Employment Standards TRIBUNAL

An appeal

- by -

Renshaw Travel Ltd.
("Renshaw")

- 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.: 2008A/28

DATE OF DECISION: May 9, 2008

DECISION

SUBMISSIONS

Don Renshaw	on behalf of Renshaw Travel Ltd.
Dori Griffin	on her own behalf
Andres Barker	on behalf of the Director

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") brought by Renshaw Travel Ltd. ("Renshaw") of a Determination that was issued on February 1, 2008 by a delegate of the Director of Employment Standards (the "Director"). The Determination found that Renshaw had contravened Part 7, Section 58 of the *Act* in respect of the employment of Dori Griffin ("Griffin") and ordered Renshaw to pay Griffin an amount of $3,960.31, an amount which included wages and interest.

2. The Director also imposed an administrative penalty on Renshaw under Section 29(1) of the E*mployment Standards Regulation* (the "*Regulation*") in the amount of $1000.00.

3. The total amount of the Determination is $4,960.31.

4. In this appeal, Renshaw says the Director erred in law in finding Griffin took no holidays during the period September 13, 2005 to September 11, 2006. Renshaw says new evidence has come available relating to that error. Renshaw also contends the mediator was biased in favour of Griffin. The arguments in support of this allegation, however, indicate Renshaw is actually making the allegation against the delegate who conducted the complaint investigation and made the Determination.

5. Renshaw is asking the Tribunal to cancel the Determination.

6. It should be noted here that Renshaw, in a reply submission delivered to the Tribunal on April 21, 2008, expresses disagreement with the finding that Griffin was employee of Renshaw under the *Act*. This is not a matter raised in the appeal. It is a new matter raised in a final reply submission delivered approximately six weeks after the statutory time limits for filing an appeal of the Determination expired. No request for an extension of time to appeal this matter has been made to the Tribunal. It does not comply with the requirements of the *Act* for filing an appeal. The cumulative effect of these defects is that this matter will not be considered in the context of this appeal. This appeal will be confined to those matters that were filed in a timely way and properly raised in the appeal. Even if I considered this matter, it is improbable that I could reach a different result than found in the Determination. A reading of the Determination and of the submission made by Renshaw on this question confirms this view. A finding related to a person's status as an employee under the *Act* is grounded primarily in the facts and the grounds of appeal do not provide for an appeal based on alleged errors of fact.

7. Renshaw seeks an oral hearing. The reason for an oral hearing would be to allow Renshaw to call witnesses in support of the assertion that Griffin took holidays during the calendar year 2006.

8. The Tribunal is not required to hold an oral hearing. Section 103 of the *Act* incorporates several provisions of the *Administrative Tribunals Act*, SBC 2004, ch. 45, including section 36 which states, in part: ". . . the tribunal may hold any combination of written, electronic and oral hearings". The Tribunal has reviewed the material and the parties' submissions and in its discretion has concluded this appeal can be decided on the written material in the appeal file.

ISSUE

9. The issues in this appeal are whether Renshaw can introduce new evidence in this appeal and, if so, whether that evidence shows the Director erred in law in making the Determination. The allegation of bias raises a natural justice issue.

THE FACTS

10. Some reference to the facts is required.

11. Renshaw is a travel agency. Griffin was employed by Renshaw as a travel agent from September 13, 2004 to March 30, 2007, when she terminated her employment. She was paid by way of a commission on the earnings Renshaw received from suppliers and/or airlines.

12. Griffin filed a complaint under the *Act* that she had not received annual vacation pay during employment with Renshaw. She claimed entitlement to vacation pay for the full period of her employment – September 13, 2004 to March 30, 2007.

13. In response to the complaint, Renshaw took the position that Griffin was not an employee under the *Act*, but if she was, she had received her full entitlement to vacation pay. The complaint investigation addressed those two matters and considered as well whether if Griffin was an employee there were other contraventions of the *Act* related to her employment.

14. The Director found Griffin was an employee under the *Act*. That finding, although disputed in Renshaw's final submission, is not appealed.

15. The Director concluded, applying Section 80(1) of the *Act*, that any wage entitlement for Griffin was limited to wages that should have been paid between October 1, 2006 and March 30, 2007.

16. On the matter of Griffin's vacation pay entitlement, the Director considered both Section 57 and Section 58 of the *Act*, noting that Section 57 establishes an employee's entitlement to annual vacation and Section 58 establishes an employee's entitlement to annual vacation pay. After referring to those two provisions, the Director made the following statement:

> Following the timelines in Sections 57, 58 and 80, I am limited to examining whether or not Griffin is owed annual vacation pay in an amount of at least 4% of her total earnings for the period September 13, 2005 to March 30, 2007. Vacation pay on Griffin's total earnings from September 13, 2004 to September 12, 2005 were payable when Griffin took vacation no later than September 11, 2006. I accept she did not take any vacation time during this period, however, as September

> 11, 2006 is outside the statutory limit (October 1, 2006 to March 30, 2007), I am unable to order payment of vacation pay on Griffin's earnings prior to September 13, 2005.

17. It is appropriate at this stage to point out that the comment which is the object of the alleged error of law and the basis for seeking to introduce new evidence is in the final sentence of the above statement. I will point out that the "period" to which the comment relates is that period which the Director finds to be outside the statutory claim period.

18. In the complaint process, Renshaw argued that Griffin's annual vacation pay was included in her commission wage when it was paid each month. The Director, quite correctly, found that as a matter of law under the *Act* Renshaw was not permitted to include annual vacation pay in its employees' commission amounts nor was it permitted to pay annual vacation pay in each pay period unless agreed in writing between Renshaw and the affected employee, and there was none in this case.

19. The Director found that Griffin's regular wages consisted of commission payments of 50% or her sales revenue and that she was entitled to have her annual vacation pay calculated on 6% of her earnings from September 13, 2005 to March 30, 2007. The Director found Renshaw had failed to pay annual vacation pay as required by the *Act* and had contravened Section 58.

20. The Director found that Renshaw had failed to pay those wages within the time required in the *Act* and had consequently contravened Section 18 of the *Act*.

ARGUMENT

21. The appeal is quite straight forward. Renshaw says the comment of the Director – that Griffin took no vacation in the period September 13, 2004 and September 11, 2006 – is an error of law which should result in the cancelation of the Determination. Renshaw says new evidence shows she took the holidays due to her, and more.

22. Griffin and the Director have filed replies to the appeal.

23. Griffin does not dispute she took vacation time off during the period, but says any wages she received during that time off would have been for work previously performed for which payment was delayed.

24. The Director says the appeal raises no error of law, but rather challenges findings of fact. The Director objects to the introduction of the new evidence, contending the information is not new and is precisely the kind of information Renshaw should have submitted during the complaint process.

25. Renshaw has delivered a final submission. It does not advance the merits of the appeal. It alleges Griffin has made several untrue statements; it impugns Griffin's motivation for filing the complaint; it bemoans the effect of employment standards legislation on commissioned travel agents; and, as indicated above, it belatedly questions the correctness of the decision to find Griffin to be an employee under the *Act*.

ANALYSIS

26. As a result of amendments to the *Act* which came into effect on November 29, 2002, 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 made.*

27. The Tribunal has consistently indicated that the burden in an appeal is on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds.

28. The *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law (see *Britco Structures Ltd.*, BC EST #D260/03). Renshaw says the finding made in the Determination that Griffin took no vacation in the "period" is an error of law justifying cancellation of the Determination.

29. Before addressing the substantive elements of the appeal, I will dispose of the allegation of bias.

30. The allegation of bias is based on a general assertion that the delegate "favoured" Griffin. An example of this assertion is provided. Renshaw says: "she [the delegate] would not accept the paperwork and statements I provided as sufficient evidence but at the same time she used the said information to determine Renshaw Travel pay the claimant 6% instead of the 4% a person employed for 2-1/2 years would be eligible for". Renshaw also says the delegate, at one point, in response to a comment from Griffin about not being there "for the money", said, "we are here to make you money".

31. It is trite that a party alleging bias against the Director, or in this case one of his delegates, has the burden of providing clear and cogent evidence that will allow the Tribunal to make objective findings of fact demonstrating actual bias or a reasonable apprehension of bias: see *Dusty Investments Inc. d.b.a. Honda North*, BC EST #D043/99. Further, a consideration of a bias allegation against the Director, or one of his delegates, which is predominantly fact driven, must address and reflect the purposes of the legislation and the practical reality of the function of the Director and his delegates under the *Act*: see *Director of Employment Standards (Re Milan Holdings Inc.)*, BC EST #D313/98.

32. The Courts have rarely explored the definition of bias, usually preferring to say what it is not, rather than what it is. The Supreme Court of Canada has offered these comments on the meaning of bias in *R. v. R.D.S.*, [1997] S.C.J. No. 84 at para. 105:

> Bias denotes a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues. A helpful explanation of this concept was provided by Scalia, J. in *Liteky v. U.S.*, 114 S.Ct. 1147 (1994), at p. 1155:

> The words [bias or prejudice] connote a favorable or unfavorable disposition or opinion that is somehow wrongful or inappropriate, either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess (for example, a criminal juror who has been biased or prejudiced by receipt of inadmissible evidence concerning the defendant's prior criminal activities), or because it is excessive in degree (for example, a criminal juror who is so inflamed by properly admitted evidence of a defendant's prior criminal activities that he will vote guilty regardless of the facts).
>
> Scalia, J. was careful to stress that not every favourable or unfavourable disposition attracts the label of bias or prejudice. For example, it cannot be said that those who condemn Hitler are biased or prejudiced. This unfavourable disposition is objectively justifiable - in other words, it is not "wrongful or inappropriate": *Liteky*, supra, at p. 1155.

33. Renshaw has not provided any evidence that would demonstrate to an objective observer that the delegate in this case was biased in the above sense against them.

34. Under the *Act*, if an investigation is conducted, findings of fact must be made and, as a practical reality, those findings will be adverse to the interests of one of the parties. In making findings of fact, the Director may accept some evidence as cogent and disregard other evidence, even if that evidence comes from the same source. Accepting some of the information provided by Renshaw does not require the Director to accept all of it. The converse is also true. The reality is that a fair and reasonable consideration of the information provided by any party may result in some of that information being accepted and some rejected. That reality is part of the complaint process, but it does not make the delegate involved in the process bias against any party because of it.

35. The comment concerning making Griffin money is, if stated in that context, unfortunate, but not demonstrative of bias. Every successful claim "makes" the complainant some money – not necessarily because the delegate investigating the complaint is predisposed to that result, but because the *Act*, applied to the facts, compels that result.

36. Turning to the substantive issues raised by the appeal, I will first address the attempt by Renshaw to introduce new evidence into the appeal.

37. The Tribunal has taken a relatively strict view of what will be accepted as new, or additional, evidence in an appeal, indicating in several decisions that this ground of appeal is not intended to be an invitation to a dissatisfied party to seek out additional evidence to supplement an appeal if that evidence could have been acquired and provided to the Director before the Determination was issued. The Tribunal has discretion to allow new or additional evidence. In addition to considering whether the evidence which a party is seeking to introduce on appeal was reasonably available during the complaint process, the Tribunal considers whether such evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it is reasonably capable of belief, and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination (see *Davies and others (Merilus Technologies Inc.)*, BC EST #D171/03 and *Senor Rana's Cantina Ltd.*, BC EST #D017/05).

38. The evidence submitted with this appeal should not be accepted. While the document itself seems to be a summary of information created after the fact, the information on it relating to time off taken by Griffin in 2006 was clearly available to Renshaw during the complaint process. As well, Renshaw has not shown that this "new" evidence to be either relevant or probative. The challenged comment made in the

Determination was made in respect of a period outside the statutory claim time limit and is entirely irrelevant to whether Griffin was owed annual vacation pay within the statutory claim period.

39. In addition, the fact that Griffin might have taken holidays in 2006, and that the Director might have been wrong to state otherwise, is unrelated to whether Griffin received annual vacation pay for the period September 2005 to March 30, 2007.

40. Even it were allowed into the appeal, the best that can be said about this new information is that it shows Griffin was given vacation time off in 2006, but as the Determination indicates, there are two different statutory annual vacation entitlements found in the *Act*; one is found in Section 57 and the other in Section 58. The former establishes entitlement to annual vacation time off; the latter establishes entitlement to annual vacation pay.

41. Vacation time off under Section 57 is without pay. Under Section 57(2), an employer is required to ensure an employee takes annual vacation to which they are entitled under that section. However, the employer is also obliged under Section 58 of the *Act* to pay to the employee his or her annual vacation pay, "at least 7 days before the beginning of the employee's annual vacation". Meeting the statutory obligation to ensure employees are given annual vacation time off does not lead to a conclusion that an employee has been paid annual vacation pay.

42. With or without the "new" evidence, the answer to this appeal is the same.

43. The Director found that Griffin had not been paid annual vacation pay for the September 2005 to March 30, 2007 period. That is a finding of fact. No error of law in relation to that finding of fact has been demonstrated. As a result, it is not a matter which may be the subject of an appeal under Section 112.

44. For the above reasons, the appeal is dismissed.

ORDER

45. Pursuant to Section 115 of the *Act*, the Determination, dated February 1, 2008, is confirmed in the amount of $4,960.31, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal