BC EST #D094/99

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act, R.S.B.C. 1996, C. 113

- By -

Smoother Movers Limited.

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR:	Ib S. Petersen
FILE NOS.:	98/529 and 98/530
DATE OF HEARING:	November 9, 1998, January 11, 1999 and January 25, 1999
DATE OF DECISON:	March 10, 1999

DECISION

APPEARANCES

Mr. Doug Bensley ("Bensley")	on behalf of the Smoother Movers Limited
Mr. Grant Gayman ("Gayman")	on behalf of the Complainant Employee, Mr. Colin Jackson ("Jackson")
Mr. Murray White ("White")	on behalf of himself

OVERVIEW

This is an appeal by Smoother Movers Limited pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against two Determinations of the Director of Employment Standards (the "Director") issued on July 16, 1998 which determined that Jackson and White were employees of Smoother Movers Limited and that they were not managerial employees within the *Regulation* and, as such, entitled to payments on account of overtime and statutory holidays. The Director's delegate ordered Smoother Movers Limited to pay $1,925.28 to Jackson and $120.63 to White.

ISSUE TO BE DECIDED

The Employer takes issue with the findings and conclusions of the Director's delegate. The basis for the appeal are, inter alia:

1. Smoother Movers Limited is not the employer;
2. Jackson and White were managers under the *Regulation* (Section 1); and
3. Even if Jackson and White were not managers, at least in Jackson's case, the amount ordered paid in the Determination is incorrect as it did not take into account money paid on account of commissions.

Before turning to these issues, I turn to a number of issues that arose in the hearing.

PRELIMINARY AND INTERLOCUTORY RULINGS AND OTHER MATTERS

In the course of the hearing, a number of issues arose as a result of applications or motions made by Bensley on behalf of Smoother Movers Limited in respect of the following:

1. that the Adjudicator remove himself from hearing this appeal based on bias on the part of the Adjudicator;

2. Smoother Moovers Limited was not the employer. Rather the employer was Smoother Movers (Doug Bensley) proprietorship; and

3. the Tribunal did not have the jurisdiction to deal with this matter as it was under Federal jurisdiction.

1. Bias

Prior to the commencement of the hearing, I knew that Gayman represented Jackson. At the outset of the hearing, on the first day, I disclosed to the parties that I had practised law in association with Gayman. I explained that this was some years ago and came to an end in 1995. Bensley immediately requested that I remove myself from hearing the matter on the basis of the past association with Gayman.

As it was not clear from Bensley's submission at the hearing whether the basis was actual or apprehended bias, I deal with both. The rule against bias has developed from the common law doctrine that "no person shall be the judge in his own cause". When exercising their supervisory role, the courts strive to ensure that parties before a tribunal, such as the Employment Standards Tribunal, receive decisions that are made impartially and in good faith (see, for example, generally, Adams, *Canadian Labour Law*, 2nd ed., Aurora: Canada Law Books Inc., 1993-, at pages 4-49-53). In my view, my past association with Gayman does not *per se* constitute actual bias.

With respect to reasonable apprehension of bias, I understand the test to "an objective test based on whether a reasonable person, apprised of all the circumstances, would feel a reasonable apprehension of bias" (*Adams*, *above*, at page 4-50). In a recent case, *Dusty Investments Inc. d.b.a. Honda North* (BC EST #D043/99, reconsideration of BC EST #D101/98), the Tribunal has had occasion to deal with the issue of reasonable apprehension of bias. In that case, the Tribunal adopted the following comments from *Finch v. Association of Professional Engineers & GEO Scientists* (1996), 18 B.C.L.R. (3d) 361 at 376 (at pages 7-8:

> "The test for determining whether a reasonable apprehension of bias arises is well-known and clear ....

> It is, of course, impossible to determine the precise state of mind of an adjudicator who has made an administrative decision. As a result, the courts have taken the position that an unbiased appearance is, in itself, an essential component of procedural fairness.
>
> 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."

The panel in *Honda North* continued:

> "Consistent with the above statement, the test is an objective one. Two comments are appropriate in that context. First, 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. Second, the evidence presented should allow for objective findings of fact that demonstrate actual bias or a reasonable apprehension of bias. The rational for this is anchored in the principle that a party against whom an allegation of bias is made is not permitted to explain away the circumstances in which the allegation arises or deny the presence of a biased mind. ... (See also *Lee Trucking Ltd. v. B.C. Labour Relations Board* and others, B.C.J. No. 2776, November 26, 1998, Vancouver Registry No. A981590."

In my view, my past association with Gayman does not create a reasonable apprehension of bias. The association came to an end approximately three years ago. In my view, the application was--at its face value--based on Bensley's subjective impressions.

In the result, I ruled that I was not precluded from hearing the appeal.

Bensley did not agree with my ruling. Bensley stated that he was going to make a political issue of the appeal. He made reference to a letter he had received from Mr. Colin Hansen of the B.C. Liberal party caucus, the content of which he represented to be that the Liberal party was concerned about the fairness of the treatment received by employers at the Tribunal. I indicated to him that I

did not appreciate such an "attempt to bully the Tribunal". Bensley also indicated that he would apply for judicial review.

Subsequent to the first hearing day, Bensley wrote to the Tribunal, complaining about my ruling. I was advised of the letter, seeking my removal from the appeal. I understand that the Tribunal wrote back to Bensley that the reasons for my ruling on the bias issue would be set out in my written decision and that he would have the opportunity to apply for reconsideration of my decision once that decision had been rendered. This letter, from the Registrar of the Tribunal, dated November 18, 1998, was entered into evidence by Smoother Movers Limited and reads, in part, as follows:

> "Second, your proposal that the Adjudicator assigned to this appeal be disqualified is entirely inappropriate. The Adjudicator has made a preliminary ruling that he is not biased and can continue with the proceedings. It would be improper for me to interfere with his decision at this time. Once the Adjudicator renders his written decision on the merits of your appeal (which will include the reasons for his preliminary ruling that he is not biased) the parties may request a reconsideration of that decision pursuant to Section 116 of the *Act*."

On the second hearing day, Bensley made a further application that I should remove myself from the hearing on the basis of bias. His application was based on the following. On the first hearing date, he alleged that I had lunch with Gayman and discussed the appeal. Moreover, Bensley stated that I had discussions with Gayman about the appeal after the first hearing date. Bensley stated that I had told Gayman during these discussions to contact Bensley to settle the appeal. Bensley indicated that tapes of telephone messages would prove this. In support of his application, Bensley stated that he had tape recordings of messages left. He made an application that I should hear the tapes. The other parties had not been advised in advance of the hearing of this. Gayman objected to the introduction of the tapes. I requested that Bensley provide particulars of the content of the tape before I made my ruling with respect to the admissibility of the tape. Bensley refused to provide those particulars. In those circumstances, the tape was not admissible.

Gayman denied that I had lunch with him on the first hearing day and, indeed, there was no such lunch. He agreed that he had contacted Bensley for the purpose of settlement discussions. He also stated that he did not recall telling Bensley that he had been directed by me to contact Bensley and said that, if he had, that would not be true since he had not had any discussions with me concerning the case during the material time. I did not direct Gayman to contact Bensley as alleged, or at all. At the end of the hearing the material used by Bensley for the purposes of an application for judicial review was introduced into evidence. There was no objection to the introduction of this material. The material included the transcript of the messages referred to above. The transcript contains 7 messages from Gayman which may be summarized as encouragements--in colourful

language--to Bensley to contact Gayman to discuss settlement. None of messages in the transcript state that I had directed Gayman to contact Bensley for the purpose of discussing settlement or at all. Bensley's statement that I had directed Gayman to contact him was a falsehood and it appears that he deliberately misrepresented the content of the messages in his submissions to the Tribunal.

In the result, I ruled that there was no bias, actual or apprehended, on my part.

2. Proper Party

At the outset of the hearing, Bensley requested that I rule that Smoother Movers Limited was not the proper party to the appeal. He indicated that the employer was Smoother Movers (Doug Bensley) proprietorship. Smoother Movers Limited did not lead any evidence in support of the application.

The application was opposed by Jackson and White.

I agreed that the matter of the proper party was before me. I declined to rule that Smoother Movers Limited was not the Employer on a preliminary basis. In my view, that should be dealt with in the context of the other issues and based on evidence.

3. Federal Jurisdiction

On the second hearing day, Smoother Movers Limited made an application that the matter was within the federal jurisdiction and, as such, beyond the powers of the provincial employment standards legislation. Smoother Movers Limited argued that trucking was within federal jurisdiction. It also argued that its web site on the internet related to communication. In support of the application, Smoother Movers Limited produced an extra-provincial motor carrier licence issued by the Province of British Columbia to "Bensley, Douglas James, North Vancouver, B.C." Reference No. 62040.

Jackson agreed that the licence appeared to provide Smoother Movers Limited with the authority to engage in extra-provincial trucking but argued, *inter alia*, that it had not provided any evidence of "regular and continuous" activity such as to make it a federal undertaking. Jackson also argued that this was the first time this matter had come up, despite the appellant's "long history with the Employment Standards Branch", and was no more than a transparent attempt to prevent the hearing from proceeding.

In my view, jurisdiction is a fundamental matter. Whether or not it had been brought to the attention of the Branch is irrelevant. As such, I do not accept Jackson's argument that Smoother Movers Limited has attorned to the provincial jurisdiction. However, I agree that the extra-provincial licence--*per se*--is insufficient to bring Smoother Movers Limited within the federal jurisdiction. In my view, the test is whether the operation in pith and substance is interprovincial. In order to

fall within the federal jurisdiction, the "activity must be continuous and regular" (*Re Tank Truck Transport Ltd.* (1960), 25 D.L.R. (2d) 161, at page 172). As such, the time there was essentially no evidence to support the application and I dismissed it. As it happened, during cross-examination of Jackson, it became clear that, in fact, at least Smoother Movers (Doug Bensley) proprietorship regularly referred out-of-province moves to other moving companies.

Prior to making the decision, I asked the parties if they wished to have time to address this matter by way of written submissions. Smoother Movers Limited specifically requested that I make a decision at the hearing.

FACTS AND ANALYSIS

Jackson was employed between November 22, 1996 and November 15, 1997. White was employed between November 25, 1997 and January 17, 1998.

Bensley testified that Jackson and White were never employed by Smoother Movers. Rather they were employed by Smoother Movers proprietorship (Doug Bensley). The pay stubs indicated the employer's name to be Smoother Movers, not Smoother Movers Limited. He explained that Smoother Movers Limited never issued T-4 slips to employees. The T-4 slips indicated Smoother Movers (Doug Bensley). He introduced a letter from his bank which indicated that his account was in the name of Smoother Movers proprietorship. Cheques indicating "Smoother Movers Ltd." were incorrect. There was no account in the name of "Smoother Movers Ltd." Bensley also explained that Records of Employment were issued in the name of Smoother Movers proprietorship. He explained that one ROE which indicated the employer to be "Smoother Movers Ltd." was in error (for an employee named Dan Schopp). Payroll documents also pointed to Smoother Movers proprietorship as the employer. In cross-examination, Bensley testified that he had been in the moving and storage business for approximately 15 years as a proprietorship. He also explained that Smoother Movers Limited operated a web site on the internet. He was the sole shareholder, officer and director of that company. The limited company did not carry on the moving business but, Bensley admitted that it owned the vehicles.

Smoother Moovers Limited argues that it is not the Employer. As mentioned, it argues that Smoother Movers (Doug Bensley) proprietorship is the proper party. I understood the argument to be that Smoother Movers Limited had not been given an opportunity to participate in the investigation, which had been directed against the proprietorship and the principle *audi altarem partem* applies in the circumstances of this case.

Jackson argued that the real issue is whether Bensley or Smoother Movers Limited had an opportunity to participate in the investigation. In the alternative, Jackson submits that I could find that Bensley and Smoother Movers Limited are "associated businesses" under Section 95.

It is trite law that the appellant has the burden to show that the Determination is wrong. I do not agree with Jackson that Section 95 applies in the circumstances of this case. While the delegate may have referred to the application of Section 95 in a submission to the Tribunal, there is no reference to "associated businesses" in the Determination.

I agree with Smoother Movers Limited that the principle of *audi altarem partem* applies. I understand that principle to be applicable generally to administrative proceedings. In my view, the opportunity to be heard is an important aspect of natural justice. I do not, however, agree that Smoother Movers Limited was denied an opportunity to participate in the investigation of the two complaints. In cross examination Bensley agreed that he was the sole shareholder, sole director and sole officer of Smoother Movers Limited. He did not deny participating in the investigation. Rather he argued that Smoother Movers Limited was not, for example, served with a demand for employer records at its registered and records office. To adopt the narrow and technical approach suggested by Smoother Movers Limited would unduly restrict the investigations undertaken by the Director. In my view, the contacts and communications between the delegate and Bensley, and Smoother Movers Limited did not suggest or contend that there had been no such contacts, are sufficient to meet the requirement of Section 77 of the Act which provides:

> 77. If an investigation is conducted, the director must make reasonable efforts to give the person under investigation an opportunity to respond.

Smoother Movers Limited is free to argue that it is not the Employer. Smoother Movers Limited was served with the Determination, and participated vigorously and actively in a three day hearing. In my view the process did not violate the principles of natural justice.

As mentioned above, Smoother Movers Limited has the burden to show that the Determination is wrong. I do not agree with Jackson that it must show that the Determinations are "demonstrably wrong". In my view, it is sufficient that the Determinations are shown to be wrong. I agree that there are factual allegations, which, if believed, would tend to establish that the business was operated by Smoother Movers (Doug Bensley) proprietorship. Bensley gave evidence that Smoother Movers Limited was a company which simply owned and operated a web site and did not carry on the moving business. Jackson argued that Bensley later, during argument with respect to the constitutional issue, admitted that Smoother Movers Limited, in fact, owned the trucks used in the moving business. My notes of the cross examination indicates that Bensley stated that Bensley answered "no" to the question of whether the Smoother Movers Limited carried on the moving business and continued that the "company had to do with vehicles". This issue was not further pursued in cross examination.

The evidence presented--cheque stubs, pay roll records, motor carrier licence, business documents, to mention a few-- indicates that it is more likely than not that Smoother Movers Limited is not the employer. The party named in the Determinations is Smoother Movers Limited. In my view, the proper party is not a mere technical irregularity (Section 123). There is no Determination against Smoother Movers (Doug Bensley) proprietorship.

It was proper for Smoother Movers Limited to appeal. I refer in that regard to my comments in *Vancouver Cabs (1989) Ltd.*, BC EST #D385/98:

> "The delegate's analysis could well establish that Selbst was an employee of Vancouver Cabs. The delegate utilized several tests in reaching the conclusion that "lease operators (drivers) providing services to *Vancouver Taxi and its owner/operators* are employees as defined by the Employment Standards Act. Accordingly, I find that Brian Selbst has an entitlement to the minimum standards afforded to him under the legislation." (Emphasis added) In my view, the wording of the conclusion was not as clear as I would have wished. Employee status is only one side of the coin: employee status is required to enjoy the entitlements under the *Act.*
>
> The other side of the coin, where is it not readily apparent, is to identify the employer. Nevertheless, in my view, the Determination is sufficiently clear in the following respects: first, it was addressed to, and served on, Vancouver Cabs. Second, the Determination ordered Vancouver Cabs to cease contravening specified provisions of the Act and to pay the amount to Selbst. Third, a fair reading of the analysis and the conclusions points to Vancouver Cabs as the employer. I am mindful of the starting point for the delegate's analysis, namely his view that the "employer's position is that Mr. Selbst was not an employee of vancouver taxi". Vancouver Cabs did not appeal. If Vancouver Cabs disagreed with the Determination, which was addressed to it, presumably it would have appealed it in a timely fashion under the *Act.*
>
> That leaves the second issue: Gill's standing to bring the appeal. In my view, he does not have standing to bring the appeal. Although he is mentioned in the Determination as the owner of the taxi driven by Selbst, he is not a party to the Determination, the corporate entity is. He is not an authorized agent of Vancouver Cabs. Moreover, there is no basis for granting intervenor status to Gill. While he is a shareholder of the corporate entity, Vancouver cabs, there is neither

> any evidence nor, indeed, any submission to support that he is affected in a direct and legally material manner by the Determination."

In a recent decision 470999 BC Ltd. (BC EST #D042/99), the Tribunal held that a determination can not stand against a person not named in it. In that decision, the Adjudicator oberserved that the Director is "not precluded from issuing a correct determination ... and if that is done [the person] will have an opportunity to appeal that new determination in accordance with the requirements of the *Act*."

In the result, I refer the matter of the identity of the employer back to the Director.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determinations in this matter, dated July 16, 1998 be referred back to the Director.

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal