

An appeal

- by -

Karen Mandair

- 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: Carol L. Roberts

FILE No.: 2006A/133

DATE OF DECISION: January 15, 2007

DECISION

SUBMISSIONS

Karen Mandair	on her own behalf
Greg Brown	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Karen Mandair pursuant to Section 112 of the *Employment Standards Act (Act)*, against a Determination of the Director of Employment Standards (“the Director”) issued on August 18, 2006.
2. Ms. Mandair filed a complaint against Updesh Ghuman carrying on business as Garden Gate Wedding Centre, The Décor House, Art of the Wedding, Art of the Wedding at The Décor House, The Décor House at Garden Gate and Garden Gate (“Ghuman”), claiming unpaid wages, statutory holiday pay and annual vacation pay from January 2005 until June 2005.
3. Following an investigation, the Director’s delegate concluded that the parties had a business relationship rather than an employment relationship, and determined that the *Act* did not apply to the complaint.
4. Ms. Mandair filed an appeal with the Tribunal on September 26, 2006 alleging that the delegate failed to observe the principles of natural justice in making the Determination. She contends that the delegate was biased, and that the Determination was not in accordance with the evidence.
5. Section 36 of the *Administrative Tribunals Act (ATA)*, which is incorporated into the *Employment Standards Act* (s. 103), and Rule 16 of the Tribunal’s Rules of Practice and Procedure provide that the tribunal may hold any combination of written, electronic and oral hearings. (see also *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). Although Ms. Mandair sought an oral hearing, I conclude that this appeal can be adjudicated on the written submissions of the parties. This appeal is whether the delegate erred in law, an issue which does not turn on the credibility of the parties or whether additional evidence needs to be considered. There is also no need to hear *viva voce* evidence on the issue of whether there is a denial of natural justice. This appeal is decided on the section 112(5) “record”, the submissions of the parties, and the Reasons for the Determination.

ISSUE

6. Whether the delegate failed to observe the principles of natural justice in making the Determination.

FACTS AND ARGUMENT

7. Although the majority of Ms. Mandair’s submissions address the result; that is, the delegate’s conclusion that she was not an employee, the grounds of her appeal is that the delegate failed to observe the principles of natural justice. In light of my conclusions on the natural justice issue, I have not set out the facts in detail, nor the parties’ submissions on those facts.

8. Ms. Ghuman operates a wedding consulting and event planning company. The company operates under a number of names which are outlined in paragraph 2 above. Ms. Mandair said that she worked along side Ms. Ghuman from early 2004 until June 2005, and had not been paid wages for that entire period. Ms. Mandair contended that in July 2004, Ms. Ghuman agreed to pay her \$1,500 per month for business related duties such as picking up and delivering catering supplies, flowers and setting up equipment.
9. Ms. Ghuman claimed that she and Ms. Mandair discussed the establishment of a business, but that Ms. Mandair was never hired as an employee. She said she always considered Ms. Mandair a business partner, and did not maintain payroll or other employer records. She contended that the complaint about wages only came about after the parties' relationship soured.
10. Although the record contains a Notice of Hearing, the Determination indicates that the delegate reached his decision following an investigation under section 76 (2) of the *Act*. The delegate considered the definitions of 'employer' and 'employee' set out in the *Act*, and concluded that Ms. Mandair had not demonstrated that she was an employee. The delegate found that Ms. Mandair had not demonstrated that she was under the "control and direction" of Ms. Ghuman. He concluded that the parties were co-venturers in the business.
11. Ms. Mandair's appeal submission contains numerous complaints about Ms. Gupta's businesses, none of which relate to the issue of natural justice. Whether Ms. Gupta issues invoices, pays GST or PST, drives an unregistered vehicle or registered the companies she operates under are not relevant to the issue I must decide, and I have not considered these complaints in arriving at my decision.
12. Ms. Mandair contended that, during the hearing, the delegate heard evidence from her witnesses that she worked beyond April 2005, and that she performed the work under Ms. Ghuman's direction. She further stated that Ms. Ghuman did not appear at the hearing despite several attempts by the delegate to contact her by telephone. She further stated that, after hearing from her and her witnesses, the delegate visited Ms. Ghuman at her place of business. Ms. Mandair said that "justice had not been served" by the delegate.
13. While acknowledging that he contacted the witnesses identified by Ms. Mandair, the delegate says their evidence was of no assistance in determining whether she was an employee of Ms. Ghuman.
14. In a submission dated November 15, 2006 in response to an inquiry from the Tribunal as to whether the delegate held a hearing, as Ms. Mandair alleged and the record appeared to indicate, the delegate stated that, although a hearing date had been set, it appeared that Ms. Ghuman had not been served with a Notice of Complaint Hearing. He indicated that he then "switched the file to an investigation". He further wrote that Ms. Mandair brought 2 witnesses to the May 3 hearing, both of whom were unable to support Ms. Mandair's allegation that she was an employee. He also states that Ms. Mandair provided him with the names and telephone numbers of several individuals she alleged worked with her. He noted that he had referred to those witnesses in the Determination and their evidence was of no assistance to Ms. Mandair.
15. In a reply submission, Ms. Mandair states that the delegate had misled the Tribunal when he stated that he contacted her witnesses. She says that she brought six witnesses with her to the hearing, and that they were all in the hearing room from 8:30 a.m. until 12:30 p.m. She alleged that the delegate "interviewed" three of those witnesses, and expresses concern that the Branch was attempting to "cover up Ghuman".

THE FACTS AND ANALYSIS

16. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
- (a) the director erred in law
 - (b) the director failed to observe the principles of natural justice in making the determination;
or
 - (c) evidence has become available that was not available at the time the determination was being made
17. The burden of establishing the grounds for an appeal rests with an Appellant. Ms. Mandair must provide persuasive and compelling evidence that the delegate failed to observe the principles of natural justice. Having considered the record and the submissions of the parties, I conclude that the Determination should be cancelled on the grounds that the delegate failed to observe the principles of natural justice.
18. Principles of natural justice are, in essence, procedural rights that ensure parties a right to be heard by an independent decision maker.
19. As the Supreme Court of Canada has observed, natural justice requires that decision makers must also be both fair, and seen to be fair. Fairness and impartiality must be subjectively present and objectively demonstrated to the informed and reasonable observer: (*Committee for Justice and Liberty v. N.E.B.* [1978] 15 S.C.R. 369, *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817). In *R. v. R. D.S.* [1997] 3 S.C.R. 484, the Court said:

The test for finding a reasonable apprehension of bias has challenged courts in the past. It is interchangeably expressed as a "real danger of bias," a "real likelihood of bias," a "reasonable suspicion of bias" and in several other ways. An attempt at a new definition will not change the test. Lord Denning M.R. captured the essence of the inquiry in his judgment in *Metropolitan Properties Co. v. Lannon*, [1969] 1 Q.B. 577 (C.A.), at p. 599:

[I]n considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand: see *Reg. v. Huggins*; and *Rex v. Sunderland Justices*, per Vaughan Williams L.J. Nevertheless there must appear to be a real likelihood of bias. Surmise or conjecture is not enough: see *Reg. v. Camborne Justice, Ex parte Pearce*, and *Reg. v. Nailsworth Licensing Justices, Ex parte Bird*. There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not inquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: "The judge was biased."

20. In my view, an informed and reasonable observer would have the impression that Ms. Mandair was not treated fairly, and that the delegate favoured Ms. Ghuman at her expense.
21. The delegate decided that he would determine Ms. Mandair's complaint by way of an oral hearing. He issued a Hearing Notice specifying a hearing date of May 3, 2006 at 9:00 a.m. The Notice states that all evidence, including witnesses, must be available at the hearing. It appears from the submissions that Ms. Mandair did appear, along with some witnesses. It also appears from the submissions that Ms. Ghuman did not appear at the hearing. The delegate says that he determined that Ms. Ghuman did not receive the Notice of Hearing, and changed the method of deciding Ms. Mandair's complaint.
22. There is nothing in the Determination referring to these procedural matters. The information was obtained from the delegate only after an inquiry from the Tribunal about the Hearing Notice contained in the record, and the absence of any reference to a hearing in the Determination. It also appears that the delegate did not communicate any of this to Ms. Mandair.
23. Ms. Mandair says she and six witnesses were in the hearing room for approximately four hours. She also says that the delegate took evidence from three of those witnesses under oath. The delegate did not respond to these allegations. If Ms. Mandair's submission that the delegate heard from three of her witnesses before deciding to switch the method of deciding on her complaint is to be believed, Ms. Mandair was rightly concerned about the delegate's ability to fairly decide her case. If the delegate determined that Ms. Ghuman had no knowledge of the hearing, he ought to have adjourned the hearing and began it at a later date after she had been notified. It appears the delegate in fact commenced the hearing and took evidence from some of Ms. Mandair's witnesses. Again, if Ms. Mandair's evidence is to be believed, the delegate then went and spoke to Ms. Ghuman alone. If the delegate was conducting a hearing, this demonstrates actual bias, and a failure to comply with the principles of natural justice. In these circumstances, it is reasonable for Ms. Mandair to assume that the delegate was not impartial or fair.
24. Furthermore, although Ms. Mandair alleges that the delegate took evidence from some witnesses she brought to a hearing, and that she provided the delegate with the names of several witnesses, the Determination discloses nothing about their identities or evidence, or how the delegate assessed that evidence. The delegate merely states, in a reply submission, that he concluded that Ms. Mandair and Ms. Ghuman were business partners based on "the evaluation of all testimony and evidence presented by all of Mandair's witnesses". This is the first indication that the delegate heard from any witnesses apart from Ms. Mandair and Ms. Ghuman themselves. Not only is the witness evidence not mentioned in the Determination, the delegate's suggestion that he spoke with only two witnesses by telephone conflicts with Ms. Mandair's assertions that he took oral evidence from three at the hearing.
25. I conclude that the Determination was arrived at by a process which is sufficiently flawed to give rise to a reasonable apprehension of bias. I allow the appeal, and refer the matter back to the Director for a new hearing.

ORDER

26. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated August 18, 2006, be cancelled, and the matter referred back to the Director for a new hearing.

Carol L. Roberts
Member
Employment Standards Tribunal