

An appeal

- by -

Gerald Brainard  
(“Brainard”)

- 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.:** 2009A/078

**DATE OF DECISION:** July 29, 2009

## DECISION

### SUBMISSIONS

Gerald Brainard	on his own behalf
Neil Achtem	on behalf of Automation One Business Systems Inc.
Andres Barker	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 Gerald Brainard (“Brainard”) of a Determination that was issued on April 28, 2009, by a delegate of the Director of Employment Standards (the “Director”). The Determination found that Brainard was an employee under the *Act* and that his employer, Automation One Business Systems Inc. (“Automation”) had contravened Part 3, sections 18 and 28 of the *Act* in respect of his employment. The Director ordered Automation to pay Brainard an amount of \$5,882.43, an amount which included wages and interest.
2. The Director also imposed administrative penalties on Automation under Section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) in the amount of \$1000.00.
3. The total amount of the Determination is \$6,882.43.
4. This appeal is grounded in the assertion by Brainard that the Director failed to observe principles of natural justice in making the Determination and that evidence has come available that was not available when the Determination was being made.
5. The Tribunal has a discretion whether to hold a hearing on an appeal and, if a hearing is considered necessary, may hold any combination of written, electronic and oral hearings: 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 reviewed the appeal, the submissions and the material submitted by all of the parties, including the Section 112 (5) record filed by the Director, and has decided an oral hearing is not necessary in order to decide this appeal.

### ISSUE

6. The issues are whether Brainard has shown the Director failed to observe principles of natural justice in making the Determination and whether there is new evidence that has come available.

### THE FACTS

7. Automation is an office systems supply company. Brainard was employed by Automation as a sales representative from September 26, 2000. He was paid base salary and commission. In February 2006, Brainard was terminated from this position. Coincidentally, there was an agreement made between Automation and Brainard that Brainard would continue to work for Automation on a commission only basis, generally performing the same duties and tasks as he did before termination. That arrangement continued

until July 2008, when Brainard decided that physical injuries suffered in an automobile accident did not allow him to continue to perform services for Automation.

8. The Director conducted an oral complaint hearing on February 17, 2009. At the hearing, Brainard gave evidence on his own behalf and Neil Achtem, John Achtem and Steve Ellison gave evidence on behalf of Automation.
9. There was some conflict in the evidence and positions of the respective parties on two matters: first, whether Brainard informed Automation that he was “throwing in the towel” and would no longer provide any services to Automation; and second, whether Brainard normally worked eight hours a day, forty hours a week as he claimed, or considerably less, as contended by Automation.
10. On the first matter, the Director accepted that Brainard had conveyed to Automation, by words and conduct, his intention to terminate the relationship between them – or in other words, to quit. The Determination sets out the basis for reaching that conclusion. On the second matter, the Director did not accept Brainard’s position that he worked eight hours a day, forty hours a week. Nor did the Director accept the position of Automation. The Director calculated that Brainard worked, on average, twenty hours a week. The reasons for that calculation are set out in the Determination.
11. The above two matters are findings of fact.

## **ARGUMENT**

12. In this appeal, Brainard reasserts his positions on the above two matters, that he did not terminate his relationship with Automation and that he work eight hours a day, forty hours a week. In support of his appeal on the hours of work issue, he has submitted a letter from a former sales representative of Automation who was employed between October 2002 and September 2005.
13. Automation has filed a response to the appeal. The response addresses the factual assertions made by Brainard in his appeal and have generated a further response from Brainard attacking the legitimacy of many of the statements made in Automation’s response.
14. The Director has filed the section 112(5) record and provided a brief response to the appeal.

## **ANALYSIS**

15. 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.*

16. 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.

17. The *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03.
18. Brainard has submitted new evidence with the appeal and I will deal first with this ground of appeal.
19. The Tribunal has taken a relatively strict view of what will be accepted as new, or additional, evidence in an appeal, indicating in several decisions that this ground of appeal is not intended to be an invitation to a dissatisfied party to seek out additional evidence to supplement an appeal if that evidence could have been acquired and provided to the Director before the Determination was issued. The Tribunal has discretion to allow new or additional evidence. As well as considering whether the evidence which a party is seeking to introduce on appeal was reasonably available during the complaint process, the Tribunal considers whether such evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it is reasonably capable of belief, and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination: see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03 and *Senor Rana's Cantina Ltd.*, BC EST # D017/05.
20. I am not inclined to accept this new evidence. This evidence was, on its face, reasonably available to Brainard at the time the Determination was being made. As well, the additional evidence, does not show any relevance to the issue raised by Brainard in this appeal, which is whether the Director failed to observe principles of natural justice in making the Determination. As well, the probative value of the additional evidence on that issue is absent. The additional evidence submitted does not advance the natural justice ground of appeal or even assist in showing some other reviewable error in the Determination. Rather, it is apparent this “new” evidence has been asserted to support Brainard’s disagreement with findings and conclusions of fact made by the Director on the hours of work issue.
21. An appeal to the Tribunal under Section 112 is not intended as an opportunity to add new evidence to the file, hoping to have the Tribunal review and re-weigh the evidence and reach a different conclusion. An appeal under the *Act* is intended to be an error correction process, with the grounds of review identified in section 112 and the burden of persuasion being on the appellant to identify the error on one of those grounds. As indicated above, the Tribunal has limited jurisdiction in respect of findings of fact made by the Director. Essentially, the Tribunal has no authority over findings of fact that are not shown to be errors of law. Errors of law can include findings of fact resulting in a breach of principles of natural justice.
22. In respect of the chosen ground of appeal: the failure to comply with principles of natural justice in making the Determination, 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.
23. The Tribunal has also stated that the 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.

24. While Brainard has alleged a failure by the Director to observe principles of natural justice in making the Determination, he has not related any aspect of the appeal to that allegation. Rather, Brainard seems to have presumed that a natural justice argument lies because the Director did not accept his evidence on the length of service compensation and the hours of work issues and made findings of fact against his position on those issues. As I stated in *Dongoh Educational Company Ltd.*, BC EST # D049/09, at para. 32, in a comparable appeal argument:

The Tribunal recognizes persons without legal training do not always appreciate what “natural justice” means, and the concept can be confusing and complex to a lay person. Generally, the notion of “natural justice” requires a decision maker to provide all of the parties with a fair opportunity to be heard and to not interfere with that opportunity in an unfair or inappropriate way. Natural justice does not require the decision maker to accept everything each party says – that would be absurd and make the process unworkable – nor does it prohibit the decision maker from accepting the position of one party and rejecting the position of the other so long as reasons are provided for the choice made and those reasons are based on relevant considerations, which I find they were in this case. In deciding the merits of the complaint, the Director had to make some choices between the competing positions of the parties. The reasons for those choices are explained in the Determination. Dongoh may not like the choices made, but they were provided with an opportunity to present their position in evidence and argument and, in the circumstances, I am unable to accept there was any failure by the Director to observe principles of natural justice in making the choices and the resulting Determination.

25. The above describes exactly the circumstances of the Determination under appeal. The Director was required to make choices in the positions of the respective parties. Choices were made, reasons for the choices made were provided and appear to be based on relevant considerations. Making those choices does not amount to failure to observe principles of natural justice. In every respect Brainard 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 Automation.
26. As I alluded to above, Brainard has not addressed his disagreement with the Determination in the framework of natural justice, but as a disagreement with findings and conclusions of fact. No evidence to support an allegation of non-compliance with natural justice principles has been provided and, in fact, the Record shows Brainard was not denied the procedural rights identified in *Imperial Limousine Service Ltd.*, *supra*.
27. In sum, Brainard has failed to show there was a breach of natural justice by the Director in making the Determination and, accordingly, the appeal is dismissed.

## **ORDER**

28. Pursuant to Section 115, I order the Determination dated April 28, 2009, be confirmed in the amount of \$6,882.43, together with any interest that has accrued under Section 88 of the *Act*.

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**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**