Employment Standards TRIBUNAL

An appeal

- by -

Lisa A. Martyn

- 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:	Carol L. Roberts
FILE No.:	2006A/48
DATE OF DECISION:	May 30, 2006

DECISION

SUBMISSIONS

Lisa A. Martyn	on her own behalf
Robert D. Krell	on behalf of the Director of Employment Standards
Joe Coutts, Coutts Weiler & Pulver	on behalf of Baum Publications Ltd.

OVERVIEW

1. This is an appeal by Lisa A. Martyn, pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued February 22, 2006.

2. In January, 2004, Ms. Martyn filed a complaint alleging that Baum Publications Ltd. ("Baum") had contravened the *Act* in failing to pay her overtime wages. In a Determination issued February 28, 2005, a delegate of the Director determined that Baum owed Ms. Martyn overtime wages. Baum appealed that Determination to the Tribunal. Tribunal Member Matthew Westphal concluded that the delegate had failed to observe the principles of natural justice, cancelled the Determination, and referred the matter back to the Director for a new hearing before a different delegate. (*Baum Publications,* BC EST #D090/05).

3. A second hearing before a different delegate was held over a period of three days: October 28 and December 6, 2005, and January 5, 2006. On February 22, 2006 the delegate issued a Determination concluding that he did not have to decide whether Ms. Martyn was a manager because, even if she was not, her records were "insufficient to prove a claim for overtime wages". The delegate found that Baum had contravened section 28 of the *Act* in failing to maintain records of Ms. Martyn's hours of work, and imposed an administrative penalty of $500.00.

Preliminary issue

4. Ms. Martyn's appeal contains submissions relating to the February 28, 2005 Determination and Member Westphal's decision. The effect of Member Westphal's decision to cancel the Determination is equivalent to it having never been made. Ms. Martyn could have sought a reconsideration of the decision (s. 116 (2)) or applied for judicial review. She did neither. Nevertheless, in her current submission she contends that the Tribunal erred in cancelling the February 28, 2005 Determination and not advising her of the right to seek a reconsideration of Member Westphal's decision. She seeks the re-instatement of the decision of the original delegate ordering Baum to pay her overtime wages.

5. Tribunal decisions are issued with cover page outlining the effect of the decision. The Tribunal's website, the address of which is on all Tribunal correspondence, provides information about both the appeal and reconsideration process as well as information about judicial review. I also note that Ms. Martyn was represented by a student at the Legal Advice Program at the University of British Columbia for the purposes of Baum's appeal, and infer that she could have sought further advice from them after receiving the Tribunal's decision.

6. Ms. Martyn had every opportunity to inform herself about her options after receiving Member Westphal's decision. Given that she did not pursue any of her remedies at that time, his decision is final, and I have no jurisdiction to re-visit it. Similarly, Ms. Martyn cannot now rely on evidence or findings in that process as grounds for this appeal. For this reason, Ms. Martyn's submissions about the findings made in the "original adjudication" will not be referred to further.

7. This decision is about the February 22, 2006 Determination, and Ms. Martyn's appeal submissions relevant to that Determination.

8. Ms. Martyn argues that, in rejecting her evidence in favour of that of the employer, the delegate erred in law and failed to observe the principles of natural justice in making the Determination.

9. Although Ms. Martyn sought an oral hearing, I am satisfied this matter can be decided on written submissions. This appeal is decided on the section 112(5) "record", the written submissions of the parties, and the Reasons for the Determination.

SUBMISSIONS

10. Ms. Martyn says that the delegate erred in law and denied her a fair hearing "by his treatment of certain evidence", and that he refused to consider much of the evidence. She says that he refused to admit a CD which would establish the overtime hours she worked, failed to consider evidence of her immediate supervisor and some alarm reports, and based his decision on testimony that was "marred" by a "confusing set of questions".

11. Ms. Martyn also argues that the delegate erred in preferring the evidence of most of Baum's employees to hers, rejecting her work records based on "his opinion of my style of response as opposed to actual fact". She submits that, having found that Baum had contravened section 28 in failing to maintain proper records, the delegate ought to have considered her own records, and his failure to do so constitutes a bias towards her employer.

12. Finally, she submits that the delegate erred in failing to address the issue of whether or not she was a manager.

13. The delegate denies that he failed to consider all of the evidence. He says that Ms. Martyn confirmed that the contents of the CD were the same as, or similar to, a written record entered into evidence at the hearing, which he did consider. He further says that he did consider the alarm records, and agreed with Ms. Martyn's argument that these records were of no value in determining her hours of work.

14. Finally, the delegate denies that he was biased in favour of the employer.

15. Counsel for Baum says that Ms. Martyn was given every opportunity to be heard, and that her evidence was presented over the course of one and one half days. He says that Ms. Martyn objected to the use of the alarm records, claiming they were incomplete, and the delegate was under no obligation to consider them.

16. Counsel also submits that Ms. Martyn's supervisor gave evidence, but that his evidence did not support her claim.

17. Baum's counsel contends that there is no presumption of the accuracy of Ms. Martyn's records where Baum failed to maintain employer records and that the delegate correctly found that she had not established an entitlement to overtime wages.

ANALYSIS

18. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

(a) the director erred in law

(b) the director failed to observe the principles of natural justice in making the determination; or

(c) evidence has become available that was not available at the time the determination was being made

19. The burden is on an appellant to demonstrate, with clear and compelling evidence, that the grounds of appeal have been substantiated.

20. I appreciate that Ms. Martyn is not legally trained. Her arguments are neither well nor logically presented. However, it appears she is of the view that the delegate decided against her because he did not find her credible, and that he demonstrated a bias against her by refusing to admit some of her evidence. Although her submissions are not necessarily framed this way, I have decided to address them as follows.

Error of Law

21. Questions of fact alone are not reviewable by the Tribunal under section 112. In *Britco Structures Ltd.*, BC EST #D260/03, the Tribunal held that findings of fact were reviewable as errors of law if they were based on no evidence, or on a view of the facts which could not reasonably be entertained.

22. The Tribunal must defer to the conclusions of credibility by a delegate unless the appellant can demonstrate that the delegate made a palpable or overriding error. An appeal is not an opportunity to re-argue a case simply because an appellant does not agree with the delegate's conclusions.

23. Provided that the delegate explains why he preferred the evidence of one party over another and the evidence supports that conclusion, the Tribunal will not find an error of law. As the Supreme Court recently said in *R. v. Gagnon* ([2006] SCC 17):

> Assessing credibility is not a science. It is very difficult for a trial judge to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events. That is why this Court decided, most recently in *H.L.,* that in the absence of a palpable and overriding error by the trial judge, his or her perceptions should be respected. [para. 20]

24. In rejecting Ms. Martyn's claim for overtime, the delegate said that her evidence "lack[ed] the ring of truth". He considered her answers to questions to be "circuitous, obstinate and conflicted; with a demonstrated propensity to obfuscate rather than shed light on evidence surrounding the dispute". He continued as follows:

> …I find Ms. Martyn's testimony concerning the written record of hours worked, submitted in support of her claim, to be tangled and contradictory. Ms. Martyn's testimony is that the record was created after her termination from employment for the purpose of filing a complaint under the *Ac*t. Purportedly, the record was extrapolated from other records Ms. Martyn had in her possession, namely, production schedules, media guides, tradeshow papers, and personal journals and diaries.
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> …Ms. Martyn's further evidence is that sometime in between August 22, 2003 (date of termination), and January 5, 2004 (date of complaint) she created a record of hours worked by her, based on production schedules, media guides, tradeshow papers, and personal journals and diaries. From this point, Ms. Martyn's evidence in regard to journals and diaries which were important to the construction of a record of times work, took several contradictory turns. Ms. Martyn initially testified she had the journals and diaries (for 2001 and 2002) in her possession when she created the record she submitted in support of her claim under the Act. Later, when attempting to explain the whereabouts of those records, Ms. Martyn accused Baum of "confiscating" her journals and diaries for those years (i.e. evidence of hours worked) from her filing cabinet at the point of termination. When Ms. Martyn was reminded of earlier testimony saying the journal and diaries were in her possession when she created the record, Ms. Martyn she again changed her evidence to say that she threw them out herself, after the record was created. Even later, and a further contradiction, Ms. Martyn claimed to have thrown out the journals at the end of each year, around Christmas time of the year (2000 and 2001).
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> ….
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> In terms of probabilities, after scrutinizing the documents Ms. Martyn relied on in her construction of times worked by her, I am not convinced that sufficient information exists in those records to arrive at a reasonably accurate account of times worked by her. In fact, in the course of the hearings, Ms. Martyn declined an invitation to demonstrate how these times were constructed based on those records saying that too much time had past since she had worked the times (approximately 28 months). I note however that Ms. Martyn apparently had no difficulty in constructing a record of hours worked going back at least 34 months – her entire period of employment- when she created a record from those documents sometime after being terminated (August 22, 2003).
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> …
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> While I can not and do not conclude that Ms. Martyn never worked in excess of eight hours in a day or 40 hours in a week, I can not on the totality of evidence, hazard a guess as to what that time might be in the circumstances of this case. Further, I do not believe that the paucity of evidence can be remedied by further evidence on the matter. In three days' of hearing, I am satisfied the parties have submitted all of the information available to them, and necessary for me to consider in relation to the issue. [reproduced as written]

25. In short, the delegate explains why he did not find Ms. Martyn to be a credible witness, and provides reasons why he found her records to be unreliable. Having reviewed the reasons and the record, I am unable to find that Ms. Martyn has demonstrated a palpable and overriding error.

26. I dismiss the appeal on this ground.

Failure to observe principles of natural justice

27. Principles of natural justice are, in essence, procedural rights that ensure that parties know the case they have to meet, have the ability to respond to that case, and to have the case decided by an unbiased decision maker. Ms. Martyn has the burden of demonstrating that the delegate either failed to give her full opportunity to present her case, or that he was biased against her.

28. Where bias is alleged, strong evidence, not mere accusations, must be presented. An allegation of bias against a decision maker is serious and should not be made speculatively:

> An accusation of that nature is an adverse imputation on the integrity of the person against whom it is made. The sting and doubt about integrity lingers even when the allegation is rejected. It is the kind of allegation that is easily made but impossible to refute except by a general denial. It ought not be made unless supported by sufficient evidence to demonstrate that, to a reasonable person, there is a sound basis for apprehending that the person against whom it is made will not bring an impartial mind to bear upon the cause (*Adams v. British Columbia (Workers' Compensation Board*), [1989] B.C.J. No 2478 (C.A.)
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> To say that someone is unable to give an unbiased decision when he sits, in whatever capacity, deciding things between other people, is an affront of the worst kind, and unless it is well founded upon the evidence, it is not something that should ever be said. (*Vancouver Stock Exchange v. British Columbia (Securities Commission*) (B.C.C.A.) September 28, 1999

29. The onus of demonstrating bias lies with the person who is alleging its existence. Furthermore, a "real likelihood" or probability of bias must be demonstrated. Mere suspicions, or impressions, are not enough.

30. Ms. Martyn presents no evidence that the delegate was biased, relying simply on the fact that he preferred the evidence of the employer. The mere fact a decision maker has preferred the evidence of one party over another is, in and of itself, insufficient to substantiate a bias allegation. In light of the delegate's reasons set out above, I am unable to conclude that the delegate was biased in favour of the employer. Ms. Martyn had to make out a *prima facie* case that she was entitled to overtime. As I understand the delegate's decision, he accepted that while she may have worked some overtime, he found her records too unreliable to arrive at a reasoned and supportable conclusion on what those hours might have been.

31. As I noted above, the delegate found Ms. Martyn's evidence unreliable, and Ms. Martyn herself to lack credibility. The reasons for his findings are set out in the Determination.

32. Furthermore, I am not persuaded that the delegate refused to consider, or gave no weight, to relevant evidence, or considered irrelevant evidence. The record shows that the documents on the CD were, at least in a summary form, before the delegate. Ms. Martyn has presented no evidence or argument that persuades me the delegate erred in his conclusions based on the record before him; rather, it is an attempt to re-argue her case.

33. The appeal is dismissed.

ORDER

34. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated February 22, 2006, be confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal