Employment Standards TRIBUNAL

An appeal

- by -

BC Securities Commission
("B.C.S.C.")

- 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.: 2007A/11

DATE OF DECISION: May 4, 2007

DECISION

SUBMISSIONS

Donald J. Jordan, Q.C.	on behalf of the British Columbia Securities Commission
Mary Walsh	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by the British Columbia Securities Commission ("B.C.S.C."), pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued January 26, 2007.

2. Mathew Burke is employed as a senior network analyst for B.C.S.C., the provincial agency responsible for regulating securities trading in British Columbia. Following the birth of his child on May 23, 2006, Mr. Burke requested parental leave beyond May 23, 2007 under section 51(1)(c) of the *Act*, which was beyond 52 weeks after his child's birth. The B.C.S.C. denied the request on its view that parental leave must begin and end within 52 weeks of the child's birth. Mr. Burke sought an order requiring the B.C.S.C to grant his original parental leave request.

3. After a hearing on Mr. Burke's complaint on November 7, 2006, the delegate determined that the B.C.S.C. had contravened section 54 of the *Employment Standards Act* in refusing to give Mr. Burke the leave to which he was entitled. The delegate also imposed a $500 penalty on B.C.S.C. for the contravention, pursuant to section 29(1) of the *Employment Standards Regulations*.

4. B.C.S.C. contends that the delegate erred in law in interpreting s. 51(1)(c) of the *Act*, and failed to observe the principles of natural justice.

5. 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). Although B.C.S.C. sought an oral hearing, I conclude that this appeal can be adjudicated on the written submissions of the parties. This appeal is whether the delegate erred in law, an issue which does not turn on the credibility of the parties or whether additional evidence needs to be considered. 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

FACTS AND ARGUMENT

6. The facts are set out above and are not in dispute. Mr. Burke indicated that he had sought guidance from the Branch about his leave, and had been informed that the Director's policy interpretation of section 51(1)(c) was that his parental leave needed to begin within the 52 week period but did not need to conclude within that period. Accordingly, Mr. Burke sought parental leave that would extend beyond May 23, 2007.

7. At the hearing into Mr. Burke's complaint, B.C.S.C. took the position that sections 51(1)(c) and 51(1)(d) could not be read in an identical manner, and for the Branch to read out the words "and within 52 weeks after that event" from section 51 (1)(c) was both in conflict with the principles of statutory interpretation as well as beyond the Branch's authority. B.C.S.C argued that there was a presumption of consistent expression, and therefore, that the Legislature intended sections 51(1)(c) and 51(1)(d) to be applied differently.

8. The delegate found in favour of the complainant. In preferring the complainant's position to that of the employer, the delegate concluded that the grammatical and statutory interpretation principles cited by the employer more reasonably supported the complainant's interpretation. She determined that the complainant's position and the Branch's policy interpretation of section 51(1)(c) did not offend the principles of consistent expression. She also concluded that the complainant's position was supported by a purposive and consequential analysis of section 51(1)(c), determining that it would be absurd for the Legislature to intend to create a parental leave scheme that resulted in unequal treatment among various forms of families. In arriving at her conclusion, the delegate considered the principles of consistent expression, including "basic grammatical principles", the purpose and intent of section 51(1)(c), and a "consequential analysis".

9. B.C.S.C. argues that the delegate improperly relied on the Director of Employment Standards' Interpretation Guidelines Manual ("ICM") to assist her interpretation of section 51. Further, B.C.S.C. contends that the delegate breached natural justice by relying upon grammatical principles and interpretive principles that were not addressed in argument or evidence by either party.

10. In her reply, the delegate submitted that she had committed no errors of law. She relied on the Determination as issued, and advanced an additional reason for her conclusion, which was that there was a rational explanation for the use of different terms. I did not find the additional reason of assistance in considering the Determination. The delegate also submitted that it was incumbent on her to consider all relevant principles of statutory interpretation, not just the one advanced by B.C.S.C.

11. In her reply, the delegate said:

> Although the employer's appeal submission is not expressly framed in terms of whether there is a reasonable apprehension of bias, that issue permeates the appeal.

12. The delegate then provided a detailed response to her method of analysis, and, in particular, her reference to the ICM.

13. Finally, the delegate refuted B.C.S.C.'s argument that she had failed to comply with the principles of natural justice. She submitted that the record shows that the employer knew the case to be met dealt with the proper statutory interpretation of section 51(1)(c), and that it had a reasonable opportunity to make that case. The delegate submitted that it was not a breach of natural justice to conduct a grammatical analysis:

> …the requirements of natural justice do not mandate a blind application of a fixed set of rules. In short, in any given case, the scope of natural justice required must be assessed in light of the circumstances of the case, the type of inquiry, the rules governing the decision-maker's actions and the subject-matter.

