Employment Standards TRIBUNAL

An appeal

- by -

Virgiliu Aurelian
(the "Appellant")

- 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:** Kenneth Wm. Thornicroft

**FILE No.:** 2013A/19

**DATE OF DECISION:** August 13, 2013

# DECISION

## SUBMISSIONS

Virgiliu Aurelian on his own behalf

## INTRODUCTION & BACKGROUND FACTS

1. Virgiliu Aurelian (the "Appellant") and another individual filed unpaid wage complaints against their former employer, Mainstreet Equity Corp. ("Mainstreet"), a property management firm, under section 74 of the *Employment Standards Act* (the "*Act*"). A delegate of the Director of Employment Standards (the "delegate") investigated the complaints and subsequently issued a Determination and accompanying "Reasons for the Determination" (the "delegate's reasons"). This Determination is now being appealed under subsections 112(1)(a) and (b) of the *Act*.

2. I am adjudicating this appeal based on the extensive written submissions filed by the Appellant and, in addition, I have also reviewed the subsection 112(5) "record" that was before the delegate when he issued the Determination. At this juncture, I am evaluating the appeal under section 114 in order to determine if further submissions from Mainstreet and the Director of Employment Standards are required.

3. The Appellant claimed that Mainstreet employed him as a building maintenance technician from March 5, 2007, until August 12, 2010, and, in his complaint, he advanced claims for unpaid regular wages, overtime pay, vacation pay, statutory holiday pay and compensation for length of service. As I understand the situation, the Appellant was responsible for maintaining all nine of Mainstreet's apartment complexes situated in Abbotsford, B.C.

4. The delegate determined that the Appellant was paid all of the regular wages to which he was entitled and that there was no credible evidence that he worked any overtime hours. Mainstreet's payroll records showed that the Appellant was paid statutory holiday and vacation pay as mandated by sections 45 and 58 the *Act*. The delegate determined that the Appellant was not entitled to any compensation for length of service since his employment was terminated for just cause. The delegate did find that Mainstreet failed to pay the Appellant $40 on account of two separate car allowances (at the agreed rate of $20 per trip) when he had been called into Surrey to undertake some work for Mainstreet. Accordingly, the delegate issued a Determination in the Appellant's favour for $40 plus section 88 interest for a total of $42.94. The Appellant says that the delegate erred in law and failed to observe the principles of natural justice in making the Determination.

## FINDINGS AND ANALYSIS

5. Although the Appellant, on his Appeal Form, marked the box entitled "The Director of Employment Standards failed to observe the principles of natural justice in making the Determination", this ground of appeal is not particularized in any fashion. So far as I can determine, the delegate fully complied with his section 77 obligations and was not in any sort of real or perceived conflict of interest. There is simply nothing before me regarding this ground of appeal and, accordingly, the appeal, as it relates to this ground is summarily dismissed under subsections 114(1)(c) and (f).

6. The Appellant says that the delegate erred in law in several respects. For the most part, these alleged errors relating to the delegate's findings of fact. A finding of fact can constitute an error of law but only if the there was no reasonable evidentiary foundation for the factual finding. I shall address each alleged error in turn.

7. The first alleged error concerns the Appellant's claim for unpaid regular wages. The parties agree that the Appellant's compensation was comprised of the following components: i) a $3,000 monthly salary; ii) a $300/month vehicle allowance; iii) and a $375 rent allowance (representing 50% of actual rent for the Appellant's accommodation). Thus, his gross monthly compensation was $3,675. The Appellant says that he was short-changed for the months of January through April 2010 and points to alleged discrepancies between his bank statements and Mainstreet's payroll records. I have reviewed the Appellant's bank statement that he appended to his appeal form and the source of the Appellant's concern, so far as I can determine, is that while his compensation was expressed as a monthly amount, he was actually paid on a 2-week cycle. Thus, the net amount (after appropriate deductions) paid to him every 2 weeks would be less than the total net pay received if he had been paid semi-monthly.

8. The second alleged error relates to what the Appellant described as his "vacances payment for 2010". The delegate determined, based on his review of the payroll records before him, that the Appellant received his full 4% vacation pay entitlement. The delegate, at page R12 of his reasons, stated that the Appellant received a vacation pay credit with each payroll cheque and the balance due was paid at the end of the year. The delegate noted that the Appellant received a $1,440 vacation pay payment on December 31, 2009, and a final vacation pay payment on August 13, 2010, (the Appellant's employment was terminated effective August 12, 2010) of $889.85. The Appellant says that this latter sum was never paid to him. However, I have reviewed the record and there was a cheque issued to the Appellant (No. 20514) that included $889.85 vacation pay and this amount was included in the deposit to the Appellant's account on August 13, 2010.

9. As previously noted, the delegate rejected the Appellant's claim for overtime pay because, in the delegate's view of the matter, there was no credible evidence to support the claim. The Appellant strongly disagrees with this finding but it was made by the delegate after a full consideration (including his reasons for finding that some of the Appellant's evidence relating to this claim lacked credibility – see the delegate's reasons at pages R10-R12). As such, there is no basis to conclude that the delegate erred in law regarding the rejection of the Appellant's overtime pay claim.

10. There is an allegation in the Appellant's appeal submission that I am not quite sure what to make of: "Employees' rights and how to claim to Human Rights and advise us to come to them if we'll be fired. So Employment Standards knew that Mainstreet obligated us to work for free, under stress, harassment, persecution, violence". To the extent that this allegation represents a complaint regarding discrimination under the B.C. *Human Rights Code*, neither the delegate nor this Tribunal has any jurisdiction to grant any relief under that statue – see *Act*, sections 86.2 and 103 and *Administrative Tribunals Act*, section 46.3.

11. The Appellant's final alleged error of law concerns the rejection of his claim for compensation for length of service. The delegate determined that the Appellant was not entitled to any compensation for length of service because Mainstreet had just cause to terminate his employment (see subsection 63(3)(c) of the *Act*). The delegate's analysis of this matter is set out at pages R13-R15 of his reasons. Among other things, the delegate concluded that the Appellant: i) had engaged in inappropriate behaviour toward other Mainstreet employees and toward some tenants; ii) had frequently been previously warned, both verbally and in writing (on many separate occasions), regarding his conduct and his overall work performance; iii) engaged in a physical altercation with another Mainstreet employee that resulted in a police attendance; iv) was not performing at an acceptable level; and v) had been insubordinate. Rather than making a good faith effort to improve his performance and behaviour, the Appellant generally responded in a wholly provocative manner –

for example, in one response, the Appellant wrote back to his manager that the complaint against him was "fabricated" (despite ample evidence to the contrary) and that his immediate supervisor was acting in "bad faith" and trying to "harass and harm" him.

12. The Appellant appealed an initial denial of employment insurance benefits to a Board of Referees constituted under the federal *Employment Insurance Act* and that tribunal, following an oral evidentiary hearing, concluded that the Appellant had lost his employment "due to his own misconduct" and thus dismissed his appeal. The Board of Referee's decision was before the delegate but the delegate did not simply defer to that tribunal's decision but, rather, made his own independent assessment of the evidence. Whether an employer has just cause is a matter of mixed fact and law. In this case, the delegate applied the proper legal principles to the evidence that was before him. I see no error in terms of the delegate's findings of fact – which were amply supported by the evidentiary record before him – nor in the delegate's statements regarding the governing legal principles. In short, the delegate was entitled to conclude that Mainstreet met its evidentiary burden of proving it had just cause for dismissal.

13. Although the Appellant vigorously disputes the various allegations advanced against him regarding his performance and conduct, I am satisfied that the delegate was entitled to conclude that the Appellant was not entitled to compensation for length of service since there was just cause for his dismissal.

14. Having addressed all of the reasons for appeal advanced by the Appellant, I conclude that none of them has any reasonable prospect of success. That being the case, this appeal must be dismissed.

## ORDER

15. Pursuant to subsections 114(1)(c) and (f) of the *Act*, this appeal is dismissed and in accordance with subsection 115(1)(a) of the *Act*, I order that the Determination be confirmed as issued.

**Kenneth Wm. Thornicroft**
**Member**
**Employment Standards Tribunal**