

An appeal

- by -

Irina Berezoutskaia
("Employee")

- 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: Shafik Bhalloo

FILE No.: 2008A/71

DATE OF DECISION: August 20, 2008

DECISION

OVERVIEW

1. This is an appeal by Irina Berezoutskaia (the “Employee”) under Section 112 of the *Employment Standards Act* (the “Act”) against a Determination of the Director of Employment Standards (the “Director”) issued June 16, 2008.
2. The Delegate, in the Determination, concluded that the Act did not apply to the Complaint and went on to exercise his jurisdiction under Section 76(3) of the Act to stop investigating the Complaint and advised the parties that no further action would be taken in respect of the Complaint.
3. The Employee appeals the Determination on the grounds delineated in Sections 112(1)(a) and (b), namely, the Director erred in law and failed to observe the principles of natural justice in making the Determination.
4. The Employee is seeking the Tribunal to cancel the Determination.
5. The Employee has not requested an oral hearing of the Appeal. Section 36 of the *Administrative Tribunal’s Act* and Rule 17 of the Tribunal’s Rules of Practice and Procedure provide that the Tribunal may hold any combination of written, electronic and oral hearings. In my opinion, this Appeal can be adjudicated on the written submissions of the parties without resort to an oral hearing. Accordingly, I have sought to decide the Appeal on the basis of the Section 112 (5) “record”, the submissions of the parties, and the reasons for the Determination.

ISSUES

6. The issues in this appeal are two-fold, namely:
 - Did the Director err in law in determining that the Act did not apply to the Employee’s Complaint and stop investigating the Complaint pursuant to Section 76(3) of the Act?
 - Did the Director fail to observe the principles of natural justice in making the Determination?

FACTS

7. Securiguard Services Ltd. (“Securiguard”) is a security service company.
8. Securiguard employed the Employee as a security guard for a very brief period commencing January 29, 2008 until February 5, 2008. During this period the Employee was dispatched by Securiguard to provide security services to one of its clients, the Bank of Nova Scotia (the “Bank”), at 1 West Broadway, in the City of Vancouver.

9. On March 3, 2008, the Employee filed a complaint (the “Complaint”) against Securiguard with the Minister of Labour and Citizens’ Services. On the same date, the latter forwarded the Complaint to the Employment Standards Branch (the “Branch”).
10. In the Complaint, the Employee claimed that she was “forced [by Securiguard] to quit working”. As a remedy, she sought wages from her last day of employment, February 5, 2008 until she returned to work. Apparently, the Employee was seeking reinstatement in her previous position as security guard for Securiguard. She also sought compensation of \$100.00 for some “lost items” (more particularly a pair of leather shoes) she claims she left at her workplace and was not allowed by Securiguard to retrieve on her last day of employment.
11. In the extensive written submissions attached to the Complaint Form, the Employee states that during her training for the security guard position with Securiguard she was provided with written instructions pertaining to “all requirements for the security guards assigned to work at the Scotiabank.” However, she was, at the same time, “given verbal orders that demanded [her] to perform [her] job improperly and violate all rules and procedures” she was required to comply with and which she “signed to comply with”.
12. While in her submissions the Employee does not explain who gave her “verbal orders” to “perform her job improperly and violate all rules”, she provides examples of the said “verbal orders”. These examples include “a strict demand” that she remain outside the Bank during her entire shift and to “not pay attention [to] what is going on inside the [B]ank”, and “just demonstrate physical presence and open doors” for those requiring assistance.
13. The Employee then explains in her submissions that she observed numerous suspicious activities which she describes as “clear attempts to commit robbery” based on what she had learned in her training as a security guard. She describes these suspicious activities to include the following: (i) “in the same day, twice, suspicious people entered the [Bank] while there were cars outside with drivers inside waiting for them”; (ii) “the [Bank’s] personnel also acting suspiciously”; (iii) “all CCTV cameras that monitor customer service area and tellers were turned off” and only the cameras that monitor doors and entrances worked; (iv) “an unauthorized person [had] access ... to the [Bank] in the early morning hours when the [Bank] is closed” and this person brought in [a] large heavy box into the Bank which was left in the manager’s office and sent out with a delivery man who was “a husband of one of the tellers”; (v) a teller and her husband “bothered” her for the entire period she was employed at the Bank “trying to discuss [her] financial situation” and “making hints...[to her on] how to improve it”.
14. The Employee indicates that she reported these “suspicious and illicit activities ... intended to accommodate robberies and fraud” to the Bank’s authorities and she also sent “formal reports” to Securiguard. While the Bank authorities expressed gratitude to her for her observations, Securiguard forced her to quit her job without any warnings or offers to move her to another work location, according to the Employee.
15. The Employee further alleges in her Complaint that Securiguard is “operating as organized crime structure that pretended to be security”. She also alleges that Securiguard is discriminating against her because of her Russian ancestry and draws an analogy between her situation and the unfortunate case of Robert Dziekanski, a Polish man who died after being tazed by the RCM Police at the Vancouver airport. She then proceeds to discuss her last employer, Windsor Security Ltd. (“Windsor”) and her complaints against the latter leading to her allegation that both Securiguard and Windsor “have been plotting against [her]”.

16. The Employee concludes her submissions seeking compensation for the period she did not work after “Securiguard forced [her] to quit her job” and reimbursement of \$100 for her lost items comprising of her leather shoes.
17. The Delegate notes in the Reasons for the Determination that while in the Complaint, the Employee indicates that Securiguard terminated or forced her to quit her employment, during his investigation of the Complaint the Employee advised him that Securiguard never formally terminated her employment and she “still considers herself an employee of Securiguard”. According to the Delegate, this “contradicts the information provided in the written attachment of [the Employee].
18. The Delegate also notes in the Determination that during the investigation, he spoke with the Director of Human Resources for Securiguard, Joe Poznick (“Poznick”) and also considered the statement of Phillip Fletcher (“Fletcher”), a supervisor with Securiguard. Poznick, indicates the Delegate, explained that after the Employee exhibited erratic behaviour while working at the Bank, a representative of the Bank requested that she not attend to work at the Bank again.
19. The Delegate notes that Fletcher indicated that he went to the Bank on the morning of February 6, 2008 to inform the Employee that she was no longer permitted to work at the Bank. In his discussions with the Employee, Fletcher advised her that she was not scheduled to work at the Bank and she should contact Securiguard’s Scheduler with respect to her shifts and provided the Employee his cellular telephone to contact the Scheduler. The Delegate further notes that according to Fletcher the Employee contacted the Scheduler on his cellular phone and he witnessed the Employee speaking very loudly in a rude and unprofessional manner. Fletcher then asked the Employee to leave the site and speak with the Scheduler. Subsequently, the Employee asked if she could retrieve some of her personal items from the Bank but she was not allowed to on that very day and asked to contact the Scheduler to arrange a pickup at a later date. The Employee, thereafter, made no further contact with Securiguard and the latter deemed the Employee to have quite her employment.
20. The Delegate examined the payroll records provided by Securiguard, which according to the Delegate show that the Employee was paid all wages owed to her under the Act.
21. The Delegate notes that while there is a conflict of evidence on the subject of whether the Employee quit or was “fired” from her employment, a more thorough examination of this question would likely support that her employment was terminated closer to the last day she worked at the Bank- February 5, 2008- as opposed to the date indicated in the Record of Employment issued by Securiguard- February 9, 2008. According to the Delegate, even if the latter date were accepted as the termination date, the Employee would not be entitled to compensation for length of service under Section 63 of the Act, as she did not complete 3 consecutive months of employment.
22. With respect to the remedy of reinstatement and compensation for the days the Employee did not work, the Delegate noted that these remedies, which are provided in Section 79(2) of the Act, are only available when there is a contravention under Sections 8 and 83 or Part 6 of the Act, which is not the case here.
23. As concerns the Employee’s request for reimbursement for personal items left at work at the Bank, the Delegate notes that the Act does not grant such authority to the Director.

24. Therefore the Director concluded that the Act does not apply in the case of the Employee's Complaint and exercised his discretion under Section 76(3) of the Act to stop investigating the Complaint and advised both parties that he would take no further action in respect of the Complaint

SUBMISSIONS OF THE EMPLOYEE

(i) Error of Law

25. There is very little, if anything at all, in the appeal submissions of the Employee that clearly identifies her submissions in support of the error of law ground of appeal. Looking at the submissions in their totality, the Employee appears to suggest that the Delegate has disregarded or ignored "true and proven" information she presented in her Complaint, although she does not identify what that information is.

(ii) Natural Justice

26. Under this ground of appeal, there are numerous allegations on the part of the Employee that may be properly described as allegations of bias on the part of the Delegate. The Employee, under this ground of appeal reiterates for the most part the allegations she made in the Complaint and then alleges that the Delegate's decision is "based on fabrications and falsification of facts". She further alleges that the Delegate had a "personal bias" against her, "intimidated" her, and is a "corrupt officer that works in the interest of organized crime and criminal structure pretending to be private security."
27. There are numerous allegations of criminal activities on the part of Securiguard and the Delegate's complicity in those activities by virtue of the Determination. I do not wish to reiterate those unsupported allegations here. I also do not find it necessary to delineate the Employee's allegations repeating her extensive written submissions in her Complaint because, an appeal is not a forum for one to reargue the Determination or have a "second kick at the can" because one is dissatisfied with the result in the Determination.

DIRECTOR'S SUBMISSIONS

(i) Error of Law

28. The Director submits that the Employee has "offered no argument that could be construed as an error of law" nor identified any evidence or facts that the Delegate ignored "as they may pertain to a matter which falls within the jurisdiction of the [Act]".
29. According to the Director, the Employee's Primary focus is to have the Tribunal ... re-weigh the evidence submitted to the original adjudicator."

(ii) Natural justice

30. With respect to the allegations of bias, the Director submits that the accusations made by the Employee against the delegate are "serious", "wholly unfounded" and "potentially libellous".
31. The Director is asking the Tribunal to dismiss the appeal.

ANALYSIS

32. The Employee's appeal is based on two grounds of appeal, namely the Director erred in law and failed to observe the principles of natural justice in making the Determination. I will deal with each ground separately under appropriate headings below.

(i) Error of law

33. Under this ground of appeal, the Employee states that she provided all "proven ... evidence". However, the Delegate relied on section 76(3)(b) of the Act to refuse to adjudicate the Complaint on the basis that the Act did not apply to the Complaint.

34. Section 76(3)(b) of the Act provides:

Investigations

76 (3) The director may refuse to accept, review, mediate, investigate or adjudicate a complaint or may stop or postpone reviewing, mediating, investigating or adjudicating a complaint if

...

(b) this Act does not apply to the complaint

35. In my view, while I am not persuaded that any of the allegations, whether criminal or non-criminal, that the Employee has made against Securiguard are "proven ... evidence", certainly the allegations of criminal behaviour on the part of Securiguard are outside the jurisdiction of the Director and the Delegate to investigate and the Act does not apply in the case of those allegations.

36. As concerns the Employee's non-criminal allegations, namely, that she was "forced to quit" by Securiguard because she reported her observations of "suspicious activities" which she describes as "clear attempts to commit robbery", I do not need to opine on whether these allegations have a basis or not in this appeal. In my view, even if the Employee were correct that she was "forced to quit" her employment by Securiguard, in light of the remedies she is seeking-reinstatement to her position as a security guard, wages since her last day of employment on February 4, 2008 and compensation for "lost items"-the Delegate correctly concluded that the Act did not apply.

37. In my view, the Employee's employment was less than three months durations and therefore she does not qualify for compensation for length of service under Section 63. As for reinstatement and compensation for lost wages, while Section 79(2) of the Act delineates these remedies, the Employee does not fulfil the prerequisites for the Delegate to consider the remedies in her case. Section 79(2)(b) provides:

79 (2) In addition to subsection (1), if satisfied that an employer has contravened a requirement of section 8 or 83 or Part 6, the director may require the employer to do one or more of the following:

...

(b) reinstate a person in employment and pay the person any wages lost because of the contravention;

38. For the remedies of reinstatement and lost wages to be awarded under Section 79(2)(b), the Director must be satisfied that Securiguard has contravened a requirement of Section 8 (No false representations) or 83

(Mistreatment of employee because of complaint or investigation) or Part 6 (Leaves and Jury duty). None of these requisite sections apply in the case at hand and therefore the remedies under Section 79(2)(b) do not apply, even if the Delegate concluded that Securiguard terminated the Employee's employment or "forced her to quit".

39. As for compensation for "lost items", I also agree with the Director that the Act does not provide the Director with any authority to make such an order.
40. Accordingly, I find there is no error of law on the part of the Director in making the Determination.

(ii) Natural justice

41. The Employee, in this case, has made serious allegations of bias on the part of the Delegate. She states that the Delegate had a "personal bias" against her, "intimidated" her, and is a "corrupt officer that works in the interest of organized crime and criminal structure pretending to be private security". The Tribunal has repeatedly stated that an allegation of bias against a decision-maker is serious and should 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 to whom it is made will not bring an impartial mind to bear upon the case (*Re Zadehmoghadami* [2005] B.C.E.S.T.D No. 171 (QL); *Re Khabazian-Isfahani*, [2006] B.C.E.S.T.D. No. 105 (QL), confirmed [2007] BCESTD No. 13 (QL)). In this case, I find the Employee's allegations speculative, frivolous and inflammatory as they are made without any supporting basis. Accordingly, I reject the Employee's natural justice ground of appeal.

ORDER

42. Pursuant to Section 115(1)(a) of the Act, I order that the Determination be confirmed.

Shafik Bhalloo
Member
Employment Standards Tribunal