

Citation: Kamloops Golf & Country Club v. BC (Director of Employment Standards) et al
2002 BCSC 1324
Date: 20020912
Docket: 31410
Registry: Kamloops

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

KAMLOOPS GOLF AND COUNTRY CLUB LIMITED

PETITIONER

AND:

**DIRECTOR OF EMPLOYMENT STANDARDS, EMPLOYMENT STANDARDS
TRIBUNAL AND MICHAEL KUPCHANKO**

RESPONDENTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE POWERS

Counsel for the Petitioner

D.K. Hori

Counsel for the Respondent,
Employment Standards Tribunal

J. MacTavish

Counsel for the Respondent,
Director of Employment Standards

A. Adamic

No one appearing for Michael
Kupchanko

Date and Place of Hearing/Trial

August 29, 2002
Kamloops, BC

[1] Michael Kupchanko was employed by the Kamloops Golf and Country Club Limited (the "Golf Club") as a manager and golf club superintendent. The Golf Club and Mr. Kupchanko entered into a written employment contract dated March 19, 1999. The agreement provided that his income would be \$48,720.00 in 1999 and \$52,000.00 for the year 2000. Mr. Kupchanko voluntarily left that employment. He gave his notice May 1, 2000, indicating his resignation was effective June 30, 2000. The Golf Club accepted his resignation and agreed to pay Mr. Kupchanko his regular salary until June 30, 2000, but did not require him to continue to work. The continued payment was for vacation time.

[2] Subsequently, Mr. Kupchanko filed a complaint with the Director of Employment Standards (the "Director") pursuant to the **Employment Standards Act**, claiming among other things, monies owing for overtime worked between January 1, 1999 and May 12, 2000 in the amount of 425.5 hours. The contract of employment provided:

Hours of work are expected to vary. High season demands that the Superintendent often works more than the standard 40 hour week. The Superintendent shall be compensated accordingly with time in lieu during low season.

[3] The Golf Club took the position that Mr. Kupchanko, as a manager, was not entitled to be paid overtime wages. In addition, questions were raised about the accuracy of Mr. Kupchanko's hours worked and the lack of recorded hours kept by the Golf Club. The Golf Club was concerned that Kupchanko's records were made after the fact and were inaccurate. Mr. Kupchanko's records appear to have been contained in a day timer, but the Golf Club argued that the ink recording the hours worked was not consistent with the ink used for recording other matters on the same dates. Issues were also raised whether some of the time recorded was work related.

[4] The Golf Club also raised issues about the jurisdiction of the Director to decide the dispute between Mr. Kupchanko and the Golf Club. The Director took the position that they did have jurisdiction, and the Golf Club took the position that they did not, but wished to reserve the right to submit further evidence if necessary. The Director asked the Golf Club to provide any evidence to dispute Mr. Kupchanko's claim.

[5] The Golf Club's position was that there was no breach of the **Employment Standards Act** and no basis for the complaint, therefore, the matter was not within the jurisdiction of the Director. The Golf Club argued that the **Employment Standards**

Act excluded managers from the payment of overtime, and that it was not within the jurisdiction of the Director to interpret the contract of employment.

[6] The Director pursued the investigation of the complaint and made a determination January 25, 2001, among other things, that although Mr. Kupchanko was a manager and excluded under Part 4 of the **Act** (Hours of Work and Overtime), he was nevertheless entitled to be paid wages for all hours worked over and above a normal work week.

[7] The Golf Club appealed the determination to the Employment Standards Tribunal (the "Tribunal"), and the appeal was dismissed on the issue of wages for additional hours worked. The Golf Club asked the Tribunal to reconsider its decision and the Tribunal confirmed its original decision. Subsequently, the Tribunal advised the Golf Club that there had been an error in its reconsideration because it had failed to consider evidence advanced to the Tribunal, and would reconsider its decision with respect to the introduction of evidence by the Golf Club concerning hours worked by Mr. Kupchanko. By decision dated June 5, 2002, the Tribunal declined to change its previous decision.

[8] The result was that the Golf Club was directed to pay Mr. Kupchanko approximately \$9,000.00, after some adjustment by the Tribunal, to the original decision.

[9] The Golf Club applies by Petition under the **Judicial Review Procedures Act**, R.S.B.C. 1996, c.241 and amendments thereto, to review the Tribunal's decisions. The Golf Club argues:

- (a) the Director of Employment Standards and Employment Standards Tribunal were without jurisdiction to award overtime wages to the Respondent, Mr. Kupchanko;
- (b) the Director and the Tribunal committed errors of law in awarding overtime wages;
- (c) the Director and the Tribunal committed errors of law in failing to consider evidence;
- (d) that Mr. Kupchanko's claim for overtime hours was excessive.

[10] The Director and the Tribunal take the position that the decision was within the jurisdiction of the Director, that no error in law was made in determining entitlement to the overtime wages or in dealing with evidence submitted. The Director and the Tribunal take the position that even if the evidence submitted was considered, it would not change the outcome.

[11] The Golf Club argues that the Director and the Tribunal have made a decision regarding the jurisdiction of each of

them, and that the standard of review for that decision is correctness. Alternatively, even if the decisions made were within the jurisdiction of the Director and the Tribunal, and that the standard of review is patent unreasonableness, that the decision made was patently unreasonable.

[12] The Director and the Tribunal take the position that in determining which standard of review to apply, the court should employ a pragmatic and functional analysis of the nature of the matter before the Tribunal and the nature of the Tribunal in attempting to determine whether the legislature intended the court to defer to the Tribunal's decision. The Director and Tribunal argue that after applying that analysis I should determine the correct standard of review is patent unreasonableness, and that the decision made is not patently unreasonable.

[13] The Director and the Tribunal argue that the present approach in determining the standard of review is not to simply ask whether the matter goes to the jurisdiction of the Director or Tribunal, but to apply the test contained in the Supreme Court of Canada decision **Pushpanathan v. Canada (M.C.I.)**, [1998] 1 S.C.R. 982, 160 D.L.R. (4th) 193 by performing a pragmatic and functional analysis considering the following four factors:

1. Presence or absence of a privative clause.
2. Expertise of the Tribunal.
3. Purpose of the **Act** as a whole and the provision in particular.
4. The nature of the problem before the Tribunal.

[14] The Director and Tribunal point out that this was the approach in the decision *Lari Mitchell et al v. B.C. (E.S.T.)* (1998), 62 B.C.L.R. (2d) 70 (S.C.) and *Daryl-Evans Mechanical Ltd. v. Director Employment Standards (E.S.T.)* (11 January 2002), Vancouver Registry, L003189 (B.C.S.C.). In *Mitchell* the issue involved was interpretation of sections of the **Employment Standards Act** dealing with continuation of employment, where the employer has changed, as well as interpretations of sections of the **Act** that dealt with group severance pay, payable where there is a group termination. Applying the approach outlined in *Pushpanathan* the court found that the **Act** contained a full privative clause, and that the decision makers had specialized knowledge in their field and in interpreting the sections of the **Act** was dealing with matters within its knowledge, but on a matter of statutory interpretation over which the court may also have expertise. Considering the purpose of the **Act**, which includes

establishing rights between parties and a delicate balance between different constituencies, and in that case dealing with interlocking and interacting interests, the court found the Director was entitled to a high degree of deference. In considering the nature of the problem, the court concluded that the issue was one of mixed fact and law, that the "correct" interpretation may be dictated by the mandate of the Board, keeping in mind the implications of the decision throughout the province (para. 31). The court found that it should interfere with the decision, only if the decision was patently unreasonable.

[15] The decision in **Daryl-Evans** involved an interpretation of a section of the **Employment Standards Act** dealing with the facts of the particular case and severance payment. Section 65 of the **Act** provided that s.63 (Individual Terminations and S.64 - Group Terminations) do not apply to an employee employed at a construction site by an employer whose principle business is construction.

[16] The employee did work for an employer whose principle business was construction, and had worked at a number of different sites over approximately five years. When his employment was terminated he made a claim for severance pay under the **Act**. Section 65 was found not to be applicable to

this employee because he had worked at a number of different sites, rather than at one site. An application for judicial review of the Tribunal's decision was brought before the court, and in determining the standard of review, the court applied the **Pushpanathan** test. In dealing with the expertise of the Tribunal, the court found:

The very creation of the Tribunal and the statutory scheme under which it operates creates a presumption of expertise in the area of employment standards and the applicability of the **Act**.

In dealing with the purpose of the **Act** the court referred to **Rizzo and Rizzo Shoes Ltd.** (1998), 154 D.L.R. (4th) 192 citing **Machtiger v. HOJ Industries Ltd.**, [1992] 1 S.C.R. 986, 91 D.L.R. (4th) 491 for the proposition stating at para. 24 and 25 (of **Rizzo**) (the object of the Act is) the protection of "...the interest of employees by requiring employers to comply with certain minimum standards, including minimum periods of notice of termination..."

The court in **Daryl-Evans** also found that the Tribunal was responsible for balancing the rights of employers and employees, taking into account the broad considerations set out in the **Act** itself, including providing fair and efficient procedures for resolving disputes over the application and interpretation of the **Act**, and to promote fair treatment of employees and employers.

[17] The court said the issue was one of statutory

interpretation, but at the heart of the arguments were the competing interests and realities of various components of the construction industry. The court concluded in that case, that the standard of review was patent unreasonableness. The court also said at para. 61 "While the court will look closely at questions of statutory interpretation to see if the Tribunal has gone beyond its' jurisdiction by purporting to legislate, or to negate the intention of the legislature, the potential for such scrutiny does not lessen the standard of review."

[18] In the matter before me, dealing with the **Employment Standards Act**, the existence of a privative clause, the expertise of the Tribunal, and the purpose of the **Act** as a whole, all suggest that deference should be given to the decisions of the Tribunal.

[19] The Golf Club says, the Director and the Tribunal have misinterpreted their authority under the **Act**. The Golf Club says that when an employee complains to the Director that a person has contravened the requirements of Part 2 to 8 of this **Act** (s.74), that on completing an investigation, the Director may make an determination under s. 79(2), "If satisfied that the requirements of this **Act** and the regulations have not been contravened, the Director must dismiss a complaint."

[20] The Golf Club argues that there are no provisions of the **Act** or regulations which require an employer to pay a manager wages over and above the manager's salary, or that deal with a manager's hours of work. The Golf Club argues, therefore, the **Act** and regulations cannot have been contravened. If the **Act** or regulations have not been contravened, the Golf Club argues the Director must dismiss the complaint.

[21] The Director and Tribunal agree that Part 4 does not apply to a manager, but refers to s.18(2) "... an employer must pay all wages owing to an employee within six days after the employee terminates the employment." The Director and Tribunal argue that this allows the Director, in response to a complaint, to investigate and determine what wages are owing, and if they have not been paid, to find that the **Employment Standards Act** has been contravened and direct payment. The Director and Tribunal argue that this is what occurred in the present case.

[22] The Director and the Tribunal also point out that the **Act** contains substantive rights and procedural rights critical to the purposes of the **Act** (**Sobeys Stores Ltd. v. Yeomans**, [1989] 1 S.C.R. 238, 57 D.L.R. (4th) 1 at 30-32. These procedures include that the Director, through its delegate, investigates and makes determinations of complaints under Part 10 of the

Act and is given the specific authority to "make a determination" under this section", s. 79. The section then provides what the Director, or its delegate, may do if they're satisfied that the **Act** and regulations have or have not been contravened. It is clear that the **Act** itself provides that the Director, or the Director's delegate, is to be satisfied whether the **Act** or regulations have been contravened or not.

[23] The Tribunal has been created with broad appellant jurisdiction to deal with appeals from decisions of the Director. In this case, it is the decisions of the Tribunal, on appeal from a Director's decision, that are challenged. The **Act** provides for appeals to the Tribunal under Part 13. I agree with the Director and the Tribunal that the **Act** should be given a broad and liberal interpretation, considering the need to provide an informal, efficient and prompt procedure for resolving disputes between employers and employees as they arise under the **Act**. I agree that the Tribunal is to be given a high degree of deference.

[24] The nature of the problem before the Tribunal was the review of the Director's decision, and the decision whether or not to admit evidence submitted by the Golf Club.

[25] The parties frame the issues slightly differently, but the issues involve an interpretation of s.18 of the **Act**, and then an interpretation of the employment contract to determine whether s.18 had been complied with. It is clearly necessary for the Director or the Tribunal to interpret the **Act** in which they operate under. The Director or Tribunal determine whether the **Act** has been contravened, or in this case determine whether there are any wages owing. They must also interpret the contract of employment between the Golf Club and Mr. Kupchanko. Although these are matters, which in this case, the court may equally be capable of doing, these are matters which the legislation has placed within the authority of the Director and the Tribunal, and I am satisfied that a high degree of deference should be given to the Director and the Tribunal in this case. Therefore, the standard of review is whether or not the decisions were patently unreasonable.

[26] The next question that the Tribunal had to deal with is whether to admit evidence submitted by the Golf Club to refute Mr. Kupchanko's claim of hours worked. This matter deals with the procedures on appeal and the exercise of discretion whether or not to admit evidence, and again is a matter in which a high degree of deference should be given to the

Tribunal, subject to the requirements of natural justice.

Again the standard of review is "patent unreasonableness".

[27] The test of patently unreasonable has been expressed in a number of ways, including the following:

Did the Board here so misinterpret the provisions of the Act as to embark on an inquiry or answer a question not remitted to it? Put another way was the Board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the Court upon review?

(**CUPE v. NB Liquor Corp**, [1979] 2 SCR 227 at 237, 97 DLR (3d) 417.)

Also in **Canada (AG) v. P.S.A.C.** (1993), 101 DLR (4th) 673 (S.C.C.):

It is said that it is difficult to know what "patently unreasonable" means. What is patently unreasonable to one judge may be eminently reasonable to another. Yet any test can only be defined by words, the building blocks of all reasons. Obviously, the patently unreasonable test sets a high standard of review. In the Shorter Oxford English Dictionary "patently" an adverb, is defined as "openly, evidently, clearly". "Unreasonable" is defined as "not having the faculty of reason; irrational, not acting in accordance with reason or good sense". Thus, based on the dictionary definition of the words "patently unreasonable", it is apparent that if the decision of the Board reached, acting within its jurisdiction, is not clearly irrational, that is to say evidently not in accordance with reason, then it cannot be said that there was a loss of jurisdiction. This is clearly a very strict test.

It is not enough that the decision of the Board is wrong in the eyes of the court; it must, in order to

be patently unreasonable, be found by the court to be clearly irrational.”

[28] The courts have also recognized that the patently unreasonable test contemplates a situation where a Tribunal may make a decision that the court thinks is wrong, but that does not entitle the court to set it aside. (***Hospital***

Sciences Association of British Columbia v. B.C. (I.R.C.)

(1992), 67 B.C.L.R. (2d) 250 at 260 (C.A.).)

[29] The Director and subsequently the Tribunal were required to determine whether there were any wages owing to the complainant Kupchanko. To do so they were required to interpret the employment contract. I find that the proper standard of a review to be applied to those decisions is whether or not they were patently unreasonable.

[30] It is clearly possible to argue that the contract addresses the issue of compensation or hours worked over and above 40 hours per week and provides that the compensation will be time in lieu during a low season. In other words that no monies would be paid but time off would be provided. It could then reasonably be argued that Kupchanko cannot complain that he did not have the opportunity to take that time off as a result of ceasing his employment before the low season in 2000. It can be argued that Kupchanko should not be able to

turn this entitlement to "time in lieu" into a claim for money by his unilateral decision to leave his employment.

[31] The Director and the Tribunal both concluded that although Kupchanko was not entitled to payment for overtime hours pursuant to the **Employment Standards Act** because he is a manager, that the agreement contemplated compensation for the work that he provided. The contract did not anticipate that this work would be done without some benefit to Kupchanko and if he had not been able to receive that benefit before his employment ceased it was reasonable to infer that he should be compensated by payment rather than time off. The Director and the Tribunal both argue that the agreement does not specify that no compensation will be paid in the event time off is not taken. If it did so they agree that it may be patently unreasonable to interpret the contract in a manner that provided for compensation by way of monies. However failing that specific term they argue that their interpretation is a rational one. They also point to the fact that the pay records which were available from the Golf Club for a two week period indicate a 40 hour work week. This combined with the wording of the contract itself they suggest supports the inference that it was a term of the contract that the normal work week would be 40 hours averaged throughout the year.

[32] This may not be the interpretation I would give the contract, but I am unable to say that it is a clearly irrational or patently unreasonable interpretation.

[33] The Golf Club also argued that the Tribunal erred in failing to admit evidence from the Golf Club with regard to the correctness of the records submitted by Kupchanko. The Tribunal originally indicated that there was no additional evidence to be considered but in their reconsideration found that there was additional evidence which they should consider admitting. They have reviewed that evidence and found that even if it had been admitted it would not change the outcome of the dispute. The Tribunal also pointed out that that evidence was available for submission to the delegate in the first instance and that the Tribunal reserves the discretion to determine whether or not to allow the admission of that evidence. I am satisfied that the practice before the Tribunal is to exercise a discretion as to whether or not to admit evidence which had been available or could have been provided at the earlier investigative stage. The practice of the Tribunal is to consider a number of things including:

1. The importance of the evidence.
2. The reason why it was not initially disclosed.

3. Any prejudice to parties resulting from non disclosure.

4. Any other relevant criteria.

[34] Generally the Tribunal is reluctant to admit such evidence if it were available and the person seeking to submit that evidence had simply failed to refuse to submit the evidence at the investigative stage. Decisions of the Employment Standards Tribunal to that effect are as follows:

Tri-West Tractor BCEST #D268/96; **Kaiser Stables Ltd.** BCEST #D058/97; **Nickolas Poretsis, dba Aristocrat Cleaners,** BCEST #D370/98; **Gary DeRosier,** BCEST D319/99; **Changing Times Hair Design Ltd.** BCEST #D339/00.

[35] This practice seems to have been approved by the courts in the decision **Laguna Woodcraft (Canada) Ltd. v. BC (Employment Standards Tribunal)** (28 April 1999), Vancouver Registry A982962 (S.C.) and **McCall Bros. Funeral Directors Ltd. v. BC (EST)** (16 October 2000), Victoria Registry 99 0895 (B.C.S.C.). In both of these decisions the court applied the standard of patently unreasonable to the courts decision whether or not to admit evidence.

[36] In the present case the Golf Club took the position that the Director had no jurisdiction to deal with Kupchanko's

complaint. However in doing so they took the position that they reserved the right to submit additional evidence regarding the accuracy of Kupchanko's claim for hours worked. The Director requested they provide information or evidence if they wished to do so. I am unable to say that the Tribunal's subsequent decision not to admit the evidence or its findings that the evidence would not have made a significant difference to the outcome is patently unreasonable in all of the circumstances. The Tribunal appears to have reached its decision based on the circumstances under which the evidence was not provided originally and its importance to the ultimate decision.

[37] I find therefore that the application for judicial review must be dismissed. If the parties are unable to agree on the matter of costs they are at liberty to address that matter.

"R. E. Powers, J."

POWERS, J.