Employment Standards TRIBUNAL

An appeal

- by -

Blaine Germaniuk

- 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: Yuki Matsuno

FILE No.: 2007A/68

DATE OF DECISION: September 18, 2007

DECISION

SUBMISSIONS

Blaine Germaniuk	for himself
Charlene Covington	for the City of Kelowna
Ed Wall	for the Director of Employment Standards

OVERVIEW

1. The Appellant appeals a determination issued on June 8, 2007 (the "Determination") in which a delegate of the Director of Employment Standards (the "Delegate") determined that the *Employment Standards Act* (the *Act*) had not been contravened with respect to a complaint filed by the Appellant dated November 28, 2006 and that "[a]ccordingly, no wages are outstanding and no further action will be taken."

2. According to his appeal form, the Appellant does not believe an oral hearing is necessary "unless any of my claim is unclear or if Mr. Wall contradicts any of my statements." Because credibility is not an issue in this case, I will decide this appeal on the basis of the following written materials: the Appellant's appeal form and submission; the Director's submission; the Respondent City of Kelowna's submission; the Determination; and the section 112(5) "record" provided by the Delegate.

PRELIMINARY ISSUE

3. In his appeal submission, the Appellant raises a preliminary issue when he makes the following request: "I request that my identity be kept confidential, since this request is permitted by the ESA."

4. Section 75(1) of the *Act* provides:

> If requested in writing by a complainant, the director must not disclose any identifying information about the complainant unless
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> (a) the disclosure is necessary for the purposes of a proceeding under this Act, or
>
> (b) the director considers the disclosure is in the public interest.

5. This provision applies only where a complainant makes a request in writing for non-disclosure of confidential information to the Director of Employment Standards (the "Director"). It does not apply where an appellant is appealing a determination issued by the Director to the Tribunal. I do not have the jurisdiction to grant the Appellant's request.

BACKGROUND

6. The Appellant worked for the City of Kelowna (the "Employer") as a Projects Supervisor from February 20, 2004. On September 27, 2006, he received a letter terminating his employment effective September 25, 2006 and indicating that the Employer was prepared to discuss a severance agreement with the

Appellant. On October 30, 2006, the Appellant requested a severance package from the Employer, including a request for "unpaid wages up until September 27th" and "travel costs owned up until September 27th". The Appellant subsequently filed a wrongful dismissal action against the Employer. On November 28, 2006, the Appellant also filed a complaint with the Employment Standards Branch for regular wages for September 26 and 27 (estimated total: $537.24), two hours of overtime on Sept 26 (estimated total: $101.00), annual vacation pay calculated on the wages for the two days (estimated total: $40.00), and travel expenses to September 27 (estimated total: $300.00).

7. The Appellant filed the complaint at the Kelowna office and it was subsequently transferred to the Nelson Office. It appears that the Delegate who ultimately ended up handling the Appellant's complaint informed the Appellant that his claim for unpaid wages had to be severed from his wrongful dismissal action before his Employment Standards complaint could be dealt with. In February 2007, the Appellant amended his statement of claim in his wrongful dismissal action to sever the claim for unpaid wages.

8. The Appellant and the Employer engaged in a mediation session by telephone on March 5, 2007, assisted by the Delegate. It appears that a framework for a settlement was discussed at the mediation session and subsequently, the Delegate engaged in phone conversations and email exchanges with both parties to attempt to finalize an agreement. The Delegate drafted a settlement agreement dated March 27, 2007, which was signed by Ms. Covington on behalf of the Employer on that day (the "Settlement Proposal"). On the same day, Ms. Covington also delivered two cheques made out to the Appellant to the Employment Standards Office in Kelowna. One cheque was in the amount of $300.00 for the full amount of the Appellant's claim for travel costs, while the other cheque was in the amount of $477.31, which is the net amount of regular wages for 8 hours on each of September 26 and 27 ($537.24); vacation pay for those wages ($42.98); statutory deductions (income tax: $21.15; CPP: $22.06; and EI: $10.44); and pension ($49.26).

9. It appears that the Delegate provided the Appellant with the pay statements for the cheques in accordance with his email to the Appellant dated March 27, 2007 in which he says, "I will ensure the City provides a pay statement which you can review prior to signing the settlement agreement." It also appears that the Delegate provided the Appellant with the Settlement Proposal.

10. On April 12, the Appellant sent an email to the Delegate containing several questions regarding the Settlement Proposal and the pay statement, and also requesting some other changes and additions. On June 6, the Appellant sent an email to the Delegate as follows:

> I have not received a reply to my correspondence to your offices. As a significant amount of time has passed, please respond to my inquiries. I would also appreciate knowing the date for the adjudication of my case.

11. The Delegate wrote back the following day, indicating that he had decided to write a determination based on the evidence on the file. The Delegate issued the Determination on June 8, 2007.

THE DETERMINATION

12. In the Reasons for the Determination, the Delegate states under "Findings and Analysis":

> Based on the City of Kelowna's voluntary payment of 16 hours plus eight per cent annual vacation pay plus $300 in travel reimbursement, I am not able to find any evidence of an outstanding contravention of the Act.
>
> Section 76(3)(e) permits me to stop investigating a complaint if there is not enough evidence to prove the complaint. The City of Kelowna has carried out its obligations under the Act by voluntarily paying the Appellant all wages owing. The Appellant has presented no evidence to confirm his contention he worked overtime on September 26. The record provided by the City of Kelowna indicates the Appellant was paid for eight hours on September 26 and eight hours on September 27.

13. And in his conclusion, the Delegate finds:

> I find the Act has not been contravened and pursuant to Section 76(3)(e) I will cease this investigation and will close this file.

14. Section 76(3)(e) provides:

> 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
>
> . . . .
>
> (e) there is not enough evidence to prove the complaint . . .

15. The Appellant now appeals the Determination on the grounds that the Delegate erred in law and failed to observe the principles of natural justice.

ISSUE

16. Did the Delegate err in law or fail to observe the principles of natural justice in making the Determination?

ARGUMENT AND ANALYSIS

17. It is the Appellant's burden to establish the basis of his appeal. He has put forward numerous arguments under both grounds, and some of his arguments straddle both. I will consider each of the Appellant's arguments under the appropriate ground of appeal.

Error of Law

18. With respect to errors of law, in *Britco Structures Ltd*., BC EST #D260/03, the Tribunal outlined the following general understanding of "error of law", set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia* (Assessor of Area #12 – Coquitlam), [1988] B.CJ. No. 2275 (B.C.C.A.):

1. a misinterpretation or misapplication of a section of the *Act*;
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. adopting a method of assessment which is wrong in principle (in the employment standards context, exercising discretion in a fashion that is wrong in principle: *Jane Welch operating as Windy Willows Farm*, BC EST #D161/05).

19. I have grouped the Appellant's arguments that relate to error of law under three headings: The Settlement Proposal; Expenses and Interest; and Exercise of Discretion.

The Settlement Proposal

20. These arguments centre on the Settlement Proposal. I note that some of the arguments appear to treat the Settlement Proposal as if it were a Determination. It should be made clear that the Settlement Proposal was the result of the Delegate's attempts to assist the parties to come to an agreement on the matter, which is within his discretion under section 78(1)(a). The Delegate did not have any powers or responsibilities with respect to the content of the Settlement Proposal.

21. My conclusion is no errors of law are disclosed by the Appellant's arguments under this heading, as follows:

A. The Delegate required that taxes be withheld unjustly from the Settlement Proposal.

22. The Delegate replies, correctly, that the Employment Standards Branch has no power to regulate the amount of statutory deductions taken from employee's pay, and any dispute over such amounts should be pursued with the appropriate federal agency that mandates those deductions.

B. The Delegate brokered a settlement offer, in the form of the Settlement Proposal, with which the Appellant did not agree.

23. The Delegate exercised his discretion under section 78(1)(a) to assist in settling the complaint. The result was the Settlement Proposal, which was ultimately not accepted by both parties and therefore failed to turn into a settlement agreement. It is not an error of law on the part of the Delegate that the Appellant did not agree with the proposal.

C. The Delegate contended that the Appellant's use of his own vehicle is not a business cost for the employer under section 21(2) of the Act.

24. The Delegate points out in his submission that the Settlement Proposal included $300.00 in travel costs. The record shows that this amount was requested by the Appellant himself, and eventually acceded to by the Employer, for mileage costs associated with the use of his vehicle in the course of his employment.

D. The Delegate failed to correlate the amount in the Settlement Proposal to the pay period in which it was earned, and failed to order that interest be paid on the wages.

25. This argument seems to relate to the fact that the pay statement on the cheque was dated 2007 and not 2006, the year in which the wages were earned. The Delegate had no power to make any order with respect to the Settlement Proposal. As indicated above, he was exercising his discretion to assist the parties to come to their own agreement; he was not responsible for the contents of the Settlement Proposal.

Expenses and Interest

E. The Appellant argues that the Delegate did not order out of pocket expenses under section 79(2)(d) of the Act.

26. The Delegate responds, rightly, that the payment of reasonable out of pocket expenses under this section can be ordered by the Director only where the employer has contravened a requirement of section 8 or 83 or Part 6 of the Act, and that none of these sections are pertinent to the Appellant's claim.

F. The Appellant argues that the Delegate did not explain that expenses and interest could be claimed and when the Appellant forwarded a claim for expenses and interest, the Delegate did not respond.

27. The reference to expenses appears to relate to out of pocket expenses, which are considered under point 5, above. It appears from the Delegate's submissions that he understood the reference to interest as a reference to interest under section 80, and responds that section 80 only applies to wages which are required to be paid by an employer by a determination; in this case, the Determination did not require any more wages to be paid. The Delegate had no obligation here to explain the provisions of the Act related to expenses and interest.

Exercise of Discretion

28. The Appellant advances several arguments that question the Delegate's exercise of the discretion granted to him by the Act, specifically under section 76(3). The improper exercise of discretion may amount to an error of law (see point no. 5 of the test in *Britco Structures*, above.) The Tribunal has considered the issue of the extent to which it can interfere in the Director's exercise of discretion. The leading case is *Takarabe et al.*, BCEST #D160/98, which in turn quotes from the foundational case of *Jody L. Goudreau et al.*, BC EST # D066/98:

> In [*Godreau*], the Tribunal recognized that the Director is "an administrative body charged with enforcing minimum standards of employment..." and "...is deemed to have a specialized knowledge of what is appropriate in the context of carrying out that mandate." The Tribunal also

set out, at page 4, its views about the circumstances under which it would interfere with the Director's exercise of her discretion in administering the Act:

> The Tribunal will not interfere with the exercise of discretion unless it can be shown the exercise was an abuse of power, the Director made a mistake in construing the limits of her authority, there was a procedural irregularity or the decision was unreasonable. Unreasonable, in this context, has been described as being:-
>
> .. a general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably". **Associated Provincial Picture Houses v. Wednesbury Corp.** [1948] 1 K.B. 223 at 229 -
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> Absent any of these considerations, the Director even has the right to be wrong.-

29. In *Godreau*, the Tribunal restated the unreasonableness test as whether "the Director has considered immaterial factors or failed to consider material factors."

30. The Appellant's arguments regarding the Delegate's exercise of discretion are as follows:

G. The Delegate refused to continue investigating the Appellant's Employment Standards complaint while the Appellant's legal case was continuing, even though he was permitted to do so under 76(3)(f) of the Act.

31. The Appellant questions the exercise of the Delegate's discretion under section 76(3)(f) which allowed the Delegate to postpone reviewing the Appellant's complaint until the Appellant severed the unpaid wages claim from his wrongful dismissal suit. I note that the Delegate sent a letter to the Appellant dated February 9, 2007 soliciting a submission from the Appellant on the matter. In assessing the Delegate's exercise of discretion, I find nothing in the materials that indicates his decision was an abuse of process, was a mistake by the Delegate in construing the limits of his authority, involved procedural irregularity, or was unreasonable.

H. The Delegate did not exercise his discretion under section 85(1) to order the Employer to produce or deliver relevant records, even though he informed the Delegate that the records were at his former workplace.

32. On February 1, 2007, the Appellant suggested that the Delegate obtain video recordings taken at the office. On February 27, 2007, the Appellant requested that the Delegate require the Employer to disclose mobile phone and telephone records and "video recordings at the City Park Pavilion for the morning of September 27, 2006."

33. In reply to the Appellant's argument, the Delegate says in his submission that "[v]ideotapes and telephone records do not constitute a reliable and accurate record of daily hours worked. This evidence would serve only to support certain facts, but not to establish them. With the direct evidence of the appellant that he has no daily hourly records to support his claim, telephone logs and security video would have little probative value." It is clear from the record that the Appellant himself did not keep a record of the hours that he worked on September 26 and 27; in his complaint form, where it asks, "Do you have a record of

the hours worked for this employer?" he answered "No". At no point in the investigation process does the Appellant offer evidence within his control and possession that indicate his hours of work on those days.

34. Because of the terms of the Settlement Proposal and the Employer's payments of the amounts contained in the Settlement Proposal, the only issue that remained outstanding when the Delegate came to write the Determination was whether the Appellant worked two hours of overtime on September 26, 2007.

35. Given that the Appellant requests the September 27 videotape, it would seem that the videotape would be of little assistance in establishing overtime on September 26.

36. Under section 85(1), the Delegate has the discretion to require a person to produce or deliver any records for inspection that may be relevant to an investigation. However, the Delegate was not mandated to require the disclosure of the records requested by the Appellant. The record shows that on February 14 the Delegate asked the Employer to review its records, including its videotapes, to determine the Appellant's attendance at work and travel costs. No records from the Employer are on the file.

37. The Appellant also points out that the Employer has an obligation to maintain employment records under section 28. However, the Appellant says in his February 1, 2007 email to the Delegate that the Employer "has a loose method of tracking time; managers submit their salary request forms at the end of each period. Therefore, you should not expect them to provide attendance forms for that week, even though they have paid me for the first part of it." I take from this that since his employment was terminated, the Appellant did not hand in attendance forms for that week. This in turn means that the Employer would not have any records of attendance for him for the week.

38. In my view, the Delegate's exercise of discretion not to issue a demand for records should not be interfered with. Given the circumstances – overtime being the only outstanding issue, the lack of relevance of the requested videotape, the information provided by the Appellant that the Employer would not have attendance records for him for that week – it is not surprising that the Delegate declined to order the production of records from the Employer. Nothing in the materials indicates that his decision was an abuse of process, a mistake by him in construing the limits of his authority, or involved procedural irregularity. There is no indication that the Delegate considered irrelevant factors or failed to consider relevant factors. The factors that the Delegate considered were proper ones. It was not an error for the Delegate to exercise his discretion in this fashion.

I. The Delegate did not proceed to carry out a binding adjudication after the attempt at mediating the dispute was not successful.

39. In his argument, the Appellant says:

> Before setting up the arbitration meeting, Mr. Wall explained:
>
> 1. Arbitration would not be the basis for a binding decision unless both parties agreed to it.
> 2. If arbitration was unsuccessful, the matter would be settled by binding formal adjudication.
>
> The above was confirmed by the Notice of Mediation Session of February 16, 2007 from Ms. Keegan. In addition, the notice stated "The mediator has no decision-making authority, and cannot make a ruling on any of the issues."

40. (It is clear from the context that where the Appellant writes "arbitration", he intends to convey "mediation"). The Appellant then goes on to say that when his questions about the Settlement Proposal were not answered, he asked that the matter be adjudicated and got no response from either the Delegate or the Delegate's manager.

41. It should be noted that in his submissions, the Delegate does not deny the facts that the Appellant puts forward on this point, i.e. that the Delegate told him that if the issue is not settled by mediation, the issue would be decided by a binding adjudication. The Delegate replies thus to the Appellant's argument:

> In most cases, failed mediations result in adjudications to determine the matter but it is not an entitlement. Section 76(3) provides the Director of Employment Standards with the latitude to refuse to continue investigating a complaint if there is not enough evidence to substantiate a contravention of the *Employment Standards Act*. Nothing in [the Appellant's] current complaint and appeal illuminates a contravention of the Act. [The Appellant's] wages and travel expenses are waiting for him in the Employment Standards Branch Trust Account. [The Appellant] may not set the process of investigation whether by written submissions and interviews or by an adjudication meeting. This is a choice made by the Director of Employment Standards and his delegates. When the City voluntarily paid the two days wages and the travel expenses it became apparent there were no issues to adjudicate. Mindful of the need to preserve limited Branch resources, I made a determination pursuant to Section 76(3).

42. In other words, the Delegate exercised his discretion under section 76(3)(e) and stopped the investigation on the basis that there was not enough evidence to prove the complaint which, at that point, had been narrowed to the outstanding issue of the two hours of overtime on September 26. This meant that subsequent to the unsuccessful mediation, a determination was made without adjudication, contrary to what the Delegate told the Appellant before the mediation. The question I must determine, then, is whether it is appropriate for the Tribunal to interfere Delegate's exercise of discretion in these circumstances.

43. In applying the principles articulated in *Takarabe* and *Godreau*, I find no evidence of an abuse of power, a mistake by the Delegate in construing the limits of his authority, or procedural irregularity. The more difficult question is whether the exercise of discretion was unreasonable in the circumstances where the Delegate told the Appellant that the matter would be adjudicated. After considering the matter, it is my view that the Delegate considered material factors such as the Employer's agreement to pay the regular wages, vacation pay, and travel costs; that the Appellant indicated on his complaint form that he kept no record himself of his hours worked, including the 2 hours of overtime; that the Appellant presented no evidence to confirm his assertion that he worked overtime on September 26; and that there was a need to preserve limited Branch resources. As mentioned in *Takarabe* and *Godreau*, the Delegate as a representative of the Director must be understood to have specialized knowledge in what it takes to carry out the Director's mandate. Part of the mandate is to uphold the Act, which has as one of its purposes the provision of fair and efficient procedures for resolving disputes under the Act. I can find no indication that the Delegate failed to consider material factors or has considered immaterial factors in exercising his discretion.

Failure to Observe the Principles of Natural Justice

44. Although I conclude on this point that it is not appropriate for the Tribunal to interfere with the Delegate's exercise of discretion in these circumstances, I note that it is certainly understandable from the Appellant's point of view that he would expect the matter to be adjudicated if he was told that this would

be the case. This was likely exacerbated by the stretch of time (April 12 – June 6) during which the Appellant was awaiting an answer from the Delegate on his questions about the Settlement Proposal. It could be argued here that the Appellant's arguments fall under the doctrine of legitimate expectations, which is an extension of the principles of natural justice. The Tribunal discussed the doctrine in *Takarabe*, above:

> In our view, the doctrine of legitimate expectations is an aspect of the principle of fairness which applies where a public official or a decision-maker leads an affected party to believe that the decision in question will not be taken without some form of consultation or hearing. The principle was enunciated by the Supreme Court of Canada in Old St. Boniface Residents Association Inc. v. Winnipeg [(1990) 3 S.C.R. 1170] at p. 1204:
>
> > The principle developed in these cases is simply an extension of the rules of natural justice and procedural fairness. It affords a party affected by the decision of a public official an opportunity to make representations in circumstances in which there would otherwise be no such opportunity. The Court supplies the omission where, based on the conduct of the public official, a party has been led to believe that his or her rights would not be affected without consultation".
>
> We agree that the doctrine of legitimate expectations applies in the circumstances of this case and that the Act does not exhaustively outline the Appellants' procedural rights. While the doctrine could not be used to supplant statutory requirements, it can create procedural remedies where the legislation is silent and the expectation has arisen [Sturdy Truck Body (1972) Ltd. v. Canada (1995) 2 C.T.T. 338]. . . . In our view, the Appellants' legitimate expectation was to have been consulted prior to the issuance of the individual Determinations and this was not done.

45. While at first blush the doctrine appears to apply to the present case, this initial assessment does not bear close examination. The doctrine, in the Employment Standards context, has been applied where a party has been lead to believe that a decision affecting its rights would not be taken without some sort of consultation or hearing process. Specifically, in *Takarabe*, the doctrine was applied to provide relief to a group of employees on whom an industry-wide settlement agreement was imposed with no consultation whatsoever. The evidence was clear that the imposed settlement would lead to a diminishment of the employees' rights. In this case, however, it is my view that the doctrine is not applicable, since the Appellant had adequate and numerous opportunities to be consulted, bring forward evidence, and respond to the opposing case. The only outstanding issue that remained was the overtime issue, and there is no indication from the Appellant that he would have brought forward different evidence on that point at an adjudicative hearing than what he had already presented to the Delegate. Although the consultation did not take the form of a full adjudicative hearing, in my view the investigative process that the Delegate undertook ensured that the principles of natural justice were observed.

46. While I do not find that the Appellant's experience in this case was one that attracts the remedy of the doctrine, I can understand the difficulty the Appellant had with the procedure that the Delegate followed. The Appellant's experience in this case shows that it would be advisable for delegates who are dealing with complainants to, wherever possible, make it clear to complainants that the procedure that is followed in reviewing, investigating and determining complaints may vary from case to case and remains at the discretion of the Delegate.

47. The Appellant also argues that the Delegate failed to follow the principles of natural justice as follows:

J. The Delegate prevented the Appellant from responding by not responding to the Appellant's questions about the Settlement Proposal.

48. I understand this argument to refer to the Appellant's email of April 12, 2007, which was not answered by the Delegate. The Appellant suggests that his opportunity to respond in an investigation under section 77 was compromised as a result. Section 77 reads: "If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond."

49. The Delegate replies that the Appellant was given "any number of opportunities" to provide information and that his case "does not suffer from a lack response [sic] on his part." In my view, the Delegate's lack of response to the April 12 email did not keep the Delegate from making reasonable efforts to give the Appellant to respond to the Employer's case.

50. Overall, I find that the Delegate did not err in law or fail to observe the principles of natural justice. The appeal is dismissed.

PAYMENT TO THE APPELLANT OUTSTANDING

51. An important issue remains outstanding. The Delegate says in the Determination that the "record provided by the City of Kelowna indicates the Appellant was paid for eight hours on September 26 and eight hours on September 27." The Appellant points this out in his submissions, rightly, that this is not correct insofar as he has not been paid. Instead, the funds for these two days of wages and the travel expenses (total net: $777.31) were deposited with the Employment Standards Branch Trust Account. The "Cheque to Trust for Deposit" sheet indicates that the funds were deposited as if they were paid pursuant to a settlement agreement, even though in this case, no settlement agreement ultimately was made.

52. These funds remain outstanding and should be paid to the Appellant.

ORDER

53. Pursuant to Section 115 of the *Act*, I order that the Determination be confirmed and, flowing from the confirmation, the amount being held for the Appellant in the Employment Standards Branch Trust Account be paid forthwith to the Appellant, along with any interest which has accrued under section 88 of the *Act*.

Yuki Matsuno
Member
Employment Standards Tribunal