Employment Standards TRIBUNAL

An appeal

- by -

Warren Dingman
("Dingman")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

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

TRIBUNAL MEMBER: David B. Stevenson

FILE No.: 2009A/146

DATE OF DECISION: January 5, 2010

DECISION

SUBMISSIONS

Warren Dingman	on his own behalf
Ronald Lamperson	on behalf of Footprints Security Patrol, Inc.
Terry Hughes	on behalf of the Director of Employment Standards

OVERVIEW

1. This decision addresses an appeal filed under Section 112 of the *Employment Standards Act* (the *"Act"*) by Warren Dingman ("Dingman") of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on September 24, 2009.

2. The Determination was made on a complaint filed by Dingman against Footprints Security Patrol, Inc. ("Footprints"). Dingman alleged Footprints had contravened the *Act* by failing to pay all wages owed.

3. The Director found the *Act* had not been contravened and no wages were owed.

4. Dingman has appealed the Determination on the grounds that the Director erred in law and failed to observe principles of natural justice in making the Determination.

5. I have concluded this appeal can be decided from the material in the appeal file, including the written submissions of the parties.

ISSUE

6. The issues in this appeal are whether Dingman has established the Director erred in law or failed to observe principles of natural justice in making the Determination.

THE FACTS

7. The Director conducted a complaint hearing on August 25, 2009. Dingman gave oral evidence; Footprints provided no oral evidence, contenting themselves to rely on Dingman's evidence and their cross-examination on that evidence. The facts relating to the complaint are provided in the Determination and in the section 112(5) Record.

8. Footprints operates a security business. Dingman was originally employed by Footprints to work as a security guard on April 25, 2005 and later assumed the position of "Operations Supervisor – South Island". South Island describes Footprints' operation in and around Victoria, BC. He signed an employment contract for that position. The contract, among other things, named the position, set out the responsibilities of the position, set out a general description of the terms of service for the position, including a general description of hours of work, and set out the remuneration and benefits. In the fall of 2007, Dingman agreed to transfer to Nanaimo, or "Central Island", to be the branch manager there and started in that position in January, 2008. His official start date as the "Branch Manager – Central Island" was February 1, 2008. The employment contract he had signed for South Island was revised in February 2008 to cover his employment in this

position and he signed it in mid-February. Dingman worked in Nanaimo as Branch Manager – Central Island for approximately one and one-half months before he signed the revised contract.

9. Dingman was terminated from his employment with Footprints as of June 22, 2008, but was paid until September 2008.

10. For the purposes of the complaint, it was conceded, and recorded in the Determination, that Dingman was employed as a manager, as that term is defined in section 1.

11. At the time Dingman became Branch Manager – Central Island, Footprints had not hired a person to the South Island Operations Manager position and he retained some responsibilities for the South Island operation of Footprints. There was a discussion between Dingman and Footprints, before he assumed the Branch Manager – Central Island position that he would be responsible for scheduling all Footprints' employees on Vancouver Island, including those in the South Island operation, and he agreed to that. Dingman acknowledged in the complaint hearing, that scheduling Footprints' employees in Victoria and Nanaimo was a significant part of his position.

12. There were two other persons employed by Footprints who had some responsibilities related to the management and operation of the Victoria (South Island) office.

13. Neither Dingman nor Footprints maintained an accurate daily record of hours actually worked by Dingman during the last six months of his employment.

14. Dingman said there were several discussions with the principals of Footprints about compensation for the extra hours he claimed to be working. He said the last such discussion occurred in May 2008 with the President and General Manager of Footprints, Simon Collery, during which Mr. Collery acknowledged Footprints "owed him [Dingman] money". Footprints did not deny Dingman's assertion on this point, but suggested the comment was made "sarcastically". Dingman denied there was any sarcasm in the comment, but did state Mr. Collery displayed some anger toward him during this discussion. It was a short time later that he was terminated.

15. The Director considered the employment contract and found it did not provide for additional wages for hours worked in excess of full time hours. The particular term of the contract, clause 2, paragraph (2) reads:

> (2) The Employee will be expected to work on a full-time basis (40 hours +) exclusively for the Employer. The Employee understands and agrees that his or her hours of work will vary and may be irregular and will be those hours required to meet the objectives of his or her employment. Accordingly, this agreement constitutes the Employee's consent to work greater hours than those provided in applicable employment or labour standards.

16. The reasons for that conclusion are set out in the Determination. Based on this finding, the Director found Dingman was not entitled to wages over and above his salary. The reasons for that conclusion are also set out in the Determination.

ARGUMENT

17. Dingman argues the Director erred in law. Two errors of law are identified. The first error of law is described by him as the Director "failing to consider the nature of the contract" that he had signed with Footprints. Specifically, he disagrees with the conclusion of the Director that all the work he did or was

assigned to do was covered by the employment contract. He says such a conclusion is unreasonable and irrational.

18. The second error of law identified is in the Director failing to provide him with protection from "excessive hours of work". He disagrees with the finding of the Director that he had failed to record his own hours. He says a record of all of the hours he worked can be found in the "InTime" software used to record the start and finish times for Footprints' employees, including himself.

19. Dingman also says the Director failed to observe principles of natural justice in making the Determination. On this ground, he argues the Director "blatantly ignored the core issues" in the case, which he identifies as his performing work beyond the scope of his employment contract. He alleges the Director was biased, failed to refer to a January 2008 memo that had not been produced by Footprints during the complaint process, failed to address some discrepancy in the position of Footprints relating to unfound and/or destroyed documents, failed to give effect to what he alleged was a settlement of his complaint in September 2009 and failed to record the complaint hearing.

20. In response, counsel for Footprints says there was no error of law made by the Director and denies there were any relevant documents hidden of destroyed by Footprints or that there was a settlement offer ever made by Footprints.

21. The Director has provided a brief response to the appeal that primarily defers to the findings and reasoning provided in the Determination. The Director's response has provided a position on some of the arguments made in the appeal submission: Dingman has argued that the terms of the employment contract were ignored – the Director says they were not; Dingman says the Director failed to provide protection from excessive hours of work – the Director says no such protection was ever sought by Dingman; Dingman says a record of his hours of work could be found in the "InTime" records – the Director says Dingman made no such representation and clearly stated he had not kept a record of his hours worked; Dingman says evidence was "deliberately left out" by the Director –the Director denies this assertion.

22. In his final submission, Dingman takes issue with statements made in the submission filed on behalf of Footprints relating to the production of documents and the alleged settlement. He also takes issue with some of the points made by the Director relating to the timing of the filing of his complaint and his failure to bring any complaint to the Director concerning excessive hours. Dingman says he "repeatedly" brought up excessive hours of work during the complaint process and reiterates his argument about the absence of a formal record of the complaint hearing. He also reiterates his disagreement with the Director's interpretation of his employment contract.

ANALYSIS

23. As a result of amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are statutorily limited to those found in Subsection 112(1) of the *Act*, which says:

> ***112*** *(1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:*
>
> *(a) the director erred in law:*
>
> *(b) the director failed to observe the principles of natural justice in making the determination;*
>
> *(c) evidence has become available that was not available at the time the determination was made.*

24. The Tribunal has consistently indicated that the burden in an appeal is on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds. A party alleging a denial of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.

25. The *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03.

1. Error of Law

26. The Director has jurisdiction to interpret and enforce the employment contract. There is ample authority supporting such a jurisdiction, see, for example, *Dusty Investments c.o.b. Honda North*, BC EST # D043/99 (Reconsideration of BC EST # D101/98), *Halston Homes Limited*, BC EST # D527/00, *Shell Canada Products Limited Produits Shell Limitée*, BC EST # RD488/01, *Susan A. McKay*, BC EST # D518/01, *Kamloops Golf and Country Club*, BC EST # D278/01 (Reconsideration denied, BC EST # RD544/01; judicial review dismissed, 2002 BCSC 1324), *Patrick O'Reilly*, BC EST # RD165/02 and *Seann Parcker*, BC EST #D033/04.

27. The interpretation of an employment contract is a question of law: see *Director of Employment Standards (Re Kocis)*, BC EST # D331/98 (Reconsideration of BC EST # D114/98). In considering the employment contract, the Director referred in the Determination to the Tribunal's decision in *UAP Inc.*, BC EST # D418/01, which recognizes several principles arising in the *Act* relating to additional compensation for managers: first, that there is no "implied" limit on the number of hours a manager might be required to work; second, that whether a manager is entitled to extra pay for additional hours worked depends on the terms of the employment contract; and third, that if the manager is hired at an agreed salary that is paid regardless of the number of hours worked, the agreement should be given effect, unless it does not meet the minimum requirements of the *Act*.

28. *UAP Inc.* conveys the law of the statute, but the interpretation issue in this case was not a question involving the law of the statute; it is a question of general law about which the Director must be correct. Dingman does not really dispute the statutory context of the Determination; he disagrees with the Director's interpretation of his employment contract, specifically the Director's conclusion that "the employment agreement clearly supports a finding that Mr. Dingman's salary applied to all hours worked".

29. Where the Director is faced with a question of general law, as opposed to a question involving the law of the statute, the Director's analysis must conform to generally accepted legal principles relating to that question of law. In the context of interpreting the employment contract, the principles governing that task are well established. The goal of contract interpretation is to determine, objectively, the parties' intentions at the time the contract was made. The words of the contract are the primary source. If the words are not clear, reference may be had to extrinsic evidence.

30. From that perspective, I can find no error of law in the Director's analysis or interpretation of the employment contract. While Dingman complains that such an interpretation is unreasonable and irrational, the Director's conclusion was based on an analysis of the terms of the contract and the available relevant extrinsic evidence relating to the formation and operation of the contract.

31. The burden on Dingman in this appeal is to show an error of law. For the purpose of appeals that allege an error of law, the Tribunal has adopted the definition of "error of law" set out by the British Columbia Court

of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam),* [1998] B.C.J. No. 2275 (B.C.C.A.):

> 1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
> 2. a misapplication of an applicable principle of general law;
> 3. acting without any evidence;
> 4. acting on a view of the facts which could not reasonably be entertained; and
> 5. adopting a method of assessment which is wrong in principle.

32. In this case, the only part of that definition which is raised in this case would be "misapplication of an applicable principle of general law". Clearly there was evidence on which the Director could rely in making the findings on the interpretive issue and the view taken by the Director of the facts was not unreasonable.

33. Dingman has not shown how the analysis by the Director amounts to an "error of law" within that definition and, while he may disagree with the resulting conclusion, I am unable to accept his view that the Director's interpretation of the employment contract is either unreasonable or irrational. While Dingman argues there was no provision in the employment contract to provide work for the Victoria Branch, neither is there language limiting the work under the contract solely to the Nanaimo Branch and the extrinsic evidence – evidence which Dingman accepts – does reasonably point to an intention by the parties that his duties would include work related to the Victoria Branch.

34. Dingman also argues the Director erred in law by failing to provide him with protection from excessive hours. Section 39 of the *Act* is the provision dealing with excessive hours. That provision reads:

> ***39*** *Despite any provision or this Part, an employer must not require or directly or indirectly allow an employee to work excessive hours or hours detrimental to the employee's health or safety.*

35. This part of the appeal has no basis in fact or law and fails for the simple reason that the material does not show Dingman ever sought the Director's protection from excessive hours. Dingman's complaint to the Director, which was filed almost five months after he was terminated from his employment with Footprints, did not seek protection from "excessive hours"; it sought pay for additional hours worked. The time limit for Dingman to allege a breach of section 39 has long since passed. Such an allegation cannot, in the circumstances, be raised by simply "bringing it up" in discussions with the Director or in the complaint hearing. Such an allegation requires particular proof. Nowhere in any of the material, or even in this appeal, has Dingman alleged (or proven) his health was negatively affected by the hours he worked.

36. In any event, once the employment has terminated there is little reason to consider the question of excess hours since, as a matter of law, this provision does not provide a threshold over which overtime wages (or in this case additional wages) are payable, and it is therefore not relevant to his claim for pay owing: see *Homayon (Henry) Tofangchi*, BC EST # D012/09.

37. The matter of the "InTime" records has no relevance to the issues raised in this appeal. Having reached the conclusion that Dingman was not entitled to wages for what he alleged were additional hours worked, it was unnecessary to determine how many additional hours he might have worked.

38. For the above reasons, Dingman has not met the burden of showing the Director committed any error of law in the Determination and this ground of appeal is dismissed.

2. Failure to Observe Principles of Natural Justice

39. Dingman's initial argument under this ground of appeal is simply a reiteration of his disagreement with the interpretation given by the Director to his employment contract. The argument does not raise natural justice considerations and I do not need to address it further.

40. Dingman alleges bias. An allegation of bias against a decision maker is serious and should not be made speculatively or on anything less than clear and cogent evidence. In *Adams v. British Columbia (Workers' Compensation Board)*, [1989] B.C.J. No 2478 (C.A.), the Court stated:

> An accusation of that nature is an adverse imputation on the integrity of the person against whom it is made. The sting and doubt about integrity lingers even when the allegation is rejected. It is the kind of allegation that is easily made but impossible to refute except by a general denial. It ought not be made unless supported by sufficient evidence to demonstrate that, to a reasonable person, there is a sound basis for apprehending that the person against whom it is made will not bring an impartial mind to bear upon the cause.

41. The onus of demonstrating bias lies with the person who is alleging its existence. Furthermore, a "real likelihood" or probability of bias must be demonstrated. Mere suspicions, speculation or impressions, are not enough. Dingman has expressed only his "belief" that the delegate of the Director in this case was biased, referring and relying on his personal impressions and characterization of events that occurred in the complaint hearing. Such personal beliefs and impressions fall far short of the "clear and cogent" evidence required to support a finding of bias and this argument is rejected.

42. Dingman's arguments concerning documents that he alleges were not mentioned and/or not produced do not demonstrate a failure by the Director to observe principles of natural justice. It is not sufficient to merely raise an argument that the Director failed to compel production, failed to receive, failed to review or failed to give effect to particular documents. This argument requires, at least, that Dingman show there was an obligation on the Director in this respect, arising either from obligations imposed in the *Act* or from the broader obligation on the Director to ensure procedural fairness to parties involved in the complaint process, that the Director failed to meet one or more of these obligations and that the failure of the Director resulted in the denial of natural justice. Included within the burden on Dingman is the need to show the documents about which the argument is raised were at least potentially relevant to a fair adjudication of his claims.

43. Dingman has failed on all aspects of this argument. He has not demonstrated that the Director had any obligation, in the circumstances, to ensure these documents were produced, that the documents were in any way relevant to the issue on which the Director disposed of the complaint or that, as a consequence of the documents not being produced, he was denied a fair hearing on the central issue.

44. Dingman alleges his complaint was settled and the failure of the Director to enforce that settlement on Footprints is a breach of natural justice. Footprints denies there was any settlement. There is no record of any settlement in the material. Without some evidence that a settlement was reached, I cannot give any consideration or effect to this argument.

45. Finally, Dingman says the Director's practice of not recording complaint hearings is, in his view, denying due process and natural justice. Whether his opinion is correct is not the issue. The issue is whether the failure of the Director to record the complaint hearing in this case has resulted in a denial of natural justice. As has been noted in several areas of this appeal, and in the opening comments to this analysis, the burden of showing a failure by the Director to observe principles of natural justice in making the Determination is on Dingman. The natural justice obligations on the Director that typically operate in the context of the

complaint process, including the complaint hearing, are to ensure that parties have an opportunity to know the case against them, the right to present their evidence and the right to be heard by an independent decision maker: see *BWI Business World Incorporated*, BC EST # D050/96; and *Imperial Limousine Service Ltd.*, BC EST # D014/05.

46. There is no evidence that Dingman was denied any of these rights. The facts show he was accorded the appropriate level of procedural fairness within the complaint process that resulted in the Determination.

47. For the above reasons, the appeal is dismissed.

ORDER

48. Pursuant to section 115 of the *Act*, I order the Determination dated September 24, 2009, be confirmed.

David B. Stevenson
Member
Employment Standards Tribunal