



An appeal

- by -

Eureka Security Services Ltd.  
("Eureka")

– 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)

and

An application for suspension

- by -

Eureka Security Services Ltd.  
("Eureka")

– of a Determination issued by –

The Director of Employment Standards  
(the "Director")

Pursuant to section 113 of the  
*Employment Standards Act* R.S.B.C. 1996, C. 113 (as amended)

**TRIBUNAL MEMBER:** Robert E. Groves

**FILE No.:** 2010A/77 & 2010A/78

**DATE OF DECISION:** August 11, 2010

## DECISION

### SUBMISSIONS

Mica Nguyen

on behalf of the Director of Employment Standards

### OVERVIEW

1. This is an appeal brought on behalf of Eureka Security Services Ltd. (“Eureka”) challenging a decision of a delegate (the “Delegate”) of the Director of Employment Standards dated April 27, 2010 (the “Determination”).
2. The Determination was made following a complaint brought by one Gian Singh Sunner (“Sunner”), a former employee of Eureka. The Delegate determined that Eureka had contravened the *Employment Standards Act* (the “*Act*”) in respect of Sunner, and ordered that it pay \$2,483.72 for wages, overtime, statutory holiday pay, annual vacation pay, compensation for length of service, and interest. The Delegate also imposed five administrative penalties of \$500.00 pursuant to section 98 of the *Act* and section 29 of the *Employment Standards Regulation*. The total owed by Eureka was determined to be \$4,983.72.
3. I have before me Eureka’s Appeal Form, a submission it has prepared attaching a series of documents, a submission from the Delegate, and the record the Delegate has delivered in compliance with section 112(5) of the *Act*.
4. Eureka has also requested that the Determination be suspended pending the outcome of its appeal on the merits. The Delegate has advised that the Director agrees to the suspension. Notwithstanding this, and despite the fact that the matter would appear to be moot because my resolution of the application for suspension is included as part of this decision on the merits of the appeal, I must decline to order a suspension. Section 113 of the *Act* requires that a suspension may be granted by the Tribunal where the party applying for it deposits with the Director the total amount required to be paid under a determination, or a smaller amount that the Tribunal considers adequate in the circumstances of the appeal. I see no indication in the material I have before me that Eureka has deposited anything, or even suggested an amount that should be deposited in the circumstances. Having regard to the requirements imposed in section 113, it is my view that a suspension without the requirement for any deposit must be a rare event, and warranted only where there is proof of extraordinary circumstances. Here, it appears that Eureka wishes a suspension because it believes it should be successful on the appeal, and paying the sums identified in the Determination will cause it financial embarrassment. I note however, that in its submission Eureka indicates that it cannot afford to pay “all” the penalties imposed. I take this to mean that Eureka could pay some of them. In the absence of evidence that Eureka has delivered any amount, or identified what sum might be appropriate by way of deposit, I am not persuaded that it has met the requirements necessary for me to exercise my discretion in its favour, and to suspend the Determination.
5. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act*, and Rule 17 of the Tribunal’s *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings when it decides appeals. My review of the material before me persuades me that I may decide the merits of this appeal on the basis of the written documentation before me without conducting an oral, or for that matter an electronic, hearing.

## FACTS

6. Eureka is a security company. It employed Sunner as a security guard for a time in December 2008 and, after a short hiatus, from January 27, 2009, until May 14, 2009.
7. The issues the Delegate was obliged to consider during her investigation included Sunner's correct rate of pay, his length of service, the circumstances of his ceasing to be employed by Eureka, and whether he was owed regular and overtime wages, statutory holiday pay, and vacation pay. In addition, Sunner alleged that Eureka required him to pay for certain of its business costs, in the form of bills for his personal cellphone, and taxi fares he said he needed to incur for travel to and from the various sites where Eureka was engaged to provide security services. Sunner also asserted that Eureka insisted he wear special clothing at work, but did not provide all of it, or clean it, as required.
8. The Delegate found for Eureka on the issues relating to Sunner's rate of pay, whether Eureka had required Sunner to pay some of its business costs, and whether it owed Sunner anything in respect of its providing, and cleaning, special clothing. There is no appeal regarding these issues, and I will say no more about them.
9. The contentious aspects of the Determination for Eureka relate to the Delegate's findings concerning Sunner's hours of work, which led her to conclude that Sunner was owed sums for some of his regular hours worked, for overtime, for statutory holiday pay, and for vacation pay. Eureka also disputes the Delegate's conclusion that Sunner was entitled to compensation for length of service.

## ISSUE

10. Is there a basis for my deciding that the Determination must be varied or cancelled, or that the matter must be referred back to the Director for consideration afresh?

## ANALYSIS

11. The appellate jurisdiction of the Tribunal is set out in section 112(1) of the *Act*, which 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.
12. Section 115(1) of the *Act* should also be noted. It says this:
  - 115 (1) After considering whether the grounds for appeal have been met, the tribunal may, by order,
    - (a) confirm, vary or cancel the determination under appeal, or
    - (b) refer the matter back to the director.
13. Eureka's Appeal Form indicates that it challenges the Determination pursuant to section 112(1)(b). It alleges that the Director failed to observe the principles of natural justice in making the Determination.

14. A challenge to a determination on the basis that there has been a failure to observe the principles of natural justice raises a concern that the procedure followed by the Director was unfair. Examples of cases where natural justice concerns may arise include situations where a party like Eureka has not received notice of a complaint, or it has been deprived of a reasonable opportunity to deliver a response. In other situations, a decision may be impeached if a party can show bias on the part of the decision-maker, whether actual, or reasonably apprehended.
15. Eureka does not challenge in any compelling way the procedure the Delegate followed in her investigation. Instead, it disputes many of the Delegate's findings of fact, and it states that since the Delegate drew incorrect conclusions the Determination is tainted. In my view, Eureka's concern with the result of the investigation, and not the manner in which it was conducted, does not support an argument that the Delegate failed to observe the principles of natural justice.
16. My review of the record reveals no basis upon which I might conclude that the process the Delegate employed in reaching her conclusions was flawed, that Eureka was unaware of the complaints being made by Sunner, or that it was deprived of a reasonable opportunity to respond to them. The Delegate conducted two fact-finding meetings, both of which were attended by a representative of Eureka, as well as by Sunner. The Delegate forwarded a letter to the parties enclosing copies of the documents and submissions received by her to that point, and setting out her preliminary findings regarding the issues raised by Sunner in his complaint. The Delegate invited a response to the letter. Eureka submitted a response, the contents of which the Delegate considered prior to issuing her Determination. Eureka may have been disappointed with the Delegate's conclusions contained in the Determination but not, I think, with the process the Delegate followed in order to reach them.
17. A failure to observe the principles of natural justice was the only ground of appeal Eureka identified on its Appeal Form. However, in order to do justice to appellants, particularly where, as here, they are unrepresented, it is the practice of the Tribunal to seek to discern from the record the true basis for a challenge to a determination, regardless of the particular box that may have been checked off on the Form (see *Triple S Transmission Inc.*, BC EST # D141/03).
18. Eureka says that several of the Delegate's findings of fact in the Determination are wrong. The problem with this approach is that section 112(1)(a) does not clothe the Tribunal with a roving commission to interfere with a delegate's findings of fact. The Tribunal may do so only if the delegate can be said to have committed an error of fact that amounts to an error of law. Errors of fact do not amount to errors of law except in rare circumstances where they reveal what the authorities refer to as palpable and overriding error. An example would be a situation where a finding of fact is irrational or inexplicable because it is based on no evidence at all. Absent palpable and overriding error, the Tribunal cannot disturb a delegate's findings of fact, even in circumstances where the evidence might have led the Tribunal to reach different factual conclusions than those appearing in a determination (see *Gemex Developments Corp. v. B.C. (Assessor)* (1998) 62 BCLR 3d 354; *Delsom Estates Ltd. v. British Columbia (Assessor of Area 11 – Richmond/Delta)* [2000] BCJ No.331).
19. One of the principal submissions made by Eureka is that the daily logs of hours worked disclosed by Sunner during the course of the investigation were concocted by him. The Delegate addressed this contention with some care in her Reasons for the Determination. She noted that the logs submitted by Sunner were in original condition, displayed the Eureka logo, and contained detailed entries regarding dates, times and locations, as well as Sunner's observations, his name and signature. Eureka tendered no logs of its own that challenged in substance the logs produced by Sunner, and its evidence of what it required of its employees in respect of their documenting their hours of work was contradictory. For these reasons, the Delegate concluded that Sunner's daily logs constituted the best evidence available concerning his hours of work, and that they were reliable. I cannot say the Delegate was wrong in reaching this conclusion. The Sunner logs represented some evidence on

the basis of which the Delegate could with confidence calculate his actual hours of work. It was by no means irrational or inexplicable, therefore, for the Delegate to rely on them.

20. A further matter which Eureka disputes on appeal is the Delegate's findings regarding Sunner's entitlement to compensation for length of service. Eureka denies that it terminated Sunner's employment and argues that Sunner resigned, in effect, because he required surgery and then a period to convalesce. In deciding that Sunner was in fact dismissed the Delegate relied on a document that Eureka did not deny it had prepared following Sunner's departure in which it identified as the reason Sunner lost his employment that "...he had to go for surgery, he wanted to work after surgery but we did not have enough work." Given this evidence, it cannot be said that it was unreasonable for the Delegate to infer that Sunner wanted to return to work after his illness but Eureka had no work for him to do. If so, the circumstances are consistent with a termination, not a resignation.
21. Regarding vacation pay, Eureka makes the bald statement that it paid Sunner what was owed to him when he was hired back in January 2009. It also states that 4% on \$18.63 is nevertheless owed. No support is provided for either of these statements. It must be remembered that it is for an appellant to ensure the sufficiency of its material tendered on appeal. The Tribunal's role is to correct error, and unless an appellant can show that an error has occurred, the appeal will fail. These submissions from Eureka on the issue of vacation pay are entirely insufficient to establish any error on the part of the Delegate on this point.
22. Eureka's position regarding overtime is that it never communicated to the Delegate that it would not reimburse Sunner under this head. It is unclear whether Eureka means to say that it accepts the Delegate's findings concerning unpaid overtime wages, or that it accepts that overtime wages are owed, but in a different amount than determined by the Delegate. Either way, Eureka's submission on the point is inadequate to demonstrate any error in the Determination.
23. On the issue of statutory holiday pay, Eureka states, simply, that it paid what was owed to Sunner. Again, a statement like that, unsupported by documentation, or references to evidence that might lend strength to the submission, is unhelpful, and cannot ground a finding that the Delegate made an error.
24. There are several statements in Eureka's submission on appeal that appear to refer to matters that were not dealt with during the Delegate's investigation. To the extent these references constitute "new evidence," they raise questions that engage section 112(1)(c) of the *Act*. That section permits the Tribunal to allow an appeal on the ground that evidence has become available that was not available at the time a Determination was being made.
25. The Tribunal's right to allow an appeal based on new evidence under subsection 112(1)(c) incorporates an obligation to exercise a discretion. The discretion must be exercised with caution. One of the criteria that the Tribunal will apply in determining whether an appeal should be allowed on this basis is to ask whether the evidence could not, with the exercise of due diligence, have been discovered and presented to the delegate during the investigation or adjudication of the complaint and prior to the determination being made. In other words, was the evidence really unavailable to the party seeking to tender it? At the same time, even if the evidence was not unavailable in this sense, the Tribunal may nevertheless consider it if the appellant can demonstrate that the evidence is important, there is good reason why the evidence was not presented at first instance, and no serious prejudice will be visited upon another party if it is admitted (see *Re Specialty Motor Cars*, BC EST # D570/98).
26. During the investigation leading to that part of the Determination that dealt with Sunner's hours of work, Eureka pointed out Sunner's daily log for December 21, 2008, showed him working a day shift at one location, and then a 10:00 pm to 6:00 am shift elsewhere that night. In a submission delivered to the Delegate, Eureka argued that this daily log proved that Sunner was untruthful concerning his hours of work because he could not work "at 2 different job sites at one time...". The Delegate reviewed the evidence in her Reasons for the Determination,

noting that the day shift ran from 7:00 am to 7:00 pm, which left Sunner ample time to travel to the other site for the commencement of his night shift at 10:00 pm. That being so, there was no compelling basis for the Delegate to conclude that Sunner was in two places at once, or that his log for that day was inaccurate.

27. Eureka now offers new information on appeal, to the effect that Sunner could not have worked where he says he did during the night shift on December 21, 2008, because another employee had been assigned to perform that work at that site. I decline to accept Eureka's argument based on this new evidence for two reasons. First, Eureka offers no explanation why this evidence could not have been presented to the Delegate during the investigation, especially when Eureka specifically challenged Sunner's evidence regarding his hours on this day and claimed that his log was faked. Second, it is inconclusive because, as the Delegate notes in her submission, Eureka has failed to provide information regarding the other employee's start and finish times at the site, nor has it foreclosed the possibility that Sunner and this employee worked together at the site on this occasion.
28. The other new evidence Eureka seeks to present on appeal consists of statements from other witnesses who, respectively, describe the reasons for Sunner's losing his employment with Eureka in December 2008, confirm that one of the clients for whom Eureka provides security services does not require Eureka's employees to prepare daily logs, and state that Eureka does not discriminate against its employees due to their age. Again, I decline to accept that this evidence satisfies the requirements of section 112(1)(c). Eureka provides no submission explaining why this evidence might have been unavailable to it during the Delegate's investigation. Moreover, as the Delegate notes in her submission, the evidence is irrelevant to the resolution of the issues raised on this appeal. It matters not what the reasons for Sunner's loss of employment with Eureka were in 2008. The calculation of his compensation for length of service was based on his period of employment that ended in May 2009. It matters not that a client of Eureka's did not require the keeping of logs. Sunner kept his own. It also matters not that Eureka does not practise discrimination on the basis of age. The Delegate concluded that Sunner was terminated because there was a lack of work for him when he was ready to return following an illness. The Delegate made no finding that Eureka decided to terminate Sunner because of his age.

## ORDER

29. The suspension request under section 113 of the *Act* is denied.
30. Pursuant to section 115(1)(a) of the *Act*, I order that the Determination dated April 27, 2010, be confirmed, together with any interest that has accrued under section 88 of the *Act*.

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**Robert E. Groves**  
**Member**  
**Employment Standards Tribunal**