

An appeal

- by -

John Shaddick

- 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.: 2009A/005

DATE OF DECISION: March 23, 2009

DECISION

SUBMISSIONS

John Shaddick	on his own behalf
Chantel Martel	on behalf of the Director of Employment Standards
Marcia Harvey	on behalf of Urban Wood Waste Recyclers Ltd.

OVERVIEW

1. This is an appeal by John Shaddick, pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued December 19, 2008.
2. Mr. Shaddick worked as an excavator operator for Urban Wood Waste Recyclers Ltd. ("Urban Wood"), from January 2 to January 18, 2008. Mr. Shaddick filed a complaint alleging that Urban Wood contravened section 8 of the *Act* by misrepresenting the position for which he was hired.
3. Following a hearing into Mr. Shaddick's complaint on August 21, 2008, the Director's delegate concluded that there had been no contravention of the *Act*. Mr. Shaddick contends that the delegate erred in law in arriving at this conclusion.
4. Section 36 of the *Administrative Tribunals Act* ("ATA"), which is incorporated into the *Employment Standards Act* (s. 103), and Rule 17 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). This appeal is decided on the section 112(5) "record", the submissions of the parties, and the Reasons for the Determination

ISSUE

5. Did the delegate err in concluding that Urban Wood had not misrepresented the position for which Mr. Shaddick was hired?

FACTS

6. Mr. Shaddick responded to Urban Wood's advertisement at Services Canada for a permanent full time hydraulic excavator operator. The position description described the duties of the operator to include loading recyclable material onto conveyors for sorting and sorting recyclable materials from construction waste at a transfer station. Mr. Shaddick was interviewed on December 11, 2007 by Ms. Harvey, the Human Resources Manager, was offered the position and commenced work effective January 2, 2008.
7. Mr. Shaddick has a physical disability that prevents him from doing manual labour. According to the Determination, his evidence was that he advised Ms. Harvey of his disability during the interview but she did not inquire further about his limitations. Ms. Harvey's evidence was that at no time, either

during the interview or during a tour of the facility, did Mr. Shaddick disclose any prior injuries to his knees or back or raise any concerns about the type of work he was to be performing.

8. Mr. Shaddick was also provided with a tour of the facilities and given an explanation of the various areas of the plant. Ms. Harvey's evidence was that it was important for Mr. Shaddick to know about the "tipping floor", or the area in which recyclable materials were sorted because he would be required to separate the different materials for recycling. Mr. Shaddick also spent some time with the person working on the tipping floor. On December 31, 2008, prior to commencing employment, Mr. Shaddick also received a job description that outlined the requirements of the position as well as an employee handbook. The position description indicated that "the basic function of the 1st Hoe Operator is to separate all materials to ensure maximum usage in a timely manner and to make sure tipping floor is clear".
9. For the first few days of his employment, Mr. Shaddick was given tasks on the tipping floor. Between January 7 to 11, he worked on the excavator for two days and was supposed to ask his supervisor about his next assignment. Mr. Shaddick injured his foot on Friday, January 11, 2008 and was off work from January 14 to January 16. During that time, Mr. Shaddick received an email from Ms. Harvey asking that he not discuss the Workers Compensation claim with Urban Wood's owner. She continued by stating that the owner had been "pushing" her over the last two days "regarding the tipping floor and excavators being a combined job and that he has decided it should be a 50/50 split". Ms. Harvey's email indicated that she was aware this is not what Mr. Shaddick wanted and would be prepared to discuss it with him when he returned to work.
10. When Mr. Shaddick returned to work on January 17, 2008, he was assigned to operate a loader and on January 18, he was re-assigned to the tipping floor. Mr. Shaddick contended that, during his three weeks of employment, he continuously complained to management about his assignment to the tipping floor as it was too manual labour intensive. He said that he was not hired to be a labourer and did not understand when he was hired that loading recyclables onto a conveyor was to be done by hand. Mr. Shaddick's wife also gave evidence. I find it unnecessary to recite that evidence as she had no direct information on the issues before the delegate.
11. Mr. Shaddick stated that he had intended to quit his employment when Urban Wood terminated his employment on January 21, 2008. Ms. Harvey's evidence was that Mr. Shaddick's lack of skill operating the equipment concerned her and that when she confronted him, he disclosed his disability for the first time. Ms. Harvey stated that Mr. Shaddick's employment was terminated following his continued ranting and abusive language towards fellow workers.
12. Ms. Harvey contended that Urban Wood never promised Mr. Shaddick that his sole duties were to operate the excavator full time. Urban Wood's witness, Brian Jones, was Mr. Shaddick's supervisor and the Assistant Plant Manager. His evidence was that he told Mr. Shaddick that he would be on the tipping floor for one week before he was to operate the excavator. He also testified that Mr. Shaddick never told him that he had a disability but that he continually complained to him and to other employees that he should not be on the tipping floor because of his bad back and knees.
13. The delegate determined that Mr. Shaddick had the burden of showing that Urban Wood had misrepresented his position. The delegate found that Urban Wood had not misrepresented the wages, the availability of the position or the conditions of employment, as set out in Section 8 of the *Act*. Therefore, she concluded the sole issue before her was whether Urban Wood had misrepresented the duties of the position.

14. The delegate noted that Mr. Shaddick's evidence conflicted with that of Ms. Harvey on several points including the issues of whether or not he advised her about his disability and whether he was aware that work on the tipping floor area included manual labour.
15. The delegate found that the job description of excavator operator was not provided to Mr. Shaddick prior to his acceptance of the position. However, she accepted that he was given a tour of the plant, introduced to co-workers, shown the areas in which he would be working and that he did not raise any concerns regarding his position. The delegate stated that she "found it hard to accept" that Mr. Shaddick was not aware that the position of excavator operator included other duties given the tour of the plant and his introduction to the person who was doing the same job he was interviewed for. She noted that Mr. Shaddick had not raised any questions with Ms. Harvey about the stated job duties prior to accepting the position.
16. The delegate noted Mr. Shaddick's evidence that he always disclosed his disability and provided his doctor's letter outlining his disability to his prospective employers prior to accepting employment. She noted that Mr. Shaddick had not provided that letter to Urban Wood and that he had no explanation as to why it was not available for the interview. She said that she had difficulty accepting that Ms. Harvey, a human resource manager familiar with job requirements and employer liability for employee injury, would not enquire if an employee had physical limitations. She preferred Ms. Harvey's evidence on the issue of whether Mr. Shaddick had disclosed his disability during the interview process.
17. The delegate also noted Mr. Shaddick's failure to disclose certain circumstances around his termination in assessing his credibility.
18. The delegate was not persuaded by Mr. Shaddick's argument that Ms. Harvey's January 16, 2008 email supported his contention that the position was misrepresented. She concluded that it confirmed the job duties were a 50/50 mix, not that the duties were going to be changed.
19. The delegate concluded:
20. Generally, an employer has an obligation to ensure that material statements made during the recruitment process are accurate. My review of the job advertisement indicates part of the duties is to sort and load recyclable material onto conveyor (sic). It does not mention if these duties are to be done manually. However, as a result of the facility tour, I am not convinced Mr. Shaddick was not aware manual duties were part of the position he applied for. I find in providing Mr. Shaddick with a tour of their facility (this one lasting more than one hour) and explaining the different areas of the operation, introducing Mr. Shaddick to co-workers and showing him the type of work he would be doing, Urban Wood took necessary steps to ensure Mr. Shaddick had an understanding of the job prior to accepting it. To that end, I find Urban Wood did not mislead Mr. Shaddick.

ARGUMENT AND ANALYSIS

21. 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

22. The burden of establishing the grounds for an appeal rests with an Appellant. Mr. Shaddick must show clear and convincing reasons why the Tribunal should interfere with the delegate's decision on one of the three stated grounds of appeal.
23. Section 8 of the Act provides as follows:
- An employer must not induce, influence or persuade a person to become an employee, or to work or to be available for work, by misrepresenting any of the following:*
- (a) the availability of a position;*
 - (b) the type of work;*
 - (c) the wages;*
 - (d) the conditions of employment*
24. In his appeal documents, Mr. Shaddick alleges that the delegate erred in law in her conclusion that Urban Wood did not contravene section 8. However, in the written material attached to the appeal, Mr. Shaddick contends that the delegate misunderstood his evidence and omitted key facts. He also disagrees with the delegate's assessment of the credibility of the parties. Mr. Shaddick says, for example, that although the Determination states that he normally provides prospective employers with a doctor's letter, his evidence was actually that he provides a doctor's letter when asked by an employer but that he always tells his employers about his physical limitations. Mr. Shaddick also disputes the delegate's finding of fact that he did not raise any concerns regarding the position or disclose his disability. He argues that he definitely did tell the employer about his disability at the interview stage. Mr. Shaddick also takes issue with certain conclusions arrived at by the delegate about his credibility based on circumstances surrounding the termination of his employment. Both the delegate and Ms. Harvey dispute Mr. Shaddick's assertions about the evidence he gave at the hearing as well as matters surrounding the termination of his employment.
25. 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.
26. The delegate heard conflicting evidence about whether or not Mr. Shaddick disclosed his physical limitations at the interview stage. She assessed the credibility of the parties and preferred the evidence of Ms. Harvey, a seasoned human resources employee. Credibility assessment is a matter within the purview of the delegate, who heard the evidence first hand and observed the parties and any witnesses. (see *ARA Developments*, BC EST#D012/08). I am satisfied, on a review of the record, that the delegate's assessment was supportable on the evidence before her and I would not interfere with it.
27. As noted by the Tribunal in *Director of Employment Standards* (BC EST #RD048/01), section 8 is a public policy section of the *Act*, focussed on the conduct and intention of the employer leading up to the initial hiring. Mr. Shaddick had the burden of persuading the delegate that Urban Wood had contravened the *Act*. The delegate found that Urban Wood had not misrepresented the wages, the conditions of employment or the availability of the position, conclusions Mr. Shaddick does not appear to dispute. The sole remaining issue is whether Urban Wood misrepresented the type of work he was to perform.
28. The Tribunal has adopted and applied a basic legal definition of misrepresentation when considering whether an employer has misrepresented any of the four factors in s. 8. That definition includes an

assertion not in accordance with the facts; an untrue statement of fact; and incorrect or false misrepresentation, a statement made to deceive or mislead. (see, for example, *Chintz & Co.*, BC EST #D007/00, *Parsons*, BC EST #D110/00 and *CYOP et al.*, BC EST #D020/03)

29. The undisputed facts before the delegate were that Mr. Shaddick responded to an advertisement seeking a hydraulic excavator operator. The duties attached to the position were described to include “Loading recyclable material onto conveyor for sorting. Sorting recyclable materials from construction waste at transfer station”. The job description implied a broader range of duties than simply operating a piece of machinery, although I agree that it could be read more narrowly. The delegate concluded that Mr. Shaddick did not disclose his disability during the interview. Therefore, there is no reason to find that Ms. Harvey misled him about the nature of the job he was to perform.
30. Furthermore, Mr. Shaddick does not dispute the delegate’s finding that he was given a tour of the plant facilities, shown the machinery he would be operating and the area he would be working in, and introduced to a number of employees, including the person whose job he would be assuming. Mr. Shaddick also does not dispute that he had an opportunity to observe and ask questions about the position if he was unclear about the tasks he was to perform or had concerns about his ability to perform them.
31. I find no evidence that Urban Wood made any untrue statements of fact or statements that were intended to deceive or mislead. In fact, the evidence supports a contrary finding. The evidence indicates that Urban Wood was transparent about the work environment and the duties Mr. Shaddick would be performing and gave him every opportunity to clarify any concerns in respect of the job duties at the time he was hired.
32. I am unable to find that the delegate erred in her conclusion and dismiss the appeal.

ORDER

33. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated December 19, 2008, be confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal