

An appeal

- by -

Kevin Chronik
("Chronik")

- 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: Robert E. Groves

FILE No.: 2009A/158

DATE OF DECISION: March 16, 2010

asserts that they reveal deposits that are less than the amounts shown on the paycheques the Employer has produced, and in some instances, no deposits at all. The inference to be drawn from this, the Tribunal inferred in its Original Decision, was that Chrunik was alleging the paycheques produced by the Employer were forgeries.

7. The evidence Chrunik obtained for the original delegate was to the effect that the deposits shown on his credit union statements reflected the full amounts set out on the cheques deposited. There could, he argued, be no situation where the amount noted as a deposit would be less than the amount shown on the cheque because, for example, Chrunik deposited only a part, and took the balance out in cash.
8. The evidence obtained by the original delegate, which she did not share with Chrunik, was to the effect that it was entirely possible that Chrunik had only deposited a part of his paycheques, and taken the balance in the form of cash. If so, the amounts showing as deposits on Chrunik's account statements would be the sums remaining after the cash was taken. In those instances where the Employer had produced a cheque, and no deposit was made into Chrunik's account, the credit union representative to whom the original delegate spoke advised that the entire amount may have been taken as cash, with the result that no deposit would appear on his account statement.
9. It was on the basis of this evidence that the original delegate concluded that Chrunik was not a credible witness. This in turn led the original delegate to find that the Employer's evidence relating to Chrunik's rate of pay should be accepted, not Chrunik's.
10. The order referring the matter back was made with the expectation that the failure of the original delegate to observe the principles of natural justice would be cured, the relevant records of Chrunik's credit union would be obtained, and the matter of the amount of wages owed to Chrunik resolved.
11. The Tribunal has now received a report from a second delegate of the Director (the "Delegate") dated November 26, 2009 (the "Report"). The Report contains the results of the Delegate's investigation regarding the issues referred back to the Director in the Original Decision. It also attaches the documents considered by her during her investigation. The Delegate states her conclusions in the Report in the following manner:

...I do not find Mr. Chrunik to be owed any further wages as a result of the refer back. I also find no reason to disturb the findings in the Determination relating to Mr. Chrunik's rate of pay, regular wages, overtime pay, statutory holiday pay and annual vacation pay.
12. It appears from the Report that when the matter was referred back for further investigation the Delegate requested of Chrunik that he obtain the records from his credit union that the new evidence on appeal had indicated might resolve the questions surrounding the amounts the Employer had paid him for wages. Chrunik responded by producing account statements from his credit union showing his deposits. He also advised the Delegate that he deposited his paycheques from the Employer via ATM and then withdrew cash in separate transactions.
13. The cheques produced by the Employer had all cleared the Employer's account, were marked with a stamp from Chrunik's credit union, and bore the signature "K. Chrunik." Apart from denying that the signatures were his, Chrunik could provide no further information explaining how the cheques had been processed by his credit union.
14. The Delegate then sought information and records from Chrunik's credit union regarding the cheques in question. In reply, she received a letter from a representative of the credit union advising that all the cheques in question had been deposited into Chrunik's account, and if his account statements did not show that a

deposit had been made on the date(s) in question, or a deposit was made but in an amount that was less than the face value of the cheque, it was because Chrunik had withdrawn all or part of the amount of the cheque in cash. The letter implied that the credit union's transaction records documenting each transaction had been inspected in order to give support for the information being communicated, as it advised that if the records were to be produced for verification they could be retrieved in return for the payment of a fee.

15. The Delegate forwarded the credit union's letter to Chrunik, and invited a response. Chrunik replied, stating that the letter was flawed, as it was produced without his consent, its author had not spelled his name correctly, it did not state his account number, the source of the information on which its contents were based was not specifically identified, it contradicted some of the information contained in his account statements he had previously provided, and cited details of transactions on dates when his statements indicated there had been no activity.
16. Regarding Chrunik's rate of pay, the Delegate decided that since he had produced no new evidence to refute the original delegate's finding that he was to be paid \$20.00 per hour, as the Employer had asserted, and not \$25.75 as Chrunik himself had claimed, the original delegate's finding should be confirmed. The original delegate had come to this conclusion on the basis of a finding that Chrunik was not a credible witness, and so the evidence of the Employer should be preferred. The principal basis for this finding on credibility was the evidence from Chrunik's credit union, which the original delegate had not shared with Chrunik prior to her issuing the Determination, to the effect that he could have withdrawn some or all of the value of his paycheques in cash when he deposited with them, which would have affected the net amounts of the deposits shown on his statements.
17. The Delegate preferred to base her conclusion that Chrunik was to be paid \$20.00 per hour on another footing. She was not convinced by Chrunik's argument that it could not have been agreed that he be paid at that rate because the amounts of his paycheques were not divisible by 20. The Delegate pointed out what the original delegate had also observed, that several of the paycheques were in fact divisible by 20, and none were divisible by \$25.75. Moreover, the Employer had provided evidence to the effect that some of the cheques were not divisible by 20 because they included amounts for overtime and cash advances made in the relevant pay period.
18. As for the issue of the amounts Chrunik was paid for wages, the Delegate found that since she had evidence from the Employer of cancelled cheques apparently signed by Chrunik, and information from Chrunik's credit union provided in response to a specific request from the Delegate, which the Delegate considered to be reliable, and which confirmed that the discrepancy between the amounts stated on the cheques and the deposits information contained in Chrunik's account statements was due to Chrunik's having withdrawn some or all of the amounts of the cheques in cash, there was no reason to depart from the original delegate's conclusion that Chrunik had received the full amounts referred to on all the cheques in question.
19. In response to the Report, Chrunik argues that he was not made aware of the communications between the Delegate and representatives of his credit union leading up to the preparation and delivery of the credit union's reporting letter until it was appended to the Delegate's Report. He therefore had no opportunity to discuss it with his credit union before the letter was issued.
20. Chrunik further asserts that the credit union's reporting letter is flawed because it did not specifically identify the source of the information on which it is based, and no copies of transaction records were attached to it which would support the statements contained within it. He alludes further to the fact that the reporting letter refers to a transaction occurring on November 7, 2007 involving a cheque for \$1,870.00, and a deposit

into his account of \$1,670.00 with \$200.00 taken in cash, when his account records show no such deposit on or about that date.

ANALYSIS

21. The appellate jurisdiction of the Tribunal is set out in section 112(1) of the *Act*, which reads:
- 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 being made.
22. Chronik's original appeal sought relief on the basis of sections 112(1)(b) and (c).
23. Chronik's natural justice concerns have been addressed on the referral back. The information the original delegate received from his credit union, which was not shared with him prior to the issuance of the Determination, has been considered on the referral back. Chronik was provided with an opportunity to make submissions regarding all the pertinent information considered by the Delegate before she issued her Report. The responsibility for taking conduct of the referral back process, and the preparation of the Report, was placed in the hands of the Delegate, a different person than the original delegate who made adverse findings of credibility against Chronik.
24. Chronik argues that he was not made aware of the manner in which the Delegate sought to receive particulars of his records at his credit union, or the correspondence which was generated pursuant to that part of her investigation, until it was provided to him along with the Report. I am of the view that there was no procedural imperative which required the Delegate to copy Chronik with every communication that was created during the course of her investigation. Clearly, Chronik was provided with the critical communication produced by his credit union relating to the deposits credited to his account, and he was given an opportunity to respond to it, which he did, before the Delegate issued her Report.
25. Regarding section 112(1)(c), the Report confirms that the new evidence Chronik tendered with his original appeal was considered by the Delegate, along with the other evidence from his credit union her investigation revealed.
26. It follows that I see no reason to tamper with the findings in the Report based on allegations relating to a failure on the part of the Delegate to observe the principles of natural justice, or that there is new evidence that has become available that was not available to the Delegate when she prepared her Report.
27. That is not the end of the matter, however. In order to do justice to the parties to an appeal, particularly those who are not represented by legal counsel, it is the practice of the Tribunal to seek to discern the true basis for a challenge to a determination, or in this case a report following a referral back, regardless of the particular box an appellant may have checked off on an Appeal Form (see *Triple S Transmission Inc.* BC EST # D141/03). In this instance, it appears to me that Chronik has raised issues which are more properly to be characterized as alleged errors of law on the part of the Delegate, which engages section 112(1)(a) of the *Act*.

