

An appeal

- by -

Vladimir Kibalnitchenko
(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: Carol-Ann Hart

FILE No.: 2010A/039

DATE OF DECISION: July 12, 2010

DECISION

SUBMISSIONS

Vladimir Kibalnitchenko	on his own behalf
Ted Warkentin	on behalf of the Employer
Sukh Kaila	on behalf of the Director

OVERVIEW

1. This is an appeal by Vladimir Kibalnitchenko (the “Appellant”), pursuant to Section 112 of the *Employment Standards Act* (“the *Act*”), of a Determination of the Director of Employment Standards (“the Director”) issued on March 2, 2010 (the “Determination”).
2. Mr. Kibalnitchenko was employed as a salesperson by Marine Chrysler Dodge Jeep Ltd. (the “Employer”) from February 10, 2009 to March 26, 2009. In his complaint filed with the Employment Standards Branch, Mr. Kibalnitchenko alleged that the Employer had deducted the sum of \$615.00 from his wages without his authorization, in contravention of the *Act*.
3. In the Determination, the Delegate of the Director (the “Delegate”) concluded that the Employer had not contravened the *Act*, and no wages were outstanding.
4. The Appellant contends that the Director failed to observe the principles of natural justice, and erred in law in making the Determination.

ISSUES

5. The issues in this case are the following:
 1. Did the Director fail to observe the principles of natural justice in making the Determination?
 2. Did the Director err in law in concluding that the Employer had not contravened the *Employment Standards Act* because deductions from Mr. Kibalnitchenko’s pay were made pursuant to his written assignment of wages?

BACKGROUND

6. The facts in this case are straight-forward. It was undisputed that the Employer deducted the total amount of \$615.00 from the Appellant’s wages for the cost of licensing and training course fees paid to the Motor Vehicle Sales Authority of British Columbia (“VSA”).
7. The issue addressed by the Delegate in the Determination was whether the Employer had deducted the cost of the VSA licensing and training course fees from the Appellant’s wages without his written authorization.
8. The Delegate conducted a hearing on September 29, 2009. After considering all of the evidence before him, the Delegate concluded that Mr. Kibalnitchenko had signed an assignment of wages permitting the Employer to deduct the amount of \$615.00 for the VSA course registration and license fees.

ARGUMENT

For the Appellant

9. The Appellant maintained that he had never signed the documents based on which the Employer claimed he had agreed to have licensing and training fees deducted from his pay. Mr. Kibalnitchenko contended that the documents produced by the Employer to the Delegate were forged.
10. Mr. Kibalnitchenko indicated that he had “*jumped at the opportunity*” to work for Marine Chrysler Dodge Jeep Ltd. because he was not able to afford the cost of the licensing and training fees, and it was the only dealership which would pay the training and license fees for its employees. The appellant wrote that he had seen the advertisement of Marine Chrysler at www.craigslist.org, which had specified that Marine Chrysler paid for licensing and training fees.
11. Mr. Kibalnitchenko further noted that the Marine Chrysler logo did not appear on the documents the Employer was relying on to make the deductions, whereas the logo was displayed on the other documents he had signed when his employment began.

For the Employer

12. Mr. Warkentin wrote that he strongly opposed the appeal. According to Mr. Warkentin, the Employer had never faced such a complaint in the past because training and licensing issues were explained to every new salesperson at the time of their hire. This was also the case when Mr. Kibalnitchenko was hired, and all of the documents Mr. Kibalnitchenko had signed at the time the policies were explained to him were provided to the Delegate. Mr. Warkentin noted that Mr. Kibalnitchenko had failed to provide copies of the advertisements he had referenced in his appeal.

For the Director

13. The Delegate submitted that the Determination should be confirmed and the appeal dismissed. He maintained that the Appellant had not provided any evidence or commentary to explain or prove that the Director had erred in law or failed to observe the principles of natural justice.

ANALYSIS

14. Section 112(1) of the *Act* sets out the grounds upon which an appeal may be made to the Tribunal from a Determination of the Director. That provision reads:

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 being made.

Did the Director fail to observe the principles of natural justice in making the Determination?

