



An appeal

- by -

George Dumitrache
("Mr. Dumitrache")

- 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: Shafik Bhalloo

FILE No.: 2015A/26

DATE OF DECISION: April 16, 2015

DECISION

SUBMISSIONS

George Dumitrache

on his own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), George Dumitrache (“Mr. Dumitrache”) filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the “Director”) on January 5, 2015 (the “Determination”).
2. The Determination was made in respect of a complaint filed by Mr. Dumitrache, who alleged that Dynamic Raincity Facility Services Ltd. (“Dynamic”) contravened section 8 of the *Act* by inducing, influencing and persuading him to be available for work by misrepresenting the availability of work.
3. The Determination found Dynamic had not contravened the *Act*, no wages were outstanding and no further action would be taken.
4. Mr. Dumitrache has filed an appeal of the Determination, alleging the Director erred in law and failed to observe the principles of natural justice in making the Determination, and that new evidence has become available that was not available before the Determination was made.
5. On February 27, 2015, the Director provided to the Employment Standards Tribunal (the “Tribunal”) the section 112(5) “record” (the “record”). A copy was then delivered to Mr. Dumitrache and he was given the opportunity to object to its completeness. Mr. Dumitrache has not objected to the completeness of the “record”, and the Tribunal accepts it as complete.
6. By way of correspondence dated April 1, 2015, the Tribunal notified the parties, among other things, that no submissions were being sought from the other parties pending review of the appeal by the Tribunal, and that following such a review, all, or part, of the appeal might be dismissed.
7. I have decided this appeal is an appropriate case for consideration under section 114(1) of the *Act*. Therefore, at this stage, I will assess the appeal based solely on the Reasons for the Determination (the “Reasons”), the Appeal Form, the written submissions of Mr. Dumitrache, and my review of the “record” that was before the Director when the Determination was being made. Under section 114(1) of the *Act*, the Tribunal has the discretion to dismiss all or part of an appeal, without a hearing of any kind, for any of the reasons listed therein. If I am satisfied the appeal, or part of it, has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, Dynamic will, and the Director may, be invited to file further submissions. However, if it is found the appeal satisfies any of the criteria set out in section 114(1) of the *Act*, it will be dismissed.

ISSUE

8. Is there any basis to allow the appeal or should it be dismissed under section 114 of the *Act*?

THE FACTS

9. Dynamic operates a janitorial services company.
10. On February 1, 2013, Dynamic was contracted to provide janitorial services at a number of buildings that house provincial government offices in Victoria. Prior to Dynamic, another janitorial services company, Bee-Clean Building Maintenance Incorporated (“Bee-Clean”), provided janitorial services in the same offices and employed Mr. Dumitrache as a janitor.
11. On February 18, 2013, Mr. Dumitrache filed a complaint with the Employment Standards Branch (the “Branch”), alleging that Dynamic contravened section 8 of the *Act* by inducing, influencing and persuading him to be available for work by misrepresenting the availability of work (the “Complaint”).
12. In support of his contention, Mr. Dumitrache supplied the following evidence:
 1. A Record of Employment from his former employer, Bee-Clean, stating that his last day of work was January 31, 2013;
 2. A letter dated January 7, 2013 from Sue Smith, a government employee, providing a professional reference for Mr. Dumitrache;
 3. A direct deposit form of Dynamic executed by Mr. Dumitrache on or about January 9, 2013;
 4. A help wanted advertisement of Dynamic with a handwritten date of January 9, 2013;
 5. A letter, dated January 11, 2013, from Jennifer Mitchell, also a government employee, providing a professional reference for Mr. Dumitrache;
 6. A letter, dated January 29, 2013, from Ron Tannhauser, also a government employee, providing a professional reference for Mr. Dumitrache;
 7. An undated document received by the Branch on April 30, 2013, listing six (6) witnesses Mr. Dumitrache said would support his position or argument;
 8. An undated letter from Mr. Dumitrache to the Branch, received on April 30, 2013, in which Mr. Dumitrache asserts that Bob Basra (“Mr. Basra”), Vice President of Dynamic, offered him a job on four (4) occasions with a set commencement date for employment, but then told him on January 31, 2013 that he was retracting his offer of employment;
 9. An email from Bruce Edmonds (“Mr. Edmonds”), also a government employee with the Ministry of Education, stating that he conducted a quick site tour of the Ministry’s office space at 620 Superior Street for the new cleaning contractor, Dynamic, in January, 2013, and he saw Mr. Basra, Mr. Dumitrache and one other individual at the time;
 10. A document of Dynamic entitled “Pay Schedule”.
13. Based on my review of the “record”, on February 25, 2013, a delegate of the Director sent a Notice of Mediation to both Mr. Dumitrache and Dynamic, scheduling mediation on March 7, 2013. It would appear that mediation was not successful or did not take place, and the same delegate, on April 11, 2013, issued a Notice of Complaint Hearing, setting the matter for a hearing on June 4, 2013. However, the hearing appears to have been adjourned because a different delegate of the Director, on May 23, 2013, sent the parties an appointment scheduling a fact-finding meeting for the same date and time, on June 4, 2013, as the previously-scheduled hearing.