14. She also submitted that the "procedural safeguards" could not be viewed in isolation from section 77 of the *Act*, which, she says, affords parties only a reasonable opportunity to respond as opposed to a full panoply of legal procedures.

15. In reply, the B.C.S.C. argues that the delegate's response exceeds the scope of her permissible participation in an appeal before the Tribunal. Counsel submits that, given the "aggressive and adversarial nature of [the delegate's] submissions, she has compounded her failure to observe the principles of nature justice alleged in the making the initial Determination." (sic) B.C.S.C. submits that, on the issue of natural justice, the delegate has no role to play whatsoever in the making of submissions.

ISSUES

1. What is the proper role of the Director on appeal;

2. Whether the delegate erred in law in her interpretation of section 51(1)(c) of the *Act*; and

3. Whether the delegate failed to observe the principles of natural justice.

ANALYSIS

16. 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

Proper Role of Director on Appeal

17. In its reply submissions, B.C.S.C. says that the Director's delegate has exceeded the scope of her permissible participation in an appeal before the Tribunal, that the nature of her submissions compounds her failure to observe principles of natural justice, and that, on the issues of natural justice, the delegate "has no role to play whatsoever in the making of submissions". B.C.S.C. submits that, where a Determination is appealed to the Tribunal, a delegate other than the author of the Determination ought to be appointed with the responsibility of explaining it.

18. The leading cases on the proper role of the Director on appeal are *BWI Business World Incorporated* (BC EST #D050/96) and *D. Hall & Associates Ltd.* (BC EST #D354/99) In both decisions, the Tribunal emphasized the importance of the Director's neutral position in appeals:

> It is at the Branch level that the administration of employments standards law in this province is carried out. Parties to the Branch's proceedings must continue to have confidence that the Branch will administer the law in an unbiased manner. The branch will not retain this confidence unless the Director remains strictly neutral in proceedings before the Employment Standards Tribunal, most of which will concern themselves with the correctness of a decision made by an Employment Standards officer, the Director's own delegate. (*D. Hall & Associates Ltd.*)

19. In *BWI Business World Incorporated*, the member also concluded that the Director must maintain his neutrality from the investigative process through to the appeal. Although the member decided that the Director's role was wider than being restricted to explaining its decision and jurisdiction to make its decision, it was nevertheless confined to "explaining the underlying basis for the determination and to show that the determination was arrived at after a full and fair consideration of the evidence and submissions of both the employer and the employee(s)." The member noted that there was a fine line between explaining the basis for the Determination and advocating on behalf of a party. In *Mitchell v. British Columbia (Director of Employment Standards)* [1998] B.C.J. 653, the British Columbia Supreme Court cited with approval *BWI*'s comments about the role of the Director on an appeal to the Tribunal.

20. While both *D. Hall* and *BWI* were decided before the Branch decided to hold "hearings" into some complaints rather than investigate them, these principles, in my view, have not changed. The delegate has a role on appeals, although that role is limited to an explanation of the decision rather than advocating on behalf of one party or another.

21. In this appeal, the delegate has not taken the side of a party; rather, her submissions focus on the "correctness" of her decision, and contain an additional submission in support of it. I did not find that additional submission to be of assistance to the Director's position. While the delegate's reasons for her conclusion ought to be contained in the Determination itself rather than appeal submissions, they do not alter her conclusion. In my view, the delegate's submissions come close to the line of proper participation, but do not cross it. Her submissions are in support of her own Determination rather than advocating on behalf of the employee. While I agree that they go beyond an explanation of the Determination in that they contain a robust defence of her Determination and address a ground of appeal not advanced by B.C.S.C. ("reasonable apprehension of bias"), they do not suggest a bias in favour of Mr. Burke or against B.C.S.C. Therefore, after considering all the submissions, on balance, I conclude that the delegate has remained neutral in her submissions.

22. I do not agree that the delegate's comments would "compound" her alleged initial breach of natural justice. The Director, as noted above, has a role to play on appeal. That role is subsequent to, and separate from, an adjudicative function. Although the delegate's submissions contain additional, or supplementary reasons, the issue of "natural justice" does not arise in this part of the process.

Error of Law

23. 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

24. At issue before the delegate was whether section 51(1)(c) of the *Act* require that a birth father's 37 week parental leave both began and conclude within 52 weeks after the child's birth; or alternatively, whether it required only that the leave begin, but not necessarily conclude, within 52 weeks of the child's birth.

25. Section 51(1) reads as follows:

> 51(1) An employee who requests parental leave under this section is entitled to
>
> (a) for a birth mother…
>
> (b) for a birth mother…
>
> (c) for a birth father, up to 37 consecutive weeks of unpaid leave beginning after the child's birth and within 52 weeks after that event, and
>
> (d) for an adopting parent, up to 37 consecutive weeks of unpaid leave beginning within 52 weeks after the child is placed with the parent

26. B.C.S.C. contends that while Mr. Burke is entitled to up to 37 weeks of parental leave, his leave must end within 52 weeks of the child's birth. Mr. Burke contends that he is entitled to up to 37 consecutive weeks of unpaid leave beginning within 52 weeks after the birth.

