Employment Standards TRIBUNAL



An appeal

- by -

Warren Dingman
("Dingman")

- 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.:** 2009A/055

**DATE OF DECISION:** June 17, 2009

# DECISION

## SUBMISSIONS

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|---|---|
| Warren Dingman | on his own behalf |
| Ron Lamperson | on behalf of Footprints Security Patrol Inc. |
| 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 Warren Dingman ("Dingman") of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on March 19, 2009.

2. The Determination was made on a complaint filed by Dingman against Footprints Security Patrol Inc. ("Footprints"). Dingman alleged Footprints had contravened the *Act* by failing to pay regular and overtime wages and annual vacation pay on those unpaid wages.

3. The Director found the *Act* had not been contravened and no wages owed.

4. Dingman has appealed the Determination on the grounds that the Director erred in law "in failing to do a complete and thorough examination of all the facts and documents" in the case and in failing to observe principles of natural justice in making the Determination.

5. At the root of both the complaint and the appeal is Dingman's contention that he has performed work for Footprints for which he has not been paid. He is seeking to have the Tribunal cancel the Determination and award him compensation for this work.

6. I have concluded this appeal can be decided from the material in the appeal file, including the written submissions of the parties.

## ISSUE

7. The issues in this appeal are whether Dingman has established the Director made an error of law or failed to observe principles of natural justice in making the Determination.

## THE FACTS

8. The basic facts relating to the complainant are not disputed.

9. Dingman was originally employed by Footprints to work as a security guard in April 2005. In October 2005, he assumed the position of "Operations Supervisor – South Island". He signed an employment contract at the time for that position. The contract, among other things, named the position, set out the responsibilities of the position, set out a general description of the terms of service for the position, including a general description of hours of work, and set out the remuneration and benefits. In February 2008, Dingman was

transferred to Nanaimo, BC to be the "Branch Manager – Central Island" for Footprints. The employment contract was revised in February 2008 to cover his employment in this position.

10. At the time Dingman was transferred to Nanaimo, Footprints had not hired a person to the South Island Operations Manager position and, as the Determination notes, Dingman "maintained responsibility for that location as well", which "resulted in a doubling of his work load to fit into his 7 am to 5 pm office hours".

11. There were other persons employed by Footprints who had some responsibilities related to customer service and communication and the hiring and scheduling of security guards for Victoria (South Island).

12. Dingman said there were several discussions with the principals of Footprints about compensation for the extra hours he claimed to be working. He said the last such discussion occurred in May 2008 with the President and General Manager of Footprints, Simon Collery, during which Mr. Collery acknowledged Footprints "owed him [Dingman] money". Footprints did not deny Dingman's assertion on this point.

13. Dingman was advised in June 2008 that he was being relieved of his position as Branch Manager. He was relieved of his duties at that time, but remained on payroll until September 2008.

14. As it relates to this appeal and the grounds of appeal raised by Dingman, there are additional facts which appear from an examination of the file and submissions.

15. The complaint process comprised a mediation session, which occurred in January 2009, a request to Footprints to disclose documents and an oral complaint hearing conducted on March 3, 2009. The documents requested by Dingman were not provided to him prior to the start of the oral complaint hearing. This fact is not mentioned in the Determination. Dingman says these documents were necessary to his claim. The documents are not included in the subsection 112(5) record, although it is apparent they were provided to the Director and included in the file. This is a glaring omission and a clear failure to satisfy the obligation contained in subsection 112(5) of the *Act*. I do not need to elaborate this point. For a full description of the required content of the subsection 112(5) record, see *Super Save Disposal Inc. and Accton Transport Ltd.*, BC EST # D100/04.

16. The Determination contains a discussion of the employment contract which focuses on comments made by the Tribunal in *City of Ft. St. John*, BC EST # D265/03. The Determination refers to an excerpt from that decision which in fact appears to be a summary rather than a direct quote from the decision. The actual quote is found at page 5 of that decision and reads as follows:

> Because Collier was a manager for the purposes of Act, he was not entitled to receive overtime; he was entitled to be paid according to the terms of his employment contract, which might include entitlement to be paid for hours worked in excess of a set number of hours. If his employment contract did not meet the minimum standards of the Act, then Collier was entitled to receive the minimum requirements of the Act.
>
> In such circumstances, the correct approach for the Director to have taken was first to ask whether there was an agreement to pay for extra hours worked and, if so, what were "extra hours" for the purpose of giving effect to the agreement. The Director found there was an agreement to pay for extra hours and, for the purpose of giving effect to that agreement, "extra hours" comprised hours worked in excess of 7 in a day and 35 in a week. As I have indicated above, there is a substantial factual foundation for making that finding and no error has been shown in respect of it. Next, the Director should have asked whether there was an agreement setting out how much Collier would get paid for working the extra hours. The Director did not directly ask this question. If the Director had directly asked the question, the answer would have been, "yes, the agreement was that he would be paid by receiving one week's additional paid vacation in lieu of the first 163 extra hours worked, 30% of his hourly rate for all extra hours worked in excess of 163

> (up to a maximum of 200) and discretionary compensation that could take various forms". The Director should then have asked whether, in the circumstances, any part of the agreement contravened the requirements of the Act.

17. The Determination notes the employment contract for Operations Manager – Central Island contains no provision for the payment of extra hours. The Director found the total agreement regarding payment of salary and hours of work was found in Article 2, paragraphs 1 and 2 of the employment agreement and that those terms did not contain language that could be seen as a contravention of the *Act*.

18. The Determination does not specifically address the circumstance that Dingman, for a period commencing February 2008 and ending in June 2008 was employed as a manager at two locations – South Island and Central Island.

## ARGUMENT AND ANALYSIS

19. 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.*

20. 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.

21. As indicated above, in this appeal Dingman says the Director erred in law by failing to do a complete and thorough examination of all the facts and failed to observe principles of natural justice in making the Determination in several respects, some of which, as noted in the submissions of counsel for Footprints and by the Director, are misplaced.

22. It is difficult to particularize the arguments being made by Dingman. They all seem to converge into an expression of one central concern: the process failed to provide him with a forum for ensuring the allegations he had made were properly considered and, either independently or as a consequence of the preceding failure, the Determination has not adequately addressed his complaint.

23. I do not need to address each aspect of the appeal in detail. There are several elements of the process which raise some concerns. I have already mentioned the deficiency of the record. Another concern is the melding of the role of the delegate involved in the mediation process into the pre-hearing document disclosure process. That conduct has the very real prospect of supporting an argument alleging a denial of procedural fairness and, of more concern, of undermining the integrity of the mediation process generally. As well, the circumstances of this case suggest the Director should have been more proactive, with a view to ensuring that all the material and evidence was provided to the parties, and that documentary evidence was examined, that

the parties were provided an opportunity to respond on that evidence and that a reasoned decision was made by the Director on its relevance or potential relevance to the claim.

24. The central aspect of Dingman's argument in this appeal, and the basis for this decision, is his assertion that the Director failed to deal with aspects of the employment contract that were established in evidence. In his argument, he states:

> A contract was signed which dealt with a specific job and work location yet it was proved at the end of my evidence that I had done work outside of this contract. In fact, I did two contract positions for the employer yet was not compensated for it. I was the manager of two branch offices for the employer, Nanaimo & Victoria, and I was contracted to perform the duties of one branch office only. I find none of this mentioned in the Determination.

25. Other parts of Dingman's appeal submission and his final reply consistently return to what he says is the failure of the Director to properly examine and consider the documents, particularly the employment contracts, and to consider other evidence related to the work he was performing and the proper meaning of the employment contract.

26. In the response to this aspect of Dingman's appeal, the Director says:

> Mr. Dingman also challenges the review of the employment contract suggesting that it was a contract for a single location when he had actually been employed in 2 locations. I do not recall him presenting this approach to the contract at the Hearing.

27. The submission of counsel for Footprints on the appeal makes no reference, and provides no response, to this aspect of the appeal. The response of Footprints does comment on the timing of the production of documents and how that situation was handled by the Director. The thrust of this argument is twofold: first, Dingman has lost any opportunity to complain about procedural fairness when he failed to request an adjournment; and second, that the documents were not relevant to whether Dingman was entitled to wages for additional hours worked. This submission is not particularly helpful. Dingman seems to believe the documents have some relevance to the issue of entitlement, but in any event, it is the Director not Footprints who decides relevance, at least initially, and no effort has been made by the Director to do so.

28. In response to the first point made above, I do not need to reach any conclusion about the process of document production or whether Dingman's failure to seek an adjournment has cost him the ability to argue about a lack of procedural fairness in that process. Without deciding whether the circumstances of this case justify such a finding that the process of document production was procedurally unfair, I note that the Tribunal has decided that failing to provide an adjournment in circumstances where one was required is a breach of natural justice, even where none was specifically requested: see *Kyle Freney*, BC EST # D130/04; *Istvan Szilagyi operating as Rivers Mediterranean Grill and Tapas Bar*, BC EST # D061/05; and *Davinder Hundal*, BC EST # D003/07.

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

30. 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. It must also demonstrate the Director has recognized the key elements of the claim and has ensured the relevant and potentially relevant evidence has been identified and considered. Some circumstances will require the Director to be proactive.

31. In this case, the Director failed to consider a central point in Dingman's claim. Whether the Director ignored this aspect of Dingman's claim or just missed it in the analysis of the issue is irrelevant. As a consequence of the failure to appreciate this element of Dingman's claim, there is no identification or examination of the evidence in the Determination relating to this point.

32. In the circumstances, I am satisfied the Director failed to observe principles of natural justice in making the Determination.

**The Appropriate Remedy**

33. In light of my finding that the Director failed to comply with the requirements of natural justice in making the Determination, I have the option of adjudicating Dingman's complaint myself, or referring it back to the Director for a rehearing before the delegate who conducted the complaint hearing or for assignment to a different delegate of the Director.

34. I have decided this is not an appropriate case for me to adjudicate. Referring the matter back to the Director is probably more efficient.

35. The next question is whether the delegate who conducted the oral hearing, issued the Determination, and participated in the appeal on behalf of the Director should be permitted to continue his involvement in the complaint. As a matter of principle, the Tribunal does not interfere with the Director's discretion to deploy limited personnel resources as the Director considers appropriate unless the Tribunal finds that the deployment of personnel would contravene a legal principle, such as the principle regarding bias or reasonable apprehension of bias. In such circumstances, it is open to the Tribunal to refer a matter back to the Director with directions to assign the complaint to a different delegate: see *Director of Employment Standards (Re Ningfei Zhang)*, BC EST # RD635/01.

36. In *Wewaykum Indian Band v. Canada*, 2003 SCC 45, [2003] 2 S.C.R. 259, the Supreme Court of Canada described bias in the following manner, at para. 58:

> [A] leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case (quoting *R. v. Bertram*, [1989] O.J. No. 2123 (H.C.) quoted by Cory J. in *R.D.S.* at para 106).

37. In this case, the delegate involved has expressed the view, without having heard or reviewed any evidence or argument on the point that Dingman's employment contract for Branch Manager – Central Island would permit Footprints to assign him to work as Operations Manager for the South Island with no consideration of additional remuneration for that work.

38. Having already expressed that result, in my view a reasonable apprehension of bias would arise if the delegate were called upon to make that decision in light of new evidence and additional argument. I adopt the following words of the Supreme Court of Canada in *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623, 89 D.L.R. (4th) 289, at page 636:

> The duty to act fairly includes the duty to provide procedural fairness to the parties. That simply cannot exist if an adjudicator is biased. It is, of course, impossible to determine the precise state of mind of an adjudicator who has made an administrative board decision. As a result, the courts have taken the position that an unbiased appearance is, in itself, an essential component of procedural fairness. To

> ensure fairness the conduct of members of administrative tribunals had been measured against a standard of reasonable apprehension of bias. The test is whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator.

39. In the circumstances of this case, natural justice requires a different delegate of the Director of Employment Standards assume conduct of the complaint process.

## ORDER

40. Pursuant to section 115 of the *Act*, I order the Determination dated March 19, 2009 be cancelled and the matter referred back to the Director.

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**David B. Stevenson**
**Member**
**Employment Standards Tribunal**