

An appeal

- by -

Dwayne MacKenzie

- 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/144

DATE OF DECISION: February 26, 2007

DECISION

SUBMISSIONS

Dwayne Mackenzie	on his own behalf
Robert W. Joyce	on behalf of the Director of Employment Standards
Terrence P. Matte	Counsel for Fox Pro Transportation Industry Solutions Inc.

OVERVIEW

1. This is an appeal by Dwayne Mackenzie, pursuant to Section 112 of the *Employment Standards Act* (the “Act”), against a Determination of the Director of Employment Standards (“the Director”) issued December 7, 2006.
2. Mr. Mackenzie worked as the Director of operations and training for Fox Professional Driving Center 1993 Inc. from March 31, 1997 until May 19, 2005, at which time the business was sold to Fox Pro Transportation Industry Solutions Inc. (“Fox Pro”). Mr. Mackenzie continued in his position with Fox Pro until May 31, 2006. Mr. Mackenzie filed a complaint alleging that Fox Pro had contravened the *Act* in failing to pay him overtime, compensation for length of service and annual vacation pay.
3. The Director’s delegate held a hearing into Mr. Mackenzie’s complaint on October 24, 2006. At issue before the delegate was whether Fox Pro was liable under section 97 for length of service and overtime wages, whether Mr. Mackenzie quit or was fired, and whether he was a manager and thus entitled to overtime wages.
4. The delegate determined that Fox Pro had contravened Sections 17, 58 and 63 of the *Act* in failing to pay Mr. Mackenzie wages, annual vacation pay and compensation for length of service. He concluded that Mr. Mackenzie was entitled to wages and interest in the total amount of \$4,932.36. The delegate also imposed a \$1,500 penalty on Fox Pro for the contraventions of the *Act*, pursuant to section 29(1) of the *Employment Standards Regulations*.
5. Despite being successful in his complaint, Mr. Mackenzie contends that the delegate failed to observe the principles of natural justice.
6. 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). I conclude that this appeal can be adjudicated on the written submissions of the parties. 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

7. At issue is whether the delegate failed to observe principles of natural justice in making the Determination.

FACTS AND ARGUMENT

8. It is not necessary, for the purposes of this appeal, to set the facts out in any detail. Briefly, the material facts are as follows.
9. Mr. Mackenzie worked for a business that was sold to Fox Pro. The sale date was May 19, 2005. Mr. Mackenzie received a Record of Employment (ROE) on May 19, 2005 and on May 20, 2005 he began working for Fox Pro. Fox Pro contended that it had no liability to the employees under section 97 of the *Act*. The delegate found that Mr. Mackenzie's employment with Fox Pro was not continuous.
10. Mr. Mackenzie was directed to take medical leave at the end of May, 2006. He alleged that he had conversations with the employer which led him to believe that he would be returning to a contract position at the end of that leave. The employer disputed that, contending that Mr. Mackenzie would continue in a salaried position, but would receive contract work on weekends and weeknights. Mr. Mackenzie then completed his self help kit and delivered it to Fox Pro. Mr. Mackenzie did not tell Fox Pro that he was quitting, nor did Fox Pro tell him that his employment was terminated. The delegate determined that Fox Pro terminated Mr. Mackenzie's employment on June 8, 2006 by substantially altering the conditions of his employment, and concluded that he was entitled to compensation for length of service.
11. The delegate also determined that Mr. Mackenzie was a manager and thus not entitled to overtime wages. However, he did determine that he was entitled to extra wages for additional work at their straight time rate. Because Fox Pro did not maintain a record of Mr. Mackenzie's hours, the delegate relied on Mr. Mackenzie's record, which he maintained in a diary. He discounted 17 of those hours carried over from 2005 as they were unreliable, and determined that he was entitled to payment for an additional 79.5 hours at his hourly rate.
12. Mr. Mackenzie's submission consists of five pages of alleged factual errors made by the delegate. Those include whether he represented Fox Pro at meetings discussing the sale of the business, whether he was entitled to "severance pay" from the previous owner, whether he had informed Fox Pro that he was returning to work, whether the contract offer was for weekends only rather than an attempt to reduce his wages and his title while employed with Fox Pro.
13. The delegate submits that Mr. Mackenzie is attempting to re-argue his case, and that, in some cases, disputes factual findings that were made in his favour. The delegate also submits that Mr. Mackenzie has failed to establish a denial of natural justice.
14. Counsel for Fox Pro also contends that there is no basis for Mr. Mackenzie's argument that the delegate failed to observe the principles of natural justice. Fox Pro also contends that some of the facts Mr. Mackenzie advances in his appeal submission were never presented in the hearing and cannot now be considered, as he had every opportunity to do so at that time.

15. Fox Pro also contends that some of the facts Mr. Mackenzie refers to are not relevant on appeal, since they go to the issue of whether Mr. Mackenzie quit his employment, an issue the delegate found in his favour.
16. Finally, Fox Pro says that the delegate made a finding that Mr. Mackenzie was not a manager, and that Mr. Mackenzie has not demonstrated any error in the delegate's conclusion on this issue.

ANALYSIS

17. 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
18. The burden of establishing the grounds for an appeal rests with an Appellant. Mr. Mackenzie must provide persuasive and compelling evidence that the delegate failed to observe the principles of natural justice. An appeal is not an opportunity to re-argue a case that has been advanced before the delegate simply because a party disagrees with it, or to introduce evidence that they failed to give in the first instance.
19. Principles of natural justice are, in essence, procedural rights that ensure that parties know the case being made against them, the opportunity to reply, and the right to have their case heard by an impartial decision maker. Mr. Mackenzie's appeal submission does not describe how he was denied natural justice. The record discloses that he was aware of the issues given that it was his complaint, he appeared at the hearing with a witness who gave evidence on his behalf, and had every opportunity to ask questions of his employer and make submissions. I am not persuaded that Mr. Mackenzie was denied natural justice.
20. Mr. Mackenzie's submission raises alleged factual errors. The Tribunal has adopted the factors set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)* (1998] B.C.J. (C.A.) as reviewable errors of law:
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 be reasonably entertained; and
 5. Exercising discretion in a fashion that is wrong in principle

21. Questions of fact alone are not reviewable by the Tribunal under section 112. In *Britco Structures Ltd.*, BC EST #D260/03, the Tribunal held that findings of fact were reviewable as errors of law if they were based on no evidence, or on a view of the facts which could not reasonably be entertained.
22. It is unnecessary, in my view, to review the factual errors, since, but for the hours Mr. Mackenzie worked and whether he performed management tasks, none of the delegate's conclusions relied on them, and as noted above, found in his favour.
23. The essence of Mr. Mackenzie's submission, as I understand it, is that he is entitled to additional compensation for overtime hours. The delegate largely decided in Mr. Mackenzie's favour on this issue, and Mr. Mackenzie has not clearly and persuasively demonstrated how the delegate erred in this respect. I find no basis for this ground of appeal.
24. Mr. Mackenzie also appears to dispute the delegate's conclusion that he was a manager. Although the reasons for the Determination are rather brief, both in the recitation of the evidence and the analysis, the delegate applied the definition of manager contained in the *Act* to the facts. Mr. Mackenzie provides no compelling evidence or argument on how the delegate erred in law in his conclusion, and I also find no basis for this ground of appeal.
25. The appeal is dismissed.

ORDER

26. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated December 7, 2006, be confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal