Employment Standards TRIBUNAL

An appeal

- by -

Mike Keenan

- 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.: 2006A/111

DATE OF DECISION: December 5, 2006

DECISION

SUBMISSIONS

Mike Keenan	for himself
Serina Tipper	for the Director of Employment Standards

OVERVIEW OF THE APPEAL

1. Mike Keenan appeals a Determination of the Director of Employment Standards (the "Director") issued August 14, 2006 (the "Determination"), pursuant to section 112 of the *Employment Standards Act* (the "*Act*"). Mr. Keenan began his employment in sales with Pinnacle Athletic Mats Ltd. in Chilliwack, B.C. ("Pinnacle") on March 3, 2003. His employment was terminated on October 19, 2005. Mr. Keenan filed an undated complaint with the Employment Standards Branch claiming overtime of $66,000.00 spanning the entire period of his employment, as well as a $5,000.00 deduction from wages on March 22, 2005.

2. A delegate of the Director (the "Delegate") conducted an investigation and determined that there had been no contravention of the *Act*; no wages were outstanding; and no further action would be taken. In particular, the Delegate found that:

    1. Mr. Keenan is a manager under the *Act* and therefore not entitled to any overtime wages.
    2. Even if the Delegate was wrong and Mr. Keenan is not a manager under the *Act*, he is not owed any additional wages.
    3. Mr. Keenan is not entitled to $5,000.00 for deductions from wages.

3. Mr. Keenan now appeals the Determination on two grounds. The first is that the Director of Employment Standards, represented by the Delegate, failed to observe the principles of natural justice in making the Determination. Mr. Keenan makes a number of statements in support of this ground of appeal. Not all are relevant. The potentially relevant submissions can be roughly categorized under four heads of argument:

    1. The Delegate was biased.
    2. Mr. Keenan disagrees with certain statements of fact, attributed to the Employer, which are described in the Determination. He outlines his view of these facts.
    3. The Delegate incorrectly interpreted and applied the law in (a) finding that he is not a manager under the *Act*; (b) neglecting to apply the legal principle outlined in *Northland Properties Limited*, BC EST #D004/98) --- "The burden of establishing that a person is excluded from the protection of the Act, or any part of it, lies with the person asserting it, and there must be clear evidence justifying that conclusion"; and (c) finding that his claim for deductions from wages of $5000.00 was out of time.
    4. The Delegate mischaracterized his communications with the Delegate and with other Employment Standards Branch staff.

4. The second ground on which Mr. Keenan appeals the Determination is that there is new evidence that was not available at the time the Determination was made. Mr. Keenan seeks to have considered as evidence a Determination dated August 21, 2006, issued by the same Delegate, which deals with the claim of two other employees of the Employer (the "August 21 Determination"). Mr. Keenan says the August 21 Determination, which was issued after the Determination, shows that the information used to adjudicate his claim was false.

5. The Delegate has filed a response to the appeal and provided the Record, i.e. the documents that were considered in the investigation and the resulting Determination. Although Mr. Keenan has requested an oral hearing, the Tribunal has decided that this appeal can be decided on the basis of the parties' submissions and the Record.

ISSUE

6. Should Mr. Keenan's appeal be allowed on the basis that the Delegate failed to observe the principles of natural justice in making the Determination, or on the basis that there is new and relevant evidence which was not available at the time of the Determination?

THE DELEGATE'S RESPONSE

7. In response to the allegation of a failure to observe the principles of natural justice, the Delegate says that most of Mr. Keenan's submissions on this point are refutations of findings of fact made in the Determination. She argues that the Tribunal has no jurisdiction to hear appeals based solely on questions of fact, and says that the Mr. Keenan's submissions do not point to any errors of fact that might constitute a failure to observe the principles of natural justice, or an error of law. The Delegate addresses the allegation of bias in detail and says that Mr. Keenan has offered no evidence that would support a finding of bias on the Delegate's part.

8. The Delegate maintains that there is no error of law with respect to her finding that Mr. Keenan's claim for deductions from wages was out of time.

9. With respect to whether the August 21 Determination should be considered as new evidence, the Delegate says that a Determination issued with respect to one complaint does not constitute evidence with respect to another complaint. She says that the August 21 Determination has no probative value and is not relevant to any material issue in Mr. Keenan's complaint.

10. ANALYSIS

Failure to Observe the Principles of Natural Justice

11. Under section 112(1)(b) of the *Act*, a person may appeal a Determination on the ground that the director failed to observe the principles of natural justice in making the determination.

