

An appeal

- by -

Serge Spes
("Mr. Spes")

- 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: Shafik Bhalloo

FILE No.: 2013A/9

DATE OF DECISION: July 19, 2013

DECISION

SUBMISSIONS

Serge Spes	on his own behalf
Greg Nott	on behalf of 0877440 B.C. Ltd carrying on business as Preferred Painting
Gagan Dhaliwal	on behalf of the Director of Employment Standards

OVERVIEW

1. Serge Spes (“Mr. Spes”) appeals a determination of the Director of Employment Standards (the “Director”) issued January 14, 2013 (the “Determination”), pursuant to section 112 of the *Employment Standards Act* (the “*Act*”). A delegate of the Director (the “Delegate”) issued the Determination, which decided a complaint Mr. Spes filed against his employer, 0877440 B.C. Ltd. carrying on business as Preferred Painting (“Preferred Painting”), with the Employment Standards Branch (the “Branch”) on May 22, 2012 (the “Complaint”). After completing her investigation, the Delegate found that there was insufficient evidence to support Mr. Spes’ claim that Preferred Painting contravened section 83 of the *Act* which prohibits an employer from mistreating an employee because of a complaint or investigation under the *Act*. As a result, the Delegate concluded that no further action would be taken with respect to the Complaint.
2. Mr. Spes appealed the Determination on February 21, 2013, alleging that the Director had erred in law and failed to observe the principles of natural justice in making the Determination. In his Appeal Form, Mr. Spes has requested that the Employment Standards Tribunal (the “Tribunal”) refer the matter back to the Director. However, in his most recent submissions in response to the submissions of the Director and Preferred Painting dated July 2, 2013, he is also asking the Tribunal to “rule against” his employer which I interpret to mean cancel the Determination and find the employer breached s.83 of the *Act*.
3. On February 22, 2013, the Tribunal informed the parties that a Tribunal Member would review the appeal and, without seeking submissions from the parties, may dismiss all or part of the appeal and/or confirm all or part of the Determination. In the event the Tribunal Member does not dismiss all of the appeal or does not confirm all of Determination, the Tribunal may invite Preferred Painting and the Director to file Reply submissions on the appeal and, thereafter, afford Mr. Spes an opportunity to make a final reply to these submissions, if any. In the same correspondence, the Tribunal requested from the Director a complete copy of the “record”, pursuant to section 112(5) of the *Act*.
4. On March 5, 2013, pursuant to the Tribunal’s request, the Director sent the section 112(5) “record” along with a brief submission advising that as a result of the information obtained at the fact finding meeting of the Complaint on July 23, 2012 (the “Meeting”), the Director opened a separate investigation into whether Remdal Painting Restoration Inc. (“Remdal”) contravened the *Act* in relation to the employment of Ms. Spes.
5. On March 7, 2013, the Tribunal disclosed the Director’s “record” to Mr. Spes and afforded him an opportunity to provide his objections, if any, with respect to the completeness of the “record” by March 21, 2013.

6. By way of an email dated March 19, 2013, Mr. Spes raised three (3) issues with the Director's "record". First, he pointed out at page 21 of the "record" the last few sentences appear to be missing because of the way in which the document was scanned. In her reply submissions dated March 25, 2013, the Delegate acknowledges Mr. Spes' concern and reproduced the portion of the document that was inadvertently cut-off. I have reproduced that section later in the decision as it is relevant to my decision.
7. Second, Mr. Spes asserts that any correspondence between Rachel Matoul ("Ms. Matoul"), an assistant with the Branch, and Remdal and Preferred Painting should be disclosed. In her reply submissions, the Director submits that Ms. Matoul spoke with representatives of Preferred Painting and Remdal when providing them with "education prior to scheduling a mediation session", and any notes she made regarding these conversations would form part of her workflow sheets which are not part of the "record" and the Delegate did not rely on the said workflow sheets in making the Determination. I find it convenient to dispose of this issue here by stating that I agree with the Director that Ms. Matoul's said notes, if they exist, are not part of the "record" and need not be produced by the Director as they were neither before the Director, nor considered by her in making the Determination.
8. Lastly, Mr. Spes argues that "a large portion of [his] appeal is based on the separation [by the Delegate] of the case into two separate parts". Mr. Spes asks whether the Director should not include "any information or correspondence that was obtained as part of that second investigation [involving Remdal]". In response to this point, the Director states that Mr. Spes' Complaint was against Preferred Painting and, at the Meeting, the Delegate informed the parties that the Director would launch a separate investigation into whether Remdal contravened section 83 of the *Act*. The Director contends that the two (2) matters are separate investigations and, therefore, only the "record for the matter under appeal has been provided". Mr. Spes, of course, vigorously objects to the Director's decision to deal with his Complaint by way of separate investigations of Preferred Painting and Remdal. He believes that the two (2) matters should have been dealt with together, and all evidence in the Delegate's possession with respect to Remdal is relevant and should have been considered in making the Determination and furthermore should have been included in the "record" in this appeal.
9. Mr. Spes also submits that the Delegate did not inform him of the Director's decision to separately investigate Preferred Painting and Remdal until December [2012] when she had already completed her investigations and made her Determination (I note the Determination was made on January 14, 2013, and not December 2012). In support of his contention, Mr. Spes submits an audio recording of the Meeting which was attended by Mr. Spes, the Delegate, and the representatives of Preferred Painting and Remdal namely, Mr. Greg Nott, the Director of Preferred Painting and Mr. Dave Humphries ("Mr. Humphries"), the Manager of Remdal. It appears that Mr. Spes is arguing that the Delegate's failure to inform him of the separate investigation of Remdal (before December 2012) and her failure to investigate or consider evidence relating to Remdal and the role of Remdal and its president, Mr. Ewert, in context of the Complaint constitutes a failure on the part of the Director to observe the principles of natural justice.
10. In response to Mr. Spes' submissions and particularly with respect to the audio recording of the Meeting by Mr. Spes, the Director submits that it was entirely inappropriate for Mr. Spes to have recorded the Meeting without giving the parties advance notice of his intention to record and obtaining the parties' consents. Having said this, the Delegate submits that it is possible that her memory may be faulty about the Meeting and that she may not have, at that time, informed Mr. Spes that the Director was also launching an investigation into whether Remdal contravened S. 83 of the *Act*. However, the Delegate contends that there is no question that Mr. Spes was informed of the Director's investigation into Remdal's conduct in December before the Determination was issued.

11. On April 16, 2013, after having reviewed Mr. Spes' written submissions and the section 112(5) "record", the Tribunal determined that the appeal would not be dismissed under section 114 of the *Act* and invited Preferred Painting and the Director to file Reply submissions on the appeal and informed Mr. Spes that he would be given an opportunity to make a final reply to the submissions, if any.
12. On April 29, 2013, the Tribunal received the written submissions of the Director and, thereafter, on June 17, 2013, the written submissions of Mr. Nott on behalf of Preferred Painting. Subsequently on July 3, 2013, Mr. Spes made his final Reply to both those submissions.
13. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated in the *Act* (s. 103), and Rule 8 of the Tribunal's *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. In my view, this appeal, together with the preliminary issue of the admissibility of audio-recording evidence submitted by Mr. Spes, can be adjudicated on the basis of the section 112(5) "record", the written submissions of the parties and the Reasons for the Determination (the "Reasons").

ISSUE

14. The issues in this appeal are threefold, namely:
 - (i). Is the audio recording of the fact-finding meeting adduced by Mr. Spes admissible in this appeal?
 - (ii). Did the Director err in law in making the Determination?
 - (iii). Did the Director fail to observe the principles of natural justice in making the Determination?

THE FACTS AND ANALYSIS

15. Preferred Painting operates a painting business and employed Mr. Spes as a painter from September 16, 2011, to November 18, 2011. Mr. Spes filed the Complaint against Preferred Painting, alleging that the latter contravened section 83 of the *Act* by refusing to provide him further work at the direction of the President of Remdal, Mr. Ewert.
16. In the Complaint, Mr. Spes describes the relationship between Preferred Painting and Remdal as follows:

Preferred Painting is essentially a franchise of its parent company, Remdal Painting. It was actually the owner of Remdal painting, Ken Ewert, who ultimately terminated me for raising the legal issues. Although I was not technically an employee of Remdal Painting, Ken exercises considerable control over his franchisees, and so he should ultimately be held responsible for my termination, not Greg Nott of Preferred Painting. Otherwise, employers could circumvent the Act by simply working for a different shell corporation than their employees.
17. Further, in his email submissions dated August 7, 2012, to the Delegate, Mr. Spes, *inter alia*, describes Remdal's structure as follows (the part cut-off in the Director's "record" is included in this quote):

Remdal Painting is a company that acquires contracts for renovation work, and then it subcontracts all of its work to incorporated painting companies that work exclusively for Remdal. The subcontracting companies are essentially like franchises. All the franchisees have vehicles and equipment that are branded with the Remdal logo, and all of their employees wear Remdal uniforms and follow the Remdal Employee Handbook. Franchisees, their job-sites, and their employees are supervised by Remdal Project

Managers, or Team Leaders. Despite being separate legal entities, Remdal determines who those companies can hire as foremen (which they call a CF or Certified Foreman) to manage their crews, and has a strong say in how they manage their jobs and run their companies. Remdal's Handbook for Managers states that an employee can only become a CF for a Remdal franchise if 'a Remdal Project Manager is willing to become your Team Leader', and that 'the Project Managers have direct contact with CF in the job'. Dave Humphries was the Project Manager for Greg Nott and myself. Since Remdal has such a strong say in both hiring and management decisions of their franchisees, they are liable under the Employment Standards Act for policies and decisions of theirs that violate the Act.

18. In the Reasons, the Delegate notes that Mr. Spes wanted to work as a subcontractor of Remdal and so made an application to Remdal in March 2011. He subsequently interviewed with Mr. Ewert and the latter arranged for him to become a foreman of one of Remdal's subcontractors, Anvil Painting Ltd. ("Anvil"). Ms. Spes claims he was required to work for Anvil for a probationary period of one year before he expected to become a franchisee or subcontractor with Remdal. However, in August 2011, he was laid off by Anvil due to some issue or misunderstanding he had with a co-worker. Thereafter, he contacted Mr. Ewert, who arranged for him to work for Preferred Painting and he commenced working for the latter as of September 16, 2011.
19. According to Mr. Spes' submissions contained in the "record", Preferred Painting's Mr. Nott offered to serve as his mentor if he were to become a Junior Applicator or alternatively hire him as a foreman, depending on what Mr. Ewert decided Mr. Nott was allowed to do.
20. I also note that in the Reasons, the Delegate notes Mr. Spes' claim that while he was working with Anvil he hired employees who would eventually work for him when he became a subcontractor of Remdal. However, when Anvil terminated his employment, these employees stayed with Anvil. Therefore, Mr. Spes felt that he should be compensated for the time he spent hiring them. He additionally claimed he was owed bonuses from Anvil for work he performed. As a result, Mr. Spes approached Mr. Ewert with respect to the matter of compensation for the time he spent hiring employees for Anvil but Mr. Ewert advised him that the time he spent hiring employees for Anvil would not be compensable.
21. The Delegate also notes in the Reasons that Mr. Spes claims that he had a conversation with Mr. Ewert on October 26, 2011, wherein Mr. Ewert discouraged him from pursuing his rights under the *Act* against Anvil, indicating that this would jeopardize his future with Remdal. In his written submissions to the Delegate on July 24, 2012, Mr. Spes states:

Now in my case I was offered two potential promotions or employment opportunities in November [2012]: either work with Preferred Painting as a foreman, or for another subcontractor as a foreman. I raised an issue regarding my rights, and Ken [Mr. Ewert] responded that my mention of legal action ends all discussion and that 'when you threatened to pursue legal action, that does pretty much close the door to a further working relationship'. That is a violation of Section 83 of the Act. Whether I was ultimately right or not in asserting my legal rights is irrelevant. An employer cannot penalize an employee (or potential employee) for 'pursuing' their rights. I was denied either job as a foreman because I raised the issue of my rights.

There remains ambiguity about who to hold responsible for this violation of the Act. It does not matter that I was not employed by Remdal, since 'prospective employees' are protected under Section 83. The attorney I spoke with seemed to believe that I could make a complaint against either Remdal or Preferred Painting, but that I should probably do it against Preferred, since I was also employed by them. The ESB seconded that view when I phoned them to ask about a complaint. My complaint should not be dismissed because of a legal ambiguity or mistake by the ESB. Furthermore, I would like to point that Greg Nott at Preferred wanted to make me a foreman, but he was not allowed to do so by Ken Ewert at Remdal. But ultimately, Preferred Painting is responsible for following through on Ken Ewert's decision.

I understand that it may seem strange to claim that Ken Ewert is responsible for hiring decisions at one of his subcontractor's companies. But as I have stated, it is ultimately Ken that decides who can and cannot be a foreman for his subcontractors. In fact, Remdal's employment manual for managers explicitly states that all foreman must be approved by Remdal management (I can forward you a copy of the manual if you wish).

...

I would also like to add that if Remdal's legal structure makes it immune from the Act, then all employers have a simple means of bypassing every measure of the Act. Employers simply need to set up two separate corporations, and have managers and Human Resources work for one corporation and employees work for another. Then even if HR and management are making hiring and employment decisions, they technically work for a different corporation and they are therefore immune from any and all prosecution under the Act. Any employee that makes a complaint will be terminated and find themselves in the situation that I am currently in.

22. Although there are several email exchanges delineated in the Reasons between Mr. Spes and each of Mr. Ewert and Mr. Nott that the Delegate found relevant and considered in the course of making the Determination, I find noticeably missing in the Reasons any analysis or consideration of section 95 (associated employers) of the *Act* by the Director. While I am not intending to prejudge the matter and do not want this decision to be taken as such, I find the evidence adduced by Mr. Spes (which forms part of the Director's "record") raises the question of whether Preferred Painting and Remdal are "associated employers" within the meaning of section 95 of the *Act*. This question is relevant to Mr. Spes' Complaint and, in my view, should have been considered by the Director in the investigation of and, ultimately, in the determination of Mr. Spes' Complaint. It may very well be that the determination of the Director may be the same at the end of the day but separating the investigation of Remdal and Preferred Painting and considering separately evidence relating to each neglects consideration of an important question, namely, whether Preferred Painting and Remdal are associated employers.
23. Having said this, I have carefully reviewed the appeal submissions of the Director and Preferred Painting including their recent submissions in response to the Tribunal's request on April 16, 2013, and I am not persuaded that the Director's investigation of Remdal and any associated evidence relating to that investigation should be dealt with separately from Mr. Spes' Complaint against and the investigation of Preferred Painting. While the Director states in her last submission of April 29, 2013, "there was not enough evidence to associate the two companies", I find lacking any analysis in the Reasons for such conclusion. I reiterate that I am not prejudging or predetermining the outcome of such an exercise. I am simply stating that the question of whether or not Preferred Painting and Remdal are "associated employers" under Section 95 of the *Act* is materially relevant and should have been properly considered by the Delegate in context of the Complaint. In my view, the Delegate's failure to consider it in context of Mr. Spes' Complaint (whether due to the Director's decision to investigate Remdal separately or not) is, in my view, a failure of natural justice on the part of the Director.
24. In the circumstances, I find the appropriate course of action is to cancel the Determination and refer the matter back to the Director with specific instructions to consider or assess all evidence, whether obtained in context of the Director's investigation of Mr. Spes' complaint against Preferred Painting or in the Director's separate investigation of Remdal, with a view to determining the nature of the relationship between Remdal and Preferred Painting and Mr. Spes in context of Section 95 of the *Act* and subject to that determination if Mr. Spes' employer contravened section 83 of the *Act*.
25. In light of my decision above, I do not find it necessary, at this point, to deal with the error of law ground of appeal advanced by Mr. Spes. However, I do want to point out that I have also read the submission of Mr.

Nott on behalf of Preferred Painting dated June 10, 2013, and Mr. Spes' submission dated July 2, 2013. I find both submissions in part address what relationship there was between Remdal and Preferred Painting. The Director may consider those submissions and may solicit any further submissions from the parties to better assess the nature of the relationship between Remdal, Preferred Painting, and Spes in context of the S. 95 assessment.

26. Finally, I would like to address below, very briefly, the matter of the admissibility of the audio recording of the Meeting made by Mr. Spes, which the latter adduced in this appeal.

ADMISSIBILITY OF AUDIO RECORDING ADDUCED BY MR. SPES

27. Mr. Spes has adduced an audio recording of the Meeting attended by himself, the Delegate, Mr. Humphries and Mr. Nott. The recording was made by Mr. Spes without the consent of any of the other parties in attendance at the Meeting. Mr. Spes has produced the audio recording simply to contradict the Director's assertion that the Delegate, at the Meeting, advised him that a separate investigation in relation to whether Remdal breached section 83 of the *Act* would be undertaken by the Director. The Director objects to the introduction of the audio recording.
28. The question of whether Mr. Spes' audio recording is admissible or not in this case is governed by the British Columbia Supreme Court's decision in *Lam v. Chiu* (2012 BCSC 440). In the latter case, the plaintiff sought to introduce a secret recording at trial which contained an admission that a debt was owed between the parties. The defendants opposed this claim stating that the recording was unfair and out of context. As the plaintiff recorded a conversation to which she was a party, the recording, in and of itself, was not illegal. Madam Justice Gray, in ruling that the recording was admissible, stated:

[25] ...there is discretion in the court to exclude evidence where the prejudicial effect outweighs the probative value. There are cases where the court has commented on the practice of recording household conversations between family members and described that as odious. The court has also referred to illegal tape-recording, that is, tape-recordings when no party to the conversation had consented to it being recorded.

...

[30] In terms of prejudice, there clearly is unfairness when one party knows that a conversation is being tape-recorded and the other party does not. That is clear on the evidence and can be taken into account on considering what, if any, weight the evidence ought to be given...

[31] The matter which gave me the greatest concern was the question of the impact on the administration of justice of permitting the admission into evidence of a surreptitious recording. I am not sure that I can characterize this surreptitious recording as odious. That was a term used by Mr. Justice Thackray and embraced by other judges, but when they were referring to recordings in a home with an ongoing parental relationship and, as I have said, that does not apply here. Whether it is odious or not, the recording was certainly unfair. It is not criminal because Mr. Lam knew the recording was being made. As I have said, the recording was staged and therefore unfair, but that is apparent from the recording.

[32] This is not a clear case. In my view, there is some probative value to admitting the full recording, and the concerns about prejudice are not sufficiently significant that the recording should be excluded from evidence, primarily because any concerns about them are clear on the recording itself.

29. In the present case, I would like to note at the outset that the recording is not of a mediation meeting between the parties, which would be privileged and clearly inadmissible, but instead, it is a recording of a fact-

finding meeting at which the Delegate informed all parties that the meeting was “on the record”. Having said this, while I do not wish to be taken as condoning secret audio recordings of any Employment Standards proceedings, including fact-finding meetings, I do not find the recording in this case is odious or illegal, although it was unfairly recorded by Mr. Spes in secret, without the consent of the other parties. While I find the prejudicial effect of admitting the recording in question in evidence is minimal, I am unconvinced of its probative value. I do not find the recording necessary or particularly helpful in my decision-making. In the circumstances, I find the recording inadmissible.

ORDER

30. Pursuant to section 115(1)(a) and (b) of the *Act*, I cancel the Determination of January 14, 2013, and refer the matter back to the Director with specific instructions to consider or assess all evidence to determine the nature of the relationship between Remdal and Preferred Painting and Mr. Spes in context of Section 95 of the *Act* and based on that determination decide if Mr. Spes’ employer contravened section 83 of the *Act*.

Shafik Bhalloo
Member
Employment Standards Tribunal