Employment Standards TRIBUNAL

An appeal

- by -

Kenneth Johnston
("Johnston")

- 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/62

DATE OF DECISION: July 2, 2010

DECISION

SUBMISSIONS

Kenneth Johnston	on his own behalf
Jennifer Redekop	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by Kenneth Johnston ("Johnston") of a Determination that was issued on March 30, 2010, by a delegate of the Director of Employment Standards (the "Director").

2. Johnston had complained Her Majesty the Queen in Right of the Province of British Columbia as represented by the Chief Electoral Officer (the "Province") had contravened Part 4, sections 32 and 39 of the *Act* on May 12, 2009. The Director concluded the complaint filed by Johnston against the Province did not show a contravention of the *Act* and declined to take any further action on it.

3. Johnston has appealed, saying the Director erred in law and failed to observe principles of natural justice in making the Determination. He asks the Tribunal to vary the Determination and find the Province contravened section 39 of the *Act*.

4. Johnston seeks an oral hearing on this appeal. He claims there is evidence he would like to present. 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. 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

5. The sole issue is whether the Director committed a reviewable error in finding the Province did not contravene the *Act*.

THE FACTS

6. Johnston worked as a voting officer during the May 2009 provincial election. He worked from 7:15 am to 9:15 pm, 14 hours, on May 12, 2009. He also worked 2 training hours on, or about, May 7, 2009. Johnston worked a total of 16 hours for the Province during the election.

7. Johnston complained the Province had contravened sections 32 and 39 of the *Act*. Applying section 35.1 of the *Employment Standards Regulation* (the *Regulation"*), the Director found no contravention of section 32 of the *Act*.

8. In respect of section 39, the Director found the 14 hours worked by Johnston on May 12 were not "excessive" and there was no contravention. In making that finding, the Director considered the dictionary

definition of the word "excessive", the employment context, other provisions of the *Act* that touched on hours of work or working conditions and whether there was any evidence that the hours worked were detrimental to Johnston's health or safety. On the last point, the Director found Johnston had not provided any evidence showing a detriment to either his health or his safety from having worked that 14 hour day.

ARGUMENT

9. The appeal submission filed by Johnston indicates that the Director's decision on both sections 32 and 39 are in issue. There is nothing in the appeal specifically identifying or arguing any error by the Director on the section 32 claim, although there is a general comment that the Province should not be exempt from a requirement to comply with employment standards.

10. Johnston's main argument takes issue with the Director's finding that the 14 hours worked by him on May 12 was not "excessive", in the sense that it did not exceed what is "usual and proper" in all the circumstances. He says that on employment matters, the *Act* takes precedence over the *Elections Act* and a suggestion that the latter contemplates employees working excessive hours cannot override the prohibition in the *Act* against an employer allowing an employee to work excessive hours.

11. Johnston argues that "excessive hours", as that term is used in section 39, are any hours over 12 in a day and the Director erred in not making that finding.

12. In reply to the appeal, the Director says the appeal has not indicated how the finding on section 32, which applied section 35.1 of the *Regulation*, was in error. The Director says there was none. On the section 39 issue, the Director relies on the analysis set out in the Determination.

13. The Director says Johnston has not shown any failure by the Director to observe principles of natural justice in making the Determination. The Director says Johnston was provided with the opportunity to make his case and to respond to the submissions and the material provided by the Province in response to his complaint.

14. The Province has not filed a reply to the appeal.

15. In his final submission, Johnston notes the absence of a position from the Province. He also says he anticipates an oral hearing and intends to have three witnesses, expert in the field of excessive hours, provide evidence.

ANALYSIS

16. 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.*

17. 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. It is not simply an opportunity for a dissatisfied party to have the Tribunal review the material in the file and reach its own conclusion without reference to the findings and conclusions made by the Director: see *World Project Management Inc. et al*, BC EST # D134/97 (Reconsideration of BC EST # D325/96). 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.

18. At the outset I will make the point that this appeal is confined to the facts alleged by Johnston in his complaint: that he had worked for the Province at a provincial election polling station for 14 hours on May 12, 2009. This appeal is not about, and does not address, whether another person employed in another job who worked 14 hours in different circumstances was required or allowed to work excessive hours or whether another person who may have worked 17 hours at a provincial polling station was required or allowed to work excessive hours.

19. I am able to address Johnston'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.

20. 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 Johnston 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 the Province.

21. Johnston has not met the burden of showing there has been a breach of natural justice by the Director in making the Determination and, accordingly, this aspect of his appeal is dismissed.

22. I also summarily dismiss any suggestion the Director erred in finding no contravention of section 32 of the *Act*. The Director was correct in finding section 35.1 of the *Regulation* provided a complete and succinct answer to this claim.

23. The argument concerning section 39 raises an issue of statutory interpretation, namely whether the Director's interpretation of section 39 was correct, and an issue relating to the Director's application of the provision to Johnston.

24. In *Douglas Mattson*, BC EST # RD647/01 (Reconsideration of BC EST # D148/01), the Tribunal identified and endorsed the following approach to interpreting the *Act*:

> In *Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, the Supreme Court of Canada, endorsed a purposive approach to statutory interpretation. At para. 21, the Court said:

> Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "Construction of Statutes"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> The above approach is summarized in Driedger, *The Construction of Statues*, (3rd ed. 1994), in the following propositions, found at page 35:
>
> > (1) All legislation is presumed to have a purpose. It is possible for courts to discover, or to adequately reconstruct, this purpose through interpretation.
> >
> > (2) Legislative purpose should be taken into account in every case and at every stage of interpretation, including the determination of ordinary meaning.
> >
> > (3) Other things being equal, interpretations that are consistent with or promote legislative purpose should be preferred and interpretations that defeat or undermine legislative purpose should be avoided.
> >
> > (4) The ordinary meaning of a provision may be rejected in favour of an interpretation more consistent with the purpose if the preferred interpretation is one the words are capable of bearing.
>
> The purposive approach directs that the *Act* must be read as a whole, attempting to give meaning to all the words in their entire context in a way that is consistent with the scheme and object of the *Act*, and the intention embodied in the words.

25. The Director used this approach in considering the meaning of section 39 of the *Act*, which reads:

> *Despite any provision of this part, an employer must not require or directly or indirectly allow an employee to work excessive hours detrimental to the employee's health or safety.*

26. As noted in the Determination, the *Act* does not define "excessive hours". The Director noted the need to take account of the purposes of the legislation, which are directly expressed in section 2. In his appeal, Johnston does not relate his suggested interpretation to any stated purpose, although it is hard to argue that the *Act* does not, as he submits, contain a "reasonableness" element when interpreting and applying its provisions.

27. The Director considered the ordinary meaning of the word "excessive" by reference to dictionary sources, accepting the word holds the connotation of "exceeding what is necessary or proper" within section 39. Johnston does not specifically disagree with the Director on this point, but it is implicit in his argument that he feels what is "excessive" cannot be defined by consideration of terms like "usual and proper", but must be defined by reference to the hours of work section in the *Act*. He says the term "excessive" should be interpreted to mean "any hours over 12 in a day". He does not really explain why 12 hours in a day should be the ceiling, except to say that in his view, anything above 12 hours is not usual or proper.

28. The Director also considered the phrase "excessive hours", based on its connection to the term "detriment", must in some respect take its meaning by reference to some objectively demonstrated adverse effect to an employee's health or safety.

29. I can find no error in the approach to the interpretation of section 39 taken by the Director. The Director has addressed those propositions identified in *Matson*, *supra*. The interpretation placed on the provision appears to be consistent with the stated purposes of the *Act* and is not inconsistent with any of the *Act's* objectives or purposes. I do not find an interpretation of section 39 based on considerations within the employment context to be unreasonable.

30. I am unable to accept the interpretation urged by Johnston for four main reasons.

31. First, section 39 uses the term "excessive hours". The legislature chose not to define that phrase, although it could have done so. The logical inference is that the legislature did not intend to give that phrase any specific meaning.

32. Second, the prohibition is framed in the context of the hours required or allowed to be worked causing detriment to health or safety. I agree with the Director that where there is detriment shown, it would be counterintuitive to determine what are "excessive hours" without reference to the employment context, which I take to include the nature of the work being performed, the circumstances of the work, the period of time over which the hours are being worked and any other circumstances peculiar to the individual being required or allowed to work the hours. The health and safety of an employee may, in some employment contexts, be compromised over periods of work that are less than 12 hours in a day.

33. Third, the view taken by Johnston does not address whether "excessive hours" might arise in the context of hours worked *in a week*. It would not seem logical to confine the meaning of the term to 12 hours in a day when the possible consequence would be to endorse a work week (which on Johnston's view could run continuously) of up to 72 hours duration.

34. Fourth, it is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. An interpretation can be considered absurd if it is incompatible with other provisions or with the object of the legislative enactment: see Côté, *The Interpretation of Legislation in Canada* at pp. 378-80. Both sections 37 and 40 of the *Act* contemplate an employee may work more than 12 hours in a day: see subsection 37(4) and paragraph 40(1) (b). Johnston's assertion that a 12 hour day is, in itself, excessive hours, is inconsistent with a recognition in the *Act* that more than 12 hours can be worked provided they are paid for at the appropriate overtime rate.

35. For the above reasons, I find Johnston has not shown the Director erred in finding the Province did not contravene section 39 when it required Johnston to work 14 hours on May 12, 2009, and the appeal is dismissed.

36. I will make one final comment in respect of Johnston's statement of his intention to have three experts in the field of "excessive hours" testify at an oral hearing. Such evidence, as it is described by Johnston, would be quite useless in support of his claim and, generally speaking, entirely unnecessary. Johnston does not purport that any of these witnesses can speak to the effect of his having worked 14 hours on the day in question. On the general issue of "excessive hours", the Tribunal does not need to be convinced of the importance of legislation prohibiting excessive hours of work that affects employees' health and safety. We accept the importance of such legislation from the simple fact the legislature has addressed this matter in the *Act*. What I have not agreed with here is that "excessive hours" in section 39 must be defined as anything over 12 hours in a day. In any event, there is no indication this evidence was not reasonably available during the investigation and could have been provided to the Director during the complaint process. Based on a preliminary assessment of the evidence, it is improbable that Johnston would be allowed to introduce it in the appeal: see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03.

ORDER

37. Pursuant to section 115 of the *Act*, I order the Determination dated March 30, 2010, be confirmed.

David B. Stevenson
Member
Employment Standards Tribunal