Employment Standards TRIBUNAL

An appeal

- by -

R. J. Somers Enterprises Ltd.

- of a process decision 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

TRIBUNAL MEMBER: Frank A.V. Falzon

FILE No.: 2003A/278

DATE OF DECISION: March 22, 2004

DECISION

SUBMISSIONS

Adam S. Albright	counsel for R.J. Somers Enterprises Ltd.
Alain Primeau	on behalf of himself
John Dafoe	on behalf of the Director of Employment Standards
Adele J. Adamic	counsel for the Director of Employment Standards

OVERVIEW

This is an appeal about a preliminary decision made by the Director's delegate ("the Delegate") concerning the process he intends to use to hear an employment standards complaint.

The issue the Appellant Employer seeks to raise before this Tribunal is whether it would be procedurally unfair for the Delegate to conduct an adjudication hearing by telephone conference in a case where, as here, credibility is in issue. The Delegate agreed to suspend his hearing pending receipt of the Tribunal's ruling on this point.

After considering original submissions filed on this appeal, I requested that the parties file additional submissions on two questions, described as follows in the Registrar's February 3, 2004 letter to the parties:

> The first issue is whether the Tribunal has jurisdiction to consider this appeal. This issue arises because s. 112 of the *Employment Standards Act* ("the *Act*") states that an appeal may be filed by a person served with a determination. The issue is whether a preliminary process ruling issued by the Delegate prior to issuing a final decision on the complaint is a "determination" within the meaning of s. 1(1) of the Act…
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> The second issue is whether, even if the Tribunal has jurisdiction to consider this appeal, the matter should be remitted back to the Delegate on the policy basis that the Tribunal should not at this stage rule on the merits of an interlocutory appeal of this nature….

For the reasons outlined below, I conclude that this appeal is not properly before the Tribunal under section 112 of the *Act*, and that it must therefore be dismissed under s. 114(1)(b). The *Act* does not give the Employer the right to appeal from a Delegate's preliminary process decision. The matter should therefore return to the Delegate to complete his hearing and issue a determination. The Tribunal's jurisdiction will be triggered only upon the Delegate completing his process and issuing a determination.

BACKGROUND FACTS

The following facts are taken from the written submissions of the parties. They do not appear to be in dispute for present purposes.

Alain Primeau (the Employee) was employed in Fort Nelson, British Columbia by R.J. Somers Enterprises Ltd. (the Employer) between October 28, 2002 and June 12, 2003. On the latter date, Mr.

Primeau either quit his position or was fired. On July 2, 2003, the Employee made a complaint to the Director of Employment Standards (the Director) under section 74(1) of the *Employment Standards Act* ("the *Act*").[1] He alleges that the Employer owes him approximately $15,000, the majority of which represents unpaid overtime.[2]

On August 12, 2003, the Branch sent a notice to the parties that the matter would be adjudicated, and requested available dates from them. The reference to "adjudication" reflects the reality that, since 2002, the Director has embarked upon the process of conducting oral hearings in certain types of complaints prior to making a determination. According to a *Fact Sheet* published by the Branch, the Branch may employ an adjudication hearing "to decide if an employer has contravened the *Employment Standards Act*. Employers and employees are given the right to be present and/or be represented at these hearings." From a process perspective, the adjudication process contrasts with the investigation process the Director had employed almost exclusively between 1995 and 2002, and that the Director has continued to employ in many cases since 2002. In the Director's investigation process, the employer and employee might never engage each other directly – the Director's only statutory obligation is to "make reasonable efforts to give a person under investigation an opportunity to respond".[3] Where adjudication is used, however, it is akin to a conventional administrative law oral hearing where both parties participate at the same time before the decision-maker.

The adjudication hearing date in this matter was set for September 11, 2003, apparently with the consent of the Employee. However, in late August 2003, the Employee moved to the Province of Quebec, where he had lived prior to taking up his employment. It appears that some time in late August or early September 2003, the Branch gave the parties notice that the adjudication hearing would be conducted via teleconference.

The position of counsel for the Employer, expressed both before and at the teleconference hearing before the Delegate, was that the Delegate's hearing could not fairly proceed by way of teleconference because credibility issues are central to its response to the complaint. The Employer's position was that the hearing should be adjourned until the Employee could make himself available for an in-person hearing, where he could be cross-examined in person and before the decision-maker.

