

An appeal

- by -

Rosauro Abinoja
("Abinoja")

- 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: Shafik Bhalloo

FILE No.: 2006A/134

DATE OF DECISION: January 31, 2007

DECISION

OVERVIEW

1. This is an appeal by Rosauro Abinoja (“Abinoja”) under Section 112 of the *Employment Standards Act* (“*Act*”) against a Determination of the Director of Employment Standards (the “Director”) issued October 25, 2006 (the “Determination”).
2. Abinoja filed a complaint pursuant to Section 74 of the *Act* alleging that his employer, Home Depot of Canada Ltd. (“Home Depot”), contravened the *Act* by substantially altering his hours of work and thereby effectively terminating his employment (the “Complaint”).
3. The Director’s delegate conducted an investigation into the Complaint and held a hearing on July 11, 2006 (the “Hearing”). Thereafter, the delegate issued a Determination that Home Depot had not contravened the *Act* (particularly Section 66) by changing Abinoja’s hours of work and, accordingly, dismissed Abinoja’s Complaint.
4. Abinoja is appealing the Determination on two grounds, namely, that the Director erred in law as well as failed to observe the principles of natural justice in making the Determination. Abinoja is also seeking the Tribunal to change or vary the Determination (although he does not explain how) or refer it back to the Director. Abinoja has submitted written submissions in support of his appeal and is seeking an oral hearing of his appeal. The Tribunal is of the view that an oral hearing is not necessary in order to adjudicate this appeal and, therefore, the Tribunal will determine the appeal based on a review of the Determination, the parties’ written submissions, and the Section 112(5) “Record”.

ISSUES

5. The issues to be determined in this appeal are twofold:
 1. Did the Director of Employment Standards err in law in making the Determination?
 2. Did the Director of Employment Standards fail to observe the principles of natural justice in making the Determination?

FACTS

6. Abinoja started his employment as a Sales Associate at the Surrey location of Home Depot in 1999.
7. Subsequently, Abinoja transferred to the Vancouver location of the Home Depot at Terminal Avenue (the “Vancouver Store”) and continued working in the same capacity, Sales Associate.
8. When Abinoja was first employed at the Vancouver Store it was open to the public 24 hours per day, and Abinoja’s hours of work comprised four hours per day, 20 hours per week.
9. In or about December 1999, Abinoja applied for and won a competition for a full-time graveyard shift at the Vancouver Store.

10. When he was offered the graveyard shift at the Vancouver Store, Abinoja states he confirmed with Home Depot that his work hours would not change in this new position because he had an electrical business that he worked at during his hours off from Home Depot.
11. Abinoja worked the full-time graveyard shift for approximately two years at the Vancouver Store
12. In 2002, Home Depot changed its hours of operation twice at the Vancouver Store. Initially it changed the hours of business from 5:30 a.m. to 12:00 a.m. and subsequently from 7:00 a.m. to 10:00 p.m.
13. When the changes in the hours of operation occurred at the Vancouver Store, Abinoja requested the Human Resources Manager, Mr. Daniel Watt (“Watt”), for a position on the freight crew, which was responsible for receiving materials and restocking after hours. The freight crew shift worked between 10:00 p.m. and 7:00 a.m.
14. After making the request to work on the freight crew, Abinoja’s general hours of work changed to 3:30 p.m. to 12:00 a.m. In particular, he worked as a Sales Associate from 3:30 p.m. to 10:00 p.m. and thereafter he was part of the freight crew until 12:00 a.m. This schedule allowed him to work at his electrical business during his off hours from Home Depot.
15. In and during September 2005, Abinoja received a letter dated September 22, 2005 from Home Depot providing him advance formal notice of change of his shift effective October 9, 2005 (the “Notice”).
16. Home Depot submitted that the change in Abinoja’s shift times was due to consumer needs at Home Depot.
17. The Notice did not specifically delineate the shifts he would be working; however, he was told by the Human Resources Manager, Watt, that his shifts would range anywhere between 5:00 p.m. to 11:00 p.m. and he would be apprised of his shifts at least one week in advance of scheduling.
18. Abinoja informed Watt, that he would not be able to work those hours and further refused to sign acknowledgement of receipt of the Notice.
19. Abinoja never worked his new shift as he offered to submit his letter of resignation dated October 7, 2005 (the “Resignation Letter”) to Home Depot advising Home Depot that he was resigning from his employment as a Sales Associate effective October 13, 2005.
20. Abinoja contended that he quit his position as a Sales Associate and did not apply for a supervisory position as he thought that he would not be successful in obtaining the supervisory position in light of an unsatisfactory review of his performance at Home Depot.
21. Home Depot, through one of its other Human Resources Manager, Doug Galloway, contended that Abinoja’s performance review was not totally negative and in fact contained many positive outcomes.
22. Galloway also stated that the Vancouver Store has 300 Sales Associates and that while the store was open to the public 24 hours per day at one point, the hours were changed later from 7:00 a.m. to 10:00 p.m., although the store was operational 24 hours per day (presumably for receiving and stocking and other such activities after).

23. Galloway also indicated that while Home Depot attempts to accommodate Sales Associates, there is no guarantee the associates will get their desired shift times.
24. Galloway also indicated that Abinoja, when hired, was advised that his shift would vary according to Home Depot's business and customer needs.
25. Galloway also referred to the initial offer of employment presented to Abinoja (when he started working at Home Depot on a part-time basis), which clearly delineated that hours of work scheduled for associates would fluctuate from week to week based on the needs of the business of Home Depot. According to Galloway, this term of employment did not change when Abinoja became a full-time employee subsequently.
26. Galloway also indicated that any changes in the shift schedule of employees were for business reasons and Abinoja was not singled out in this regard.
27. Abinoja was given both written and verbal notice at least two weeks in advance of the changes, but Abinoja opted to resign in advance of the shift change, according to Galloway.
28. Galloway confirmed that, with the shift change, Abinoja's duties, income, location of work and authority would remain the same.
29. Abinoja, at the Hearing, agreed that he was provided at least one and one-half weeks' advance notice of his work schedule and that his work schedule previously fluctuated.
30. Abinoja also confirmed at the hearing that he neither worked the new schedule nor pursued alternative employment with Home Depot after receiving the Notice.
31. Furthermore, at the Hearing, Abinoja agreed that he quit because he wanted to work specifically between the hours of 3:30 p.m. and 6:30 a.m. and that any other schedule would interfere with his personal electrical business.
32. The Director determined that Abinoja's submissions pertaining to what Abinoja considered to be a negative performance review preventing him from applying for a supervisory position was irrelevant to the Complaint but considered Abinoja's testimony in this regard to support his desire for a position that had similar hours of work as his Sales Associate position.
33. The Director considered Abinoja's Complaint in light of Section 66 of the Act and concluded that Home Depot had not made any unreasonable changes that substantially altered Abinoja's conditions of work. The delegate found that Abinoja understood the job of Sales Associate and had often worked different shifts during Home Depot's hours of operation. When the Notice was provided to Abinoja, the change in his hours of work conflicted with his electrical business and this was the crux of Abinoja's Complaint.
34. The Director concluded that Abinoja failed to support his allegations that his employment conditions were substantially altered by Home Depot forcing him to quit.
35. The change in Abinoja's shift, according to the Director, was not something an objective, reasonable person would find to be unfair, unreasonable and unacceptable. The Director did not find in Abinoja's

evidence that the change in his shift created a new employment relationship with substantially different terms and thus a termination of his employment.

36. According to the Director, Home Depot, as Abinoja's employer, exercised its right to schedule Abinoja based on its business needs. The fact that Abinoja did not like or agree with the changes did not constitute a breach of the Act.
37. The Director also noted that while Home Depot tried to accommodate Abinoja's shift request, there was no explicit agreement between Home Depot and Abinoja that he was to work a specific schedule. Moreover, even if there was a specific schedule, according to the Director, Home Depot could have changed Abinoja's hours work for business reasons with appropriate notice.
38. The Director also found that the shift change in question, when compared to the shift worked by Abinoja, was not substantially different.

ARGUMENT

Abinoja's Submissions

39. On the Appeal form, while Abinoja has checked off two grounds of appeal, namely, that the Director erred in law and the Director failed to observe the principles of natural justice in making the Determination, Abinoja does not make any submissions in support of his grounds of appeal. Abinoja, instead, reiterates his position at the hearing before the Delegate and attempts to rebut some of the findings and conclusions reached by the Delegate. In particular, Abinoja, in the preamble to his written submissions on appeal indicates that the reasons for the Determination are "not complete and not true". He then goes on to identify, in numbered paragraphs, the facts, which he would like considered on appeal.
40. First, he points out that when he applied for a graveyard shift with Home Depot, the hours and days of work for the shift were specified. Second, he points out that when he became a full-time associate, he did not carry on his electrical business anymore. Third, he notes that he did not request his supervisor for a transfer to the freight crew when Home Depot stopped opening 24 hours a day for customer shopping. He says that he had a choice to transfer to the department he wanted. Fourth, he indicates that he "did not sign or refuse to sign the change of work schedule notice" provided to him, as there was "already a schedule made for that week". Fifth, Mr. Daniel Watt was a human resources manager and not a supervisor and that he indicated to Watt "there is no need to sign (presumably the change in shift schedule) because the schedule was already implemented. Sixth, he indicates that when he became a full-time employee he understood that this was an opportunity for him to further excel to a supervisory position which would allow him higher pay and this may come with a change in his schedule and he understood this because his pay rate would presumably be increased. Seventh, he indicates that he applied for the position as a supervisor and was interviewed by Watt as well as an assistant manager by the name of Glen. Eighth, he indicates that he applied to a different location of Home Depot but he was turned down because his salary was "much higher than the position" he applied for.
41. Abinoja then digresses to a completely new area of evidence in his appeal submissions when he asserts that he was assaulted by a new employee at work and he advised the management at Home Depot about the incident but they did not respond or do anything. Instead, the Home Depot management wanted him to go back on the floor and carry on working and forget about the incident, according to Abinoja.

Abinoja concludes in his submissions that it is his belief that Home Depot promotes “whom they know, not considering (his) expertise, knowledge and experience”. He indicates that his qualifications for a supervisory position is far superior than employees they have promoted and that he feels that Home Depot, by their actions, tried to get rid of him.

Home Depot’s submissions

42. Home Depot, in its written submissions, indicates that Abinoja is simply disagreeing with the Director’s Determination without more and reiterating the same facts that he presented “throughout the Employment Standards Process” without any facts to substantiate that the Director erred in law or failed to observe the principles of natural justice.

Director’s submissions

43. The Director’s responded to each of the eight points of Abinoja on appeal and reiterates the conclusion in the Determination that the evidence presented by Abinoja did not support a finding of contravention of section 66 of *Act* and that the changes made by Home Depot in Abinoja’s shift were not unreasonable, unfair, or unacceptable. With respect to the reply of the Director to each of the eight points in Abinoja’s submissions, while I have reviewed them, I do not think it necessary for me to reiterate them except for the Director’s response in respect to Abinoja’s second point that he did not have an electrical business when he became a full time employee of Home Depot. The Director submits that Abinoja testified at the Hearing under oath on several occasions that he specifically wanted to work certain hours during the day to enable him to run his electrical business and that this point was further clarified on several occasions during the Hearing.

ANALYSIS

44. Abinoja, as indicated earlier, appeals the Determination on the grounds that the Director erred in law and failed to observe the principles of natural justice in making the determination. I will deal with each ground separately starting with the latter.

The Director failed to observe the principles of natural justice

45. As indicated by the Tribunal in *Re 607730 B.C. Ltd. (c.o.b. English Inn and Resort) [2005] B.C.E.S.T.D. No. 55 (QL)* the principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to learn the case against them, the right to present their evidence, and the right to be heard by an independent decision-maker. In the case at hand, Abinoja attended at the Hearing before the delegate of the Director and made submissions in support of his position and was heard by the delegate. There is also no evidence that he was denied an opportunity to respond to Home Depot’s submissions. Abinoja, in my view, has failed to discharge the burden of proof placed upon him to show that he was denied natural justice at any stage of the Employment Standards process leading to the Determination. Accordingly, I find this ground of Abinoja’s appeal without any merit.

Error of law

46. The second ground of appeal advanced by Abinoja is that the Director erred in law in making the Determination. However, as with the previous ground of appeal, Abinoja has failed to make any submissions in support of this ground of appeal. However, since Abinoja's written submissions on appeal contested certain findings of facts on the part of the Director and since there may be some instances where errors of fact may give rise to errors of law, I carefully reviewed the basis of the Director's Determination and particularly the Director's findings of facts leading to the Director's Determination. In this context, it should be noted, that the onus is on the appellant, Abinoja, on a balance of probabilities, to show either that there was no evidence to support the findings of fact made by the Director, or that the Director took a view of the facts that could not reasonably be entertained based on the evidence presented (*Re: Britco Structures Ltd.*, [2003] B.C.E.S.T.D. No. 26 (QL); *Re Digits Information Technology Services Ltd.* [2005] B.C.E.S.T.D. No. 199 (QL)). Having carefully reviewed each of the eight points raised by Abinoja in his appeal submissions, as well as the appeal submissions of the Director, I find that Abinoja has not discharged the burden placed upon him to show that there was no evidence to support the findings made by the Director or that the Director took a view of the facts that could not reasonably be entertained based on the evidence before the Director.
47. I also wish to point out that the Director properly considered the question of whether or not Abinoja had been constructively dismissed within the meaning of section 66 of the Act and properly applied the general principles governing the said section. More specifically, the Director, properly analyzed the nature of the employment relationship between Abinoja and Home Depot throughout Abinoja's employment with Home Depot, the conditions of Abinoja's employment (particularly the fact that there was no guarantee of specific shifts or shift times from the very beginning of his employment with Home Depot and that he worked a variety of shifts during his employment), the alteration to Abinoja's shift (that it was not something an objective, reasonable person would find to be unfair, unreasonable and unacceptable), the legitimate expectations of Home Depot and Abinoja and whether there were any express or implied agreements or understandings between the parties. With respect to the latter factor, the Director preferred the evidence of Home Depot that there was no explicit agreement with Abinoja that he would work a specific schedule and that Home Depot could change the hours of work of Abinoja for business reasons with appropriate notice and did so. In my view, there was clearly evidence to support the findings of fact made by the Director in the Determination and there was a reasonable basis on the basis of the facts presented at the Hearing for the Director to have arrived at the conclusions in the Determination. Accordingly, I find that Abinoja has no basis to argue that the Director erred in law in making the Determination.
48. Finally, I would like to note that Abinoja in his appeal, for the first time, notes that he was assaulted by another employee and reported the incident to Home Depot's management but management "did nothing about it" and asked him to "go back to the floor and forget about it". I do not think that Abinoja's latter submission is at all relevant in the context of this appeal and wish to point out that the scope of this Tribunal's powers in considering an appeal is limited to those matters dealt with in the original Determination. This Tribunal does not have remedial authority to make a finding of first instance, assuming that Mr. Abinoja is asking for some remedy or determination on this matter or issue. If it was the intention of Mr. Abinoja to refer to the incident in question to somehow support his position that he was constructively dismissed by Home Depot, then Mr. Abinoja at the Hearing before the Delegate should have brought up this incident. At this stage, however, it certainly would not qualify under section 112(1)(c) of the *Act* as new evidence.

ORDER

49. Pursuant to Section 115 of the *Act*, I order that the Determination be confirmed as issued.

Shafik Bhalloo
Member
Employment Standards Tribunal