15. 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. The burden to establish an infringement rests with the party asserting the breach of the principles of natural justice. (See *Dusty Investments Inc. dba Honda North*, BC EST #D043/99).
16. No allegation has been made by the Appellant that he was not made aware of the case he was required to meet, or not given a full and fair opportunity to present his evidence. There was also no allegation that the Delegate was not an independent and impartial decision maker.
17. The Delegate conducted an investigation and an oral hearing at which the parties presented their evidence and made submissions before the Determination was issued. There is no evidence or argument on appeal which would suggest that the Appellant was denied natural justice.
18. The Appellant has failed to establish that the Delegate breached the principles of natural justice.

Did the Director err in law in concluding that the Employer had not contravened the Employment Standards Act because deductions from Mr. Kibalnitzenko's pay were made pursuant to his written assignment of wages?

19. The Tribunal has adopted the definition of "error of law" set out by the BC Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.) in a number of decisions including: *J.C. Creations Ltd. (c.o.b.) Heavenly Bodies Sport*, BC EST #RD317/03. In the *Gemex* decision, the Court of Appeal outlined the following reviewable types of errors of law:
 1. a misinterpretation or misapplication of a section of a statute;
 2. a misapplication of an applicable principle of general law;
 3. acting without any evidence;
 4. acting on a view of the facts which could not reasonably be entertained; and
 5. exercising discretion in a manner which is wrong in principle.
20. The Appellant did not bring forward any arguments to show that any of these types of errors of law had been made in the Determination in this case. Rather, he essentially alleges that the Delegate erred in making his findings of fact.
21. This is not a case where findings of fact were made by the Delegate without any evidence, or based on a view of the facts which could not reasonably be entertained based on the evidence. The Delegate heard testimony from the parties, and made assessments of credibility, based on the often-cited principles outlined by the Court of Appeal in *Faryna v. Chorny* (1952) 2 D.L.R. 354, (BCCA), and the factors set out by the Tribunal in *Werachai Laoha*, BC EST #370/01. Clearly there was evidence and reasoned analysis, as outlined in the Determination, to support the Delegate's finding of facts and conclusions.
22. In support of his position that the signatures were forged on the two documents (which the Employer claimed Mr. Kibalnitzenko had signed agreeing to the deductions from his pay), the Appellant points out that there is no Marine Chrysler logo. In reviewing the Record, I found that there were, in fact, other documents signed by Mr. Kibalnitzenko on February 10, 2010, on which the Marine Chrysler logo also was not present.

23. It did not appear that the Appellant had raised this matter with the Delegate during the investigation or the hearing, and there was no explanation as to why he had not done so. In any event, it was not shown that the fact that the company logo did not appear on the written documents in question and other documents signed by the Appellant would have changed the Determination.
24. The Appellant also contends that by looking at the signatures on the two documents in question, it is apparent that they have been forged. As the Delegate noted in the Determination, there was no expert evidence presented regarding the handwriting in question. The Delegate reviewed and compared the documents which Mr. Kibalnitchenko acknowledged having signed with the documents he contended were forged, and found “*no apparent differences in handwriting based on [bis] assessment*”. The Delegate made it clear that he was not a handwriting expert, and placed little weight on this point.
25. It was correctly noted by the Delegate that without any expert, or other witness evidence, the credibility of the parties was of primary importance in deciding the issue. I find nothing inappropriate about the manner in which the Delegate dealt with the contentious evidence regarding the documents and signatures in question.
26. In support of his appeal, the Appellant referred to advertising by the Employer at www.craigslist.com, but as the Employer noted, he did not provide a copy of the advertisement in question to the Delegate during the investigation or on appeal. Accordingly, the advertisement on which the Appellant sought to rely could not be considered.
27. In conclusion, it is clear to me that Mr. Kibalnitchenko disagrees with the findings of fact made by the Delegate and seeks to have the Tribunal arrive at a different conclusion. The Appellant has not demonstrated any error of law or breach of natural justice in the Determination.
28. The appeal is dismissed.

ORDER

29. Pursuant to Section 115 of the *Act*, I order that the Determination in this matter dated March 2, 2010 be confirmed as issued.

Carol-Ann Hart
Member
Employment Standards Tribunal