THE DELEGATE'S PROCESS RULING

The Delegate dismissed the Employer's argument the parties' personal attendance was a pre-condition to a fair hearing:

> The Employer argues that they would suffer prejudice were the hearing to proceed by teleconference. They argue that to do so would amount to a failure of natural justice. It is correct that the right to natural justice includes the right to cross-examine opposing witnesses. It must also be understood that this is not an absolute right. It is also clear that a witness's demeanour, behaviour, etc. are all factors that can be considered in assessing credibility. In terms of the weight placed on these factors, however, I prefer the view of the Court in *Faryna v. Chorny*, [1952] 2 D.L.R. 354:

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[1] Section 74 of the Act provides that: "74(1) An employee, former employee or other person may complain to the director that a person has contravened (a) a requirement of Parts 2 to 8 of this Act, or (b) a requirement of the regulations specified under section 127(2)(l)."

[2] *Act*, s. 40.

[3] *Act*, s. 77, and see *J.C. Creations*, BCEST #RD317/03

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried the conviction of the truth. The test must reasonably subject the story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of probabilities which a practical and informed person would readily recognize in that place and those circumstances.

Despite this ruling, the Delegate granted the Employer's request for an adjournment "until such time as the Tribunal issues a decision on the appeal of my ruling and their request for an in-person hearing." As I will set out below, the Delegate should not have adjourned the matter because the Tribunal has no jurisdiction to consider his process ruling until such time as the Delegate issues a Determination.

THE SUBJECT MATTER OF THE EMPLOYER'S APPEAL

The Employer seeks to appeal to the Tribunal on the ground that the Director's preliminary procedural ruling is contrary to natural justice.

The Employer's position is that the Employee's claim for approximately $15,000 in unpaid overtime is "in part or totally fabricated". The Employer says that he has recovered time records from the Employee's computer, which records the Employee tried to erase, and which contradict the Employee's handwritten account to the Branch regarding overtime hours he alleges that he worked. The Employer intends, further to this position, to apply to the Director to refuse to accept or adjudicate the complaint under s. 76(3)(c) on the basis that it is not made in good faith:

> 76(3) The director may refuse to accept, review, mediate, investigate or adjudicate a complaint or may stop or postpone reviewing, mediating, investigating or adjudicating a complaint if:
>
> (c) the complaint is frivolous, vexatious or trivial or is not made in good faith.

The Employer emphasizes the amount of money at stake in this matter, and the fact that the Branch itself has deemed the matter appropriate for an oral hearing:

> …taking into consideration the circumstances of this case, which include issues of credibility, including two sets of records, the significant amount of the claim (approximately $15,000), the erasing or attempted erasing of computer records, the fact that the inquiry was deemed to require an oral hearing and that the Branch is bound by the principles of natural justice, the Delegate erred in these circumstances in denying the adjournment request so that the Employee attend in person.

The Employer states that there is no prejudice in adjourning the appeal pending the Employee's attendance. The Employer states that it has sued the Employee in Fort Nelson Small Claims Court for monies owing the Employer. It states: "the Employee will be returning to British Columbia in the near future to appear in Small Claims Court. The Employer consents to the scheduling of the hearing at the Branch to coincide with the Employee's return to British Columbia for appearance in Small Claims Court." The Employer does not say when the Employee will be returning to British Columbia.

THE EMPLOYEE'S RESPONSE

The Employee's written response to the employer's appeal makes it evident that he takes issue with the Employer's allegations. In addition to stating that he was fired and did not quit, the Employee alleges that: "During the course of my employment I kept a records [sic] of my overtime on the computer. *The employer modified hours worked and deleted some entry on the file*". This could be read as an allegation that the computer records relied on by the Employer to show a lack of veracity in the Employee were in fact manufactured by the Employer. If this is an accurate reading, it becomes apparent that both the Employer and the Employee will be making allegations that the other has acted in a patently dishonest fashion.

The Employee has filed a reply and counter-claim to the Employer's Small Claim Court action. Neither the Employer nor Employee has disclosed any date for a Small Claims Court hearing. In fact, the Employee states: "I just started a new job, I am a single parent [and] I cannot afford the cost to fly to attend an in-person hearing…."

THE DIRECTOR'S ORIGINAL POSITION

In her original submission, the Director submitted that natural justice is sufficiently flexible as to authorize the Director to hold a hearing by electronic means, even where credibility is in issue. The Director submitted as follows:

> At the time set for the hearing, a situation which continues to the date of the submissions, the geography of the parties is as follows: the complainant resides and is employed in Quebec, the employer is in Fort Nelson, British Columbia, the adjudicator is in Terrace, British Columbia and counsel for the Employer is in Vancouver. The demand of the employer's counsel for an "in person" hearing is not in accordance with section 2 of the Act in that it does not appear necessary for a "fair and efficient" process s. 2(d) [sic], nor does it contribute to the complainant's ability to "meet … work responsibilities".

The Director argued that, in this case there is a significant body of evidence on which credibility can be assessed "without the need to see the whites of the complainant's eyes." The Director also argued that the Small Claim Court action may be seen as an attempt by the employer to discourage the employee from pursuing his complaint, and should not be considered as a basis for require an in person hearing.

THE SUPPLEMENTARY SUBMISSIONS

In her supplementary submission of February 27, 2004, the Director submits that this appeal is not lawfully before the Tribunal, and that even if it were, the Tribunal should decline to consider it in order to avoid fragmenting this proceeding. The Director argues that while the Employer could certainly raise this natural justice issue once a Determination is issued, there is as yet no Determination and therefore no appealable issue. The Employer's March 12, 2004 letter takes issue with both submissions. The Employer argues that this matter is within the Tribunal's jurisdiction because "[the] initial Determination is part of the determination that the Delegate *will* make under either Section 76(3) or 79 of the *Employment Standards Act*" [emphasis added]. The Employer argues that, in light of this jurisdiction, the Tribunal should address the appeal to address the breach of natural justice.

DECISION

It is a fundamental principle of law that appellate administrative tribunals have only the jurisdiction assigned to them by statute. They do not acquire jurisdiction by consent. I find that this Tribunal has no jurisdiction to entertain this issue at this time, despite the Delegate's earlier agreement to adjourn his hearing pending a decision from the Tribunal on the Employer's natural justice argument.

The Tribunal's appellate jurisdiction is defined by section 112(1) of the *Act*:

> 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:
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> (a) the director erred in law;
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> (b) the director failed to observe the principles of natural justice in making the *determination*;
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> (c) evidence has become available that was not available at the time the *determination* was being made. [emphasis added]

Section 112(1) does not just define the grounds of appeal; it makes clear that the only person with a right of appeal is "a person served with a determination". The reality that an appeal is limited to an appeal from a determination is clear throughout the subsection, and is explicit in s. 112(1)(b), the ground relied on by the employer here.

Section 1(1) of the *Act* carefully defines "determination":

> "determination" means any decision made by the director under section 22(2), 30(2), 66, 68(3), 73, 76(3), 79, 100 or 119.

It will be noted that the definition of "determination" speaks in the past tense. A determination is any decision *made* by the director under the listed sections. Obviously, it does not, and could not logically, refer to a decision that a person "will" make.

From among the sections listed in the above definition, the only section that is potentially operative here is s. 79:

> 79(1) If satisfied that a person has contravened a requirement of this Act or the regulations, the director may require the person to do one or more of the following:
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> (a) comply with the requirement;
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> (b) remedy or cease doing an act;
>
> (c) post notice, in a form and location specified by the director, respecting
> (i) a determination, or
> (ii) a requirement of, or information about, this Act or the regulations;
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> (d) pay all wages to an employee by deposit to the credit of the employee's account in a savings institution;
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> (e) employ, at the employer's expense, a payroll service for the payment of wages to an employee;
>
> (f) pay any costs incurred by the director in connection with inspections under section 85 related to investigation of the contravention.

(2) In addition to subsection (1), if satisfied that an employer has contravened a requirement of section 8 or 83 or Part 6, the director may require the employer to do one or more of the following:
   (a) hire a person and pay the person any wages lost because of the contravention;
   (b) reinstate a person in employment and pay the person any wages lost because of the contravention;
   (c) pay a person compensation instead of reinstating the person in employment;
   (d) pay an employee or other person reasonable and actual out of pocket expenses incurred by him or her because of the contravention.

(3) In addition to subsection (1), if satisfied that an employer has contravened section 39, the director may require the employer to limit hours of work of employees to the hours or schedule specified by the director.

(4) The director may make a requirement under subsection (1), (2) or (3) subject to any terms and conditions that the director considers appropriate.

(5) The director must serve an employer with notice of a requirement imposed under subsection (1), (2) or (3), including any terms and conditions imposed under subsection (4).

(6) A person on whom the director imposes a requirement under this section must comply with that requirement.

(7) If the director requires a person to pay costs referred to in subsection (1) (f), the amount required to be paid is a debt due to the government and may be collected by the director in the same manner as wages.

(8) If satisfied that the requirements of this Act and the regulations have not been contravened, the director must dismiss a complaint.

The decisions listed in s. 79 are all decisions that would be made following the completion of an investigation, hearing or some other process. They are all decisions regarding whether a person has contravened the substantive requirements of the *Act* in some way, and are usually accompanied by a remedy.

In my opinion, it would be contrary to the plain language of the word "determination" to expand it to include any preliminary process decision that the director makes along the way to making a decision listed in section 79.

This plain language approach is supported by legislative policy. A key purpose of the *Act* is to provide fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*: s. 2(d). It does not enhance efficiency to encourage interlocutory appeals on procedural questions, which appeals would unnecessarily fragment a dispute and thereby prolong its final resolution. This has long been recognized in criminal and administrative law cases where, despite the courts' plenary jurisdiction, it is rare for a court to entertain an interlocutory judicial review on a fairness question.[4] Brown and Evans, *Judicial Review of Administrative Action in Canada* (2003) accurately summarize the law at p. 3-58:

> …courts now generally defer a determination of an allegation that an administrative decision-maker has no jurisdiction over a matter or has breached the duty of fairness until the administrative process is complete. Not only does this avoid fragmentation of the issues and possibly unnecessary litigation, but also permits the reviewing court to have the benefit of a complete record….

[4] See for example *Vancouver (City) v. British Columbia (Assessment Appeal Board),* [1996] B.C.J. 1062 (C.A.)

The plain language of s. 112(1) supports the policy by ensuring that the Delegate is allowed to complete his process without interruption, such that it may be unnecessary for the Employer even to raise this ground on an appeal because the Employer has been successful in the result. If, on the other hand, the Employer is ultimately unsuccessful and a determination is made against him, the Employer's appeal can proceed on all appealable grounds, including the natural justice ground, which can then be adjudicated by this Tribunal all at once and based on a complete record.

This policy serves not only the interests of efficiency, but also the interest of properly adjudicating fairness questions. The question whether the Delegate could fairly determine credibility questions in a teleconference should not be decided based on a sparse record and abstract discussion. From a decision-making perspective, an issue such as arises here is much more appropriately addressed in light of that wonderfully elegant (albeit sometimes frustrating) common law phrase "all of the circumstances." In truth, the question whether a process was "fair" can really only be decided by taking all the circumstances into account. It can only properly be done in the context of concrete facts rather than engaging in a degree of speculation or guesswork about what might or might not happen at the hearing. In *Knight v. Indian Head School Division (No. 19)*, [1990] 1 S.C.R. 653 at para. 46, the Supreme Court of Canada acknowledged the wisdom of Lord Morris who said this in 1973:

> Natural justice is but fairness writ large and juridically. It has been described as 'fair play in action'. Nor is it a leaven to be associated only with judicial or quasi-judicial occasions. But as was pointed out by Tucker L.J. in *Russell v. Duke of Norfolk* [1949] 1 All. E.R. 109, 118, the requirements of natural justice must depend on the circumstances of each particular case and the subject matter under consideration. [Emphasis added.][5]

In my view, the question as to how the Employee ought to be questioned is for the Delegate to contend with at this stage. The Delegate is in control of his process prior to making a Determination. The Delegate understands that he has an obligation to provide a fair hearing. If, after issuing his determination, any party concludes that the Delegate breached that party's right to a fair hearing, that party will have a right to appeal to this Tribunal. No useful purpose would be served by having this Tribunal at this stage provide what amounts to a declaratory opinion on partial facts.

Finally, I would state, for completeness, that I would have remitted this matter back to the Director without deciding the natural justice question even if I found that the Tribunal had jurisdiction to entertain this appeal. Section 115(1) allows the Tribunal to refer a matter back to the Director after considering whether the grounds of appeal have been met. I would have exercised that power in this case on the basis that, for the policy reasons articulated above, the natural justice argument is not yet ripe for decision by the Tribunal.

[5] See also *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817

ORDER

The appeal is dismissed under s. 114(1)(b) of the *Act* as being outside the Tribunal's jurisdiction.

Frank A.V. Falzon
Member
Employment Standards Tribunal