14. I am unable to determine from the “record” whether the fact-finding session proceeded with the second delegate on June 4, 2013.
15. I note there appears to be some gap in the “record” or communication between the delegate and Mr. Dumitrache after the scheduled June 4, 2013, fact-finding meeting until October 31, 2014, when a fourth delegate of the Director, by email, advises Mr. Dumitrache that she had been assigned to investigate the Complaint and that the third delegate who was dealing with the Complaint had accepted another position and was no longer available to work on the matter. There is scarce mention of the third delegate in the “record”, and there does not seem to be much evidence, if any, showing what precisely the third delegate did in terms of the investigation of the Complaint. In any event, it seems nothing much happened with respect to the investigation of the Complaint for a period of at least 17 months or more from the time the hearing was adjourned in June 2013.
16. Subsequently, at the request of the last delegate, Mr. Dumitrache, on November 18, 2014, sent the delegate written submissions in support of his Complaint by email. There appears to have been a telephone discussion between the delegate and Mr. Dumitrache subsequently and the delegate summarizes the substance of the discussion in the Reasons as follows:
- Mr. Dumitrache noted a help wanted advertisement posted by Dynamic. On January 4, 2013 Mr. Dumitrache faxed Mr. Basra a letter stating that he wanted to apply for the position. Later that day, Mr. Basra phoned Mr. Dumitrache and advised him that he should apply for the job.
 - On January 9, 2013 Mr. Dumitrache attended Dynamic’s office and submitted a job application.
 - Also on January 9, 2013, Mr. Basra attended Mr. Dumitrache’s work site and told him that he would keep his position. Mr. Dumitrache provided the names of six individuals who, he said, witnessed this conversation.
 - On January 14, 2013 Mr. Basra attended Mr. Dumitrache’s work site and told him that he was happy to be working together again.
 - On January 28, 2013, Mr. Basra called Mr. Dumitrache and told him that he would be working for his company as of February 1, 2013.
 - At some point later, the facility manager of the site informed Mr. Dumitrache that Mr. Basra had told him that another company had been subcontracted to provide janitorial services at the building. Mr. Dumitrache called Mr. Basra who confirmed this was so.
 - [Mr. Dumitrache] felt that he was tricked into accepting a job that was later taken from him. Had he known that he would not get the job, Mr. Dumitrache would have looked for work elsewhere.
17. The delegate also notes in the Reasons that she had a further conversation with Mr. Dumitrache on December 10, 2014, and Mr. Dumitrache said that he met with Mr. Basra several times before January 28, 2014 [sic], to discuss the job he had been offered and on January 28, 2014 [sic], Mr. Basra called him to advise that he had subcontracted the work to another company.
18. The delegate also notes in the Reasons that she contacted those witnesses that were available from the list of six (6) that Mr. Dumitrache supplied previously as well as Mr. Edmonds, the government employee, but no one was able to confirm that they witnessed Mr. Basra offer Mr. Dumitrache a job.

19. With respect to the evidence of Dynamic, the delegate notes in the Reasons that Dynamic contends that it did not offer Mr. Dumitrache employment, nor could it have offered him employment as it had subcontracted the responsibility for the site to another janitorial company, Radiant Professional (“Radiant”). In support of its contention, Dynamic provided a subcontractor agreement between Dynamic and Radiant, executed on January 30, 2013; and a letter from Mr. Basra to the Branch, dated May 9, 2013, in which Mr. Basra explained that the subcontractor was responsible for employing staff to provide services at the site, and that the application form Mr. Dumitrache submitted was required of all candidates.
20. After considering the submissions and evidence of both parties, the delegate considered all of the elements of section 8 relevant to Mr. Dumitrache’s allegations, and, in concluding that Dynamic did not breach section 8 of the *Act*, stated:
- ...I do not find that Mr. Basra’s advice to Mr. Dumitrache to apply for a job with Dynamic is persuasion, influence or inducement. There is no evidence to suggest that Mr. Basra advised Mr. Dumitrache that if he applied he would be offered the job or otherwise assured him that employment was a given. I do note the direct deposit form that Mr. Dumitrache executed. While this information is not typically part of the application process, I do not accept that simply because Mr. Dumitrache filled out a direct deposit form as part of his application process it is proof he had been offered a job.
21. The delegate therefore concluded that Dynamic did not misrepresent to Mr. Dumitrache the availability of work. In so concluding the delegate reasoned that while Mr. Basra may have informed Mr. Dumitrache that a job opening existed and encouraged him to apply, “the communication of the possibility of employment is not misrepresentation, however enthusiastic or promising”.
22. The delegate also concluded in the Reasons that there was no evidence of Mr. Basra and Mr. Dumitrache discussing employment in advance of Dynamic taking over the contract from the former contractor, Bee-Clean. While Mr. Dumitrache repeatedly said that he and Mr. Basra spoke about the terms and conditions of his anticipated employment, the delegate notes that she did not find Mr. Dumitrache’s evidence credible as Mr. Dumitrache regularly contradicted himself in the conversations he had with her and the written submissions he submitted. As an example, the delegate notes that Mr. Dumitrache, in his written submissions of November 20, 2014, said Mr. Basra offered him the job on January 28, 2013, but in her conversation with Mr. Dumitrache, the latter said that Mr. Basra called him on January 28, 2013, to tell him that he had subcontracted the job to another company.
23. Further, the delegate notes that in Mr. Dumitrache’s written statement, he states that he learned that Mr. Basra had contracted the job to another company when he reported for work and met with the facility manager in February, 2013. This is also inconsistent with Mr. Basra calling Mr. Dumitrache on January 28, 2013, to tell him that the job was contracted to another company.
24. The delegate also notes that Mr. Dumitrache repeatedly stated that he had six (6) witnesses to Mr. Basra offering him a job, but none of the individuals contacted by the delegate could confirm that they witnessed Mr. Basra offer him a job.
25. The delegate also notes that while Mr. Dumitrache argues that he relied on the misrepresentations of Dynamic and made himself available for work and did not look for other work, Mr. Dumitrache knew well in advance that his last day of employment with his previous employer, Bee-Clean, was January 31, 2013. Based on Mr. Dumitrache’s own evidence, he did not receive news that he had a job with Dynamic until January 28, 2013. Therefore, the delegate was not persuaded that Mr. Dumitrache’s failure to look for other work was based on any representations of Dynamic to him.

26. The delegate also notes that Mr. Dumitrache did not provide any evidence that he looked for other work, or turned down another offer in favour of working for Dynamic. What is more probable, according to the delegate, is that Mr. Dumitrache assumed that he would be given a job with Dynamic and that assumption, not any misrepresentation by Dynamic, led him to neglect his job search.
27. On the totality of the evidence of the parties, the delegate preferred the evidence of Dynamic. More particularly, the delegate accepted Dynamic's evidence that it had subcontracted the work with another party, which was responsible for hiring staff. Therefore, Dynamic was not in a position to offer Mr. Dumitrache employment. While Mr. Dumitrache presented the advertisement of Dynamic searching for staff, the delegate concluded that there is no evidence that Dynamic was looking for staff to provide janitorial services at the specific sites of concern to Mr. Dumitrache.
28. The delegate also reasoned in the alternative, relying upon the Tribunal's decision in *Re: Irving M. Kirsch* (BC EST # D463/99), that a mere offer of a job and a subsequent retraction of that offer does not constitute a breach of section 8 of the *Act*. Therefore, if Dynamic had made an offer and retracted it, that would not constitute a contravention of section 8 of the *Act*.

SUBMISSIONS OF MR. DUMITRACHE

29. Mr. Dumitrache advances all three (3) grounds of appeal under section 112(1) of the *Act*. With respect to the error of law ground of appeal, Mr. Dumitrache argues that the Director's "failure to provide a valid reason for rejecting appellant's evidence is an error of law".
30. With respect to the natural justice ground of appeal, Mr. Dumitrache's arguments are twofold. First, he argues that the delay occasioned by the Director in the investigation of the Complaint amounts to a denial of natural justice. He submits that the hearing of the Complaint, which was originally scheduled for June 4, 2013, was cancelled, and then the Complaint lingered on in the Branch's office in Nanaimo, and it was 22 months later when he was contacted by the last of several delegates who dealt with the Complaint.
31. He relies upon the decision in *Westhawk Enterprises Inc.* (BC EST # D302/98), wherein the Tribunal was critical of the Director's 20-month delay in reaching the determination after commencing the investigation of a complaint. In *Westhawk*, the employer provided information and witnesses to support the allegation of just cause to terminate the employment of its employee. The employer contacted the first delegate on several occasions, but received no response from him and concluded that the investigation had been abandoned or resolved in its favour until several months later on July 3, 1996, when a new delegate contacted the employer to again request information to support the employer's claim of just cause. After the employer responded in writing to the new delegate, reiterating the reasons for the dismissal and referring to the information and witnesses provided to the first delegate, the employer did not hear anything further from the delegate until August 1997 when a third delegate commenced an investigation and again requested the employer to provide information regarding the alleged dismissal for cause. The Tribunal, in granting the employer's appeal and dismissing the earlier determination against the employer, noted that the lack of explanation by the delegate for the delay was troubling, and the employer was indeed prejudiced because the delay made it impossible to properly conduct an inquiry into the question of whether there was cause for the employee's dismissal.
32. Based on the *Westhawk* decision, Mr. Dumitrache argues that the delay by the Director's delegates in the investigation and determination of his Complaint is akin to that in *Westhawk*, and he suffered prejudice, particularly because no one spoke to the witnesses he provided to the Branch in excess of two (2) years ago. In the circumstances, he argues that the Determination should be cancelled.

33. Also under the natural justice ground of appeal, Mr. Dumitrache questions the impartiality of each delegate who was involved in the investigation of the Complaint. He does not provide any evidence in support of this allegation.
34. With respect to the new evidence ground of appeal, Mr. Dumitrache states that Mr. Basra, in his written submissions to the delegate on May 9, 2013, says that a representative of Radiant met with him and this is a lie. He argues that the evidence of the lie is new evidence that should be considered on appeal.

ANALYSIS

35. As indicated previously, Mr. Dumitrache's appeal is based on all three (3) grounds of appeal under section 112(1) of the *Act*. I will deal with each ground under separate sub-headings below.

(i) *Error of Law*

36. With respect to the error of law ground of appeal, the British Columbia Court of Appeal's decision in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (BCCA) is very instructive and describes an error of law as follows:

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 reasonably be entertained; and
5. adopting a method of assessment which is wrong in principle.

37. In *Britco Structures Ltd.* (BC EST # D260/03), the Tribunal stated that the definition of error of law should not be applied so broadly as to include errors which are not in fact errors of law, such as errors of fact alone, or errors of mixed law and fact, which do not contain extricable errors of law. The Tribunal also added that unless there is an allegation that the delegate erred in interpreting the law when determining what legal principles are applicable, there could not be an allegation that the delegate erred by applying the incorrect legal test to the facts.

38. It is also important to note that the Tribunal has repeatedly stated that it does not have jurisdiction over questions of fact unless, of course, the matter involves errors on findings of fact, which amount to an error of law (see *Re: Pro-Serv Investigations Ltd.*, BC EST # D059/05). With respect to the criteria for determining findings of fact which amount to an error of law, the Tribunal has explained in *Re: Funk* (BC EST # D195/05), that the appellant would have to show that the factfinder made a "palpable and overriding error" or that the finding of fact was "clearly wrong" before an error of law will be found. However, where there is no evidence that the delegate "acted without any evidence or on a view of evidence that could not reasonably be entertained" or committed a "palpable or overriding error" or arrived at a "clearly wrong conclusion of fact", the Tribunal will be reluctant to substitute the delegate's findings of facts, even if it is inclined to reach a different conclusion on the evidence.

39. Having set out above some of the governing principles of law in relation to the error of law ground of appeal, I am not persuaded with Mr. Dumitrache's contention that the Director erred in law by failing to provide a valid reason for rejecting his evidence. To the contrary, I find that the delegate, in the Reasons, has provided sufficient justification for preferring the evidence of Dynamic over Mr. Dumitrache's and amply supported her conclusion that Dynamic did not breach section 8 of the *Act*. I have summarized the delegate's reasons

in paragraphs 20 to 28 inclusive under the heading “The Facts” in this decision. It is within the delegate’s authority as a decision maker to weigh the evidence, to make credibility findings (as this delegate did) and to reach conclusions of fact which, of necessity, will result in the delegate preferring the evidence of one party over the other. Therefore, I find there is no evidence of “palpable and overriding error” on the part of the delegate in reaching her conclusion that Dynamic did not breach section 8 of the *Act*.

40. I also wish to note that the gist of Mr. Dumitrache’s appeal is based on his challenge of the delegate’s credibility determinations and findings and conclusions of fact, which the *Act* does not allow. The Tribunal has no authority to consider appeals based on alleged errors in the findings of fact, unless such findings raise an error of law. In this case, I do not find there to be any evidence of an error of law arising from the delegate’s findings of fact.

(ii) Natural Justice

41. Mr. Dumitrache also contends that the Director breached the principles of natural justice in making the Determination because of the delay occasioned by the Director in both the investigation of the Complaint and its ultimate determination. He also questions the impartiality of each delegate involved in the investigation of the Complaint.

42. In *Imperial Limousine Service Ltd.* (BC EST # D014/05), the Tribunal explained the principles of natural justice as follows:

Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegate are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the Act and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party. (see *B.W.I. Business World Incorporated*, BC EST #D050/96.)

43. While the Director, at this stage, was not asked to respond to the substantive submissions of Mr. Dumitrache, I am indeed very troubled with the unexplained delay in the investigation and final determination of the Complaint. I have counted four (4) delegates having dealt with Mr. Dumitrache’s file, starting with the first delegate who was involved in the setting of the mediation and, thereafter, a hearing. For some unexplained reason, the hearing did not proceed but, instead, the matter was set for a fact-finding meeting with a second delegate. At some point, the second delegate was succeeded by a third delegate and, as pointed out previously, there is scarce information regarding the third delegate and what she did in terms of the investigation of the Complaint, if anything. There seems to be a lapse of over 17 months between the previously-scheduled hearing or fact-finding meeting and the next contact between the delegate (i.e. the fourth delegate) and Mr. Dumitrache. It would appear that the Director failed to observe the spirit and letter of section 2(d) of the *Act* which sets out one of several important purposes of the *Act*, namely, “to provide fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*”. However, unlike in the *Westhawk* decision, I am unable to find in this case that Mr. Dumitrache suffered prejudice due to the unexplained delay by the Director to the extent of making it impossible for the Director to conduct an inquiry into the subject of the Complaint, namely, whether Dynamic breached section 8 of the *Act*.

44. I also note that while the delegate may not have been able to contact all six (6) witnesses on the list provided by Mr. Dumitrache, the witnesses she was able to contact, including Mr. Edmonds (the government

employee), did not confirm or support Mr. Dumitrache's contention that Mr. Basra offered him employment with Dynamic. Furthermore, I am satisfied that the delegate made reasonable assessments of credibility in findings of fact in this case such that I do not feel it is appropriate to disturb the Director's ultimate decision based on the natural justice ground of appeal.

45. As for the allegation of Mr. Dumitrache questioning the impartiality of each delegate involved in the investigation of the Complaint, I do not find Mr. Dumitrache has discharged the onus on him to show evidence of bias on the part of any delegate involved in the investigation of the Complaint.

(iii) New Evidence

46. Mr. Dumitrache also contends that new evidence has become available that was not available at the time the Determination was being made. He states that the new evidence is that Mr. Basra, in his written submissions to the delegate on May 9, 2013, lied when he said that a representative of Radiant met with him (Mr. Dumitrache). I do not find that Mr. Dumitrache's dispute with the evidence of Mr. Basra that was before the delegate during the investigation of the Complaint and before the Determination was made, constitutes new evidence within the meaning of the test set out by the Tribunal in *Re: Merilus Technologies Inc.* (BC EST # D171/03) simply because Mr. Dumitrache disputes its veracity.
47. In the result, I find Mr. Dumitrache has not satisfied any of the grounds of appeal in section 112(1) of the *Act* and, I dismiss his appeal.

ORDER

48. Pursuant to section 114(1)(f) of the *Act*, I dismiss the appeal. Accordingly, pursuant to section 115 of the *Act*, the Determination, dated January 5, 2015, is confirmed.

Shafik Bhalloo
Member
Employment Standards Tribunal