27. B.C.S.C. argues that, because paragraphs (c) and (d) are worded differently, the Legislature intended that they have a different meaning. It relied on the Concise Oxford English Dictionary definition of "within" as "Inside, enclosed or contained by, not beyond or exceeding, not further off than" in arguing that Mr. Burke's parental leave had to conclude by May 23, 2007.

28. The delegate considered the "principle of consistent expression" argued by B.C.S.C. and concluded that it supported an interpretation advanced by Mr. Burke. She also considered a "contextual and grammatical analysis", a "purposive analysis", including section 10 of the *Interpretation Act* and the statutory interpretation principles enunciated in *Re Rizzo and Rizzo Shoes* ([1998] 1 S.C.R. 27), which this Tribunal has consistently applied, as well as a "consequential analysis".

29. B.C.S.C. says that the delegate erred in relying on a "grammatical analysis" over the "presumption of consistent expression".

30. I am not persuaded that the delegate's conclusion that Mr. Burke was entitled to take, or start, his parental leave within 52 weeks of his child's birth is untenable or unreasonable.

31. That there are two logical and reasonable interpretations of the section is apparent from the very fact of the appeal itself. How, or if, a birth father's parental leave may be different from that of an adoptive parent cannot be determined just on one statutory principle alone, and the delegate was correct, in my view, to consider several other principles in coming to her conclusion.

32. There are a number of statutory interpretation principles that can be used to interpret the meaning of the words. One of those principles is that, where the legislature has used different words in different sections, there is an intended difference in meaning. Another principle is that words be construed according to their ordinary and popular meaning. (*British Columbia (Assessor of Area No. 26 – Prince George) v. Northwood Pulp and Timber Ltd.* [1984] B.C.J. No. 834, para. 7) A third is that a statute should be construed so that no clause, sentence or word is superfluous, void or insignificant. (*British Columbia (Assessor of Area No. 26 – Prince George)*, para. 10) I do not agree that the delegate erred or breached

natural justice when she examined, or attempted to interpret the language of the legislation in light of several principles, rather than simply the one advanced by B.C.S.C.

33. One of the principles the delegate considered was the leading case on the approach to statutory interpretation of employment standards legislation, *Rizzo (supra*). In that case, the Court acknowledged there were many approaches to statutory interpretation. However, the Court relied on one approach:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in the grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament (at paragraph 21).
>
> …Since the E.S.A is a mechanism for providing minimum benefits and standards to protect the interests of employees, it can be characterized as benefits conferring legislation. As such, according to several decisions of this Court, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant. (at paragraph 36)

34. In my view, given that the "principle of consistent expression" does not entirely resolve the issue, the *Rizzo* decision assists with the proper interpretation where no unreasonable interpretation exists. Any doubts about the interpretation of section 51(1)(c) must be resolved in Mr. Burke's favour.

35. I am unable to conclude that the delegate erred in law in applying a variety of statutory interpretation principles in arriving at her conclusion.

Failure to observe principles of Natural Justice

36. B.C.S.C. contends that the delegate failed to observe the principles of natural justice when she failed to disclose to the parties that she would consider, and rely on, issues that were not argued before her by either party, including "rules of grammar", and a "societal recognition of different family forms".

37. B.C.S.C. does not allege that the delegate considered any facts, information or material that was not presented by the parties which would be a clear denial of natural justice. Rather, B.C.S.C. argues that it did not have the opportunity to respond to the delegate's use of "interpretive principles" in arriving at her conclusion.

38. In my view, it is not a breach of natural justice for a delegate to rely on "interpretive principles" in deciding an issue of statutory interpretation. In order to decide which of two contrasting views of the meaning of a paragraph of the *Act*, the delegate considered well known rules of statutory interpretation. In fact, B.C.S.C.'s appeal submission referred to the *Rizzo* decision, which was analyzed and relied on by the delegate in arriving at her conclusion. I find no basis for the employer's submission that the delegate failed to observe principles of natural justice.

39. I am satisfied that, even if there was a deficiency, that is, even if B.C.S.C.'s inability to make submissions on interpretive principles considered by the delegate was a failure to observe the principles of natural justice, such a failure would be cured by the present appeal proceedings, where the parties have had an opportunity to make full submissions. (*O'Reilly*, BC EST #RD 165/02, *Modern Logic Inc.*, BCEST #D151/02 and *Field*, BC EST #D034/03)

ORDER

40. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated January 26, 2007, be confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal