

An appeal

- by -

Irina Berezoutskaia

- 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.:** 2007A/157

**DATE OF DECISION:** March 6, 2008

## DECISION

### OVERVIEW

1. This is an appeal from a determination issued by a delegate (the "Delegate") of the Director of Employment Standards dated November 19, 2007 (the "Determination") in respect of a complaint brought by one Irina Berezoutskaia (the "Complainant") against her previous employer, Windsor Security Limited (the "Employer"). The Delegate decided that the Employer had not contravened the *Employment Standards Act* (the "Act").
2. The Complainant appeals the Determination, alleging (a) that the Director failed to observe the principles of natural justice in making the Determination, and (b) that evidence has become available that was not available at the time the Determination was being made.
3. I have before me the Determination, the Reasons for the Determination, the Complainant's Appeal Form and attached submission filed with the Tribunal on December 14, 2007, a submission from the Delegate dated January 2, 2008 together with the record I infer the Director has supplied in accord with section 112(5) of the *Act*, and a further submission from the Complainant dated January 21, 2008.
4. The Tribunal has determined that I will decide the appeal on the basis of the written materials submitted by the parties, pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act* and Rule 16 of the Tribunal's Rules of Practice and Procedure.

### FACTS

5. The Employer operates a private security business. The Complainant worked for the Employer as a security guard from August 12, 2005 until December 31, 2006.
6. The record reveals that over time the Complainant became unhappy with several aspects of her work, and concluded that the Employer was exploiting her. In particular, the Complainant came to believe that she was underpaid having regard to the tasks she was performing and the custom within the security industry, that the Employer had misrepresented the opportunities for advancement within the company at the time she was hired, was providing her with no constructive feedback despite her requests for help, was unlawfully requiring her to provide her own clothing and equipment in order to perform her job, and was exposing her to dangerous situations unnecessarily.
7. The Complainant's employment ended on New Year's Eve 2006 after she reported that she had been assaulted by a patron in the garage of a restaurant premises where the Complainant was providing security. The Complainant believed that neither the client nor the Employer were as concerned as they should have been for her safety as a result of this incident, and that the assault could have been avoided had the Employer scheduled more staff at that venue, as it should have done in her opinion having regard to the fact that it was a raucous time of year. For its part, the Employer, through its principal, a Mr. Mroz, reassured the Complainant that safety was of primary importance. At the same time, however, Mr. Mroz chastised the Complainant for making a "scene" in the restaurant, and advised her that the client did not want her to work at that location in future.

8. As for what transpired thereafter, it appears that Mr. Mroz came to believe that the Complainant had effectively resigned from her position of employment, as she had demanded of him that the Employer guarantee her personal safety, and she had declined to report at the different locations where the Employer had offered to see her continue to work. The Complainant denied that she had refused work. She also asserted that she could not attend at the new locations, because they were at some distance from her residence, and she did not drive.
9. In the event, the Employer took the position that the employment relationship had come to an end, and later forwarded a Record of Employment. It also paid the Complainant a sum which the Delegate later found to be in excess of the amount the Complainant was entitled to expect by way of compensation for length of service under the *Act*.
10. The Complainant then engaged the complaint process under the *Act*, alleging that monies were owed to her by the Employer. The Delegate conducted a hearing on October 10, 2007. The Complainant and Mr. Mroz were present, gave evidence, and made submissions. In the Determination which followed, the Delegate stated the issues to be decided as follows:
- did the Employer fail to pay regular wages, annual vacation pay and compensation for length of service under the *Act*?
  - since the Complainant made use of her own cellphone on the job, could it be said that the Employer required the Complainant to pay some of the Employer's business costs in contravention of the *Act*?
  - since the Complainant complied with the Employer's dress code requiring black clothing at work, could it be said that the Employer required the Complainant to pay the costs of providing, cleaning or maintaining special apparel in contravention of the *Act*?
11. After a detailed review of the evidence, and the relevant provisions of the *Act*, the Delegate answered "no" to these questions in the Determination.

## ISSUES

12. Should the Determination be varied or cancelled, or the matter referred back to the Director for consideration afresh, either because the Delegate failed to observe the principles of natural justice in making the Determination, or because evidence has become available that was not available at the time the Determination was being made.

## ANALYSIS

13. The jurisdiction of the Tribunal to hear an appeal of a determination is contained 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.

14. Section 115(1) of the *Act* should also be noted. It says this:

115(1) After considering whether the grounds for appeal have been met, the tribunal may, by order,

- (a) confirm, vary or cancel the determination under appeal, or
- (b) refer the matter back to the director.

15. I pause to note that the Complainant does not appear to challenge the Delegate's calculations as to the amounts that were owed to her under the *Act*. The Delegate concluded that the Employer had paid to the Complainant the appropriate sums, including an amount in respect of her entitlement to compensation for length of service.

16. However, the Complainant has engaged the grounds set forth in section 112(1)(b) and (c). I will deal with these grounds in that order.

***Section 112(1)(b) – Did the Delegate fail to observe the principles of natural justice?***

17. A challenge to a determination on the grounds of a failure to observe the principles of natural justice raises a concern that the procedure followed by the Director and his delegates was unfair. The principles of natural justice mandate that a party must have an opportunity to know the case it is required to meet, and an opportunity to be heard in reply. The duty is imported into proceedings conducted at the behest of the Director under the *Act* by virtue of section 77, which states that if an investigation is conducted, the Director must make reasonable efforts to give a person under investigation an opportunity to respond. Another facet of natural justice is that the determination that is made be made by an independent decision-maker, free from bias.

18. The portions of the Complainant's submissions on this appeal which I discern to be capable of raising natural justice concerns are set out as follows. In her December 14, 2007 submission, the Complainant said this, in part:

I am requesting to cancel the Determination because my former employer, Mr. Andy Mroz, was lying under oath and Mr. Mark Hale, the Delegate of the Director of Employment Standards, was aware of that. During the hearing at the Employment Standards Branch I strongly objected the position of employer and proved that his statements and allegations were false. I tried to draw Mr. Hale's attention on the dishonesty of my ex-employer, but unfortunately, he supported everything that Mr. Mroz said and had misinterpreted the facts and evidence in his findings and arguments. Also, Mr. Hale deceived in his conclusions when describing events; he quoted me improperly alleging that I said something that I didn't say or changing the meaning of my words and statements.

I would like to declare that the Delagate of the Director, Mr. Hale was corrupt and that the decision in my case was made to order from the Minister of Public Safety and Solicitor General of BC, John Les, and Premier of BC, Gordon Campbell, to whom I personally reported about circumstances of my dismissal from the Windsor Security Ltd....The Minister of Public Safety

responded on behalf of himself and the BC Premier and advised to file complaint with the Employment Standards Branch, where, however, I was treated badly. From the beginning, the officer that handled my complaint used coercion and intimidation so that to force me to withdraw my complaint against Windsor Security; the ESB appeared bias, and the Determination was made out of the point. Actually, Mr. Hale predominantly focused on the position of employer and ignored my position, oversimplifying the issues that we discussed during the hearing and misrepresenting my evidence.

19. In her January 21, 2008 submission, the Complainant said this:

...The most important issues that were raised during the hearing conducted by Mr. Hale were not in the scope of his Determination and it was not "*without influence from any other party*" because I had complained about bias against me and sent letters to the BC Minister of Public Safety and Solicitor General John Les, and Premier of BC Gordon Campbell telling them that I was coerced and intimidated at the Employment Standards Branch with a purpose to withdraw my complaint against Windsor Security Ltd. There was hidden influence and pressure on me before and during the hearing.

20. Distilled to its essentials, the Complainant's position is that due to inappropriate political interference her complaint was doomed to fail from the beginning, and that the Delegate merely went through the motions of adjudicating her case, after Branch attempts to pressure her into abandoning her claims were unsuccessful. In sum, the Complainant is saying that the proceedings involving the Director and his Delegate were corrupt, and therefore constituted a sham. In legal terms, the Complainant asserts that the proceedings should be cancelled due to actual bias.

21. Allegations of this sort are serious. They should never be made in the absence of evidence sufficient to overcome the presumption that an adjudicator will act fairly and impartially. Mere suspicion of bias is not enough (see *Re Gallagher* BC EST #D124/03).

22. I do not doubt that the Complainant genuinely believes that the process under scrutiny on this appeal was fatally flawed in the ways she has identified. However, statements of conclusions the Complainant wishes the Tribunal to draw, which is what the Complainant has offered, are a different species of animal than statements setting out facts on the basis of which the Tribunal might find that the Determination is tainted due to bias. The Complainant's submissions in no way descend into particulars, notwithstanding they state the reality that is perceived by her. In my opinion, this is fatal. In proceedings before the Tribunal, the burden rests on an appellant to ensure the sufficiency of an appeal, and that the material submitted to the Tribunal is adequate to satisfy the legal requirements relating to the matters raised by an appellant in her appeal submission (see *MSI Delivery Services Ltd.* BC EST D051/06).

23. It follows that I have decided that there is no basis on the record before me justifying a conclusion that the proceedings before the Delegate reveal bias. I find that the Complainant's assertions are entirely speculative.

***Section 112(1)(c) – Has evidence become available that was not available at the time the Determination was being made?***

24. Previous decisions of the Tribunal have held that section 112(1)(c) does permit a party to adduce new evidence on appeal, provided that certain stringent tests are met.

25. In her December 14, 2007 submission filed on this appeal the Complainant raised the issue of new evidence in these terms:

I attach some of my communication with the Minister of Public Safety, John Les, and Premier of BC, Gordon Campbell, that had always resulted to the termination of my employment and is a proof of the reprissals for making complaints about illegal activities resembled more criminal activities than security operations. I am able to provide more evidence, but I would prefer to keep it limited because of corruption at the Employment Standards Branch.

26. The correspondence attached from Mr. Les was in response to a lengthy letter the Complainant had forwarded to him, and to Premier Campbell, dated January 9, 2007, in which she had discussed in detail the circumstances surrounding her dismissal from her position of employment with the Employer. At one point in her letter, the Complainant said this:

I tried my best, but unfortunately in British Columbia safety rules and laws are not respected and, as result, I became punished for my reports and lost a job. Upon my previous experience when I contacted the Ministry of Public Safety with reports about corruption and bribery in this industry, I was told that the Ministry will not intervene in such matters and it is impossible to complain about any wrongdoing in this province where corruption is everywhere. All country knows that a culture of entitlement and cronysm, greed and venality, and a scheme of "kickbacks" for granting contracts to friendly companies runs deep into the Liberal Party.

27. Mr. Les' brief letter in reply, dated February 16, 2007, adverted to the fact that the issues raised in the Complainant's correspondence were "worksite concerns", and accordingly, she should contact the Employment Standards Branch and Worksafe BC to discuss the options that might be available to her. Contact information was also provided.

28. In her January 21, 2008 submission on the appeal, the Complainant said:

...I don't have doubts that Mr. Mroz works in cooperations with drug dealers and, probably by himself is part of the organized crime. As an ordinary citizen I am not able to prove such allegations, but I am able to prove reporting facts of illicit activities in which Windsor Security was involved and which I had witnessed.

In conclusion, I am able to provide more evidence in support of my allegations, but it must be heard and audio taped...

...I refuse to make additional comments regarding new evidence that was not available at the time the Determination prior to my new hearing because of the personal safety concerns. It is very dangerous for me to accuse my ex-employer in acting in the interests of the organized crime. I have many reasons to be afraid for my life as well as new reprissals and growing pressure that I am experienced since filing this complaint with the Employment Standards Branch.

29. Even where evidence can be said to have been available at the time the Determination was being made the Tribunal may nevertheless consider it if the appellant can demonstrate that the evidence is important, there is good reason why the evidence was not presented at first instance, and no serious prejudice will be visited upon the respondent if it is admitted (see *MSI Delivery Services, supra; Re Specialty Motor Cars BC EST #D570/98*). The difficulty I have with the Complainant's submissions on this point is that it is impossible to discern exactly what that new evidence is.

30. The Complainant says that she was dismissed as a reprisal for communicating to the Premier and one of his Ministers. Given that the Complainant was paid compensation for length of service, which implies a discharge without cause, it is unclear to me why the Employer's motive for discharging the Complainant would be relevant to the proceedings she commenced under the *Act*. But even if it is, the Complainant has identified no evidence she might tender which might support the conclusion for which she contends. She says there is such evidence, but she declines to produce it due to alleged corruption at the Employment Standards Branch. This is clearly an inadequate explanation for the failure to produce the evidence. This appeal is a proceeding before the Tribunal. It is not a proceeding before the Branch.
31. The same reasoning applies, in my view, to the Complainant's assertions that Mr. Mroz is involved in criminal activity, and that there is other evidence she could bring forward which must for the moment remain undisclosed because of worries relating to her personal safety. On this point, too, I do not mean to imply that I doubt the Complainant's *bona fides*. The problem, however, is that since the Complainant has declined to set out the nature of the evidence she wishes to tender which would constitute factual support for the assertions she is making, it is impossible for the Tribunal to conclude that such evidence is available, and that it otherwise satisfies the requirements of Section 112(1)(c).

## **ORDER**

32. I order that the Determination dated November 19, 2007 be confirmed.

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**Robert E. Groves**  
**Member**  
**Employment Standards Tribunal**