Citation: DWS Logistics Inc. (Re)
2024 BCEST 56

EMPLOYMENT STANDARDS TRIBUNAL

An appeal
pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

- by -

DWS Logistics Inc.

- of a Determination issued by -

The Director of Employment Standards

PANEL: Kenneth Wm. Thornicroft

FILE NO.: 2023/190

DATE OF DECISION: June 14, 2024

DECISION

SUBMISSIONS

David R. Foster	legal counsel for DWS Logistics Inc.
Kirika Blaine, Law Student	on behalf of Julio Marcado
Sarah Beth Hutchison	delegate of the Director of Employment Standards

INTRODUCTION

1. Pursuant to section 112 of the *Employment Standards Act* ("*ESA*"), DWS Logistics Inc. ("DWS") appeals a determination that was issued by Sarah Beth Hutchison, a delegate of the Director of Employment Standards ("delegate"), on November 16, 2023 ("Determination"). The delegate also issued her accompanying "Reasons for the Determination" ("delegate's reasons") on November 16, 2023.

2. By way of the Determination, DWS was ordered to pay a former employee ("complainant") $25,468.56 representing overtime pay ($21,756.20), concomitant vacation pay ($870.25), and section 88 interest ($2,842.11). By way of the Determination the delegate also levied two separate $500 monetary penalties against DWS based on its contraventions of section 17 (failure to pay all wages earned in a pay period) and section 28 (failure to keep payroll records). Accordingly, DWS's total liability under the Determination is $26,468.56.

3. DWS appeals the Determination on the grounds that the delegate erred in law and failed to observe the principles of natural justice in making the Determination (see sections 112(1)(a) and (b) of the *ESA*).

BACKGROUND FACTS AND PRIOR PROCEEDINGS

The complaint and investigation

4. DWS operates a warehouse and storage facility in Delta. The complainant was employed as a "team lead" on the night shift at the warehouse at an hourly rate of $20, as of the end of his employment. His last day of work was August 24, 2020. On September 11, 2020, the complainant filed an unpaid wage complaint claiming $31,000 in unpaid overtime pay earned during the period from January 2, 2019, to June 20, 2020. In his complaint he alleged that "I work 11 hours Monday to Thursday and more than 14 hours Friday to Saturday." He claimed he worked about 60 hours per week.

5. On October 20, 2020, an Employment Standards Branch officer delivered an "Investigation Report" to both the complainant and DWS, summarizing the evidence he had gathered during his investigation. This report was provided to the parties for their response. In the report, the officer noted that there were two issues to be addressed: first, whether the complainant was owed overtime wages and, if so, in what amount; and second, whether the complainant was entitled to section 63 compensation for length of service. With respect to section 63, I note that although the complainant did not advance a claim for compensation for length of service in his original complaint, he nonetheless asserted that he was

dismissed "without a valid reason," and later claimed that he was dismissed "with no notice or compensation for length of service" (Investigation Report, page IR8). In the Investigation Report, the officer noted that the complainant was, in fact, paid three weeks' wages as compensation for length of service. DWS, while conceding that the complainant occasionally worked overtime hours (for which he was paid), contested the number of overtime hours that the complainant claimed to have worked.

6. The officer did not make any specific findings of fact in his report regarding the obvious conflicts in the evidence (other than with respect to section 63 compensation for length of service). Rather, the report merely summarized the evidence the officer had received from the parties. As noted above, both parties were invited to respond to the Investigation Report. In its response, DWS asserted that the complainant was not entitled to any additional overtime pay and, in any event, was subject to the "managerial" overtime exclusion set out in the *Employment Standards Regulation* ("*Regulation*").

The Determination

7. On November 16, 2023, the delegate issued the Determination now under appeal, together with her reasons. In her reasons, the delegate noted that both parties responded to the Investigation Report and that she considered both the Investigation Report and the parties' responses to it "in reaching my decision as required by the Act" (page R3). The delegate did not undertake any further investigation with respect to the complaint.

8. The delegate addressed two issues in her reasons, namely, whether the complainant was a "manager" as defined in section 1(1) of the *Regulation* and his entitlement, if any, to overtime pay. The delegate determined that the complainant was not a "manager," and that he was entitled to overtime pay. DWS has not appealed the delegate's determination that the complainant was not a "manager." DWS's appeal is focused solely on the overtime pay award, and the decision-making process that led to that award.

9. DWS had a "swipe" system, whereby employees "clocked-in" using an identification card at the start and end of each shift. With respect to the complainant's overtime pay claim, the delegate referred to the complainant's statement that his recorded shift hours were inaccurate because he actually worked more hours than was reflected by his "swiped" shift start and end times: "[the complainant] worked from 6:30 pm to 6:00 am but would swipe in and out according to his scheduled shift times because the Employer would be angry if he recorded working any more than two hours of overtime each day" (delegate's reasons, page R4). DWS maintained that the complainant was specifically instructed not to work any unauthorized overtime. On this latter point, the delegate held, at pages R5-R6:

> [DWS] instructed the Complainant to complete orders and to work only overtime hours necessary to complete the orders, keeping such hours to a minimum. The Complainant's continued employment through the recovery period despite [DWS's] own evidence showing that he continued to work overtime hours after [DWS] instructed him not to do so demonstrates the [DWS's] ongoing acceptance of how the Complainant was accomplishing the tasks the Employer instructed him to perform…
>
> …In response to the Investigation Report, the Complainant provided messages from himself to his manager, referring to some specific overtime hours worked during that period which are not reflected in [DWS's] records. The evidence was provided to [DWS], which did not dispute the veracity of the messages or the contents. The messages, which the Complainant provided in

> summarized form, include references to hours worked in excess of the scheduled hours and include messages dated April 11, 2020, February 3, 2020, September 28, 2019, and November 9, 2019. The messages include a reference to the Complainant not working on September 13, 2019, and I accept that evidence.
>
> Based on the evidence before me, I find that [DWS] was aware of the Complainant working hours in excess of the scheduled shifts, and that the [DWS] instructed the Complainant to swipe in and out according to the hours he was scheduled to work rather than his actual hours worked…Messages provided by both parties support a finding that the Complainant worked hours not captured by his swipe in and out times. Accordingly, I find that the Complainant's estimate of his hours worked is reasonable and the best evidence of his daily hours of work from August 24, 2019 to June 20, 2020.
>
> I find that the Complainant worked 12 hours a day, Monday through Friday, between August 24, 2019 and June 20, 2020. The Complainant stated that after June 20, 2020, he worked only his scheduled shifts, and accurately recorded all overtime hours he worked. Accordingly, after June 20, 2020, I accept the swipe in and out times as the hours worked by the Complainant.

REASONS FOR APPEAL

10. As noted above, DWS appeals the Determination on the grounds that the delegate erred in law and failed to observe the principles of natural justice.

Alleged errors of law

11. DWS says that the delegate erred in law in her calculation of the complainant's unpaid overtime pay entitlement, misapplied the legal test relating to "condonation," and failed to properly assess the parties' relative credibility.

12. DWS notes that the complainant did not record his hours each day. DWS says that the original email messages that the complainant provided "in summarized form" (see above) were never disclosed to DWS during the investigation and, that being the case, it was an error of law for the delegate "to accept these unsubstantiated messages into evidence."

13. The delegate determined that the complainant worked 12 hours each day (Monday to Friday) for the period from August 24, 2019, to June 19, 2020 (delegate's reasons, page R6). However, as noted above, the complainant stated in his complaint that he worked 11-hour shifts on Monday to Thursday, and the complainant's evidence as recorded in the delegate's reasons was that "he worked from 6:30 pm to 6:00 am" (i.e., 11.5 hours; delegate's reasons, page R4). DWS says that in light of these findings, "there is no evidentiary foundation for the finding that the Complainant worked 12 hours per day…between August 24, 2019 and June 20, 2020," and that the delegate's unpaid overtime pay calculation thus constitutes an error in law.

14. Further, DWS says the delegate also erred in that she did not "subtract" an unpaid 30-miniute meal break for each shift. DWS says that there was no cogent evidence that the complainant did not regularly take his meal breaks.

15. With respect to the matter of "condonation," it should be noted that while the delegate never referred to this legal principle, DWS says that it never "condoned" the complainant working unauthorized overtime hours and, in fact, specifically warned the complainant not to do so. DWS says that the delegate erred in law when she found that:

> The Complainant's continued employment through the recovery period despite [DWS's] own evidence showing that he continued to work overtime hours after [DWS] instructed him not to do so demonstrates [DWS's] ongoing acceptance of how the Complainant was accomplishing the tasks the Employer instructed him to perform. [my underlining]

16. Finally, DWS says that the delegate erred by failing to properly address what it says were "conflicts in the evidence." In particular, DWS says that the delegate failed to address the inconsistencies in the complainant's evidence, his "misrepresentation" that he was not paid section 63 compensation for length of service, and his factually inaccurate statement (based on his own evidence), and that he "regularly worked alone." DWS also says that the delegate should have turned her mind to whether the complainant was motivated to file an overtime complaint as a retaliatory measure:

> …no weight is given to the fact that the Complainant only raised the allegation of unpaid overtime once he had been terminated without cause. At no point during his employment did the Complainant seek compensation for his alleged overtime, and no evidence was raised to the contrary. This allegation was only raised after the Complainant had suffered the perceived indignity of the loss of his employment and at a time when the Complainant may have been eager for retribution for this perceived injustice. No consideration was given to whether his termination may have encouraged the Complainant to embellish his allegations, which, based on the evidence, he did.

Failure to Observe the Principles of Natural Justice

17. DWS's fundamental argument under this ground of appeal is, in my view, misconceived, and appears to be based on what I find to be a typographical error. The delegate held, at page R8 of her reasons, as follows:

> Section 28 of the Act requires an employer to keep and maintain employee records including a record of the hours worked by the employee on each day. By failing to keep a record of the employee's hours, I find that the Employer contravened section 58 of the Act, with a contravention date of January 18, 2020. I impose an administrative penalty of $500.00 for the contravention. [my underlining]

18. DWS says that the delegate failed "to observe the principles of natural justice by imposing an administrative penalty without providing the benefit of consistent and coherent reasons." Specifically, DWS asserts:

> Section 58 of the Act pertains to vacation pay. Respectfully, the Determination does not provide any reasons to support a finding that the Employer breached section 58 of the Act by failing to provide the Complainant with vacation pay on January 18, 2020. This finding also contradicts the Determination at D1, which states the Employer breached section 28.

19. Page D1 of the Determination is clear – no penalty was issued for a section 58 contravention. The two penalties levied against DWS were in relation to sections 17 and 28 of the *ESA*. The complainant's $870.25

vacation pay award simply reflected a 4% vacation pay award calculated with reference to the unpaid overtime award (i.e., 4% of $21,756.20 = $870.25). The delegate's reference to section 58 at page R8 of her reasons (see above) is, in my view, an obvious typographical error. The delegate simply (and, I find, likely inadvertently) referenced section 58, rather than section 28, at page R8. A penalty was levied for a contravention of section 28, and not for section 58, of the *ESA*. That being the case, I do not propose to address this issue any further.

THE RESPONDENTS' POSITIONS

The complainant

20. The complainant says that the delegate was entitled to rely on the evidence contained in email summaries provided by the complainant even if the original documents were not provided. The complainant characterizes the summaries as reliable estimates corroborating his position regarding his actual working hours. The complainant did not provide copies of the original documents. With respect to the delegate's failure to account for a 30-minute meal break in her calculations, the complainant says that DWS never produced any "compelling evidence that the [complainant] regularly took any half-hour lunch breaks," and that the 12-hour working day the delegate used to calculate the complainant's overtime pay entitlement "was a fair estimate of time worked taking the issue of breaks into account." The complainant's submission does not address his inconsistent evidence regarding the length of his working days, nor does he assert in his submission that he never took meal breaks.

21. With respect to the delegate's finding that DWS was aware of, and effectively "condoned" the complainant's continued overtime despite having been specifically told not to work any unauthorized overtime hours (delegate's reasons, page R5), the complainant says: "Even if the legal test for condonation was stated imperfectly, the result was correct based on the [delegate's] acceptance that the [complainant] was regularly working overtime and [DWS] had knowledge of that regular overtime, benefited from that overtime and took no steps to correct the overtime." It should be noted that the delegate never used the term "condonation" in her reasons; rather she stated that DWS demonstrated an "ongoing acceptance" of the complainant working overtime hours that were not specifically authorized. The delegate did not specifically address the overtime claim from the perspective of whether DWS indirectly allowed the complainant to work overtime hours, and never issued a penalty against DWS for having contravened section 32 of the *ESA* (this provision requires an employer to ensure that no employee works more than 5 consecutive hours without a meal break).

22. As noted above, DWS says that the complainant was not a credible witness and, in its submissions, identified several examples where the complainant provided conflicting or clearly inaccurate information. The complainant, by way of response, submits that the delegate's credibility findings are entitled to deference and, in any event: "These points are not necessarily a contradiction but instead a matter of dissonance between how the [complainant] and [DWS] are interpreting things that were said, which is not a sufficient challenge against the [complainant's] credibility." I should note that the delegate, in her reasons, and despite the obvious conflict in the evidence, never made any affirmative findings regarding the parties' relative credibility. Similarly, the officer who issued the Investigation report never turned to his mind to the relative credibility of the parties.

The delegate

23. For the most part, the delegate's submission is simply a statement of disagreement with the position advanced by DWS in this appeal.

24. The delegate, at pages R5-R6 of her reasons, identified several emails or other electronic messages which apparently showed that the complainant worked overtime hours that were not reflected in DWS's payroll records. The delegate noted that these records were provided to DWS. However, DWS's stated concern is that the original documents were never disclosed to it, and the delegate essentially concedes that this is the case as only "summaries" of the messages were ever disclosed.

25. The delegate also says that DWS never disputed "the accuracy or veracity of the messages." However, DWS consistently maintained throughout the investigation that the complainant was paid for all authorized overtime hours and vigorously disputed his overtime claim, asserting that it was fabricated and/or represented hours worked without its knowledge or authorization.

26. Insofar as the parties' relative credibility is concerned, the delegate does not directly address the several identified conflicts and inconsistencies in the complainant's evidence but, rather, asserts that she "considered the evidence before her in terms of its source, and in the context of differing evidence also present in the Record." In my view, the delegate's "consideration" of the evidence before her is not sufficiently explained in her reasons. The delegate did not address the obvious inconsistency in the evidence relating to the complainant's shifts (i.e., he stated he worked 11-hour shifts Monday to Thursday, but he was awarded overtime based on consistently working 12-hour shifts).

27. The delegate also says that DWS never disputed "the accuracy or veracity of the messages." However, as noted above, DWS consistently maintained throughout the investigation that the complainant was paid for all authorized overtime hours.

FINDINGS AND ANALYSIS

28. The original complaint was filed on September 11, 2020, following the complainant's without cause termination on August 24, 2020. In his complaint, the complainant indicated: "I work 11 hours Monday to Thursday and more than 14 hours Friday to Saturday." I note that despite this statement, the delegate's overtime pay award was based on a 12-hour workday, Monday to Friday (page R6). With respect to this overtime claim, the complainant stated: "Only in the last 14 months I working more than 900 hours overtime. And I did much more in the last 3 Years but I only want to be compensated for 1000 hours of overtime" [*sic*].

29. This complaint was investigated and adjudicated in two separate stages. Initially, an employment standards officer, after gathering the parties' evidence and argument, prepared an "Investigation Report," dated October 20, 2022. This report was provided to the parties for their review and comment. I should note that this report was not included in the section 112(5) record that the delegate provided to the Tribunal – it clearly should have been included. A copy of the report was attached to the appeal submission filed by DWS.

30. As recorded in the Investigation Report, the complainant maintained that although he recorded 1 or 2 overtime hours each day, in fact, he regularly worked 4 to 4.5 overtime hours each day prior to June 20, 2020, never took a meal break, and only occasionally took a 15-minute break. He stated that he correctly recorded all of his regular and overtime hours via the "swipe" system as and from June 20, 2020. DWS's position, as recorded in the report, was that the complainant regularly worked an 8 PM to 4:30 AM shift with an unpaid 30-minute meal break and an additional two paid 15-minute breaks. DWS maintained that the complainant did not work any overtime that was not captured via the swipe system. The officer did not make any findings of fact in the report regarding the parties' wholly incompatible positions. However, the record contains an email from the officer to the complainant, dated August 2, 2022, in which he informed the complainant as follows:

> First, I should let you know that I don't think this evidence is very strong. Without a record of your daily overtime hours it will be difficult to prove that you worked the overtime that you claimed. I will still tell the employer that you claim you're owed overtime, but if the employer sends me payroll records showing that you did not work overtime, a decision-maker may take the side of the employer if they send a record of your hours worked.

31. I note that the complainant never submitted a daily or weekly record of his overtime hours; DWS provided a weekly record of the complainant's hours of work based on the "swipe" card records. The day before the report was issued, DWS informed the officer that it had emails to the complainant "reminding him to swipe in and out when on duty at start and end, not try to do things his own way to benefit his perceived situation on nights, not trying to log or claim O/T when not previously approved or to explain why O/T was required after the shift." This information does not appear in the Investigation Report.

32. In its response to the Investigation Report, DWS maintained its position that the complainant had been paid for all hours worked (including overtime) and emphasized that its workplace policy was that "all overtime needed to be authorized and approved in advance by [the complainant's] supervisor". DWS also noted that in a September 3, 2019, email to the complainant he was specifically instructed that "Going forward NO overtime unless orders in the night warrant it and I can prove to others it was required," a direction with which the complainant promised to comply: "Normally I give a lot of free over time but I will make sure I will stop doing this."

33. An employer is not obliged to pay for overtime hours about which it had no knowledge and that were, in fact, never authorized unless it "indirectly allows" the employee to work that overtime (see, for example, *Donetz*, BC EST # D077/00, 2000 CanLII 49585, and *Director of Employment Standards*, BC EST # RD016/04, 2004 CanLII 9446). There was evidence before the delegate that the complainant was specifically instructed not to work overtime hours and that he agreed he would not do so (see section 112(5) record at pages 106 and 184-186 and 189). I question whether an employer can be determined to have indirectly allowed an employee to work overtime hours when it was not made aware that the employee was regularly working overtime until after the parties' employment relationship ended. In my view, the delegate did not adequately address this latter point in her reasons. Relevant original documents (namely, the emails upon which the complainant relied to show that the employer knew he was regularly working overtime) have never been produced. The complainant did not advance his claim for additional overtime until after his employment ended. DWS maintains that this claim was not a *bona fide* claim and was predicated on a desire for "retribution." While I make no finding in this latter regard, I will say that there are reasons to question whether the complainant actually worked all of the overtime hours he claimed to

have worked. On the other hand, he may well have worked substantial overtime but was reluctant to record his overtime hours because he was concerned about being disciplined in some way for doing so, given that he was specifically warned on several occasions not to work any unauthorized overtime.

34. There was a legitimate dispute between the parties regarding whether the complainant actually worked the overtime hours he claimed to have worked. Neither the investigating officer, nor the delegate, carefully assessed the parties' conflicting evidence to determine which parties' evidence was more credible. It was the complainant's burden to show that he worked the overtime hours he claimed to have worked, and that DWS either authorized or indirectly allowed him to work the hours in question. There was a stark contrast in their positions. I do not consider the record that was before the delegate sufficient so as to allow her to make affirmative factual findings regarding whether the complainant actually worked the overtime hours he claimed to have worked.

35. In my view, the delegate's reasons, in light of the several concerns I have identified, do not adequately explain why the complainant's position was preferred to that advanced by DWS, particularly since it was the complainant's burden to demonstrate that he actually worked the overtime hours he claimed to have worked, and that DWS either authorized, or indirectly allowed, the complainant to work those overtime hours. In finding that DWS was aware of the complainant's overtime, and thus presumably at least indirectly allowed the complainant to work overtime hours, the delegate appears to have exclusively relied on summaries of emails that the complainant submitted. DWS says it has no record of these emails, and the investigating officer never obtained – as he should have – the original documents. The complainant's summaries may be accurate; however, they might also be inaccurate, reflect statements taken out of context, or otherwise could be self-serving.

36. As noted by DWS in its appeal submission, there is some justification for calling the complainant's veracity into question given that some of his statements made during the course of the investigation were clearly false (for example, whether he received compensation for length of service, and that he "generally worked the night shift alone," delegate's reasons page R3). In addition, there is a legitimate argument to be made that the delegate did not correctly calculate the complainant's overtime entitlement since her calculations were based on a 12-hour day (despite the complainant stating in his complaint that he worked 11-hour shifts), and do not appear to account for meal breaks.

37. In light of the foregoing concerns, and I am reluctant to do this given that the original complaint was filed well over 3 ½ years ago, I believe that the best course of action is to cancel the Determination and return this matter to the Director of Employment Standards. Hopefully, the Director of Employment Standards will address this matter on a priority basis.

ORDER

38. Pursuant to subsections 115(1)(a) and (b) of the *ESA*, the Determination is cancelled, and the subject complaint is referred back to the Director of Employment Standards.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal