Employment Standards TRIBUNAL

An appeal

- by -

Bernhausen Specialty Automotive Ltd.
("Bernhausen")

- 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: David B. Stevenson

FILE No.: 2015A/165

DATE OF DECISION: March 9, 2016

DECISION

SUBMISSIONS

Shelley-Mae Mitchell — counsel for Bernhausen Specialty Automotive Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the *"Act"*), Bernhausen Specialty Automotive Ltd. ("Bernhausen") has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on October 28, 2015.

2. The Determination found Bernhausen had contravened Part 3, sections 18 and 28, Part 4, section 40, Part 5, section 46, Part 7, section 58 and Part 8, section 63 of the *Act* in respect of the employment of Tyler W. Banner ("Mr. Banner") and ordered Bernhausen to pay Mr. Banner wages in the amount of $19,108.70 and to pay administrative penalties in the amount of $2,500.00. The total amount of the Determination is $21,608.70.

3. Bernhausen has appealed the Determination, alleging the Director erred in law and failed to observe principles of natural justice in making the Determination.

4. Bernhausen has applied under section 113 of the *Act* for a suspension of the effect of the Determination. In correspondence dated December 10, 2015, the Tribunal notified the parties that the Director had accepted a partial amount deposited by Bernhausen and undertaken not to engage in any collection action prior to the Tribunal making a decision on this appeal. On that basis, the Tribunal does not find it necessary to make any decision on the suspension application.

5. In other correspondence dated December 10, 2015, the Tribunal notified the parties, among other things, that no submissions were being sought from any other party pending a review of the appeal by the Tribunal and, following such review, all or part of the appeal might be dismissed.

6. The section 112(5) record (the "record") has been provided to the Tribunal by the Director and a copy has been delivered to Bernhausen, through its legal counsel. They have been provided with the opportunity to object to its completeness. No objection to the completeness of the record has been received and, accordingly, the Tribunal accepts it as being complete.

7. I have decided this appeal is appropriate for consideration under section 114 of the *Act*. At this stage, I am assessing the appeal based solely on the Determination, the reasons for Determination, the appeal, the written submission filed with the appeal, my review of the material that was before the Director when the Determination was being made and any other material allowed by the Tribunal to be added to the record. Under section 114(1) of the *Act*, the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed in the subsection, which reads:

> *114 (1) At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of the appeal if the tribunal determines that any of the following apply:*
>
> *(a) the appeal is not within the jurisdiction of the tribunal;*
>
> *(b) the appeal was not filed within the applicable time limit;*

> *(c) the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process;*
>
> *(d) the appeal was made in bad faith or filed for an improper purpose or motive;*
>
> *(e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;*
>
> *(f) there is no reasonable prospect that the appeal will succeed;*
>
> *(g) the substance of the appeal has been appropriately dealt with in another proceeding;*
>
> *(h) one or more of the requirements of section 112(2) have not been met.*

8. If satisfied the appeal or a part of it has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, the Director and Mr. Banner will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1), it is liable to be dismissed. In this case, I am looking at whether there is any reasonable prospect the appeal can succeed.

ISSUE

9. The issues in this case are whether the Director erred in law or failed to observe principles of natural justice in making the Determination and whether there is any reasonable prospect this appeal can succeed.

THE FACTS

10. Bernhausen operates a specialty automotive company in Langley, BC. Mr. Banner was employed by Bernhausen as a mechanic from November 25, 2012, to January 3, 2014, at a rate of $34.00 an hour. Mr. Banner was terminated on January 3, 2014, for what Bernhausen alleged was just cause.

11. Mr. Banner filed a complaint with the Director in June 2014, alleging he was owed wages from Bernhausen, comprising unpaid regular wages, overtime wages, annual vacation pay, compensation for length of service and reimbursement for the cost of work boots. In the complaint form, which was provided to Bernhausen, Mr. Banner alleges he worked "tons of hours 6 days a week" for Bernhausen that included working statutory holidays, for which he received no overtime.

12. Bernhausen kept no record of the hours worked by Mr. Banner. He was "generally paid for 80 hours every two weeks". In October or November 2013, Bernhausen implemented a punch clock system. None of Mr. Banner's records from that system were provided by Bernhausen during the complaint process or in response to a Demand for Employer Records issued September 12, 2014.

13. On December 5, 2013, Bernhausen issued three separate letters of warning to Mr. Banner for "unsatisfactory work performance" and "unsatisfactory work quality".

14. The Director conducted a complaint hearing on October 23, 2014. Mr. Banner testified on his own behalf and Satya Bernhausen ("Mr. Bernhausen") testified on behalf of Bernhausen. Mr. Banner presented three witnesses to support aspects of his claim.

15. Prior to the hearing, Bernhausen and Mr. Banner provided documents; they are contained in the record. The documents provided by Mr. Banner, comprising copies of his daily record of hours and a list of witnesses, were not delivered to Bernhausen until late in the day before the scheduled hearing date.

16. The Determination records Mr. Banner's evidence relating to these records as follows at page R3:

> With respect to his claim for overtime Mr. Banner testified he kept daily records of his hours and has done so for years. Mr. Banner recorded the number of hours he worked each day in a day timer, which he submitted. Mr. Banner worked long hours, often 14 to 16 hours per day, usually six and sometimes seven days a week. He generally had two 15 minute coffee breaks and an unpaid ½ hour meal break, which is accounted for in the record of hours worked. His records are only inclusive to November 3, 2013.

17. Bernhausen's position on Mr. Banner's overtime claim is recorded in the Determination at page R4 as follows:

> With respect to Mr. Banner's claim for overtime, Mr. Bernhausen refuted he worked the hours claimed and recorded in his day timer. However, the employer did not keep a daily record of hours worked.

18. The Determination records Bernhausen's response to Mr. Banner's claims as a global denial that he was owed any further wages.

19. The Determination contains no reference to any objection from Bernhausen to the evidence presented by Mr. Banner or to any request for an adjournment of the complaint hearing by Bernhausen.

20. The Director accepted Mr. Banner's records of hours worked and the evidence of his witnesses as corroborating his evidence of hours worked. The Director rejected much of Mr. Bernhausen's evidence, noting it contained some internal inconsistencies and that Bernhausen had an opportunity to address the hours of work issue by producing whatever time clock records it had, but did not do so. The Director drew an adverse inference from this omission.

21. On the claim for compensation for length of service, the Director noted the statutory obligation to pay compensation for length of service is discharged if the employer had just cause terminate, the burden of establishing just cause is on the employer and Bernhausen had not met that burden in its termination of Mr. Banner on January 3, 2014.

ARGUMENT

22. Bernhausen submits the Director committed two reviewable errors: an error in law relating to the decision on just cause; and a failure to observe principles of natural justice by accepting and relying upon the written evidence of hours of work provided by Mr. Banner and the evidence given by witnesses presented by Mr. Banner at the complaint hearing. I shall briefly summarize the arguments made on each ground.

Failure to observe principles of natural justice

23. This argument asserts the Director failed to observe principles of natural justice by accepting the written evidence of hours worked submitted by Mr. Banner at the complaint hearing, when this material had not been disclosed to Bernhausen prior to the hearing, and by hearing evidence from witnesses for Mr. Banner who had not been included on a list of potential witnesses submitted prior to the hearing.

24. It is submitted this process denied Bernhausen the opportunity to know the case against it and to provide an answer to it.

25. Bernhausen says the decision to accept the written evidence and the witnesses' evidence was inconsistent with the Employment Standards Branch's "procedural requirements", which instruct the parties to provide copies

prior to the hearing of any documents upon which they intend to rely and to provide a list of any persons intended to called as witnesses, together with a brief summary of their evidence.

26. Bernhausen also notes it took twelve months for the Director to issue the Determination.

Error of law

27. Bernhausen submits the Director erred in law by misapplying the principle of "condonation" to the question of whether Bernhausen had established just cause for the termination of Mr. Banner.

28. Bernhausen argues that the Director erred in not considering all of Mr. Banner's misconduct together when assessing whether just cause for his termination had been established.

29. Bernhausen submits the assessment of just cause made by the Director was "flawed" by failing to consider all of the incidents identified in the January 3, 2014, termination letter as a whole, instead of looking at the restaurant incident and the "poor work performance" occurring on January 2, 2014, individually.

ANALYSIS

30. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *Act*, which says:

> *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.*

31. A review of decisions of the Tribunal reveals certain principles applicable to appeals that have general application and have consistently been applied in considering appeals.

32. An appeal is not simply another opportunity to argue the merits of a claim to another decision maker. An appeal is an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds.

33. A party alleging a breach of principles of natural justice must provide some evidence in support of that position: *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.

34. The grounds of appeal listed above do not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the Director unless the Director's findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03.

Failure to observe principles of natural justice

35. I shall begin my assessment of this ground of appeal by addressing several assertions of fact made by Bernhausen in its submission. These assertions of fact are listed at pages 3 and 4 of the submission. Several of these assertions of fact are not supported by anything in the Determination or the record or in any evidence submitted in support of this ground of appeal. I refer specifically to the assertions that Bernhausen

expressed to the Director at the complaint hearing "an inability to proceed with the Hearing" immediately upon learning of the extensive amount of undisclosed evidence; that Bernhausen specifically informed the Director it had received no prior notice or disclosure with respect to Mr. Banner's documents and witnesses and had no opportunity to review this evidence; that the Director refused to adjourn the hearing (which implies Mr. Bernhausen requested an adjournment and was denied); that the Director advised Bernhausen the hearing would go ahead as scheduled; and that the evidence provided by Mr. Banner's witnesses was biased.

36. I do not accept any of these assertions as facts in this appeal. There is no proof of any of these assertions. Section 112(1) (c) does not come into play since these assertions cannot be characterized as "evidence". I will also note, in respect of the last matter, that allegations of bias impugn the integrity of the person against whom they are made and must be objectively demonstrated through clear and convincing evidence. Such allegations may not be based on some subjective perception or, in this case, on the mere fact that the persons accused of bias had personal relationships with Mr. Banner. As with the rest of the assertions made, there is no evidence, let alone the clear and cogent evidence required in support of such assertion.

37. The Tribunal has confirmed on many occasions that the content and scope of procedural fairness is highly contextual.

38. As a matter of law, it is the obligation of the Director to ensure the process is fair, both actually and perceptually. The Determination must show the parties have been accorded the procedural fairness required in the circumstances. In its appeal submission, Bernhausen has referred to the following statement form *Imperial Limousine Service Ltd.*, BC EST # D014/05:

> 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 delegates 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 *BWI Business World Incorporated* BC EST #D050/96)

39. I agree with Bernhausen that the above statement is an accurate, if brief, summary of the natural justice concerns that operate in the context of the natural justice ground of appeal in this case. The statement succinctly incorporates and expresses both the common law duty of fairness and the statutory duty of fairness arising from section 77 of the *Act* to which a party is entitled when engaged in processes under the *Act*. I do not accept, however, that Bernhausen was accorded "none of these rights" – as submitted in its appeal submission – contemplated by that summary.

40. I am satisfied Bernhausen was accorded the procedural rights required under the *Act*. Bernhausen was provided with a copy of the complaint form. That document set out the details of Mr. Banner's claim. Bernhausen knew, or ought to have known, the case being brought against them by Mr. Banner and which they would have to meet in their response. In particular, Bernhausen was made aware that Mr. Banner was claiming over $13,000.00 in overtime wages and alleging he worked "6 days a week and long hours". Bernhausen was given the opportunity to respond to that claim and to present their evidence on it to the Director at the complaint hearing. In that respect, their "evidence" comprised what were in effect several denials: a denial of the existence of a daily record of hours; a denial of the shop being open on days Mr. Banner claimed he worked; a denial of Mr. Banner's claim of hours worked; and a denial of knowledge of the whereabouts of the time cards used by Bernhausen for a period just prior to Mr. Banner's termination.

Witnesses who may have been able to shed some light on the claims made by Mr. Banner were not brought forward by Bernhausen.

41. In the circumstances of this case, I find the following comment from *Bero Investments Ltd.*, BC EST # D035/06, to be relevant and applicable:

> There is no set level of procedural protection that must accompany a function of the Director. What is required is that the parties know the case being made against them and be given an opportunity to reply. It is not required that a party be provided with full particulars of the claim. It is sufficient that the person under investigation be provided with enough details of the claim to make the opportunity to respond meaningful.

42. Bernhausen was provided with the opportunity described in that comment.

43. Further, the requirement that arises under both the statute and under common law principles of natural justice for the Director to make reasonable efforts to give a person under investigation an opportunity to respond is not characterized in absolute terms. As stated by the Tribunal in *Tina Argenti*, BC EST # D332/00:

> I start with the proposition that Section 77 does not, nor was it intended to, create a "discovery" obligation such as that found in the B.C. Supreme Court Rules whereby documents are presumptively inadmissible - and therefore cannot be relied on by a party - in the absence of prior disclosure. As well, it is acknowledged that under the *Act*, there is no specific legislative requirement that the Director disclose all information received by the Director to all parties involved.

44. The above comment has equal application to procedural fairness generally in the *Act*. The Tribunal has long echoed what courts have recognized in respect of procedural fairness before administrative tribunals: that there are no rigid rules of procedure which must be followed to satisfy the requirements of natural justice. Courts have been careful not to place the decision-making officials and tribunals in a procedural strait-jacket, and, in particular, not to require them to hold judicial type hearings in every case; the purpose of beneficent legislation must not be stultified by unnecessary judicialization of procedure: see *Downing v. Graydon*, (1978) 2 O.R. (2d) 292 (C.A.), at page 310.

45. To paraphrase the comments of the Court in *Downing v. Grayson* in the context of this ground of appeal: it suffers from the misconception that the right to know and to reply requires adherence to the full panoply of natural justice rights that might arise in a judicial context. This is not so. The appropriate procedure depends on the provisions of the statute and the circumstances in which it has to be applied. It is well established, however, that there is no "discovery" or "disclosure" obligation in the *Act*: see, for example, *Cyberbc.com AD & Host Services Inc. c.o.b. 108 Temp and La Pizzaria*, BC EST # RD344/02.

46. As well, while the comments in *Tina Argenti*, *supra*, were made in the context of investigations conducted by the Director, not complaint hearings, the proposition stated and the reference to the absence of legislative requirements obliging the Director to disclose are valid in the context of any part of the complaint process, including a complaint hearing.

47. The preparation by the Employment Standards Branch of a factsheet for complaint hearings does not create legal obligations that are not found in the *Act*. The disclaimer at the top of the factsheet for "Adjudication Hearings" – "[this] is not a legal document" – should make that obvious. One of the objectives of the *Act* is to provide a mechanism that allows appeals to be addressed with some informality, with the minimum possible reliance on lawyers, and at the lowest possible cost to the parties: see *Patrick O'Reilly*, BC EST #

RD165/02. While the factsheets prepared by the Employment Standards Branch may assist in that objective, they neither expand nor define the scope of procedural fairness under the *Act*.

48. In sum, a party is not necessarily entitled to prior disclosure of the evidence that may be presented to the Director. It is only required, as stated above in *Bero Investments Ltd.*, *supra*, that in each case is the party has been provided with sufficient particulars of a claim to make the opportunity to respond effective. I am satisfied, based on the Determination and the material before me that Bernhausen was given sufficient particulars of Mr. Banner's claim and provided with the opportunity to respond effectively.

49. It is unnecessary to address the comment made in the appeal submission about the amount of time taken by the Director to issue the Determination. There is nothing in the appeal that establishes an evidentiary foundation for a delay argument.

50. As indicated above, a party asserting a failure to observe principles of natural justice bears the burden of establishing such a breach and Bernhausen has not met that burden. I find this ground of appeal has no merit and no reasonable prospect of succeeding.

Error of law

51. The Tribunal has adopted the following definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam),* [1998] B.C.J. No. 2275 (B.C.C.A.):

> 1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment 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.

