Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

578047 B.C. Ltd. operating as Pro Gas & Heating
(the "Employer")

- 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

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE No.: 2004A/92

DATE OF DECISION: July 23, 2004

DECISION

SUBMISSIONS:

Michael Nielsen	Legal Counsel for 578047 B.C. Ltd.
Adele Adamic	Legal Counsel for the Director of Employment Standards

INTRODUCTION

This is an application filed by 578047 B.C. Ltd. operating as "Pro Gas & Heating" (the "Employer") pursuant to section 116 of the *Employment Standards Act* (the "*Act*") for reconsideration of an a Tribunal Member's decision issued on March 3rd, 2004 (B.C.E.S.T. Decision No. D037/04).

By way of a letter dated July 8th, 2004, the parties were advised by the Tribunal's Vice-Chair that this application would be heard by way of written submissions. I have before me the Employer's original application (filed May 28th, 2004) with attached 4-page submission from its legal counsel and a submission, dated June 21st, 2004, from the Director of Employment Standards' legal counsel. Although invited to do so, the Employer did not file a reply to the Director's submission; the respondent employee never filed any submission whatsoever.

As will be seen, in my view, although this application is timely, it is not meritorious.

PREVIOUS PROCEEDINGS

On November 7th, 2003, and following an investigation conducted pursuant to section 76 of the *Act*, a delegate of the Director of Employment Standards (the "delegate") issued a Determination (with attached "Reasons for Determination") ordering the Employer to pay its former employee, Cameron Munford ("Munford"), the total sum of $3,813.45 on account of unpaid wages (overtime and concomitant vacation pay) and section 88 interest (the "Determination").

Mr. Munford was employed from April 8th to November 29th, 2001 as a gas fitter. He was hired at an hourly wage of $15 and when his employment ended, his wage rate was $22 per hour. Mr. Munford also had a claim in relation to the 2001 Labour Day holiday, however, the Employer voluntarily paid this aspect of the claim prior to the issuance of the Determination. The record before me indicates that Mr. Munford's complaint was one of at least 11 separate complaints filed against the Employer, all in regard to unpaid wages.

Further, by way of the Determination the Employer was also assessed a $150 administrative penalty pursuant to section 98 of the *Act* and the former section 29(2)(b) of the *Employment Standards Regulation* (*i.e.*, the provision that was in force prior to November 30th, 2002). Thus, the total amount payable under the Determination was $3,963.45.

The Employer appealed the Determination on the grounds that the delegate erred in law, failed to observe the principles of natural justice and based on the assertion that evidence had become available that was unavailable when the Determination was being made [see subsections 112(1)(a), (b) and (c)].

The Employer's appeal was wholly unsuccessful. The Employer's own records showed that Mr. Munford often worked more than 8 hours in a day and thus was presumptively entitled to overtime pay. The Employer's appeal was predicated on two principal assertions. First, the Employer stated that Mr. Munford had been employed under a "flexible work schedule" pursuant to the provisions of the now-repealed section 38. Second, and in any event, the Employer alleged that Mr. Munford's overtime claim had been settled.

Tribunal Member Roberts, in her Reasons for Decision, observed that the delegate quite correctly noted that former section 38 only applied to employees who were employed under a collective agreement--and that Mr. Munford was not so employed. Accordingly, the only potentially appropriate provision was section 37, however, both the delegate and Member Roberts concluded (again, correctly in my view) that this latter provision could not be relied on since the schedule in question did not fully satisfy the provisions of the *Act* and the *Regulation* as they stood during the relevant time period.

With respect to the alleged "settlement", Member Roberts held (at page 5 of her Reasons for Decision):

> Mr. Munford filed a complaint with regard to overtime on October 17, 2001. On October 18, he notified the Director that he had withdrawn his complaint because he had resolved the issue with his employer. Mr. Munford reinstated his complaint by way of a letter dated December 3, 2001. In that letter, Mr. Munford indicated that he had withdrawn his earlier complaint on the condition that [the Employer] would not require him to work more than 10 hours per day 4 days a week. He contended that he was working 12-14 hour shifts, in contravention of the conditions.
>
> I find no basis for [the Employer's] argument that Mr. Munford "forfeited any claims to overtime" as a result of his withdrawal of this complaint. It did not constitute a settlement, as [the Employer] contends, and, in any event, parties may not agree to waive, or forfeit, the minimum standards prescribed by the Act.

The Employer's sole argument with respect to the matter of natural justice was contained in its February 13th, 2004 submission to the Tribunal. The Employer alleged that it had filed some sort of civil suit against the delegate and asserted that "although the lawsuit...predominantly has nothing to do with the Cameron Munford file the aforementioned lawsuit does however speak to natural justice and the [delegate's] treatment and bias conduct [sic] towards this company". Not surprisingly (and entirely properly), Member Roberts gave this latter argument short shrift (at page 5 of her Reasons for Decision):

> Although [the Employer's [principal] contends that the delegate is biased towards him, he does not specify how the delegate might be so biased, but for his reference to a lawsuit [the Employer] has purportedly filed against him. A statement of claim, if one indeed has been filed, is not evidence of anything. The statement of claim may contain allegations, but those allegations, without more, do not form grounds for an appeal on the grounds that the delegate failed to observe natural justice.

The so-called "new evidence" tendered by the Employer was a fax cover sheet dated August 8th, 2001. This document appears to be a cover sheet of a 3-page (including the cover sheet) fax communication sent from the Surrey office of the Employment Standards Branch by a Director's delegate (not the delegate who issued the Determination) to the Employer (Attention: Lee Baxter). The relevant portions of the cover sheet are reproduced below:

> Subject: Flexible Work Schedules
>
> Message:
>
> Here is our fact sheet on flexible work schedules. Please note all the conditions which must be met for a flexible work schedule to be permitted.

I am in complete agreement with Member Roberts' comments regarding this "new evidence" (at page 6 of her Reasons for Decision):

> This is not new evidence. It was available at the time the delegate was investigating the complaint, and could have been provided at that time. However, even if the evidence was new, it does not support [the Employer's] argument.
>
> The fax does not, as [the Employer] asserts, constitute either notification to the Director of a flexible work schedule, or an approval of one. Rather, it related to information provided by the Director to [the Employer] about flexible work schedules. Even if it was provided to the delegate at first instance, I am not persuaded that it would have led him to a different conclusion on the issue of whether the parties had a flexible work schedule that complied with the Act.

THE REQUEST FOR RECONSIDERATION

The principal basis upon which this application is founded is set out at page 2 of the Employer's submission prepared by its legal counsel:

> When the Adjudicator decided that Mr. Munford's withdrawal of his complaint from the Employment Standards Branch and his agreement with [the Employer] did not constitute a settlement and that, in any event, parties may not agree to waive, or forfeit, the minimum standards prescribed by the Act she made a serious mistake in applying the law.

ANALYSIS

As noted at the outset of these reasons, I do not consider this application to be meritorious. I am of the view that this application does not even satisfy the threshold test for reconsideration--that is, I do not consider that it raises a presumptively meritorious legal argument worthy of further consideration (see *Milan Holdings Inc.*, B.C.E.S.T. Decision No. D313/98).

The Employer says that Member Roberts erred in finding that "parties may not agree to waive, or forfeit, the minimum standards prescribed by the Act". However, Employer's counsel does not, at any point in his submission, address section 4 of the *Act* as it stood at the material time: "The requirements of the Act or the 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". I might add that these latter sections refer to the now-repealed provisions of the *Act* that allowed for a limited form of "contracting out" by way of a collective agreement if, on balance, the comparable provisions in the collective agreement could be said to "meet or exceed" the provisions of the *Act.* It is conceded that the Employer is a nonunion workplace and thus the "meet or exceed" provisions are wholly inapplicable.

Further, counsel fundamentally misconceives the nature of the agreement between Mr. Munford and the Employer. So far as I can determine, Mr. Munford did not receive a settlement payment reflecting his

accrued overtime pay in exchange for releasing the Employer from its liability under the *Act*; he simply asked the Director not to continue to investigate his complaint. In other words, if there was an agreement, and quite apart from the illegality of such an agreement, it had no legal force since it was not apparently supported by any consideration. I reject counsel's submission that Mr. Munford's complaint could not be determined by the Director on the ground that there was an "estoppel by contract". If Mr. Munford's complaint was never lawfully resolved by way of a valid and enforceable contractual agreement, this latter doctrine is simply not relevant.

Further, the terms of the "gentlemen's agreement"--and this is how the parties themselves characterized the matter in their handwritten memorandum dated October 21st, 2001--were that Mr. Munford would henceforth no longer be required to work in excess of 10 hours in a day; an understanding that was apparently breached by the Employer and that, in turn, led to Mr. Munford requesting the Branch to reactivate his complaint (it should be noted that the complaint was never "settled"; it was merely withdrawn).

Alternatively, counsel asserts (at page 4 of his submission) that:

> ...the evidence provided to the Adjudicator shows that the director was provided with a copy of the flexible work schedule. It would offend the rules of equity if after accepting the schedule the director were thereafter permitted to question its validity and for this reason the director should not be permitted to do so.

First, the "evidence" submitted to Member Roberts was inadmissible for the reasons given by Ms. Roberts in relation to section 112(1)(c) of the *Act.* In other words, *there was no evidence before Member Roberts regarding the implementation of a lawful flexible work schedule.*

Second, even if that latter evidence was properly before Member Roberts (and I agree with Member Roberts that it was not properly before her), the documents in question had little, if any, probative value in terms of proving that there was a valid section 37 "flexible work schedule" in place.

ORDER

The Employer's application to reconsider the decision issued by Tribunal Member Roberts in this matter is **refused.**

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal