Employment Standards TRIBUNAL

An appeal

- by -

Scott Cohen

- 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: Yuki Matsuno

FILE No.: 2009A/136

DATE OF DECISION: January 5, 2010

Employment Standards Tribunal
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BRITISH COLUMBIA

DECISION

SUBMISSIONS

Scott Cohen	on his own behalf
Diane Black	on behalf of Diane Black and Duane Black carrying on business as D & D Traffic Control
Theresa Robertson	on behalf of the Director of Employment Standards

OVERVIEW

1. Scott Cohen appeals a determination of the Director of Employment Standards (the "Director") issued September 4, 2009 (the "Determination"), pursuant to section 112 of the *Employment Standards Act* (the "*Act*").

2. Mr. Cohen worked as a flagger with Diane Black and Duane Black carrying on business as D & D Traffic Control ("D & D" or the "Employer") from April 14 to November 6, 2008. Mr. Cohen filed a complaint with the Employment Standards Branch on December 15, 2008, claiming, amongst other things, regular wages, overtime, and compensation for length of service.

3. A mediation was held, at which the parties did not reach a resolution of the complaint. A hearing of the complaint was scheduled to take place on February 24, 2009; however, this hearing was cancelled in light of serious health problems being experienced by one of the principals of D & D. The Employment Standards Branch decided that a delegate of the Director (the "Delegate") would conduct an investigation instead of a hearing. After she reviewed the submissions of the parties, the Delegate issued a letter containing Preliminary Findings on July 10, 2009 (the "Preliminary Findings"). In the Preliminary Findings, the Delegate wrote that it appeared that Mr. Cohen was an employee of the Employer and not an independent contractor. Subsequently, the Employer acceded to the finding that Mr. Cohen was an employee and voluntarily paid the amount of $2093.09. These funds were forwarded to the Employment Standards Branch, which in turn issued a cheque dated September 11, 2009 to Mr. Cohen for that same amount.

4. The Delegate issued the Determination on September 4, 2009 in which she

- confirmed Mr. Cohen's status as an employee;
- explained the evidence before her with respect to hours worked – the Employer's payroll records and Mr. Cohen's claims to having worked more hours; that Mr. Cohen did not provide "concrete evidence" to refute the Employer's records; and therefore the Employer's evidence was preferred;
- found on the basis of the Employer's records that Mr. Cohen worked a number of hours for which he was not paid daily and weekly overtime; and that Mr. Cohen had not been paid vacation pay or statutory holiday pay;
- found, based on the provisions of the *Act*, that the collection period for wages for Mr. Cohen was May 7 to November 6, 2009;

- reviewed the information provided by Mr. Cohen regarding travel or commute time and found that the information provided by the Employer was preferred, resulting in no additional wages owed to Mr. Cohen for travel or commute time;
- found that Mr. Cohen was entitled to compensation for length of service under section 63 of the *Act* in the amount of one week of pay, determined to be $357.36;
- noted that the *Act* prevents an employer from making deductions other than statutory withholdings; that the Employer conducted a "self audit" of the amounts deducted from Mr. Cohen's pay each pay period to cover Work Safe premiums; and paid an additional $368.67 as a result of the "self audit";
- responded to Mr. Cohen's expectation, as she understood it, that he would be compensated for income tax, EI and CPP deductions that were not made by the Employer by explaining that whether employers make these deductions is not a matter for Employment Standards to deal with it and that it is not within the mandate of Employment Standards to compensate an employee when an employer has not made such deductions;
- noted that the Employer has paid $2093.09 in additional wages to Mr. Cohen which have been paid into the Director's Trust account on his behalf and disbursed to him; and
- found that there is no evidence that the Employer continues to be in contravention of the *Act*; therefore, Mr. Cohen's complaint is dismissed and no further action will be taken.

5. Mr. Cohen now appeals the Determination on two grounds. The first is that the Director of Employment Standards erred in law. The second is that the Director failed to observe the principles of natural justice.

6. Some of Mr. Cohen's submissions and attachments also suggest that he expects the Tribunal to consider new evidence. He attaches some documents that appear not to have been sent to the Delegate in the course of the investigation, including maps indicating travel times from the Employer's site to work sites, letters, and Mr. Cohen's personal notes regarding various events. The information contained in the attachments appears to be information that was available at the time the Determination was made and do not constitute evidence which would be admissible under the test in *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST # D171/03. I will therefore not consider this information in my decision.

7. Mr. Cohen asks that his wage complaint and "inability to collect my Employment Insurance that was deducted but not recorded must be forwarded to the Trust Compliance so they may start their own process so that I may regain my Employment Insurance." This appears to be a reference to Employment Insurance, which is a program administered by the federal government. The Tribunal has no jurisdiction over federal programs and will not be forwarding this decision or any other documents to anyone other than the parties.

8. Mr. Cohen has filed an appeal and a final reply. The Delegate has filed a response to the appeal and provided the Record, i.e. the documents that were considered in the investigation and the resulting Determination. The Employer also provided submissions in response to the appeal. I have reviewed the submissions of the parties and the Record and am able to make a decision solely on the basis of these written materials.

ISSUE

9. Should Mr. Cohen's appeal be allowed on the basis that the Director, or the Delegate acting on his behalf, erred in law or failed to observe the principles of natural justice in making the Determination?

ANALYSIS

10. Mr. Cohen's submissions are extensive. I have reviewed all of his submissions, as well as those of the Director's Delegate and the Employer, and in this decision will address only those submissions which are relevant to each ground of appeal.

Error of Law

11. Mr. Cohen's relevant submissions that go this ground of appeal may be broadly summarized as follows:

1. **Adequacy of Employer's Payroll Documents**: In Mr. Cohen's view, the documents submitted by the Employer as payroll records were not proper employer records as required under the *Act*. He says the documents submitted by the Employer to the Delegate in the course of the investigation were merely copies of documents that Mr. Cohen submitted at mediation, annotated (or in Mr. Cohen's words, "vandalised") with the Employer's handwritten notes.

   The Delegate's response: When the Delegate commenced the investigation, she asked both parties for any additional documents that they had. The Employer's submission was essentially the same as the one they provided prior to mediation which had been exchanged, so the Delegate did not see a need to exchange those documents again.

2. **Calculation of wages owing:** Mr. Cohen makes the following points with respect to the Delegate's calculation of wages as outlined in the Determination:

   a. The Delegate did not acknowledge amounts taken from Mr. Cohen's pay for Employment Insurance and the Preliminary Findings did not advise the Employer that they had to pay back the amounts deducted as "Employment Insurance";

   b. The Delegate did not show any calculations to prove the correctness of the amount determined to be owing to Mr. Cohen by the Employer's self-audit for Worksafe premiums;

   c. The Employer has not yet paid Mr. Cohen for November 5 and 6, 2008, the last two days he worked for the Employer, even though those days were counted in the Determination as being paid;

   d. The full amount of severance pay has not been calculated because of an error in start date. Mr. Cohen is of the view that the start date should be April; and

   e. Mr. Cohen is not satisfied with the Delegate's calculations and submits that a new calculation should be completed, showing "all deductions, what they were taken form, and why they are deducted."

   The Delegate's response: In calculating the wages owing to Mr. Cohen, the Delegate used his gross earnings as indicated by his pay slips before the deductions for what was labelled "Employment Insurance" (which were in fact deductions the Employer claimed had been made for Worksafe BC premiums). Although the Preliminary Findings did not advise the Employer that these deducted amounts needed to be paid back to Mr. Cohen, the Delegate advised the Employer that this was the case when the Employer contacted the Delegate to voluntarily pay wages owed to Mr. Cohen.

12. Tribunal jurisprudence regarding error of law is well established. The leading case is *Britco Structures Ltd.*, BC EST # D260/03, in which the Tribunal adopted the following 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), [1988] B.CJ. No. 2275 (B.C.C.A.):

1. a misinterpretation or misapplication of a section of the *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.

13. With respect to the Mr. Cohen's first argument regarding the Employer's payroll records, what he appears to be suggesting is that these documents submitted by the Employer should not be believed and as evidence should be given little if any weight by the Delegate. The weight of evidence is a matter to be decided by the Delegate and is a question of fact, not law: *Beamriders Sound & Video*, BC EST # D028/06. In this case the Delegate chose to accept the payroll records submitted by the Employer as evidence of the hours worked by Mr. Cohen and the payments made to him. She expressly preferred the Employer's evidence "as a credible reflection of the hours worked by Mr. Cohen", and stated that Mr. Cohen "did not provide any concrete evidence to refute records provided" by the Employer. I do not find that the Delegate made any error of law in drawing this conclusion.

14. With respect to the calculation for wages owing, an error of calculation may amount to an error of law if the error was made by the Delegate acting without any evidence or acting on a view of the facts which could not reasonably be entertained under the test in *Britco*, above. In this case, my review of the submissions and the Record show that the Delegate made several errors in law in the course of making the calculations in the Determination, as follows:

1. **Collection period**: In the Determination, the Delegate correctly states even though Mr. Cohen worked from April 14 to November 6, 2008, due to the provision in the *Act* [section 80] that limits the time period for collection to 6 months prior to the last day worked, the collection period for Mr. Cohen's wage complaint is May 7 to November 6, 2009. However, the Wage Calculation Summary attached to the Determination shows "Regular Wages" ($9,567.25) and "1.5X Wages" ($1,352.25) as being calculated from April 14, 2008 to November 6, 2008. This means that wages earned in the period April 14 to May 6, 2008 appear to be included in the calculation of wages earned by Mr. Cohen during the collection period. This amounts to an error of law because there is no evidence to support the finding that the wages that Mr. Cohen is entitled to under the Determination should include wages earned between April 14 and May 6, 2008.

2. **Total Wages paid to Mr. Cohen**: In the Wage Calculation Summary, the Delegate indicates the amount of "Wages Paid" and "Gross Pay" to be $10,415.25. The Delegate does not indicate in the Determination how this amount was calculated. A review of the Record reveals that this amount appears on one of the payroll documents submitted by the Employer, entitled "Scott Cohens' actual hours worked 'By the Week'" ("Hours by the Week" document). This two-page document contains a list of Mr. Cohen's hours worked by the week (starting April 14, 2008), listing the week, the location, the hours, the wage rate, the total for each wage rate, and the "(31 week) total earnings = $10,415.25". What is important to note is that the Hours by the Week document does not indicate that the total amount actually paid to Mr. Cohen is $10,415.25. Further, the calculations begin on April 14, 2008, which is before the collection period.

There was other evidence before the Delegate suggesting that the amount of $10,415.25 is not a correct calculation of the amount paid. First, there is evidence that Mr. Cohen was not paid for his last two days of work (see paragraph below). Second, the Employer issued payslips to Mr. Cohen; these payslips formed part of the Record. When the amounts contained in the "total earnings" section of all the payslips issued during the collection period are totalled, the amount does not appear to equal $10,415.25. Therefore, the Delegate's statement in her submissions that in calculating the wages owed to him, she used "his gross earnings as per his payslips before the deduction for "Employment Insurance" [sic]" does not appear to accord with the evidence. The Delegate's conclusion in the Determination regarding the total wages paid to Mr. Cohen amounts to an error of law because there is no evidence to support the finding that the Employer actually paid Mr. Cohen $10,415.25 during the collection period.

3. **Payment for November 5 and 6, 2008**: This issue is related to the issue outlined above. Mr. Cohen points out in his submissions that he has never been paid for his last two days of work, November 5 and 6, 2008. This is confirmed by the Employer on another one of its payroll documents, entitled "Scott Cohens 'Hours Worked' at a glance" ("Hours Worked" document). This document is a list of Mr. Cohen's hours worked that contains the date worked, principal contractor, work location, hours worked, sign set-up and takedown, total hours paid for, pay slip number, cheque number, and cheque date. On the Hours Worked document, the Employer indicates with respect to the hours worked on November 5 and 6, 2008: "not paid as of yet – as Scott wants nearly $11,000.00 instead of what's owed him". In my view, the Delegate's failure to take into account that Mr. Cohen was not paid for November 5 and 6, 2008 amounts to acting on a view of the facts which could not reasonably be entertained, given that both Mr. Cohen and the Employer agree that payment was not made for those dates.

4. **Deductions for Worksafe premiums**: Mr. Cohen says that the Delegate erred in not confirming the accuracy of the amount paid by the Employer for the deductions from his pay to cover Worksafe premiums (indicated on the payslips as "Employee Ins (WCB/Worksafe)". According to the Determination, the total amount calculated by the Employer in its self audit for these deductions was $368.67. The Determination does not indicate how the Employer came to this number, nor do any documents in the Record. However, there is evidence in the Record in the form of the payslips that suggest (if all of the deductions indicated in the Payslips were totalled) that an amount greater than $368.67 was deducted from Mr. Cohen's pay. Therefore a greater sum may be owed. In my view, the Delegate's acceptance of the Employer's self audited amount for deductions without any indication of how the Employer came to that amount results in an error of law because she acted on a view of the facts which could not reasonably be entertained, given that the payslips indicate a different amount was deducted from Mr. Cohen's pay.

15. In light of these errors of law related to the calculation of wages, the Determination will be referred back to the Director for recalculation of the amount of wages owing to Mr. Cohen. The recalculation will be based solely on the evidence in the Record and will include a reasoned explanation, based on the evidence in the Record, for each calculation. The Delegate will not receive any additional evidence from the parties with respect to the recalculation. Further, the recalculation will take into account the additional wages already paid to Mr. Cohen by the Employer, namely $2093.09. All parties should note that the recalculation may result in no change to the amount owing to Mr. Cohen, or may result in an increase or decrease.

Failure to Observe the Principles of Natural Justice

16. In order to show that the Delegate failed to observe the principles of natural justice, the appellant must prove that the Delegate made an error in procedure, amounting to unfairness, in carrying out the investigation or making the Determination. Among Mr. Cohen's arguments, the following points are relevant to this ground of appeal. Overall, I find that there has been no failure on the part of the Delegate to observe the principles of natural justice. To the contrary, I find that the Delegate and the Director have fulfilled the requirements of due process as far as Mr. Cohen's complaint is concerned.

1. Mr. Cohen says that the Director or Delegate did not properly investigate his complaint about the Employer regarding child labour issues. He requests that the Tribunal deal with this issue.

   The Delegate responds that Mr. Cohen's original complaint and self-help kit contained no mention of any child employment issue; Mr. Cohen made this allegation later. The Delegate advised Mr. Cohen by letter dated March 12, 2008 that the child employment issue would be handled as a separate investigation from Mr. Cohen's wage complaint. The child employment issue was dealt with separately and Mr. Cohen's further input was not required.

   The scope of this appeal to the Tribunal concerns the Determination dated September 4, 2009, the sole subject matter of which is Mr. Cohen's wage complaint. This Tribunal has no jurisdiction to deal with any other matter besides the Determination and therefore cannot assist Mr. Cohen to resolve any concerns he may have regarding the child employment issue he raised with the Employment Standards Branch. In the context of the present appeal of the Determination, there is no evidence that the Delegate or the Director failed to observe the principles of natural justice in choosing to deal with Mr. Cohen's wage complaint and the complaint about child employment in separate investigations.

2. Mr. Cohen says the Delegate disregarded evidence submitted by Mr. Cohen and has not sent information to the parties in the investigation.

   The submissions made by Mr. Cohen on this point are confusing. It is not made clear what exact evidence submitted by Mr. Cohen was disregarded, or what information was not sent to the parties. In her submissions on behalf of the Employer, Ms. Black says that she has received information from the Delegate in a timely way. Further, in viewing the Record and the numerous submissions made by Mr. Cohen, many of which were in response to submissions and documents provided by the Employer and other persons, it appears that Mr. Cohen received information on a regular basis from the Delegate. No failure to observe the principles of natural justice is indicated.

3. Mr. Cohen says he received the Preliminary Findings of the investigation dated July 10, 2009 on July 27, 2009. The Preliminary Findings indicated the deadline for further submissions was July 24, 2009. Therefore, Mr. Cohen "was forced into not being able to submit my documents to further the investigation."

   The Delegate says in her submission that this is the first time she has heard this complaint from Mr. Cohen. She points out that Mr. Cohen did not request an extension of the response deadline and at no time did he mention that the Preliminary Findings were received late, even when the Delegate attempted to speak to Mr. Cohen by telephone in August.

   I note that the Record shows that Mr. Cohen corresponded with the Delegate after the issuance of the Preliminary Findings. There appears to have been ample opportunity for Mr. Cohen to inform the Delegate that the Preliminary Findings were received late and to request an extension to submit further documents. I do not find that Mr. Cohen was denied natural justice in this regard.

4. Mr. Cohen says the hearing of Mr. Cohen's complaint, scheduled for February 24, 2009, was cancelled and an investigation carried out instead because of the health issues faced by one of the Employer's principals. Mr. Cohen appears to suggest this change was the result of bias on the part of the Delegate and/or the Employment Standards Branch. In fact, Mr. Cohen alleges bias generally on the part of the Delegate in favour of the Employer. In addition, Mr. Cohen says that in a letter to him dated March 5, 2009, the Director of Employment Standards stated that the Branch "can pick and choose who they will help".

   The Delegate says that the hearing was changed to an investigation because to carry on with the hearing in the circumstances would be denying the Employer natural justice. The Delegate also points out that the March 5, 2009, letter from the Director made no statement as alleged by Mr. Cohen.

   Under section 76 of the *Act*, the Director may deal with a complaint in a number of ways, including by investigation, mediation, or adjudication. In all cases the Director or his Delegate must do so while observing the principles of natural justice. In this case, the Director made an assessment based on the circumstances and decided that an investigation would be the most efficient and fair process for both parties to address the issues raised by Mr. Cohen's complaint, given the totality of the circumstances. There is no indication here of a failure of due process.

   Further, an allegation of bias is serious and must be addressed. In *Dusty Investments Inc. d.b.a. Honda North*, BC EST # D043/99 (Reconsideration of BC EST # D101/98), the Tribunal adopted the comments of Newbury, J.A. in *Finch v. The Association of Professional Engineers and Geoscientists* (1996), 18 B.C.L.R. (3d) 361 at 376 (B.C.C.A.):

   > The test for determining whether a reasonable apprehension of bias arises is well-known and clear: Cory, J. for the Court in *Newfoundland Telephone Co. Ltd. v. Board of Commissioners of Public Utilities* (1992) 4 Admin. L.R. (2d) 121 (S.C.C.) formulated it this way:
   >
   > > It is, of course, impossible to determine the precise state of mind of an adjudicator who has made an administrative board decision. As a result, the courts have taken the position that an unbiased appearance is, in itself, an essential component of procedural fairness.
   > >
   > > To ensure fairness the conduct of members of administrative tribunals has been measured against a standard of reasonable apprehension of bias. The test is whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator.

   Nothing in the Determination or Record provides any evidence of bias. In my view, a reasonably informed bystander could not reasonably perceive bias on the part of the Delegate or Director. I note in particular that it is not an indication of bias where the Delegate or Director makes findings or takes action with which one party or another disagrees. Further, I have reviewed the March 5, 2009, letter to Mr. Cohen from the Director and find that it no way indicates bias of any kind regarding any party. I find that there was no bias, or reasonable apprehension of bias, arising from the Delegate's investigation and Determination.

5. Mr. Cohen says that although the Determination indicated that funds from the Employer ($2093.09) were disbursed to him, at the time of the Determination no funds had been so disbursed.

   The Delegate responds that the finance department of the Employment Standards Branch confirmed that the funds have been disbursed, and Mr. Cohen confirmed in his reply submission that the funds had been disbursed. In my view, no issue of due process turns on the one week delay between the issuance of the Determination (September 4, 2008) and the issuance of the cheque to Mr. Cohen (September 11, 2008).

6. Mr. Cohen says the Delegate did not investigate the issue of travel time, for which Mr. Cohen says he should have been paid.

   On the contrary, the Delegate dealt with the issue of travel time in the Determination. The Delegate indicated in the Determination that Mr. Cohen alleged that he drove company equipment and employees to and from work sites, but did not offer specifics and did not respond to the Delegate's request for more information. The Delegate proceeded to make a finding on this matter based on the information provided by the Employer.

   During the course of the investigation the Delegate addressed the issue, gathered information, invited the parties to provide more information, and made a decision based on the evidence before her. No denial of natural justice took place.

ORDER

17. Pursuant to Section 115 of the *Act*, I order that the Determination be referred back to the Director of Employment Standards for a recalculation of wages owing to Mr. Cohen based on the documents contained in the Record, along with any concomitant adjustment to vacation pay, statutory holiday pay, compensation for length of service, and any interest payable under section 88(1). I order that the Determination be confirmed in every other respect.

Yuki Matsuno
Member
Employment Standards Tribunal