Employment Standards TRIBUNAL

An appeal

- by -

Alfred Jaromamay
("Jaromamay")

- 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

ADJUDICATOR: David B. Stevenson

FILE No.: 2001/872

DATE OF DECISION: March 26, 2002

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by Alfred Jaromamay ("Jaromamay") of a Determination that was issued on November 26, 2001 by a delegate of the Director of Employment Standards (the "Director").

Jaromamay had filed a complaint with the Director under the *Act* alleging his former employer, Securiguard Services Ltd. ("Securiguard") had terminated his employment without cause or notice, contrary to Section 63 of the *Act,* had failed to post meal breaks, contrary to Section 31(2)(c) of the *Act*, had failed to provide meal breaks, contrary to Section 31(2)(a) of the *Act* and failed to pay for meal breaks worked, contrary to Section 32(2) of the *Act*. Jaromamay also raised some matters of complaint that were not within the jurisdiction of the *Act*.

The Determination concluded there was no contravention of Section 63 of the *Act*; that Jaromamay had terminated his own employment and the company was, accordingly, discharged of their obligation to pay length of service compensation. The Determination also concluded Securiguard had contravened Part 4, Section 31(1), 31(2)(c), 32(1)(a) and 32(2), ordered Securiguard to cease contravening, and to comply with, the requirements the *Act* and *Regulations*. Jaromamay was compensated for those times Securiguard failed to comply with Section 32(1) of the *Act*.

Jaromamay says there are serious errors in the Determination.

ISSUE

The issue in this appeal is whether Jaromamay has shown the Determination was wrong in a manner that justifies the intervention of the Tribunal under Section 115 of the *Act* to cancel or vary the Determination, or to refer it back to the director.

FACTS

Securiguard is a security firm. Jaromamay was employed as a security officer at a rate of $11.50 an hour. On August 16, 2000, Jaromamay was working in that capacity at the Vancouver International Airport. During his shift the employer conducted an evaluation of his work performance and issued a report. The report recommended that he be moved from the site. The report was discussed with Jaromamay on August 17, 2000 and he was told he was being removed from the Vancouver International Airport site and to contact Don Lenz, a scheduler for the company, for re-assignment. Jaromamay did not follow that instruction and several attempts by Securiguard to communicate with him went unanswered. Jaromamay commenced employment with another employer on September 5, 2000.

Based on the material provided during the investigation, the Director found that the potential for being assigned to work at different sites was a condition of employment and Jaromamay had, in fact, worked at several sites during his employment with Securiguard.

The Director also found that during Jaromamay's employment, Securiguard typically had not posted his meal breaks and, during the period August 17, 1998 to August 16, 2000, Jaromamay had not been given a lunch break on 21 occasions (14 of which had been paid) and had been given a late break on 16 other occasions.

ARGUMENT AND ANALYSIS

In his appeal, Jaromamay has listed eight points for consideration. Those can be summarized as follows:

1. Securiguard falsified his employment records and the Director should have reached that conclusion and referred the matter to the appropriate government agency for investigation;

2. Because a contravention of the *Act* was found (after Securiguard had denied any contravention), the Director should have taken disciplinary action against Securiguard;

3. Securiguard is not above the law and should have been punished for their interfering with Jaromamay's rights under the *Act*;

4. There was some reference during the investigation and in the Determination about dental work that Jaromamay had done on September 1st and 2nd, 2000 and which was billed to the medical/dental plan he had while employed with Securiguard. He says that dental work proceeded on the understanding he had dental coverage;

5. The Director failed to take into consideration that Jaromamay was 'constructively dismissed' as a result of his complaining to the company about persistent violations of the *Act*;

6. It was not a condition of employment that Securiguard could assign him to other work sites;

7. Jaromamay says that evaluations of his work, which were provided during the investigation, were selective and failed to convey that, in fact, he was considered to be a good worker; and

8. Jaromamay submits, on the facts and the law, that he was 'constructively dismissed'.

The appeal does not establish any reviewable error in the Determination.

The first matter is not a matter that falls under the *Act*. Even if Securiguard committed some illegal act relating to Jaromamay's date of hire (and that is by no means clear) there is no reference or requirement in the *Act* that the Director to either address that alleged misconduct or to refer it to some other agency for investigation. This concern was raised in the complaint and was addressed in the Determination as follows:

> Jaromamay was informed the Branch does not have jurisdiction to require changes to a Record of Employment since it is a federal document. He was further informed that the alleged breech [sic] of the Security Agency Act would have to be dealt with by the agency responsible for that Act.

There is no error in that part of the Determination.

The second and third points relate to matters that fall within the discretion of the Director under the *Act*. The Tribunal has indicated in several decisions that it will not interfere with the exercise of discretion by the Director under the *Act* unless it can be shown that 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

There is nothing in the material on file or in the appeal that would justify an intervention by the Tribunal into the decision of the Director to take no further action beyond what is provided in the Determination.

The commentary about the dental work, in the fourth point, does not establish any reviewable error in the Determination. I agree with the statement in the Determination that the fact Jaromamay sought to use his insurance medical/dental insurance on September 1 and 2, 2000 is consistent with a conclusion that he did not consider he had been terminated on August 17, 2000, but it is a small point considering the other evidence that was available on the same question.

Turning to the fifth point, I do not accept that the Director failed to consider whether Jaromamay had been 'constructively dismissed'. The Determination includes a consideration of whether the decision of the company to re-assign Jaromamay to another location was a condition of employment:

The evidence supplied by the company showed Jaromamay had been assigned to other sites in the past and confirms that this is standard practice in the industry. Although Jaromamay was upset because, in his view, the company had not carried out a fair and thorough investigation of the incident at the airport, there is no bar in the employment contract to assigning employees as the company sees fit.

Nothing in the appeal demonstrates that conclusion is wrong. As an aside, an alleged 'constructive dismissal' under the *Act* is appropriately considered in the context of Section 66 of the *Act*, which states:

> *66. If a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated.*

It is clear the Director considered the decision of Securiguard to re-assign Jaromamay in that context. Based on a review of the material, I can find no basis for finding that conclusion to be wrong. This explanation also disposes of the eighth point raise in the appeal.

On the sixth point, the question of whether Securiguard had the authority, as a condition of Jaromamay's employment, to re-assign to other work locations was considered and answered in the Determination. Nothing in the appeal shows that conclusion was wrong.

The seventh point does no more than continue to disagree with the decision of Securiguard to remove him from the Vancouver International Airport site. That disagreement is irrelevant to the Determination. Even if Jaromamay is right about the motives of Securiguard in removing him from the Vancouver International Airport site, it does not affect the conclusion that in doing so, they were not terminating his employment. As an aside, the evidence does not appear to support a conclusion that Securiguard was improperly motivated when the decision was made to re-assign him.

The appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated November 26, 2001 be confirmed.

David B. Stevenson
Adjudicator
Employment Standards Tribunal