28. Chrunik's concerns appear to relate to the fact that the Delegate has decided (a) that his rate of pay was \$20.00 per hour, rather than \$25.75, and (b) that the information regarding the deposits into his account contained in the reporting letter obtained from his credit union supports a finding that he was paid the sums set out in the paycheques produced by his Employer, and so no further regular wages are owed to him. In substance, then, Chrunik says that the Delegate made errors in her findings concerning these important facts.
29. In order to show that an error of fact amounts to an error of law an appellant must show what the authorities refer to as palpable and overriding error, which involves a finding that the factual conclusions of a delegate, or the inferences drawn from those factual conclusions, are inadequately supported, or are wholly unsupported, by the evidentiary record, with the result that there is no rational basis for the finding, and so it is perverse or inexplicable. Put another way, an appellant will succeed only if she establishes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have come to the determination (see *Gemex Developments Corp. v. B.C. (Assessor)* (1998) 62 BCLR 3d 354; *Delsom Estates Ltd. v. British Columbia (Assessor of Area 11 – Richmond/Delta)* [2000] BCJ No.331). This means that it is unnecessary in order for a delegate's decision to be upheld that the Tribunal must agree with the delegate's conclusions on the facts. It means that it may not be an error of law that a delegate could have made other findings of fact on the evidence, but did not do so. It also acknowledges that the weight to be ascribed to the evidence is a question of fact, not of law (see *Beamriders Sound & Video* BC EST # D028/06).
30. Having regard to this formula, I am not persuaded that the Report demonstrates that the Delegate committed errors of fact which amount to errors of law. No doubt Chrunik disagrees with the factual conclusions reached by the Delegate because they are the same as those reached by the original delegate in the Determination. However, this misses the point. For the Tribunal, the question on appeal is not whether the Delegate's factual conclusions have been proven to be correct, but whether Chrunik has shown that they are perverse, inexplicable, or irrational, having regard to the evidence tendered.
31. In my opinion, Chrunik has not demonstrated that the Delegate's findings of fact on these critical points are perverse, inexplicable, or irrational.
32. There was some evidence on the basis of which the Delegate could conclude that Chrunik's rate of pay was \$20.00 per hour, and the Delegate was entitled to prefer the evidence of the Employer on this point. Chrunik tendered no compelling evidence to the contrary.
33. As for the matter of the deposits, the Delegate had available to her the cheques issued to Chrunik by the Employer showing that they had been negotiated at Chrunik's credit union, that they had cleared the Employer's account, and that they appeared to bear Chrunik's signature. In addition, the Delegate had the reporting letter from the credit union in response to a specific request from the Delegate that it review its transaction records regarding the cheques and determine whether the sums drawn on them had been deposited into Chrunik's account, in whole or in part, and whether part of or all of them had been taken back in cash. That letter stated categorically that the transactions in question had been negotiated by Chrunik, and that the transaction records could be produced on payment of a fixed fee. It also stated that the reason that some of the cheque amounts did not appear on the account statements that Chrunik had produced was that Chrunik had deposited a portion of those cheques and received the balance of the amounts set out on the cheques in cash.
34. Chrunik disputes the contents of the credit union's reporting letter. He says they are inconsistent with the account statements he produced, which he regards as "uncontestable" evidence of the amounts shown on the paycheques he received from the Employer, the full amounts of which he asserts he deposited into his account. I do not think, however, that his account statements are conclusive in this respect. The credit union

reporting letter supports the conclusion drawn by the Delegate that the account statements could show a deposit amount net of the sums Chrunik took in cash. This meant that it was plausible for the Delegate to conclude that the account statements were correct, but that they did not tell the whole story.

35. Chrunik also takes issue with the reliability of the information contained in the credit union's reporting letter, pointing to the fact that it refers to a transaction by date for which there is no reference in his account statements. The point is really of no moment. The deposit to which the reporting letter refers appears elsewhere in his account statements, and Chrunik acknowledges that it took place. It is obvious, therefore, that the representative of the credit union preparing the reporting letter merely erred as to the relevant date.
36. Finally, Chrunik seeks to undermine the efficacy of the credit union's reporting letter on the basis that it does not state clearly the source(s) of information on which its conclusions were based. I am of the view that this submission also fails to persuade. The inference I believe the Delegate was entitled to draw from the letter is that credit union staff reviewed the transaction records relating to the impugned cheques and prepared the report based on that review. The letter advised that the relevant supporting documentation was available for review on payment of the credit union's fixed fee. I do not think it unreasonable that the Delegate appears to have relied on the statements in the letter at face value. I do not think it was necessary for the Delegate to have required the credit union to produce copies of the actual transaction records prior to her issuing her Report. The Delegate provided a copy of the credit union's reporting letter to Chrunik prior to her issuing her Report, for his review and comment. If Chrunik believed the credit union's reporting letter did not accurately reflect what the transaction records actually showed, he was free to request, and pay for, copies of the transaction records himself. He did not do so.
37. In the circumstances, I cannot conclude that Chrunik has shown that the Delegate erred in law with respect to her findings in the Report.

ORDER

38. Pursuant to section 115(1)(a) I order that the part of the Determination confirmed by the Tribunal in its Original Decision be varied to add that the Employer pay as wages payable to Chrunik statutory holiday pay of \$152.00, annual vacation pay of \$436.56, and concomitant annual vacation pay of \$6.08, together with accrued interest.

Robert E. Groves
Member
Employment Standards Tribunal