Employment Standards TRIBUNAL

An appeal

- by -

Martin Vasil

- 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/82

DATE OF DECISION: October 18, 2007

DECISION

SUBMISSIONS

Clea Parfitt	for Martin Vasil
Rawn Mongovius	for 528716 B.C. Ltd. carrying on business as Rawn's Buy and Sell Network
Rod Bianchini	for the Director of Employment Standards

THE DETERMINATION AND APPEAL

1. Martin Vasil appeals a determination dated June 21, 2007 (the "Determination") to the Employment Standards Tribunal (the "Tribunal"). The delegate of the Director of Employment Standards (the "Delegate") who made the Determination found that 528716 B.C. Ltd. carrying on business as Rawn's Buy and Sell Network (the "Employer") was liable for the amount of $4,342.90 in wages owing to Mr. Vasil, consisting of regular wages, annual vacation pay, statutory vacation pay, and accrued interest under section 88 of the Employment Standards Act (the "Act"). The Employer was also assessed $2,000.00 in administrative penalties, consisting of a $500.00 fine for each of four contraventions of the Act.

2. Mr. Vasil now appeals on the grounds that the Director of Employment Standards erred in law and failed to observe the principles of natural justice in making the Determination.

3. The Tribunal has determined that Mr. Vasil's appeal will be decided on the basis of written materials only; no reason for an oral hearing is apparent, and Mr. Vasil indicates that no oral hearing is necessary. In deciding this appeal, I have before me Mr. Vasil's appeal form and submission; the Director's submission; the Employer's submissions; the Determination; and the section 112 (5) record (the Record).

BACKGROUND

4. The Employer is engaged in repairing and selling computers, computer equipment and other electrical equipment. The Employer employed Mr. Vasil as a labourer and computer technician. Mr. Vasil first began working for the Employer in 2000. He was terminated from his employment on March 16, 2006. While he worked for the employer, Mr. Vasil received financial assistance form the ministry of Employment and Income Assistance due to a long-term disability.

5. Mr. Vasil filed a complaint against the Employer with the Employment Standards Branch on May 3, 2006, claiming regular wages, annual vacation pay, statutory holiday pay, and termination pay. An investigation was carried out by an Employment Standards Officer and subsequently, a Determination issued by the Delegate. The findings in the Determination which are disputed by Mr. Vasil in his appeal are as follows:

- Length of Service: the Delegate determined that Mr. Vasil was employed for two distinct periods: July 1, 2000 to July 9, 2001 and May 31, 2003 until March 16, 2006.

- Wage Rate and Hours of Work: the Delegate determined that during the period during which wages are recoverable for Mr. Vasil (September 16, 2005 to March 16, 2006), Mr. Vasil's rate of pay was $8.00 per hour from September 16, 2005 to January 8, 2006 and $15.00 per hour from January 9 to March 15, 2006. The Delegate determined that during this period, it was determined that Mr. Vasil worked an average of 27.5 hours per week.

- Termination of Employment and Compensation for Length of Service: the Delegate determined that Mr. Vasil's employment was terminated for just cause, due to Mr. Vasil's behaviour at work on March 15, 2006, and therefore the Employer owed no compensation for length of service.

ISSUE

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

ARGUMENT AND ANALYSIS

Mr. Vasil's Appeal

7. The burden is on the appellant, Mr. Vasil, to persuade the Tribunal that the Determination is wrong and that the Tribunal should intervene. An appeal to the Tribunal presents neither an opportunity for reinvestigation nor an opportunity to reargue the merits of the case. Section 112 of the Act describes the Tribunal's jurisdiction to consider appeals of the Director's determinations:

> 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.

8. Mr. Vasil appeals on the first two grounds: error of law and failure to observe the principles of natural justice. Mr. Vasil also makes submissions regarding credibility and admissions against interest, which will be addressed first.

Credibility

9. In his submission, Mr. Vasil says that Mr. Mongovius's evidence should not be accepted (and, presumably, should not have been accepted by the Delegate) because he failed to keep statutorily required employment records, did not report Mr. Vasil's earnings accurately to the government, may have failed to remit deductions, and submitted inconsistent evidence. Mr. Vasil says that his evidence should be preferred at all times over that of Mr. Mongovius, absent corroborating independent evidence. In other words, Mr. Vasil urges the Tribunal to give little if no weight to Mr. Mongovius's evidence and suggests that the Delegate erred in the weight he gave to Mr. Mongovius's evidence.

10. The Delegate, as the finder of fact, is tasked with making decisions regarding the weight of evidence, and matters such as consistency may go to weight. However, the failure of a party to adhere to statutory requirements does not automatically lead a finder of fact to the conclusion that the evidence presented by the party has little or no weight. I do not accept Mr. Vasil's suggestion of a broad dismissive approach to Mr. Mongovius's evidence.

Admissions against Interest

11. In his submission, Mr. Vasil makes the argument that some of the Employer's evidence should have been taken by the Delegate as admissions against interest and therefore be given more weight than other evidence on the same issue. For instance, Mr. Vasil argues:

- "In any event, Mr. Mongovius' highest statements of hours of work and rate of pay should be binding on him as admissions against interest."

- "Mr. Mongovius's statement that Mr. Vasil worked "on average" 6 to 7 hours per day should be considered binding as an admission against interest."

- "Mr. Mongovius wrote to the government of Canada that Mr. Vasil had worked for him "for the last 5 years plus" . . . This must be considered an admission against interest confirming Mr. Vasil's evidence that he worked continuously for Mr. Mongovious through 2001, 2002 and 2003 . . ."

12. It should be noted that in the law of evidence, admissions of a party have been traditionally been characterized as a type of exception to the rule against hearsay. The authors of *The Law of Evidence in Canada* (Sopinka, Lederman and Bryant, 2nd ed.) say at page 286 – 287:

> (para. 6.292) Traditionally, out-of-court assertions made by a party to the proceedings have been regarded as admissible at the instance of the opposite party as an exception to the hearsay rule. . . . Elements of trustworthiness and the adversary theory and original evidence all combine together to justify the reception of this kind of evidence.
>
> (para. 6.293) Admissions of a party are admissible against him or her in both civil and criminal cases.

13. In other words, the law regarding admissions is a rule of admissibility, not weight. Once the admission has been accepted as evidence, its probative value must be assessed in light of all of the evidence. Contrary to Mr. Vasil's suggestions in his submissions, the mere fact that a statement is an admission against interest by a party does not in itself give the admission special weight. In making the Determination, the Delegate was obliged to assess and weigh all the evidence and come to conclusions on the issues. He did so. The question to be answered in this appeal is whether the Tribunal should disturb the Determination based on its jurisdiction to consider appeals.

Error of Law

14. In his submissions, Mr. Vasil first "appeals the findings of fact made by the Director of Employment Standards with respect to [his] rate of pay, hours of work, start date, severance pay and termination for cause, and the calculations made which depend on these findings." The vast majority of Mr. Vasil's

detailed submissions contain arguments regarding why the findings of fact made by the Delegate are incorrect, and how the evidence should have been weighed differently by the Delegate.

15. The weight of evidence is a matter to be decided by the Delegate and is a question of fact, not law: *Beamriders Sound & Video*, BCEST #028/06. The Tribunal does not have the jurisdiction to hear appeals based on questions of fact alone, but where there is an allegation that the Delegate acted without evidence or acted on a view of facts which could not reasonably be entertained, an error of law may be found under the test in *Britco Structures Ltd*., BC EST #D260/03. In this decision, 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).

16. If a finding of fact was made on no evidence, or on a view of the evidence that could not reasonably be entertained, then an error of law may be made out. The Tribunal also noted in *Britco*, quoting from the decision of the British Columbia Supreme Court in *Delsom Estate Ltd. v. Assessor of Area 11 – Richmond/Delta*, [2000] B.C.J. No. 331, that an error of law in these circumstances is only found where it is shown

> . . . that there is no evidence before the Board which supports the finding made, in the sense that it is inconsistent with and contradictory to the evidence. In other words, the evidence does not provide any rational basis for the finding. It is perverse or inexplicable. Put still another way, in terms analogous to jury trials, the Appellant will succeed only if it establishes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have come to the determination, the emphasis being on the word "could". . .

17. My reasons with respect to Mr. Vasil's arguments on error of law follow.

Length of Service

18. In coming to the conclusion that Mr. Vasil was employed by the Employer for two separate and distinct periods of employment, the Delegate enumerates the evidence that he relied on: Mr. Vasil's and Mr. Mongovius's statements, Records of Employment that record start and end dates for the two periods of employment, and the statement of Mr. Nazir Kassam, a former employee of the Employer who worked in Mr. Vasil's position. Mr. Kassam confirmed that he took over Mr. Vasil's position after Mr. Vasil left in July 2001 and continued in the position, alone, until 2003 when he met Mr. Vasil when he returned to employment with the Employer.

19. Mr. Vasil says that the Delegate's conclusion was an unreasonable finding of fact constituting an error of law. He argues that the evidence points to him having worked throughout the period from July 1, 2000 to March 15, 2006, and encourages an alternate view of the facts from that taken by the Delegate. Mr. Vasil also says that Mr. Mongovius's evidence cannot be relied on because he is generally unreliable, and that his evidence with respect to length of service in particular is inconsistent.

20. In my view, Mr. Vasil's arguments on this point are not persuasive. There was ample evidence to support the Delegate's decision. The evidence provided a rational basis for the finding that Mr. Vasil was employed for two separate and distinct periods of employment, especially Mr. Kassam's evidence. No error of law is apparent.

Wage Rate and Hours of Work

21. The parties appear to agree, and the Delegate found, that during 2000 and 2001, Mr. Vasil was paid $10 per hour by the Employer. What the Delegate had to decide, was the wage rate for Mr. Vasil after 2001, and in particular during the period for which the Employment Standards Act allows Mr. Vasil to recover wages (September 16, 2005 to March 16, 2006). The Delegate considers the evidence regarding wages and concluded that during most of this period, the parties were in agreement that Mr. Vasil would be paid $75.00 per week, equalling $300.00 per month. The Delegate bases this conclusion on evidence from a number of sources, including evidence that the parties were aware that Mr. Vasil's government benefits would have been jeopardized had he been paid more than $75.00 a week.

22. Mr. Vasil argued that his wage was $2,500.00 per month. However, other than Mr. Vasil's assertions, the only evidence of a $2,500 monthly wage is a 2005 email written by Mr. Mongovius to a government official in support of a visa application for Mr. Vasil's girlfriend. This email refers to Mr. Vasil being placed back on a $2,500.00 monthly wage. The Delegate finds that Mr. Mongovius's email was not in itself indicative of a contractual relationship outlining a specific monthly wage of $2,500 per month, especially in light of the other evidence he cites as supporting a $75 weekly wage. He finds that Mr. Vasil was not promised $2,500 per month, and that the primary purpose of the 2005 email was to assist Mr. Vasil's girlfriend with Canada Immigration to enable her to move to Canada. The Delegate also found that Mr. Vasil's wage was changed after January 9, 2006 to $15.00 per hour in order to enable Mr. Vasil to save money for a planned a trip to Slovakia in April 2006.

23. The Delegate also assesses the evidence with respect to Mr. Vasil's hours of work in order to come up with an hourly wage rate. The evidence before the Delegate regarding hours of work was, for the most part, neither clear nor specific. Both parties agreed that there were no set hours of work for Mr. Vasil and that the Employer for the most part accommodated Mr. Vasil's health constraints and requirements. The Delegate also outlines Mr. Vasil's evidence with respect to hours of work and notes that none of the witnesses interviewed had any specific information with respect to Vasil's hours of work, including work Mr. Vasil said he did at home. The Delegate notes that Mr. Mongovius's view was that Mr. Vasil was permitted to "putter around" in the store on his own time, and that Mr. Vasil took equipment home to download information and music to his computer for his own use. Mr. Mongovius's evidence was that there was insufficient work for a full-time position. On the other hand, it was Mr. Vasil's view that he also worked at home repairing electronic goods for resale by the Employer, and he submitted evidence to that effect.

24. The Delegate concludes that Mr. Vasil's weekly hours of work was 27.5 hours per week between January 9 and March 15, 2006, based on a list of hours submitted by Mr. Mongovius for that period (the "Time

Record"). The Delegate also refers to Mr. Mongovius's "calendar itemisation of cash payment and corresponding work dates for Vasil" (the Calendar Record). The Delegate then determined that it was reasonable to use the same number as the average weekly hours of work for the period starting September 16, 2005 and ending January 8, 2006. Based on these average weekly hours and the pay of $75.00 per week, the Delegate found Mr. Vasil's hourly rate during this period was less than minimum wage and applied the minimum wage of $8.00 per hour to the average work hours of 27.5 hours per week during this period.

25. In his appeal, Mr. Vasil says that the Delegate's findings of fact with respect to hours of work and wages are unreasonable on all the evidence. He also says that telephone and alarm records would help confirm Mr. Vasil's presence at work but Mr. Mongovius did not provide these records to substantiate his claim. I note that Mr. Mongovius was not required to produce these records by the investigator and in any event, Mr. Mongovius is not the one who is obliged to substantiate his claim – rather, the onus is on Mr. Vasil to substantiate his claim regarding what hours he worked.

26. I note that all of the evidence that Mr. Vasil points to as showing that the Delegate was wrong in his conclusions was either contained in the Record or specifically mentioned by the Delegate in his reasons. That being said, of particular note are Mr. Vasil's arguments regarding the Delegate's use of the Time Record. Mr. Vasil says that this document shows the hours of work as "exactly 5 hours per day, Monday to Friday, and 2.5 hours on Saturdays" and that it is contradicted by admissions by Mr. Mongovius that Mr. Vasil kept irregular hours and worked on average 6 to 7 hours per day; Mr. Vasil's records of attendance at doctor's appointments; and the Calendar Record.

27. In fact, the hours of work noted in the Time Record are not as regular as suggested by Mr. Vasil. The Time Record shows that in some weeks, Mr. Vasil only works four or five days per week, and the days of the week where he does not work appears to vary, as do the number of hours worked. It is true that some of the days shown as having been worked by Mr. Vasil are also days on which he had doctor's appointments; however, some of Mr. Vasil's doctor's appointments also clash with the dates he appears to work according to the Calendar Record. It is also true that the work dates on the Time Record and the Calendar Record do not always correspond. Finally, it should be noted that in one of two statements where Mr. Mongovius says Mr. Vasil worked 6 or 7 hours a day, he also says that Mr. Vasil came in Monday, Wednesday, some Thursdays and Friday; in the other statement, he says that Mr. Vasil did not come in every day.

28. Clearly, the Delegate was working with a large amount of evidence, some of which contradicted each other, and it is apparent in the Determination that he found it a challenge to find specific evidence regarding hours of work. He refers to a Tribunal case (*Robert A. Wing*, BCEST #D074/01) which urges that "the task is to reach a fair and reasonable conclusion based on the best evidence available." In my view, the Delegate did exactly that; he considered all the evidence and took what he considered the best evidence, including the Time Record, to find that Mr. Vasil's weekly wage was $75 and he worked an average of 27.5 hours per week. In my view, the Delegate did not act without any evidence, nor did he act on a view of the facts that could not reasonably be entertained. Mr. Vasil's submissions fail to convince me that a reasonable person, acting judicially and properly instructed as to the relevant law, could not have come to the same determination as the Delegate. The Delegate laid out the evidence that supported his findings of fact in a comprehensive manner, and it is clear from the Determination that he gave consideration to the relevant evidence in a case where the evidence was far from specific. The Delegate did not err in law.

Termination of Employment

29. The Delegate concluded that Mr. Vasil had been terminated from employment for just cause and therefore was not entitled to compensation for length of service. The Delegate outlined the evidence before him on this topic, including the evidence of Mr. Jeff James, brother-in-law of Mr. Mongovius, who was taking over Mr. Vasil's position and who witnessed the events that led to the termination of Mr. Vasil's employment. Mr. Vasil was scheduled to leave his employment in April 2006 to travel to Slovakia. The Delegate assessed Mr. James' evidence and found that regardless of his relationship with Mr. Mongovius, Mr. James appeared credible and his evidence acceptable.

30. Mr. Vasil argues that the Delegate did not account for Mr. Mongovius failing to provide security tapes which would have shown the events that led to the termination of Mr. Vasil's employment; that he did not account for the fact that Mr. Vasil was threatening to report Mr. Mongovius to the Employment Standards Branch for not providing his pay and had been asking for his cheques before his employment was terminated; and that it was unreasonable for the Delegate to rely on Mr. James' evidence over Mr. Vasil's evidence.

31. Again, it appears that Mr. Vasil is merely repeating the arguments he made in the course of the investigation of his complaint. A review of the Determination and the Record indicate that the Delegate did not act without any evidence, nor did he act on a view of the facts that could not reasonably be entertained in concluding that the termination of employment was justified. The Delegate considered all the evidence, much of which was contradictory, conflicting, or unclear, and came to a conclusion. No error of law is apparent.

Discretion

32. Mr. Vasil alleges that the Delegate exercised discretion unreasonably when coming to conclusions on the rate of pay. The improper exercise of discretion may amount to an error of law (see point no. 5 of the test for error of law, above.) The Tribunal has considered the issue of the extent to which it can interfere in the Director's exercise of discretion; the leading cases are *Takarabe et al.*, BCEST #D160/98 and *Jody L. Goudreau et al.*, BC EST # D066/98. The Tribunal will generally 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. Here, on reviewing the materials, I cannot find any reason to interfere with the Delegate's conclusions based on an unreasonable exercise of discretion.

Failure to observe the principles of natural justice

33. Mr. Vasil argues that the Delegate failed to observe the principles of natural justice when he failed to take notice of relevant evidence with regards to length of service and rate of pay. However, Mr. Vasil does not specify what relevant evidence was not considered by the Delegate. The Record was before the Delegate and Mr. Vasil does not bring forward any new evidence. Mr. Vasil's arguments are not sufficiently specific to point to any failure to observe the principles of natural justice on the basis that relevant evidence was not considered.

CONCLUSION

34. The Delegate is tasked with the job of collecting and weighing the evidence, coming to conclusions on the issues, and expressing those conclusions in the Reasons for Determination. Often, as in this case, the assessment of the evidence leads the Delegate to put more weight on one piece of evidence over another. Often, the Delegate's conclusions are not agreed to by the parties; even the Tribunal may not agree with the conclusions. However, unless the findings of fact are so unsupportable as to be unreasonable in the context of the guidance provided by the jurisprudence in *Britco* and *Gemex*, an appellant's appeal of those findings of fact to the Tribunal will not succeed.

35. In this case, Mr. Vasil has not shown that any findings of fact made by the Delegate are so unreasonable as to constitute errors of law and justify the Tribunal's interference. Nor has Mr. Vasil shown that there was a failure to observe the principles of natural justice.

36. The appeal is dismissed.

ORDER

37. Pursuant to Section 115 of the *Act*, I order that the Determination dated June 21, 2007 be confirmed.

Yuki Matsuno
Member
Employment Standards Tribunal