52. In *3 Sees Holdings Ltd. carrying on business as Jonathan's Restaurant*, BC EST # D041/13, the Tribunal considered the allowable scope of review on a decision by the Director on just cause, noting that the question of whether an employee has been terminated for just cause is a question of mixed law and fact requiring a conclusion about whether the facts of the case satisfy the relevant legal tests. As stated in *Britco Structures Ltd.*, *supra*, "a question of mixed fact and law may give rise to an error of law where a question of law can be extricated that has resulted in an error." By way of example, an error on a question of law would occur if the decision-maker applied the incorrect legal standard to the facts as found. In the context of dealing with questions where just cause is the issue, it is for the trier of fact to determine, first, whether the evidence reveals employee misconduct and, second, whether the circumstances in which the employee's misconduct occurred were sufficient to justify the employee's termination. Neither of these questions can be said to involve an extricable question of law that is reviewable by the Tribunal without establishing the Director committed an error of law, which in the circumstances requires Bernhausen to show the factual conclusions drawn by the Director, or the inferences drawn by those conclusions, are inadequately supported, or wholly unsupported, by the evidentiary record with the result there is no rational basis for the conclusions and so they are perverse or inexplicable: see *3 Sees Holdings Ltd. Carrying on business as Jonathan's Restaurant*, *supra*, at paras. 26 – 29.

53. In this appeal, Bernhausen does not seriously challenge the legal tests applied by the Director to the "just cause" questions, but says the Director's approach to the restaurant incident was a "misapplication of the principle of condonation". I disagree.

54. The Director's assessment of the restaurant incident did not involve an issue of condonation at all. The Director's approach to this incident involved a finding of fact about whether this incident, either alone or in combination with the others, established just cause for dismissal. That is the accepted and required approach.

55. Bernhausen has taken a view of the reasons of the Director that are not in accord with the Director's analysis. The Director found it was not necessary to determine if the restaurant incident occurred because Bernhausen treated the incident as warranting nothing more than a "verbal reprimand". If such a response can be viewed as discipline at all, it is discipline of the most minor nature, not warranting summary dismissal and adding little weight to the scales of "just cause". As the Director noted in the Determination, Bernhausen only treated this incident as being serious misconduct after Mr. Banner filed his complaint. It is not open to Bernhausen to attempt to recast the nature of this incident as something other than what it was when the termination took place; allowing such would be unfair, inappropriate and inconsistent with the objectives of efficiency and finality. There is no indication in any of the material that Bernhausen "condoned" the conduct of Mr. Banner on December 20 or that it ever viewed the matter (at least until the complaint was filed) as "serious misconduct" warranting immediate dismissal. What the evidence indicates is that Bernhausen viewed the incident as one warranting the response of a verbal reprimand. Nothing more. That is how the Director accepted and treated it. There is no error in the Director's view of the facts relating to the restaurant incident or in the analysis conducted on those facts.

56. In respect of the January 2 incident, there is nothing in the evidence that warranted a finding that incident was worthy of any consideration as supporting termination. As stated in the Determination: "Mr. Bernhausen claimed that following the issuance of these letters, on January 2, 2014, Mr. Banner displayed poor performance, during an argument between the parties. However, Mr. Bernhausen did not provide any details regarding this dispute. Mr. Banner was not disciplined for this incident at the time. The Employer **has not established** (emphasis added) that Mr. Banner failed to meet a performance standard for which he was previously warned that his employment would be terminated." The reasonable inference from that finding is that Bernhausen had not met the burden of showing the allegation relating to the events of January 2 warranted any discipline at all, let alone dismissal. The question of just cause requires an objective assessment of the conduct. The burden is on the employer to show just cause. A failure by the employer to provide objective evidence establishing the conduct warranted discipline, and ultimately termination for just cause, leaves a significant gap in the analytical framework which the Director must consider. The function of the Director is an objective one, based on the evidence provided. More specifically, an assessment of the "just cause" standard under the *Act* is not determined by the view taken by the employer of the conduct alleged to justify termination, but on the particular facts and circumstances of each case.

57. I find the Director made no error in assessing the issue of just cause in this case. The appeal represents no more than an attempt by Bernhausen to have the Tribunal take a different view of the facts and circumstances of the termination of Mr. Banner than was taken by the Director. No error of law has been shown in the findings of fact made by the Director. The Director made no error in the principles applied or in the analysis used to decide the issue of just cause. There is no merit to this ground of appeal and no reasonable prospect it will succeed.

58. The purposes and objects of the *Act* would not be served by requiring the other parties to respond to this appeal.

ORDER

59. Pursuant to subsection 115(1)(a) of the *Act*, I order the Determination dated October 28, 2015 be confirmed in the amount of $21,608.70, together with whatever further interest that has accrued under section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal