Employment Standards TRIBUNAL

An appeal

- by -

Kenneth Dale Atkinson
(the "Appellant")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2009A/116

DATE OF DECISION: November 16, 2009

DECISION

SUBMISSIONS

Kenneth Dale Atkinson	on his own behalf
Adam Rich	on behalf of 0769510 B.C. Ltd.
Amanda Clark Welder	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal filed by Kenneth Dale Atkinson (the "Appellant") pursuant to section 112(1) of the *Employment Standards Act* (the "*Act*") of a Determination issued by a delegate of the Director of Employment Standards (the "delegate") on July 29, 2009 under file number ER # 157-345 (the "Determination"). The delegate dismissed the Appellant's complaint in its entirety and the Appellant now asks that the Determination be varied or referred back to the Director of Employment Standards on the grounds that the delegate erred in law, failed to observe the principles of natural justice in making the Determination, and on the basis that new and relevant evidence is now available (see *Act*, sections 112(1)(a), (b) and (c)).

2. I am adjudicating this appeal based solely on the parties' written submissions and have before me submissions filed by the Appellant (September 8 and October 15, 2009), the respondent employer, 0769510 B.C. Ltd., carrying on business as Penticton Honda (the "Employer"), dated September 23, 2009, and from the Director of Employment Standards dated September 22, 2009. I have also reviewed the section 112(5) record that was before the delegate when the Determination was being made.

THE DETERMINATION

3. The following factual summary is taken from the delegate's "Reasons for the Determination" ("Reasons"). The Appellant worked for the Employer, an automobile dealership located in Penticton, as a commissioned salesperson from March 15, 2001 until he resigned on July 3, 2008. In September 2007 the dealership was acquired by an entity known as the "Sentes Group" and following that acquisition a number of changes were implemented – the showroom was renovated, advertising budgets were increased, software was upgraded and a new commission structure was introduced. The new commission structure was presented to the sales staff on either April 8 (Employer's evidence) or April 25 (Appellant's evidence), 2008 to take effect as of May 1, 2008. The particular components of the structural changes to the commission scheme are set out in the delegate's Reasons and, in general, the new plan was designed to reward higher sales volume whereas the former plan focused on the gross profit earned on each vehicle sale.

4. The Appellant continued working under the new plan for about two months, however, apparently convinced that his overall compensation would decline under the new plan, resigned on July 3, 2008. The Appellant's terse handwritten July 3 letter is reproduced, in full, below:

> To Whom it May Concern
>
> Please accept this letter as my resignation effective immediately.
>
> "Dale Atkinson" [signature]

5. The Appellant resigned and joined another local automobile dealership and subsequently filed a complaint against his former Employer alleging that the Employer's unilateral implementation of the new commission structure constituted a deemed dismissal under section 66 of the *Act*:

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

Further, the Appellant claimed that he was owed approximately $700 in unpaid commissions earned under the new plan. I understand that this latter claim was not contained in the original complaint but, rather, was raised at the complaint hearing thus necessitating an adjournment of the hearing so that the parties could file further written submissions on the matter.

6. The delegate conducted a complaint hearing on February 11, 2009 where the Appellant and the former General Sales Manager testified for the Appellant; Adam Rich, the general manager and a principal of the Employer, was the sole witness for the Employer. In light of the new unpaid commission claim advanced at the hearing, the delegate adjourned the hearing so that the parties could file further submissions and documentation regarding this claim. The Employer was given 7 days to file its submission, the Appellant was given 7 days to respond to the Employer's evidence and argument and the Employer was given a further 7 days to file any final reply.

7. On July 29, 2009, the delegate issued the Determination dismissing the complaint. In her accompanying Reasons the delegate explained that she did not find any commissions to be outstanding (a finding not challenged by the Appellant in this appeal); indeed, the delegate appears to have concluded that the Employer overpaid the Appellant by about $65. As for the section 66 "deemed dismissal" claim, the delegate concluded that while the Employer unilaterally implemented a new commission structure and that the Appellant neither accepted nor condoned this change in his employment conditions, the change was not sufficiently "substantial" to constitute a section 66 contravention. The delegate, at pages R21 – R24, undertook a detailed comparative analysis of the Appellant's likely commission earnings under the old and new plans and concluded that if the Appellant was, in fact, "worse off" (and this was far from clear) under the new plan, the adverse impact was minimal. Since the Appellant only worked under the new plan for two months before he resigned, earning about $165 more and about $300 less in each month comparing the old plan to the new, "it is impossible to accurately project with any degree of certainty whether there would continue to be a financial loss to [the Appellant] in the future" (Reasons, page R23).

THE PARTIES' POSITIONS

8. The Appellant says that the delegate erred in law, failed to observe the principles of natural justice and that new and relevant evidence is now available. Although the Appellant argues that all three statutory appeal grounds apply in this case (the Appellant simply checked off each of the appropriate boxes in his Appeal Form), the Appellant's submissions do not specifically address the appeal grounds in any sort of systematic fashion. It appears that the Appellant's principal challenge to the Determination is based on the assertion that, in fact, the Employer *did* make fundamental adverse changes to the existing commission plan and, accordingly, that the delegate erred in failing to give effect to section 66 of the *Act*. It also appears that some of the assertions contained in the Appellant's two submissions could be read as raising natural justice concerns. However, there is nothing in the material before me that could be properly characterized as evidence that was not available at the time the Determination was being made (see *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST # D171/03). Accordingly, the Appellant's appeal under section 112(1)(c) of the *Act* (*i.e.*, the "new evidence" ground) is summarily dismissed under section 114(1)(f) of the *Act*.

9. With respect to the natural justice ground, the Appellant has made several assertions in his submissions that could be seen as falling within the ambit of this statutory ground. In particular, the Appellant has raised concerns regarding the disclosure of evidence and the timeliness of the decision-making process. The Appellant also appears to be concerned that the delegate who issued the Determination is not the same person who filed submissions on the Director's behalf in response to the appeal.

10. The alleged error of law appears to relate to the delegate's conclusion that there was no contravention of section 66 of the *Act* in this instance. In short, the Appellant says that, contrary to the delegate's finding, his conditions of employment were substantially altered and he was thus entitled to payment of compensation for length of service under section 63 of the *Act*.

11. The Employer's submission is contained in a 1¼ - page letter under Mr. Rich's signature (the Employer's sole witness at the complaint hearing). The Employer contends that the Appellant is simply re-arguing matters of fact that were correctly determined in the Employer's favour and further says that many of the Appellant's concerns would not have adversely affected his commission income had he chosen not to resign. Finally, the Employer takes no position regarding document disclosure or the timeliness of the process: "I am very unclear as to what evidence was not forwarded to [the Appellant] [and] I have no comment on his concern over the length of time the director's decision took as I have never been involved in an Employment Standards hearing previously".

12. The Director's delegate (not the same delegate who issued the Determination) says that there was no breach of the principles of natural justice in this case and that the Appellant has not demonstrated the original delegate fundamentally misconceived the evidence before her or failed to consider otherwise relevant evidence. In short, the Director's delegate says that the Appellant is simply re-arguing his case on appeal without demonstrating any "palpable and overriding error".

ANALYSIS AND FINDINGS

13. I shall first address the Appellant's assertions that could be characterized as falling within the purview of the "natural justice" appeal ground. The Appellant says that he received certain information only 15 minutes before a scheduled mediation session. A mediation is a voluntary consensual dispute resolution process. Mediation hearings are not adjudicative hearings (that is, the mediator has no legal authority to issue a binding decision) and thus the usual rules regarding prior document disclosure do not apply. Mediation, as conducted by the Employment Standards Branch, is a forum to explore resolution and parties are not obliged to agree to any proposed settlement agreement that may be presented to them during the mediation process. Nothing consequential turns on whether information was not disclosed in a timely manner prior to a mediation hearing.

14. The Appellant has expressed concern about the post-complaint hearing document submission process. The Appellant concedes that "I did not request payment of outstanding commissions but was told by the delegate that if in her findings money was owed, it would be paid [and] I did state that was not the reason why I had started these proceedings and was not my primary concern" (October 15, 2009 submission, page 1). In light of the fact that the Employer did not have any prior notice that the Appellant intended to assert a claim for unpaid commissions, the delegate might well have simply refused to allow that issue to go forward. In my judgment, the delegate adopted a course of action that was entirely favourable to the Appellant, namely, she agreed to adjourn the hearing so as to allow the parties to better particularize and document their positions on this aspect of the Appellant's claim. During the hearing, the Appellant acknowledged, in response to questions put to him by Mr. Rich for the Employer, that his claim for unpaid commissions allegedly owed under the new plan was quite possibly inflated since he had not accounted for certain costs that would have

been charged to each transaction prior to calculating the actual commission payable. The delegate then ordered that the Employer file, within one week, relevant cost information relating to the disputed commissions, the Appellant was given one week to respond to the Employer's documentation (which, the record shows, was provided to him) and the Employer was given one further week for any final reply. This sort of submission cycle is routinely adopted in both judicial and administrative tribunal forums and allowed both parties a fair and reasonable time to present their case and respond to the other party's case. In the context of this case, I find nothing objectionable about this process in terms of the rules of natural justice.

15. The Appellant has objected to the timeliness of the decision-making process. The complaint hearing was conducted on February 11, 2009 and the Determination was not issued until July 29, 2009 – a delay of some 5½ months. The Appellant does not say that he was prejudiced by this delay in some material way (beyond, I suppose, having to wait for a decision) although there is a veiled assertion that the delay compromised his ability to prepare his appeal documents since he now must "rely on my memory and whatever notes that were available". Given the nature of the appeal grounds, I am not persuaded, based on the record before me, that there has been any real prejudice to the Appellant. There is an ample documentary record in this case and no one need necessarily rely on their "memory" in order to address the appeal grounds raised by the Appellant.

16. In *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 the B.C. Human Rights Tribunal heard several sexual harassment complaints about 32 months after they were originally filed. The Supreme Court of Canada observed that in the administrative context, delay, standing alone, does not amount to an abuse of process. The delay must be "unacceptable" and coupled with proof of actual prejudice flowing from the delay. Here, the Appellant does not complain about pre-hearing delay but, rather, about the delay in issuing a decision following the conclusion of the hearing. In my view, while it would have been preferable for the delegate's reasons to have been issued sooner than 5½ months after the hearing date, that delay falls well short of being "unacceptable" in light of the *Blencoe* decision and other decisions since *Blencoe* that have addressed the same issue. Given that there is no evidence of actual prejudice relating to post-hearing delay in issuing the Determination, I find that there was no breach of the principles of natural justice flowing from this situation (see also *Quackenbush v. Purves Ritchie Equipment Ltd.*, 2006 BCSC 246 where a post-hearing delay of 23 months in the context of a human rights adjudicative process fell short of constituting an abuse of process; in *Quackenbush*, the petitioner also argued that the delay compromised his ability to pursue an appeal or review process).

17. The Appellant also complains about what he described as "delegate replacement" (October 15, 2009 submission, page 2). The Appellant appears to be concerned that the delegate who issued the Determination is not the same delegate who filed submissions to the Tribunal regarding the appeal. The short answer to this concern is that the Director has the absolute discretion to assign some other delegate the task of preparing a submission in response to an appeal. If the delegate who issued the Determination and Reasons was not the person who actually heard the evidence and argument presented at the complaint hearing, that would have constituted a clear violation of the principles of natural justice (and in particular the rule that the person hearing the case should decide the case – see *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, [2001] 1 S.C.R. 221) but that is not the situation here.

18. Finally, I now turn to the central thrust of the Appellant's appeal, namely, the assertion that the Employer did, in fact, unilaterally, detrimentally and substantially alter the Appellant's conditions of employment *(i.e.*, the change in the commission structure). While there is no question that the Employer unilaterally altered the existing commission scheme with not very much notice to the affected employees, section 66 cannot be implicated in this case unless that change substantially (and adversely) affected the commissioned employees' income potential. The delegate undertook a careful and detailed analysis of the competing schemes (see Reasons, pages R19 – R24). The evidence before the delegate indicates that some aspects of the new

program were somewhat less advantageous compared to the old plan but that other aspects left the commissioned sales staff in a better overall position. Perhaps the most telling evidence was that given by the former General Sales Manager (a witness who testified for the Appellant) and recounted at page R11 of the delegate's Reasons:

> …In the past, the pay structure was gross profit oriented and the commission was higher for higher grossing deals. The new pay plan would have a negative effect on deals with a higher gross profit. However, the new pay plan was more volume oriented and would pay a higher commission on deals with a lower gross profit. Therefore, how the new pay plan affected the individual sales person would be dependent on the type and size of the deals that were transacted each month.

19. The Appellant resigned two months after the new plan was implemented and, based on the delegate's analysis, he absorbed a very minor commission reduction for those two months as compared to the old plan (less than $150 or, annualized, approximately 1.29% of his previous year's commission earnings). By any reasonable measure, even if this "loss" continued to accrue (and there was no conclusive evidence to that effect), I am unable to disagree with the delegate's conclusion that this change was not sufficiently substantial to constitute a deemed dismissal under section 66 of the *Act*.

ORDER

20. Pursuant to Section 115(1)(a) of the *Act*, I order the Determination dated July 29, 2009, be confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal