Employment Standards TRIBUNAL

An appeal

- by -

Robert Craig
("Craig")

- 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.: 2010A/32

DATE OF DECISION: May 19, 2010

DECISION

SUBMISSIONS

Robert Craig	on his own behalf
Rajiv K. Gandhi	Counsel for Victoria Ford Alliance Ltd. (carrying on business as Suburban Motors)
Ian MacNeill	on behalf of the Director of Employment Standards

OVERVIEW

1. This decision addresses an appeal filed under Section 112 of the *Employment Standards Act* (the *"Act"*) by Robert Craig ("Craig") of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on January 29, 2010.

2. The Determination was made in respect of a complaint filed by Craig who alleged his former employer, Victoria Ford Alliance Ltd. carrying on business as Suburban Motors ("Suburban Motors") had contravened the *Act* by failing to pay annual and statutory holiday pay. Craig also claimed length of service compensation, alleging Suburban Motors had terminated his employment by substantially altering conditions of his employment.

3. The Determination found that Suburban Motors had contravened the *Act* by failing to pay Craig annual vacation pay and ordered Suburban Motors to pay Craig an amount of $26,291.90, an amount which included wages and interest[1]. The Director also imposed administrative penalties on Suburban Motors under Section 29(1) of the E*mployment Standards Regulation* (the *"Regulation"*) in the amount of $500.00.

4. The Determination dismissed Craig's claim for length of service compensation, rejecting the contention that his employment should be considered terminated as a consequence of a substantial alteration to conditions of that employment.

5. In this appeal, Craig says the Director erred in law and failed to observe principles of natural justice in making the Determination on his claim for length of service compensation.

6. The Tribunal has a discretion whether to hold an oral hearing on an appeal: see Section 36 of the *Administrative Tribunals Act* ("*ATA*"), which is incorporated into the *Employment Standards Act* (s. 103), Rule 17 of the Tribunal's *Rules of Practice and Procedure* and *D. Hall & Associates v. Director of Employment Standards et al.,* 2001 BCSC 575. None of the parties seeks an oral hearing on this appeal. In this case, the Tribunal has decided an oral hearing is not necessary and this appeal can be decided on the submissions and the material submitted by all of the parties, including the section 112 (5) Record filed by the Director.

ISSUE

7. The issue here is whether the Director erred in law or failed to observe principles of natural justice in determining Craig's employment was not terminated by a substantial alteration in conditions of employment.

[1] Suburban Motors has also appealed the Determination. That appeal is the subject of a separate decision.

THE FACTS

8. Suburban Motors operates three automobile dealerships in Victoria, B.C. Craig was employed at one of the dealerships as a Financial Services Representative from January 28, 2006, until June 3, 2009. He was employed under a contract of employment, the compensation details of which are included in the section 112(5) Record.

9. The principal focus of the assertion by Craig that his employment should be considered terminated was a reduction to his commission rate in April 2009 from 7.5% to 6%. There was no disagreement on the evidence that such a reduction occurred. The analysis in the Determination flowed from that alteration.

10. The Director found the reduction was a variation of a material term of Craig's employment or, in the vernacular of section 66, was an alteration of Craig's terms and conditions of employment. The Director examined the effect on Craig's earnings of this alteration by comparing the average income earned by Craig over the first three months of 2009 with the average income he earned over the last two months of his employment and found the 1.5% reduction in the commission rate translated to a reduction of his average income over those last two months of $1,166.76, or 11.68%.

11. The Director found that amount of a reduction in Craig's average earnings was not substantial and, consequently, did not invoke section 66 of the *Act*.

ARGUMENT

12. Craig argues the Director erred by calculating the effect of the 1.5% reduction in his commission rate on the first five months of 2009.

13. Craig says there were two other ways of calculating the effect of the rate reduction that would have provided a more accurate reflection of the actual reduction in his earnings.

14. First, he says the Director should have developed the analysis on a longer period of time, referring specifically to the commission calculations provided to the Director by Suburban Motors in the complaint hearing. Those calculations covered a period from January 2008 through May 2009. Craig says if those calculations are used, his average earnings from January 2008 to March 2009, at 7.5% commission rate, were 11,248.71, while his average earnings over the last two months were $8,820.78 – a reduction of 21.6%.

15. Alternatively, Craig says the Director could have compared his earnings over the same periods in 2008 and 2009. Applying that analysis, Craig says the reduction in his earnings from April and May 2008, at 7.5%, and his earnings in the same months of 2009 was almost 54%.

16. Craig also says the delay in having his complaint resolved does not meet principles of natural justice. He says the lengthy delay has caused him and his family considerable financial and emotional hardship.

17. Suburban Motors have filed a response to Craig's appeal. They object to the inclusion with the appeal of an "annotated version" of a document provided to the Director during the complaint hearing. They also object to certain allegations made in the appeal which they say are simply irrelevant, inadmissible and unsubstantiated assertions and allegations.

18. On the merits of the substantive issue raised in the appeal – the refusal of the Director to find Craig's employment was terminated – Suburban Motors says the method of calculation used by the Director to

calculate the effect of the commission rate reduction on Craig's actual earnings was not incorrect, but was consistent with the methodology established in section 63(4) to calculate length of service compensation.

19. Suburban Motors says the methods of calculation suggested by Craig are neither correct nor appropriate because: they fail to acknowledge commission earnings are dependent on other, external, economic factors; they are premised on speculation concerning the nature of the automobile industry; they do not acknowledge Craig was receiving a commission in excess of his contractual rate in 2008; and they are not in keeping with section 63(4) of the *Act*.

20. The Director has also filed a response to this appeal, contending the examples used by Craig to argue for the appropriateness of an earnings analysis over a longer period of time are not supported by any kind of documentation. The Director says Craig has not shown there are any employment standards cases which find a fifteen month period is an appropriate period for review.

21. The Director says the five month period in 2009 was chosen because it was considered reasonable and appropriate.

22. Finally, the Director makes no comment on the natural justice argument made by Craig as the delegate responding on the appeal was not involved in the particular matter about which Craig complains.

23. In his final reply, Craig has sought to address the documentary deficiencies referred to in the Director's reply, providing information relating to his contention that a longer period should have been used in analysing the effect of the commission rate reduction.

24. In responding to the submission of Suburban Motors, Craig agrees with the comment made by counsel for the employer that "commissions are generally dependent entirely on external factors" and submits since that is the case, the effect of the reduction in his commission rate should have been analyzed without reference to these external factors, but simply on an analysis of its obvious effect on his earnings, which is that before the reduction, he earned $7.50 on every $100 of sales and $6.00 after the reduction – a decrease of 20% in his wage rate.

ANALYSIS

25. 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.*

26. 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. A party alleging a denial of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.

27. I am able to address Craig's natural justice ground without the need for much analysis. The Tribunal has briefly summarized the natural justice principles that typically operate in the complaint process, including this complaint, in *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.

28. Provided the process exhibits the elements of the above statement, it is unlikely the Director will be found to have failed to observe principles of natural justice in making the Determination. On the face of the information provided to the Tribunal in this appeal Craig was provided with the opportunity required by section 77 of the *Act* and principles of natural justice to present his position and to respond to the position presented by Suburban Motors.

29. Craig has not shown in this case there has been a breach of natural justice by the Director in making the Determination and, accordingly, this aspect of his appeal is dismissed. In respect of the delays complained of by Craig, there is no evidence of prejudice to him by the delays encountered. While I can understand that Craig feels frustrated with the process even if I cannot fully empathize with the effect of those delays on him personally, in the present circumstances the Tribunal has no authority under the *Act* to redress this frustration.

30. Turning to the section 66 issue, in *Isle Three Holdings Ltd.,* BC EST # D084/08 (confirmed on reconsideration, BC EST # RD124/08), the Tribunal provided an overview of the interpretation and operation of section 66 within the *Act*. Included in the analysis of that decision are the following comments, found at paras. 27-31:

> Section 66 of the Act states:
>
> > *If a condition of employment is substantially altered, the director may determine that the employment has been terminated.*
>
> An accurate summary of the elements of this statutory provision is found in *Bogie and Bacall Hair Design Inc.*, BC EST # D062/08, at para 41:
>
> > Section 66 of the *Act* provides that if a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated. There must be a finding that there is a change in the conditions of employment, that the change is substantial and that the change constitutes termination.
>
> Conditions of employment is defined in Section 1 of the *Act* to mean all matters and circumstances that in any way affect the employment relationship. The alteration must be substantial, or "sufficiently material that it could be described as being a fundamental change in the employment relationship": see *Helliker*, BC EST # D338/97, (Reconsideration of BC EST # D357/96). The focus of the examination in Section 66 is the employment relationship in place at the time of the alteration: *Helliker*, *supra*.
>
> The Tribunal has indicated that the test of what constitutes a substantial change is an objective one that includes a consideration of the following factors:

a) the nature of the employment relationship;

b) the conditions of employment;

c) the alterations that have been made;

d) the legitimate expectations of the parties; and

e) whether there are any implied or express agreements or understandings.

(see for example, *Helliker*, BC EST # D338/97; *A.J. Leisure Group Inc.*, BC EST # D036/98; *Task Force Building Services Inc.*, BC EST # D047/98; and *Big River Brewing Company Ltd.*, BC EST # D324/02)

The language of section 66 gives the Director discretion to decide the employment of the employee has been terminated. The exercise of that discretion is reviewable by the Tribunal: *Jaeger*, BC EST # D244/99, *Jody L. Goudreau*, BC EST # D066/98; and *Takarabe and others*, BC EST # D160/98. As expressed in the last decision, the Director must exercise discretion for *bona fide* reasons, must not be arbitrary and must not base the decision on irrelevant factors.

31. As well, the Tribunal has endorsed an approach to section 66 which requires the Director to be guided in that exercise of discretion by the purposes and objects of the *Act*, which is remedial legislation "that exists, in large part, for the benefit and protection of employees who otherwise have no control over decisions of their employer about the terms and conditions under which they will be employed": *Barry McPhee*, BC EST # D183/97.

32. It is within the above framework that the conclusion of the Director on section 66 must be examined.

33. There are two concerns raised by Craig in this appeal: first, that the Director calculated the effect of the unilateral alteration of his commission rate by reference to a period of time that was not reasonable; and, alternatively, that the Director erred by using earnings at all, rather than simply considering the alteration that was made, *ie.*, a twenty percent reduction in his commission rate.

34. I make note that the Determination does not provide any reason for the Director choosing to apply an analysis that considered only actual earnings in Craig's five months of employment in 2009 except the view that period was chosen because "it was a reasonable period of time and provided a reasonable reflection of the complainant's earnings prior to the change in his commission rate and after that change".

35. The suggestion by the employer that the period chosen was "in keeping with the methodology established by Section 63(4) of the *Employment Standards Act* for determining "severance pay" is speculative; there is no indication in any of the Director's statements that section 63(4) formed the rationale for the decision made to use only 2009 earnings in the analysis. In any event, when considering the average or normal wages for commissioned employees, the Tribunal has endorsed an approach that seeks to reasonably reflect the employee's typical, regular or usual wages and that approach is not necessarily limited to looking at the wages earned only in the eight weeks preceding the termination. Although the case arises under a different provision, the following comment from *Raymond Man Lee Wah and Blaine Howard Rowlett, Directors/Officers of C-O-E Poscann Systems Inc.*, BC EST # D281/00 describes the objective of taking such an approach:

The delegate has provided the Tribunal with information from two perspectives. Mr. Law worked for the Employer for 21 months. For 10 months his commissions exceeded $3,011.09 (April 1998), for 10 months his commissions were less. Looking at the commission earnings from the standpoint of "average" commissions, throughout Mr. Law's employment, the average turns out to be $2,975.24. In some cases, an average is appropriate, in other cases, perhaps, not. In some cases, it may be appropriate to consider a

> relatively short period, in other cases, a longer period. In my view, there is no "magic way" to calculate the liability, the point being that the delegate must consider the "wages that are earned by an employee over a period of time and are reasonably reflective of the employee's typical, regular or usual wages."

36. For the Director to take an approach such as suggested by the employer could well be found to be unreasonable if the resulting wage amount, viewed objectively, did not reasonably reflect the employee's typical or usual wage.

37. The Director could have used the time frame suggested by Craig. That length of time, or something close to it, has been used in some cases. In *Kenneth Dale Atkinson*, BC EST # D113/09, for example, the finding was based on an analysis of the employee's previous year's commission earnings.

38. The concern in this appeal, however, is not to simply reassess what the Director could have done, but to decide whether the Director committed a reviewable error in using an earnings analysis covering only five months in 2009 – or in using an earnings analysis at all – to decide if the change to the commission rate amounted to a "substantial" alteration.

39. I do not accept the suggestion by Craig that the Director should have looked only at the reduction in the commission rate without reference to the effect of that reduction on actual earnings. In my view, such an approach would be unrealistic and unreasonable when the nature of the employment relationship and the legitimate expectations of the parties are considered.

40. As well, I am not persuaded the Director has committed a reviewable error in using an earnings analysis covering a relatively short period of time, over one that covers a longer period of time. As indicated above, there is no one formula that is "correct". Craig has provided alternative ways of performing the analysis using different time periods which he submits would yield a different conclusion. The Director has countered by indicating there are also time frames which could have been used that would generate the same result.

41. However, showing there are different periods does not resolve the appeal one way or the other. The burden on Craig in challenging the time period chosen for analysis by the Director is to show that choice, which is in large part discretionary, was not made for *bona fide* reasons, was arbitrary or was based on irrelevant factors. The evidence in the file must support the challenge and justify the Tribunal's intervention. It does not assist the appeal to say that a 12 month period is used by financial institutions to establish credit and in unemployment insurance legislation to establish claims entitlement. We are concerned here with how the *Act* should be applied. The financial institutions and the federal legislators have established those time frames for their own purposes, which are not the same as the purposes at play in considering matters under the *Act*.

42. I am unable to find any legal basis for finding the earnings analysis used by the Director was an error in law or for disagreeing with the Director's conclusion that this change was not sufficiently substantial to constitute a deemed dismissal under section 66 of the *Act*.

43. Accordingly, this appeal is dismissed.

ORDER

44. Pursuant to section 115 of the *Act*, I order that part of the Determination dated January 29, 2010, dealing with Craig's claim for length of service compensation be confirmed.

David B. Stevenson
Member
Employment Standards Tribunal