



An appeal

- by -

Man Soo Kyung
("Kyung")

- 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: Shafik Bhalloo

FILE No.: 2008A/85

DATE OF DECISION: October 7, 2008

DECISION

SUBMISSIONS

Man Soo Kyung	on his own behalf
Ross Keegan	on behalf of Dennison Chevrolet Ltd.
Chantal Martel	on behalf of the Director

OVERVIEW

1. This is an appeal by Man Soo Kyung (“Kyung”) under Section 112 of the *Employment Standards Act* (the “Act”) against a Determination of the Director of Employment Standards (the “Director”) issued July 4, 2008.
2. The Determination concluded that Kyung’s employer, Dennison Chevrolet Ltd. (“Dennison”), did not contravene the Act and therefore, no wages were owed by the latter to Kyung and no further action would be taken with respect to Kyung’s complaint filed on November 5, 2007 alleging that Dennison failed to pay him compensation for length of service, bonus and minimum daily pay (the “Complaint”).
3. Kyung appeals the Determination on the sole ground delineated in Section 112(1)(b), namely, the Director failed to observe the principle of natural justice in making the Determination. With respect to remedy, Kyung has checked-off the box in the Appeal Form indicating that he is seeking a change or variation of the Determination. However, in support of this request, in his written submissions, Kyung simply delineates the changes he seeks in the findings of fact made by the Director in the Determination. More specifically, Kyung essentially reiterates his view of the evidence rather than requests how he wants the Determination changed. One can, however, deduce that what he is seeking the Tribunal to do is reverse the Director’s decision in the Determination and find that he was indeed owed compensation for length of service and bonus pay.
4. Kyung has not requested an oral hearing of the appeal. Pursuant to Section 36 of the *Administrative Tribunal’s Act* and Rule 17 of the *Tribunal’s Rule of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. In my view, this appeal may be adjudicated on the written submissions of the parties without resorting to an oral hearing. Accordingly, I will decide the appeal based on the Section 112(5) “record”, the submissions of the parties and the Reasons for the Determination.

ISSUE

5. The sole issue in this appeal is whether the Director failed to observe the principles of natural justice in making the Determination.

FACTS

6. Dennison operates a Chevrolet car dealership and employed Kyung as an auto-body painter from August 17, 1992 to August 10, 2007 at the rate of pay of \$24.50 per hour.
7. On November 5, 2007, almost 3 months after the last day of his employment with Dennison, Kyung filed the Complaint against Dennison alleging that Dennison contravened the *Act* by failing to pay him compensation for length of service, bonus and minimum daily pay.
8. The Delegate held a hearing of the Complaint on May 8, 2008 (the “Hearing”). Ross Keegan (“Keegan”), the Controller of Dennison, represented the latter at the Hearing and Kyung attended on his own behalf.
9. At the Hearing, Kyung raised the issue of non-payment of minimum daily pay by Dennison and this issue was settled in advance of the Hearing and therefore not addressed in the Determination and in this appeal.
10. At the Hearing, Kyung argued that he was forced to leave his employment with Dennison because he could not handle the pressure from the unfair treatment he received during his employment with Dennison since 2003. He indicated that “something had changed” when he returned to work after he was away on his medical leave between 2001 and 2003 and Dennison did not want him to return in 2003. When he returned in 2003, Kyung states he received unfair treatment from various service managers at Dennison including being sent home early and being not assigned to a specific job. He also indicated that his hours of work were reduced to the point where he was no longer able to make a living. When he raised with the Owner of Dennison the matter of his reduced hours and possibly having Dennison laying him off, Kyung states that he felt that the owner wanted him to quit instead of granting him a layoff and paying him severance pay.
11. In further support of his belief that Dennison did not want him back after his return from a medical leave in 2003, Kyung states that between 2005 and 2007, when Dennison’s body shop was very busy, there was sufficient work for one painter and a prep person. Kyung states that he requested Dennison to hire a prep person to assist him in the body shop but Dennison instead hired a second painter named Raveen. Kyung states that there was insufficient work to support two full painters and as a result Raveen, later, quit his employment.
12. With respect to Kyung’s claim for a bonus, Kyung indicates that on his 10th anniversary with Dennison, he received a bonus of \$1,000.00. According to Kyung, Dennison pays its employees a bonus after every 10 years of service. Kyung indicates that his 20th anniversary with Dennison was in 2002 while he was away on a medical leave. He states that he did not receive a bonus upon his return in 2003 and he inquired about his bonus with Keegan but was later told that the owner of Dennison did not respond to his inquiry. Kyung, as a result, abandoned or dropped the matter altogether.
13. In response to Kyung’s testimony, Keegan, on behalf of Dennison, testified that Kyung provided a verbal notice of his resignation to Dennison’s Body Shop Manager stating that his reason for leaving was that he had found work closer to home. Keegan further testified that Kyung worked at Dennison until August 3, 2007 followed by one week’s holiday. He received wages up to August 10, 2007 including statutory holiday pay for August 6, 2007.
14. Keegan further testified that there was no change to Kyung’s employment conditions or hours of work contrary to Kyung’s allegation. Keegan indicated that Dennison relies on the Insurance Corporation of

British Columbia (“ICBC”) for the majority of its work in the body shop. According to Keegan, Kyung was well aware that the hours of work would fluctuate from month to month depending on the work Dennison received from ICBC. Accordingly, Kyung was never guaranteed any set of hours of work. Keegan submitted some time sheets for the body shop delineating the hours worked by all employees for each month from August 2005 to August 2007 in support of his assertion that Kyung’s hours of work were in fact greater in 2007 than in 2006 resulting in no significant alterations in Kyung’s hours of work during 2007.

15. Keegan, in refuting Kyung’s allegation that Dennison was trying to get rid of him when he returned from his medical leave, noted that while Kyung was away on medical leave for 18 months between 2001 and 2003, Dennison kept his position open during this time and Dennison did the same when Kyung was away on a WCB claim from March 6 to April 14, 2003. In the latter case, Keegan indicated that Dennison further accommodated Kyung upon the latter’s return to work by assigning him lighter duties for a period of three weeks ending April 14, 2003.
16. According to Keegan, Dennison was unable to control the fluctuating hours in the body shop due to the nature of the business, which was dependent on work from ICBC. In the circumstances, Keegan stated it was impossible to guarantee any employee any set of hours of work.
17. The Delegate, after considering both Kyung’s and Keegan’s testimonies at the Hearing, on the issue of compensation for length of service, noted that under Section 66 of the *Act*, if a condition of employment is substantially altered, the employee’s employment may be deemed by the Director to be terminated. However, to make such a finding, the Delegate noted that it must be shown that the change made by the employer places the employee in a position of having to accept as a condition of continued employment, changes to wages, working conditions or benefits which an objective, reasonable person would find to be unfair, unreasonable and unacceptable. However, in this case, the Delegate notes that Kyung did not provide sufficient evidence to support that his employment conditions were substantially altered, forcing him to quit. According to the Delegate, nothing was presented by Kyung to show that Dennison changed his wages, working conditions or benefits in any way, which an objective, reasonable person would find to be unfair, unreasonable or unacceptable. Accordingly, the Delegate concluded that he was not persuaded that any substantial changes or alterations occurred in Kyung’s working conditions within the meaning of Section 66 of the *Act*. The Delegate also noted that even if he were wrong in concluding that there was no substantial alterations in the conditions of Kyung’s employment within the meaning of Section 66 of the *Act*, Kyung accepted the alterations, if any, because he did not raise any objections to the changes within a reasonable period.
18. The Delegate also noted that in his review of the time sheets provided by Dennison, Kyung’s hours of work, during the last six months of his employment with Dennison, were comparable or greater than other shop employees. Furthermore, other than the realignment of Kyung’s hours in 2005 as a result of the hiring of the extra painter, Raveen, there was no other change in Kyung’s total hours of work from year to year and all other aspects of his employment remained the same, according to the Delegate.
19. Further, according to the Delegate, while Kyung argues that he could no longer afford to work at Dennison and had to quit, the evidence shows that Kyung appeared to accept, from at least 2003 to 2007, the fluctuation to his hours of work with little or no protest. According to the Delegate, there is evidence of acquiescence on the part of Kyung rather than rejection of any changes made to his employment by Dennison. The Delegate, accordingly, concludes that there was no termination of employment of Kyung pursuant to Section 66 of the *Act* and Kyung is therefore not owed compensation for length of service.

20. With respect to the \$1,000.00 bonus claimed by Kyung for reaching the 20th anniversary mark with Dennison, the Delegate noted that he preferred Keegan's testimony to Kyung's on the subject. In particular, Keegan testified that the payment of such a bonus is at the discretion of the employer and that no such policy for payment of a bonus based on length of service existed with Dennison. The Delegate also indicated that it is noteworthy that Kyung did not pursue the matter of the bonus after the owner failed to respond to his request, as it is indicative that such policy did not exist or was improbable. As a result, the Delegate determined that Kyung is not owed a bonus and even if a bonus was payable to him in 2002 (the date of his 20th anniversary), such bonus would not be payable under Section 80 of the *Act* which limits recovery of wages, including bonuses, to those wages payable in the last six months of employment.

KYUNG'S SUBMISSIONS

21. Kyung, in his written appeal submissions resubmits two previously written submissions he submitted to the Employment Standards Branch and the Delegate. The first of the written submissions particularized the Complaint and Kyung previously submitted it together with the Complaint form. The second written submissions further particularized the Complaint and Kyung submitted it to the Delegate before the Hearing. The Delegate had the benefit of both sets of written submissions prior to the Hearing and the Determination.
22. In addition, supplementing the earlier written submissions referred to, Kyung also adds a page and a half of new submissions, which essentially buttress his previous written submissions and set out his disappointment with the manner in which he has been dealt with by the Employment Standards Branch and the Delegate. In particular, he states that he "reached out to the Labour Board in order to let them know of the suffering and poor treatment" he endured while in the employ of Dennison. He alleges that the Employment Standards Branch "completely leaned towards [Dennison's] side" and this upset him greatly. He indicates that the Delegate, during the mediation between the parties, "decided to side with the stronger faction, while looking down [upon him]" and disregarding his circumstances.
23. Kyung also submits that during the mediation meeting of February 11, 2008, he calculated that he should receive \$8,000.00 from Dennison and Dennison offered him \$3,000.00, which he did not accept. Kyung states that the Director's subsequent decision in the Determination that Dennison does not owe him any severance pay at all "both shocks and frustrates" him and it is "unbelievable" and "unfair". He also argues that the Determination reinforces the "narrow view of the situation" taken by the Director. He indicates that while he endured 3 ½ years of "limited work", the Director simply focused on "the last six months" when calculating minimum wages. This, according to Kyung, does not make any sense and he should have "received payment dating back to 2003".

DENNISON'S SUBMISSIONS

24. Dennison submits that the Determination is correct and should not be changed or varied.

THE DIRECTOR'S SUBMISSIONS

25. According to the Director, Kyung has failed to provide any evidence to support his argument that the Director has failed to observe the principles of natural justice in making the Determination. Further, according to the Director, Kyung is simply expressing his disagreement with the findings and conclusions

of fact made in the Determination and attempting to reargue the merits of the case. Therefore, the Director submits that the appeal should be dismissed.

ANALYSIS

26. Kyung has based his appeal on the “natural justice” ground of appeal in Section 112(1)(b) of the *Act*. The Tribunal has indicated that principles of natural justice are, in essence, procedural rights ensuring the parties have an opportunity to learn the case against them, the right to present their evidence or respond to evidence against their interests, and the right to be heard by an independent decision-maker (*Re 607730 B.C. Ltd. (cob English Inn and Resort)* [2005] B.C.E.S.T.D. No. 55 (QL); *Re Wilkinson* [2006] B.C.E.S.T.D. No. 17 (QL)).
27. In the case at hand, I do not find any allegation or evidence that Kyung was denied reasonable opportunity to hear or respond to key evidence against his interests. The Delegate conducted the Hearing of Kyung’s Complaint on May 8, 2008 and Kyung attended at the Hearing and had the opportunity to hear and respond to the evidence of Dennison. There is absolutely no evidence that Kyung was at any time, after the filing of the Compliant until the Determination was made, denied an opportunity to participate in the process at every step of the way. In my view, Kyung’s allegation that the Director breached the principles of natural justice is no more than a bare allegation without any basis or supporting evidence and therefore I reject Kyung’s “natural justice” ground of appeal as devoid of any merit.
28. It is also apparent to me that Kyung is dissatisfied with the result in the Determination and is seeking to reargue the Complaint afresh. He has adduced two sets of written submissions, which the Delegate had before him prior to making the Determination. The purpose of an appeal is not to provide another opportunity to a party dissatisfied with the Determination to have its case reheard and reweighed.
29. Finally, while Kyung, in his appeal, does not raise error of law ground of appeal, I have heeded to the direction of the Tribunal in *Triple S Transmission Inc.*, [2003] B.C.E.S.T.D. No. 141 (QL) that the Tribunal must not mechanically adjudicate an appeal based on the particular “box” that an appellant has simply checked-off, and considered the error of law ground of appeal as well. As Kyung is challenging the findings and conclusions of facts made by the Director in the Determination, it is important to note that errors on findings of fact may amount to an error of law. The onus, of course, is on the appellant to show that the Director took a view of the facts that could not reasonably be entertained based on the evidence before the Director. Having said this, I have carefully reviewed the evidence before the Director and do not find that Kyung has discharged the burden to show that the Director took a view of the facts that could not reasonably be supported based on the evidence before him during the investigation and the hearing.

ORDER

30. Pursuant to Section 115 of the *Act*, I order that the Determination be confirmed as issued.

Shafik Bhalloo
Member

Employment Standards Tribunal