



An appeal

- by -

Iraj Khabazian-Isfahani

- 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: Carol L. Roberts

FILE No.: 2006A/96

DATE OF DECISION: October 12, 2006

DECISION

SUBMISSIONS

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| Iraj Khabazian-Isfahani | on his own behalf |
| Rod Bianchini | on behalf of the Director of Employment Standards |
| Chris Hatty, Employee Relations Manager | on behalf of UBC |

OVERVIEW

1. This is an appeal by Iraj Khabazian-Isfahani (“Khabazian”), pursuant to Section 112 of the *Employment Standards Act* (“the Act”), against a Determination of the Director of Employment Standards (“the Director”) issued July 6, 2006.
2. Khabazian was employed as a research assistant in the Ophthalmology Department of Vancouver General Hospital Research Pavilion, under the jurisdiction of the University of British Columbia from March 1999 until September 19, 2003. Khabazian filed a complaint alleging that he was owed compensation for length of service, regular wages, overtime wages, and deductions from wages.
3. The Director’s delegate held a three day hearing into the complaint on June 3 and 27, and July 28, 2005. Khabazian was represented by counsel, UBC was represented by Kyle Cormier, the Employee Relations Manager.
4. The delegate determined that UBC had contravened Sections 17 of the *Employment Standards Act* in failing to pay Khabazian wages for 14 hours of work. He concluded that Khabazian was entitled to wages and interest in the total amount of \$305.29. The delegate also imposed a \$500 penalty on UBC for the contraventions of the Act, pursuant to section 29(1) of the *Employment Standards Regulations*.
5. The delegate was unable to find, on the evidence, that Khabazian was entitled to compensation for length of service, overtime wages, vacation pay, or travel expenses. The delegate also concluded that UBC had not misrepresented Khabazian’s position.
6. Khabazian contends that the delegate erred in law, and that the delegate failed to observe the principles of natural justice in making the Determination.
7. Section 36 of the *Administrative Tribunals Act* (“ATA”), which is incorporated into the *Employment Standards Act* (s. 103), and Rule 16 of the Tribunal’s Rules of Practice and Procedure provide that the tribunal may hold any combination of written, electronic and oral hearings. (see also *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). Although Khabazian sought an oral hearing, I conclude that this appeal can be adjudicated on the written submissions of the parties. This appeal is whether the delegate erred in law, an issue which does not turn on the credibility of the parties or whether additional evidence needs to be considered. There is also no need to hear *viva voce* evidence on the issue of whether there is a denial of natural justice. This appeal is decided on the section 112(5) “record”, the submissions of the parties, and the Reasons for the Determination.

ISSUES

8. Did the delegate err in finding that Khabazian's job was not misrepresented, that he was dismissed for cause, and that he was not entitled to overtime wages, vacation pay and travel expenses?
9. Did the delegate fail to observe the principles of natural justice in making the Determination?

FACTS

10. Khabazian's complaint raised a number of issues. I have summarized the evidence, argument and conclusions of the delegate according to each of those issues.
11. Khabazian began his employment with UBC as a Technician I. In July 2001, he was promoted to a Technician II and received a corresponding pay increase. Khabazian contended that his job had been misrepresented, and that he was required to perform tasks outside his job description. The delegate analyzed section 8 of the *Act* and concluded that UBC had not misrepresented Khabazian's position.
12. Khabazian alleged that he was entitled to compensation for length of service. UBC took the position that Khabazian's employment was terminated for cause as a result of lengthy disciplinary record of insubordination, abuse and inappropriate emails to his supervisor. After reviewing the evidence of both parties, the delegate concluded that UBC had discharged the burden of establishing that Khabazian had been dismissed for cause. The delegate considered, in particular, letters and emails from UBC officials to Khabazian warning him about his conduct on June 18, 2002, August 19, 2002, October 4, 2002, January 28, 2003 and March 3, 2003. The delegate also considered Khabazian's response to UBC's actions. He determined that UBC had established and communicated conduct standards to Khabazian, Khabazian had been warned that he had not met those standards, that his employment was in jeopardy if he did not meet those standards, and that Khabazian continued to be unwilling or unable to meet the standards. In particular, the delegate noted the tone of Khabazian's emails to his supervisor, his insubordinate behaviour, UBC's final and unequivocal warning letter of March 3 accompanied by a three day suspension, followed by further emails in May, 2003. The delegate also dismissed Khabazian's argument that UBC condoned his behaviour.
13. Khabazian claimed he was entitled to regular and overtime wages for work performed while he was on parental leave. The delegate considered Khabazian's evidence about the hours he worked as well as evidence presented by three UBC representatives, and concluded that Khabazian was entitled to wages for work performed while he was on parental leave.
14. Khabazian also claimed vacation pay from March 2002 to March 2003. After reviewing the records and hearing evidence from the parties, the delegate concluded that Khabazian received vacation pay and time off in accordance with the *Act*.
15. Khabazian claimed that his wages for the three day suspension were improperly deducted from his pay. The delegate concluded that the suspension was a valid disciplinary measure, and that section 21 was not intended to capture wages not paid as a result of the suspension.
16. Finally, Khabazian also claimed travel expenses, representing approximately 36 trips taken between UBC and Vancouver General Hospital while he was on parental leave.

17. The delegate determined that while the definition of wages could include an employer's business costs improperly paid by an employee, he found no evidence supporting Khabazian's claim.

ARGUMENT

18. Khabazian contends that the delegate ignored relevant facts, erred in other factual findings, made false assumptions and misjudged the case. He seeks to have "the whole case re-examined" based on these grounds as well as the delegate's failure to appreciate UBC's "involvement in [his] personal life and constructing [his] termination". He also alleges that the delegate was biased against him, preferring the evidence of the employer to his evidence.
19. Khabazian identified nine "examples" of errors and misconceptions, of which he says there are many:
- a) the delegate identified hearing days as including June 3. He contends he did not attend a hearing on that day
 - b) the delegate said that Khabazian cleared up some confusion as to his date of termination. He says there was never any confusion of his termination date.
 - c) the delegate said that Khabazian submitted a revised complaint form on October 22, 2003. Khabazian says that he was sent a new form by a Branch case manager, with suggestions on how to revise it to reflect the issues to be decided, which he did.
 - d) the delegate ignored his job description when determining that his position had not been misrepresented, relying instead on a fabricated document from the employer.
 - e) the delegate found that he was terminated for just cause. He says that the delegate put too much weight on the employers' evidence "despite the fact that the employer was clearly trying to construct my dismissal and set me up with false accusations and active meddling".
 - f) the delegate found that he was only entitled to 14 hours wages. He says that he "clearly proved it to be much, much more than that".
 - g) the delegate found that he was not entitled to vacation time. He says that the delegate accepted a fabricated document from his employer and ignored the original document he filed.
 - h) the delegate concluded that there was no deductions from his wages. Khabazian says that the evidence to support his claim is on the file.
 - i) the delegate found that he was not owed any travel allowance. Again, Khabazian says that the evidence to support his claim is on the file.
20. The delegate submitted the record before him at the time the Determination was made. He took the position that all the appeal issues were dealt with in the Determination.

21. UBC submitted that Khabazian's appeal was frivolous, and that he had not established any grounds of appeal. It seeks to have the appeal dismissed and the Determination confirmed.

ANALYSIS

22. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
- (a) the director erred in law
 - (b) the director failed to observe the principles of natural justice in making the determination;
or
 - (c) evidence has become available that was not available at the time the determination was being made
23. The burden of establishing the grounds for an appeal rests with an Appellant. Khabazian must provide persuasive and compelling evidence that there were errors of law in the Determination, as alleged, or that the delegate failed to observe the principles of natural justice. A disagreement with the result, in and of itself, is not a ground of appeal. An appellant must show clear and convincing reasons why the Tribunal should interfere with the delegate's decision on one of the three stated grounds of appeal.
24. Khabazian's appeal document does not identify any errors of law or describe how he is of the view he was denied natural justice. What he seeks, in his own words, is a re-hearing of the complaint. An appeal is not an opportunity to re-argue a case that has been advanced before the delegate.
25. I have concluded that Khabazian has not demonstrated either an error of law or a denial of natural justice for the following reasons.

Error of Law

26. The Tribunal has adopted the factors set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)* (1998] B.C.J. (C.A.) as reviewable errors of law:
- 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 be reasonably entertained; and
 - 5. Exercising discretion in a fashion that is wrong in principle
27. Questions of fact alone are not reviewable by the Tribunal under section 112. In *Britco Structures Ltd.*, BC EST #D260/03, the Tribunal held that findings of fact were reviewable as errors of law if they were based on no evidence, or on a view of the facts which could not reasonably be entertained.

28. The Tribunal must defer to the factual findings of a delegate unless the appellant can demonstrate that the delegate made a palpable or overriding error.
29. Khabazian has set out nine grounds for his appeal. The first three he alleges are “factual errors”. None of these “facts” are material to the conclusion and I find it unnecessary to address them further.
30. Although Khabazian outlines other “examples” of how the delegate erred, misinterpreted the facts or ignored evidence, he does not provide any particulars or argument in support of these assertions, stating only that “the evidence to support my claim is on file”. That is insufficient basis for an appeal.
31. Nevertheless, I have reviewed the record, which is extensive, and in particular, the evidence submitted at the hearing before the delegate. I find the delegate’s factual findings and conclusions on each of the issues to be supportable on the evidence before him. There is simply no basis for concluding that the delegate ignored or misinterpreted any of the evidence.
32. I am also unable to find that the delegate erred in law in his interpretation of any relevant sections of the *Act*.
33. I dismiss the appeal on this ground.

Natural Justice

34. Principles of natural justice are, in essence, procedural rights that ensure that parties know the case being made against them, the opportunity to reply, and the right to have their case heard by an impartial decision maker.
35. The principles include a requirement that decision makers must base their decisions, and be seen to be basing their decisions, on nothing but admissible evidence (the rule against bias). The concept of impartiality describes “a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case” (*Valente v. The Queen*, [1985] 2 S.C.R. 673 at p. 685)
36. Khabazian was represented at the hearing by counsel, and I infer that his case was ably presented. Indeed, there is nothing to the contrary in the record. In the absence of any evidence or submissions by either Khabazian or his counsel as to the fairness of the hearing or related processes, I find no basis for this allegation.
37. Khabazian also alleged that the delegate was biased against him. His allegation appears to be based solely on the fact that the delegate found his claims to be largely unsubstantiated. Although the delegate preferred the evidence of UBC to that of Khabazian, that conclusion, without more, is not evidence of bias.
38. An allegation of bias against a decision maker is serious and should not be made speculatively. It ought not be made unless supported by sufficient evidence to demonstrate that, to a reasonable person, there is a sound bias for apprehending that the person against whom it is made will not bring an impartial mind to bear upon the cause (*Adams v. British Columbia (Workers' Compensation Board)*, [1989] B.C.J. No 2478 (C.A.)).

39. To say that someone is unable to give an unbiased decision when he sits, in whatever capacity, deciding things between other people, is an affront of the worst kind, and unless it is well founded upon the evidence, it is not something that should ever be said. (*Vancouver Stock Exchange v. British Columbia (Securities Commission)* (B.C.C.A.) September 28, 1999)
40. The onus of demonstrating bias lies with the person who is alleging its existence. Mere suspicions, or impressions, are not enough. Khabazian has presented no evidence that the delegate was biased, asserting that he was simply on the basis that he found against him. I find no basis for this ground of appeal.
41. The appeal is dismissed.

ORDER

42. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated July 6, 2006, be confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal