the section 112(5) record.

PRIOR PROCEEDINGS

4. The Applicant was formerly employed by Babine as the "Electrical Supervisor" at its lumber mill near Burns Lake. His employment was terminated on October 14, 2009, and on December 16, 2009, he filed a complaint under section 74 of the *Act* seeking "overtime" pay. In addition, the Applicant filed a civil claim in the B.C. Supreme Court seeking damages for "wrongful dismissal" against Babine and a related company (see *Higginson v. Babine Forest Products Ltd.*, 2010 BCSC 614 for an interlocutory decision in this proceeding). Thus, the Applicant truncated the scope of his *Act* complaint – limiting it to a claim for overtime pay – likely as a result of the B.C. Court of Appeal's decision in *Macaraeg v. E Care Contact Centers Ltd.*, 2008 BCCA 182 (leave to appeal to the Supreme Court of Canada refused: 2008 CanLII 53790). There is nothing before me regarding the outcome of the civil court action; it may still be pending awaiting trial.

5. In his *Act* complaint, the Applicant alleged that Babine was refusing to pay him overtime pay since he was a "manager": "Babine's new management claims that I am a manager and that I am overtime exempt and I feel that I am not a manager under the Employment Standards Act and that I should get paid for my overtime hours." "Managers", defined in section 1 of the *Employment Standards Regulation ("Regulation")*, are excluded from Part 4 of the *Act* (the hours of work and overtime provisions) by section 34(f) of the *Regulation*. Accordingly, unless a "manager" has a clear *contractual* right to overtime pay, that person is not entitled to overtime pay under the *Act*.

6. Quite apart from one's entitlement to statutory overtime pay (paid at premium rates), all employees are entitled to be paid for all hours worked and thus, to the extent that a "manager" works more hours in a pay period than provided for in their employment contract, they are entitled to be paid for those "excess hours" at their "regular wage" rate as calculated in accordance with section 1 of the *Act*.

7. The Director's delegate investigated the complaint and, as noted above, on September 24, 2010, issued a Determination ordering Babine to pay the Applicant $7,605.85 on account of unpaid wages and section 88 interest. The Director did *not* find that the Applicant was entitled to *statutory* overtime pay; indeed, the delegate concluded that the Applicant was a "manager" as defined in the *Employment Standards Regulation* and thus exempt from the *Act* hours of work and overtime provisions (see delegate's reasons, page R8). However, the delegate also held that the Applicant had a *contractual* right to additional wages. In short, the delegate determined that the Applicant's salary was based on a 40-hour week and that during the last 6 months of his employment (see *Act*, section 80(1)(a)) he worked an "extra" 170 hours for which he had not been paid (see delegate's reasons, pages R8 – R10).

8. Babine appealed the Determination (as did the Applicant, see BC EST Decision # D017/11) on the sole ground that the delegate erred in law (*Act*, section 112(1)(a)) and, more particularly, that the delegate erred in failing to give full effect to the parties' employment contract dated April 12, 2007. The Applicant acknowledged that he signed this agreement, albeit "under protest" (see delegate's reasons, page R3). The relevant portions of the parties' agreement (which takes the form of a 1-page letter) are reproduced at para. 9 of Tribunal Member Roberts' decision but, for ease of reference, I have set out the relevant provisions, below:

> We are pleased to extend an offer of employment with Hampton Affiliates, from the recorded date on this document forward, as the Electrical Supervisor. In this capacity, you will supervise and direct human and other resources. Should you accept this position by signing and dating this document, you agree to administer and adhere to Hampton Affiliates company policies and procedures...
>
> The compensation package you will receive includes a monthly salary of $8050.00 Canadian, which is paid twice a month on the 15th and 31st, and is subject to all applicable deductions and includes the standard salaried benefits package. <u>The attached list of key expectations outlines the specific responsibilities and accountabilities associated with this position, including the commitment and flexibility to accomplish assigned tasks, which may include evening and weekend work. Overtime is not compensable</u>. Your compensation and performance will be reviewed annually...
>
> Nothing herein shall be construed as a substitution or modification of the Company's employment policy or any applicable criteria in the British Columbia Employment Standards Regulations...
>
> (My <u>underlining</u>)

9. Tribunal Member Roberts allowed the appeal and cancelled the Determination. The key portions of her reasons for decision (paras. 31 – 33) are reproduced, below:

> In my view, the employment contract between the parties was not ambiguous. It expressly and clearly stated that in order for Mr. Higginson to accomplish certain responsibilities and accountabilities he might have to work evenings and weekends. It clearly provided that overtime was not compensable. The plain and ordinary meaning of these words is that Mr. Higginson was not entitled to additional pay for work performed to accomplish those responsibilities.
>
> I find that the delegate erred in law when he resorted to extrinsic evidence, including Mr. Higginson's understanding that his work week was 40 hours (which understanding was not shared by the employer), the Handbook (which was not in existence when the contract was signed and was not applicable retroactively) and the standardized payroll system in an effort to determine the meaning of these

> unambiguous words and to conclude that Mr. Higginson's employment agreement was based on 40 hours work per week for the stated salary. The evidence supports the conclusion that as a manager, Mr. Higginson was expected to put in extra hours without extra pay.
>
> I have concluded that the delegate's interpretation of the contract is patently unreasonable and as such, constitutes an error of law. Therefore, the Determination finding that Mr. Higginson is entitled to additional wages must be cancelled.

10. The Applicant now applies for reconsideration of Tribunal Member Roberts' decision.

THE APPLICATION FOR RECONSIDERATION

11. The Applicant's "reasons for reconsideration" are appended to the Tribunal's reconsideration form (Form 2) and take the form of a 1-page letter. The substance of the Applicant's position is set out in four separate paragraphs that I propose to briefly summarize.

12. In his first paragraph, the Applicant notes that at an earlier point in his work history he was paid overtime (this is not controversial – see delegate's reasons at pages R2 – R7) and that the employment contract in force as of the date of termination (i.e., the April 12, 2007, letter) did not constitute a forfeiture of his earlier entitlement to take time off in lieu of extra hours worked: "The contract says that I won't get paid, but nowhere does it say that I was forfeiting my right to take time off in lieu. Because Babine terminated me prior to me taking the accumulated time off, they should now have to pay me for the 148.92 extra hours that I worked and would have been entitled to take off." This point is reinforced in the Applicant's fourth paragraph.

13. In the second and third paragraphs, the Applicant reiterates his position that his salary was given in exchange for a 40-hour workweek.

FINDINGS AND ANALYSIS

14. At the outset, I wish to note that the present application for reconsideration purports to advance a wholly different case than originally set out in the Applicant's December 16, 2009, *Act* complaint where he limited his claim to statutory overtime on the sole basis that he was not a "manager" as defined in the *Employment Standards Regulation*. The delegate determined that the Applicant *was* a "manager" (and this aspect of the Determination was *not* appealed by either party) but nonetheless concluded, based on his interpretation of the parties' employment contract, that the Applicant was entitled to payment for time worked beyond the contractually agreed 40-hour workweek. The only issue before Tribunal Member Roberts in the Babine appeal was the proper interpretation of the parties' April 12, 2007, agreement.

15. The present application for reconsideration simply represents an attempt to re-argue the contract interpretation issue. If I were persuaded that Tribunal Member Roberts' interpretation of the parties' agreement was clearly wrong, I would not hesitate to cancel her decision and reinstate the Determination. However, in my view, it is clear and obvious that Tribunal Member Roberts' decision was manifestly correct.

16. I can well appreciate, as the delegate found, why the Applicant signed the April 12, 2007, agreement "under protest" since he was undoubtedly aware that he would no longer be entitled to any overtime pay. He continued to work under that agreement until October 14, 2009, and, so far as I can determine, at no time during this period was he ever paid overtime pay nor did he ever take any "time off in lieu". He did not file an overtime complaint until after his employment ended. In my view, the April 12, 2007, agreement could not have been clearer – the Applicant was expected to sometimes work evenings and weekends and any

"overtime work is not compensable". In other words, the "compensation" for any extra hours was already embedded in the agreed salary and benefits; no extra pay would be forthcoming nor would any extra hours be "compensated" in some other fashion (say, by paid time off in lieu).

17. The Applicant appears to be saying that he had a "time bank" (he refers to it as "accumulated time off") into which he could "deposit" his extra hours and draw them down at some future point as paid time off or by way of a straight cash payment. The April 12, 2007, agreement is silent regarding such a time bank and the express terms of that agreement are completely at odds with such a scheme being in place. Section 42 of the *Act* does allow parties to establish time banks but this provision, since it is found in Part 4 of the *Act*, does not apply to the Applicant because he was a "manager". Further, even if the Applicant were not excluded from Part 4, time banks under the *Act* are created at the discretion of the employer and there is no evidence that Babine agreed to establish a time bank in favour of the Applicant after April 12, 2007.

18. In accordance with the Tribunal's decision in *Director of Employment Standards (Milan Holdings Ltd.)*, BC EST # D313/98, reconsideration applications are evaluated by way of a two-stage process and, in my view, the present application does not pass the first stage of that test since it does not raise a *prima facie* case of error on the part of the Tribunal Member regarding the issue of law that was before her.

ORDER

19. The application to reconsider Tribunal Decision BC EST # D016/11 is refused. According, pursuant to section 116 of the *Act*, Tribunal Member Roberts' decision issued in this matter on February 8, 2011, is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal