ONTARIO LABOUR RELATIONS BOARD

2660-01-ES Ronald E. Rowell, Applicant v. **Ontario Lottery & Gaming Corporation Sudbury Racetrack Slots** and Ministry of Labour, Responding Parties.

Employment Practices Branch File No. **10004648**

BEFORE: Patrick Kelly, Vice-Chair.

APPEARANCES: Ron Rowell appeared on his own behalf; Donna M. D'Andrea, Rick Webb, Terry Scott and Lora Hywarren appeared for the responding party employer; Darcy Watson appeared for the Ministry of Labour.

DECISION OF THE BOARD; March 24, 2003

1. This is an employee application under the *Employment Standards Act*, R.S.O. 1990, c. E.14, as amended ("the Act") for review of the refusal of Employment Standards Officer E. Robert Unger to issue an Order to Pay.

2. The issue, as framed by the applicant, is whether or not, as a result of the responding party employer's ("the employer") change in pay calculations introduced on June 22, 2000, wages in the amount of $92.70 are payable to the applicant for the period from September 7, 1999, his first day of employment until June 22, 2000.

3. The hearing in this matter commenced on March 20, 2003. The applicant (or "Mr. Rowell") was not represented by legal counsel. I indicated to him at the outset of the hearing that he was welcome and entitled to participate without counsel, but that this was a legal proceeding which would potentially affect the interests, rights and obligations of the parties thereto.

4. The employer made two preliminary motions. First, it maintained that the application on its face failed to disclose a *prima facie* violation of the Act. Secondly, the employer took the position that Mr. Rowell was not entitled to any relief in respect of monies alleged to be owing in the period September 7, 1999 until June 22, 2000 because of the application of the statutory prohibition against the recovery of wages that became due more than six months before the complaint was filed with the Employment Standards Branch, in this case, September 6, 2001.

5. Counsel for the employer filed a book of documents which it relied upon in support of its preliminary motions. Mr. Rowell indicated that he had no objection to the documents therein contained. There was no dispute concerning any material facts disclosed by those documents or alleged by the employer.

6. I turn to the employer's *prima facie* motion. Mr. Rowell received a written offer of employment from the employer, which he accepted on July 30, 1999. The offer was for the position of Site Auditor, with an annual salary of $35, 200. Following the commencement of his employment on September 7, 1999, Mr. Rowell received his annual salary in bi-weekly instalments, which were calculated by dividing the annual salary of $35,200 by 26.089285 pay

periods. The figure 26.089285 was used as a method of averaging the fluctuation between years in which there are precisely 26 pay periods, and other, less frequent years in which there are 27. The effect was to maintain consistently identical bi-weekly pays, year over year, regardless of the actual number of pay periods in any given year.

7. On June 22, 2000, the employer announced to salaried employees a change in the calculation of annual salaries, as a result of a change in its third-party payroll service. As of the pay due employees on July 6, 2000, annual salaries would henceforth be calculated on the actual number of pay periods in any particular year i.e. 26 or 27. In 2000, there were 26 pay periods, and therefore 26 would be the denominator used in the bi-weekly calculation. In 2004, there will be 27 pay periods, and therefore 27 will be the denominator utilized that year.

8. Mr. Rowell is of the view that that change in methodology detrimentally affected his annual salary. The fact is, he received more than his annual salary of $35,200 for the period September 7, 1999 until September 6, 2000, his first full year of employment. He appears to believe that, because he received salary for September 4, 5 and 6, 1999 in the pay period immediately following September 6, 2000, that he did not in fact get what he contracted for in his first year of employment. However, that is not a reasonable interpretation of the written offer of employment he accepted in July 1999. The employer did not warrant in that offer that the full annual salary would arrive in Mr. Rowell's hands on or before his anniversary date of employment. He received his full annual salary within a reasonably short period following his anniversary date, regardless of what denominator was used to calculate bi-weekly salary.

9. The employer's *prima facie* motion succeeds. Mr. Rowell received all the wages he was entitled to receive in the period from September 7, 1999 until June 22, 2000, and indeed until September 6, 2000, marking the end of his first year of employment. In fact, he got slightly more than he bargained for because of the change in payroll calculations. The Act does not stipulate the methodology by which employers are to calculate an employee's bi-weekly pay.

10. With respect to the scope of the relief available to him, it appears that Mr. Rowell took far too long to register his claim with the Employment Standards Branch. He did so on September 6, 2001, approximately 15 months after the alleged violation of the Act took place i.e. June 22, 2000. It is not disputed that he raised his concerns with the employer soon after the announcement with respect to the new payroll calculation. However, the Act focuses upon the point in time that the complaint first comes to the knowledge of the Director of Employment Standards. Section 82.3 of the Act provides as follows:

> **82.3** (1) In a prosecution or proceeding under the Act, no person is entitled to recover money that became due to the person more than six months before the date on which the facts upon which the prosecution or proceeding is based first come to the knowledge of the Director.
>
> (2) Despite subsection (1), if a person's entitlement under the Act comes to the knowledge of an employment standards officer when he or she is investigating the complaint of another person, the first person is entitled to recover money that became due to the first person not more than six months before the date on which the second person's complaint is filed.

(3) In a prosecution for a failure to pay wages to the Director in trust as required by an order, the person is entitled to recover all money due under the order despite subsection (1).

(4) A person may recover money that became due before the date determined under subsection (1),

(a) if the money became due to the person not more than one year before that date;

(b) if, in the same prosecution or proceeding, the person is entitled to recover money that became due not more than six months before that date; and

(c) if the money referred to in clauses (a) and (b) became due to the person by virtue of the same provision of the Act or the same provision of the contract of employment.

(5) For the purposes of this section, money shall be deemed to have become due on the following date:

1. In the case of a failure to pay termination pay to the Director under subsection 57 (21), the date on which, had the required payment been made, the employee would have been deemed under clause 57 (21) (b) to have abandoned the right to be recalled.

2. In the case of a failure to pay severance pay to the Director under subsection 58 (12), the date on which, had the required payment been made, the employee would have been deemed under clause 58 (12) (b) to have abandoned the right to be recalled.

(6) If the facts upon which a proceeding or prosecution is based first come to the knowledge of the Director within 60 days after the day on which this section comes into force, the person may recover money that became due more than six months before the date determined under subsection (1) or (2),

(a) if the money became due to the person not more than two years before the date determined under subsection (1) or (2); and

(b) if it became due before the day on which this section comes into force.

11. Subsection 82.3(1) effectively bars Mr. Rowell from any relief, even if he we were otherwise entitled, because his claim is for wages that he contends were payable to him more than six months from the date his complaint first came to the knowledge of the Director of Employment Standards. None of the exceptions in subsections 82.3(2), (3), (4) or (6) apply in the circumstances of this case. Therefore, on that basis alone, the claim could not have given rise to an Order to Pay, even were it otherwise valid.

12. For all the above reasons, the application is dismissed.

"Patrick Kelly"
for the Board