Employment Standards TRIBUNAL

An appeal

- by -

Gordon Cameron
("Cameron")

- 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.: 2006A/53

DATE OF DECISION: July 11, 2006

DECISION

SUBMISSIONS

Gordon Cameron	on his own behalf
Kyara Kahakauwila	on behalf of L.A Limousines Ltd.
Shelley Burchnall	on behalf of the Director

OVERVIEW

1. This decision addresses an appeal filed under Section 112 of the *Employment Standards Act* (the "*Act*") by Gordon Cameron ("Cameron") of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on March 29, 2006.

2. The Determination was made on a complaint filed by Cameron against L.A. Limousine Inc. ("LAL"). The complaint originally alleged LAL had failed to pay Cameron wages for travel. Later, Cameron added an allegation that LAL had contravened Sections 63 and 83 of the *Act* by terminating his employment because he had filed a complaint under the *Act*.

3. Cameron says the Director erred in law in finding he was not entitled to length of service compensation and in concluding Cameron had the burden of proving LAL had contravened Section 83 of the *Act* and that he had not met that burden. Additionally, Cameron says the Director failed to observe principles of natural justice in making the Determination. He says the delegate seemed pre-disposed to decide his complaint a certain way and that he did not have an opportunity to "fully speak on the issues in the case before the delegate".

4. The Tribunal has reviewed the appeal and the materials submitted with it and has decided an oral hearing is not necessary in order to decide this appeal.

ISSUE

5. The issues are whether Cameron has shown there was an error of law in the Determination or a failure by the delegate to observe principles of natural justice in making the Determination.

THE FACTS

6. Cameron commenced employment with LAL in April 2005 as a limousine driver being paid at a rate of $10.25 an hour. In July, Cameron complained to LAL that he was not being paid in accordance with the requirements of the *Act*. He prepared a Self Help form in early October 2005 and delivered it to LAL. When Cameron's claims remained unresolved, he filed a complaint with the Director.

7. On November 1, 2005, Cameron amended his complaint to include a claim under Section 63 and Section 83 of the *Act*.

8. On January 25, 2006, a complaint hearing was conducted by a delegate of the Director. Cameron attended on his own behalf and Ed and Kyara Kahakauwila attended on behalf of LAL. The delegate received a substantial amount of material and information from the parties.

9. In the Determination, the delegate notes that in describing his employment, Cameron said:

> . . . he was hired as a driver on an "as, and when needed basis". He and Mrs. Kahakauwila would contact each other by telephone or e-mail to determine his availability for jobs and he would either accept or refuse.

10. Mrs. Kahakauwila is described in the Determination as saying Cameron's employment was "on-call, casual", where Cameron had the option to accept or refuse a driving assignment offered to him. There is ample evidence in the material supporting the description of the employment given by both Cameron and Mrs. Kahakauwila. There is reference to that material in the Determination.

11. The delegate examined the claim under Section 63 and, based on the above information, found the exception described in paragraph 65(1)(a) excluded Cameron's employment from entitlement to length of service compensation.

12. The delegate found no evidence to support a finding that LAL had taken retaliatory action against Cameron because he exercised his rights under the *Act.*

ARGUMENT AND ANALYSIS

13. In this appeal, Cameron has the burden of persuading the Tribunal there has been an error made by the delegate. Subsection 112(1) of the *Act* sets out the grounds on which an appeal may be brought:

> *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.*

Errors of Law

14. Cameron argues the delegate erred in law by concluding his employment was excluded from Section 63 of the *Act*. He argues his employment was "regular part-time work on week-ends" and submits that it could not have been the intention of the legislature to exclude such employment from length of service entitlement in Section 63.

15. In his submission on the appeal, Cameron correctly observes that an appeal cannot be made on findings of fact. Notwithstanding, Cameron asserts his employment with LAL was "one of regular part-time work on weekends". That assertion is inconsistent with the findings of fact made by the delegate about the nature of Cameron's employment, findings which are amply supported by the evidence in the file. Based on

those findings of fact, I can find no error of law in the conclusion of the delegate that Cameron's employment was, applying paragraph 65(1)(a) of the *Act*, employment to which Section 63 did not apply.

16. Cameron re-asserts his belief that he was terminated because he engaged the processes under the *Act* to resolve a wage claim, which is prohibited by Section 83 of the *Act*. He argues the delegate erred by imposing on him the burden of proving a contravention of Section 83, taking issue with the following statement from the Determination:

> In *Burnaby Select Taxi Ltd.* BC EST #D091/96, and its reconsideration decision, *Zolton Kiss* BC EST #D122/96, the Tribunal has held that in order to succeed in establishing that an employer had contravened Section 83, the burden of proof rests upon the employee to show the action of the employer was motivated in whole or in part by the employee's direct or potential involvement under the Act.

17. The above statement should not be read without the final two sentences that complete the paragraph, and state:

> Essentially, Mr. Cameron must show on the balance of probabilities, there has been retaliatory action by L.A. Limousines because he exercised his rights under the Employment Standards Act. I cannot conclude that Mr. Cameron has met this burden.

18. Cameron submits the *Act* does not place the onus on an employee to prove the employer's intent.

19. Fairly read, however, the delegate's analysis does not impose on Cameron the burden of proving his employer's intent, as he suggests. The focus of the delegate's analysis was whether there was objective evidence to support a finding that LAL had taken action against Cameron for exercising his rights under the *Act*. I do not read the Determination as saying anything more than Cameron had the burden, which was not met, of persuading the delegate, through objective evidence and on balance, that LAL had contravened Section 83.

20. I find no error of law in the delegate's approach.

21. The allegation made by Cameron of a contravention of Section 83 by LAL is not a matter where there is any initial burden on LAL to disprove such a contravention. There are few circumstances where an employer is required to disprove a contravention of the *Act*. Those which exist are found in Section 126. It was not unfair, unreasonable or inconsistent with any provision or statutory policy to impose the burden of proof on Cameron to prove a contravention of Section 83 by LAL.

22. In sum, the delegate made no errors in law and this ground of appeal is dismissed.

Failure to Observe Principles of Natural Justice

23. Cameron argues there was a denial of natural justice during and following the complaint hearing. He cites the following matters as amounting to a denial of natural justice:

(i) at the commencement of the hearing, the delegate indicated she had read the file and "it appeared" to Cameron that she had already made up her mind how his complaint would be decided;

(ii) he did not get to explain about being asked to do short notice trips and trips of less than two hours;

(iii) questions asked by the delegate to the representatives of LAL "seemed to be worked to obtain a certain answer".

(iv) The delegate did not inquire into an earlier statement by LAL that they stopped scheduling him because he had complained about the payment of wages and had sent them a Self Help form;

(v) After the hearing, the delegate told him he had "fired himself" and "pressured" him into signing a complaint withdrawal form, which he later withdrew.

24. In its reply to the appeal, LAL says the delegate asked questions of both parties that were "direct and probing". Mrs. Kahakauwila says there was no indication by the delegate of what the Determination would be until she stated her decision following the evidence.

25. In the submission filed on behalf of the Director, the delegate denied any predisposition, expressed the view that both parties were allowed to present their case and positions and confirmed that she had delivered her decision orally at the close of hearing. She agrees to having conversed with Cameron after the hearing process had ended and indicated to him that he had the option of withdrawing the complaint.

26. While I question the wisdom of conversing with either party to a complaint hearing before a Determination is written and delivered to the parties, in the circumstances it does not appear this conduct was a failure by the delegate to observe principles of natural justice. I accept, based on the submissions made by LAL and on behalf of the Director, that a Determination had already been made. Cameron has not provided any basis for finding the conduct of the delegate following the complaint hearing amounted to a denial of natural justice. In any event, the ground of appeal speaks of a failure to observe principles of natural justice "*in making the determination*". Accordingly, the legislature seems to have directed that conduct following the issuance of a determination is largely irrelevant when considering an appeal grounded in paragraph 112(1)(b) of the *Act*. I do not discount entirely the possibility that an appeal on this ground might be based on conduct following the making of a determination, but there is nothing to indicate that has happened here.

27. In the context of principles of natural justice, Cameron's arguments have raised two questions: first, whether the delegate was biased; and second, whether he was denied a fair hearing.

28. Generally, the burden of proving a breach of natural justice is on Cameron.

29. On the question of whether the delegate was biased, Cameron alleges the delegate was in someway predisposed to a particular result on his complaint, was closed minded with regard to particular issues and "seemed to" tailor questions for the representative of LAL to obtain a certain answer.

30. Actual bias is found on the evidence. There is no evidence at all of actual bias. The Tribunal has adopted the test for finding a reasonable apprehension of bias that is articulated in the following statement:

> To ensure fairness the conduct of members of administrative tribunals has been measured against a standard of reasonable apprehension of bias. The test is whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator.

31. That test would apply when reviewing allegations of reasonable apprehension of bias against the Director or a delegate of the Director.

32. As the Tribunal noted in *Dusty Investments Inc. d.b.a. Honda North*, BC EST #D043/99 (Reconsideration of BC EST #D101/98), the test for determining actual bias or a reasonable apprehension of bias is an objective one, the evidence presented should allow for objective findings of fact:

> . . . because allegations of bias are serious allegations, they should not be found except on the clearest of evidence: see *A.B. Lumber Co. Ltd. and North Coast Forest Products Ltd. v. B. C. Labour Relations Board and another*, B.C.J. No. 1858, August 7, 1998, Vancouver Registry No. A980541.

33. An allegation of bias or reasonable apprehension of bias against a decision maker are serious and should not be made speculatively. The onus of demonstrating bias or reasonable apprehension of bias lies with the person who is alleging its existence. Furthermore, a "real likelihood" or probability of bias or reasonable apprehension of bias must be demonstrated. Mere suspicions, or impressions, are not enough.

34. Cameron has provided only his perception of what occurred. He has provided no clear and objective evidence, either directly or from any other party appearing at the hearing. He has not met the burden on one alleging bias or reasonable apprehension of bias.

35. On the second question in this ground of appeal, I find no basis for Cameron's argument. It is clear from the determination and the material on file that Cameron had full opportunity to present his case and to answer the case presented by the representatives of LAL. Cameron says he "did not get to explain about being asked to do short notice trips or trips of only two hours in length", but once again, in the context of fair hearing, there is no evidence, assuming such information was even relevant to his complaint, that the delegate inappropriately interfered with his opportunity to speak to that matter.

36. Cameron says the delegate failed to inquire into an earlier statement made by LAL. It is unclear from the appeal when and in what context this statement was allegedly made, but providing it was not allegedly made during the mediation process, Cameron himself could have inquired into the statement in his questioning of representatives of LAL in the complaint hearing. The suggestion in the appeal argument that the delegate was somehow responsible for raising and inquiring into this alleged statement misconstrues the role of a delegate in a complaint hearing and the potential problems that can be created where a delegate presiding over a complaint hearing assumes a role that might be objectively viewed as advocacy for one party or another (see *James Hubert D'Hondt operating D'Hondt Farms*, BC EST #RD021/05 (Reconsideration of BC EST #D144/04)).

37. For the above reasons, the appeal is dismissed.

ORDER

38. Pursuant to Section 116 of the *Act*, I order the Determination dated March 29, 2006 be confirmed.

David B. Stevenson
Member
Employment Standards Tribunal