1. Does the Delegate's conduct show bias or give rise to a reasonable apprehension of bias?

12. Mr. Keenan alleges that the Determination shows signs of bias, and speculates that the bias may have been caused by his "diligent and perhaps pushy pursuit."

13. In *Dusty Investments Inc. d.b.a. Honda North*, BC EST #D043/99 (Reconsideration of EST #D101/98), the Tribunal adopted the comments of Newbury, J.A. in *Finch v. The Association of Professional Engineers and Geoscientists* (1996), 18 B.C.L.R. (3d) 361 at 376 (B.C.C.A.):

> The test for determining whether a reasonable apprehension of bias arises is well-known and clear: Cory, J. for the Court in *Newfoundland Telephone Co. Ltd. v. Board of Commissioners of Public Utilities* (1992) 4 Admin. L.R. (2d) 121 (S.C.C.) formulated it this way:
>
> > It is, of course, impossible to determine the precise state of mind of an adjudicator who has made an administrative board decision. As a result, the courts have taken the position that an unbiased appearance is, in itself, an essential component of procedural fairness.
> >
> > To ensure fairness the conduct of members of administrative tribunals has been measured against a standard of reasonable apprehension of bias. The test is whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator.

14. The Tribunal goes on to point out that the test is an objective one; that because allegations of bias are serious, they should not be found except on the clearest of evidence; and that the evidence presented should allow for objective findings of fact that demonstrate actual bias or reasonable apprehension of bias.

15. The Delegate submits that Mr. Keenan's submissions do not bring forward any evidence of bias. Based on my examination of the Determination and the Record, I agree. A reasonably informed bystander could not reasonably perceive bias on the part of the Delegate. I find that there was no bias, or reasonable apprehension of bias, arising from the Delegate's conduct in the investigation or in making the Determination.

2. Does Mr. Keenan's disagreement with certain statements of fact, attributed to the Employer and described in the Determination, indicate a failure to observe the principles of natural justice?

16. In her submissions, the Delegate writes:

> The majority of the information contained in this section are statements refuting findings of fact made in the determination and do not speak to the observance of natural justice. With respect, the Tribunal has no jurisdiction to hear appeals based solely on questions of fact and nothing in the complainant's submission supports a finding that any potential errors of fact amount to a failure to observe natural justice or an error in law (*Britco Structures Ltd.*, BC EST D#260/03).

17. The Delegate's comments, on first blush, appear to be a full answer to Mr. Keenan's submissions. Usually, errors of fact cannot form the basis for a successful appeal of a Determination. However, a close examination of Mr. Keenan's submissions, along with the Determination and the Record, compels me not to dismiss Mr. Keenan's submissions as easily as the Delegate. Mr. Keenan's submissions raise a concern, not with respect to errors of fact, but that the conduct of the investigation and the Determination itself may have deficiencies that amount to a breach of natural justice principles.

18. With respect to how investigations by the Director should meet the requirements of natural justice, the Tribunal summarized the important principles in *J.C. Creations (c.o.b. Heavenly Bodies Sport)*, BC EST # RD317/03 (Reconsideration of BC EST # D132/03):

> Section 77 of the *Act* requires that the Director "...make reasonable efforts to give a person under investigation an opportunity to respond". Section 77 is thus a legislated, minimum procedural fairness requirement. It is consistent with the purposes of the *Act* "to promote the fair treatment of employees and employers" and "to provide fair and efficient procedures for resolving disputes over the application and interpretation of this *Act*" (Sections 2(b) and (d) of the *Act*). The issue here is whether the Director's Delegate made "reasonable efforts" to give the Employer an opportunity to respond to the investigation being conducted by the Delegate.
>
> The requirement under Section 77 of the *Act* in no way requires that an oral hearing be held. That is recognized by the Tribunal in the already cited BWI Business World decision. It is also reflected in the following comments by the Tribunal in *Milan Holdings Ltd*., supra, at para. 30:
>
> > An investigation is, by its nature, different from a proceeding conducted in the cool detachment of a quasi-judicial hearing where all the parties are present and procedural niceties are attended to. Investigations are a dynamic process, in which information is collected from different persons in different circumstances over time. At different points during the investigation, the investigator may hold different perspectives or viewpoints that lead him or her in one direction or another. A proper investigation cannot be run like a quasi-judicial hearing. Investigations necessarily operate in much more informal, flexible and dynamic fashion. All this is reinforced by s. 77, which requires only that "If an investigation is conducted, the director must make reasonable efforts to a give a person under investigation an opportunity to respond".
>
> Having acknowledged the unique features of an investigation under the *Act*, and the fact that an opportunity to respond does not require a formal adjudicative hearing, it is nonetheless also true that basic to any conception of fair process or a reasonable effort to give an affected person a chance to respond is the notion that a person subject to an adverse finding must be given adequate notice of the case he or she has to meet and an opportunity to be heard. That is the minimum requirement set forth in the plain words of Section 77 of the *Act*. As rightly stated by Adjudicator Orr in *Cyberbc.Com AD & Host Services Inc*. (c.o.b. 108 Temp and La Pizzaria) (Re), BC EST # RD344/02:
>
> > While the Tribunal has indicated that Section 77 does not necessarily require the production of the whole investigative file prior to issuing the determination and it is not intended to allow for a form of "discovery", there still must be meaningful disclosure of the details of the complaints in order to make the opportunity to respond reasonable and effective. (para. 36)

19. The Tribunal also dealt with the issue more recently in *Inshalla Contracting Ltd*., BC EST # RD054/06:

> In the case of investigations under the Employment Standards *Act* the duty of fairness will almost invariably require notice to the employer and employee. The general principle is that notice must be adequate in all the circumstances in order to afford those concerned a reasonable opportunity to present evidence and argument, and to respond to the position of the other party. It will also give the parties other opportunities to resolve the dispute with the assistance of the Employment Standards Branch. . . .
>
> In *Howard C. Chu o/a Label Express*, BC EST #RD113/04 this Tribunal observed as follows:
>
> . . . .
>
> When conducting an investigation, a Director's delegate is entitled to speak to the parties separately (and this is often the only practical way to proceed). However, and this was the nub of

> Tribunal Member Love's initial decision to order the matter referred back to the Director, both parties are entitled to know about, and make submissions regarding, material evidence submitted by the adverse party (see section 77 of the *Act*).

20. In summary, while an investigation is an informal process and does not carry the same level of procedural fairness obligations that would arise in a oral hearing, and while an oral hearing is not necessary for every complaint, an investigation under the *Act* still must allow for both the employer and employee to be made aware of any material evidence submitted by the adverse party in enough detail so that they have a reasonable and effective opportunity to respond. The Delegate is obligated, by virtue of section 77 and the principles of natural justice, to make reasonable efforts to ensure that this is done.

21. My review of the Record and the Determination, as well as the submissions of Mr. Keenan and the Director on appeal, indicate that in the course of the investigation, Mr. Keenan does not appear to have been afforded an opportunity to respond to evidence, put forward by the Employer, with respect the material issue of his employment responsibilities. To give Mr. Keenan this opportunity is crucial to fulfil the principles of natural justice, because evidence with respect to his employment responsibilities determines in turn whether he is a manager according to the definition under the *Act* and therefore excluded from being paid overtime wages. "Manager" is defined in the *Employment Standards Regulation* as:

> (a) a person whose principal employment responsibilities consist of supervising or directing, or both supervising and directing, human or other resources, or
>
> (b) a person employed in an executive capacity.

22. In coming to this conclusion, I note the following:

1. With respect to Mr. Keenan's job duties, the Determination outlines the evidence of Mr. Keenan; other witnesses that were interviewed by the Delegate; and Mr. Spence on behalf of the Employer. The Determination reflects the documents found in the Record that contain Mr. Keenan's and Mr. Spence's submissions.
2. In making the determination that Mr. Keenan is a manager under the *Act*, the Delegate summarizes Mr. Keenan's and Mr. Spence's evidence in this way:

   > With regard to whether or not the complainant supervised or directed other resources it is clear that he did. In his statement to me dated May 26, 2006 the complainant outlines in details [*sic*] his responsibility over inventory, sales, warranty claims, presentations to external clients/customers.
   >
   > . . . .
   >
   > Norman Spence has put forward the statements that the complainant supervised himself, was wholly responsible to organize the budget and costs for the jobs, lead all major projects and monitored them, authorized customer refunds and discounts, and had authorized spending of company resources.
3. While she summarizes the evidence of the parties and witnesses, the Delegate makes these findings of fact: a) Mr. Keenan was hired as the Director of Sales; (b) Mr. Keenan did not directly supervise any human resources; (c) Mr. Keenan supervised or directed other resources; (d) Mr. Keenan was responsible for the entire sales operation of the business. From these findings, she proceeds to conclude that Mr. Keenan is a manager as defined by the *Act*.

4. Mr. Spence's description of Mr. Keenan's employment responsibilities are very different from Mr. Keenan's description, and tend much more to suggest that Mr. Spence was a manager under the *Act*. The differences are even more striking if the documents in the Record are reviewed. The majority of Mr. Spence's description of Mr. Keenan's work responsibilities is contained in a letter dated June 26, 2006 and received by fax by the Delegate on July 9, 2006. To take one example in this letter, Mr. Spence says that Mr. Keenan had two company credit cards; that he was the only person to have credit cards; and he could use the funds on these cards at his discretion. However, a view of the Record does not reveal any indication that the Delegate put this important information to Mr. Keenan for his response. Nor does the Determination reveal that the Delegate asked Mr. Keenan about the two company credit cards he allegedly used, or any response by Mr. Keenan to the allegation. In his appeal submissions, Mr. Keenan refers to Mr. Spence's credit card allegations as follows: "It is claimed that I had Two Company credit cards. I only had my own credit card and most often reimbursed very late. All credit card statements are available . . . ."

5. Going beyond the specific example of company credit cards, the Determination contains no statements or indication that the Delegate ever put the adverse evidence of Mr. Spence regarding Mr. Keenan's employment responsibilities to Mr. Keenan in order to allow him to respond. In fact, in the whole of the Determination, there is only one instance in which it is indicated that specific evidence led by Mr. Spence was put to Mr. Keenan:

   In response to the employer's allegation that the complainant spent a great deal of time doing personal work on the company computer on ebay, the complainant states he spent no more that [*sic*] one hour per day doing personal ebay on the company computer.

6. The only documentary evidence in the Record, not created by either Mr. Spence or Mr. Keenan, which may assist in determining Mr. Keenan's employment responsibilities, is a job advertisement for a Sales and Marketing Manager with the Employer. However, it is unclear whether this ad refers to the same position that Mr. Keenan held. The Delegate does not appear to have relied on this document in her determination.

7. The documents in the Record show that the Employer and Mr. Spence sent the Delegate information (by fax) on May 26 and July 9, 2006. There is also an allusion to a conversation between Mr. Spence and the Delegate on June 26, 2006. The July 9, 2006 fax contains the majority of Mr. Spence's statements regarding Mr. Keenan's job duties.

8. The documents in the Record show that Mr. Keenan sent the Delegate information (whether by fax or email) on May 21, May 26, May 31, and June 13, 2006. The Record does not show that the Delegate sent any correspondence to Mr. Keenan. The last correspondence from Mr. Keenan, sent on June 13, asks about the progress of the case. There is no correspondence, or any indication of any conversation between the Delegate and Mr. Keenan, on or after July 9, 2006.

9. The Record also includes a "Complaint and Information Docket" which tracks the progress of the complaint file. On page 4, it indicates that the "records" received by the Delegate from the Employer were not disclosed to Mr. Keenan, but that "information contained on records was provided verbally." No date is given. There is no record of a conversation, exchange of documents, or other communication between the Delegate and Mr. Keenan on or after July 9, 2006, the date of the correspondence from Mr. Spence containing information about Mr. Keenan's job duties.

23. The Delegate had an obligation to put the key elements of the Employer's position regarding Mr. Keenan's employment responsibilities, contained in the July 9 letter, to Mr. Keenan in order to allow him to respond. To do this would constitute "reasonable efforts" within the meaning of section 77. From my

review of the Record and the Determination, I conclude that this was not done. This failure to put contrary evidence to Mr. Keenan for a response is especially troubling given that it is the Employer's burden to establish that Mr. Keenan should be excluded from the protection of the *Act*:

> . . . in the context of excluding a person from the *Act* or any part of it, the burden of establishing the basis for the exclusion lies with the person asserting it; and second, because of the consequences to an individual of such a conclusion, there must be clear evidence justifying that conclusion. The scope of exclusion from the *Act* is limited (*Northland Properties Limited*, BC EST #D004/98).

24. As the Tribunal said in *JC Creations Ltd*., above, "The *Act* is remedial legislation and should be given such large and liberal interpretation as will best ensure the attainment of its purposes and objects, see *Machtinger v. HOJ Industries Ltd*. (1992), 91 D.L.R. (4th) 491 (S.C.C.) and *Helping Hands v. Director of Employment Standards* (1995), 131 D.L.R. (4th) 336 (B.C.C.A.)." To accept the Employer's evidence regarding the key issue of whether Mr. Keenan is a manager within the meaning of the *Act*, without giving Mr. Keenan an opportunity to respond to Mr. Spence's statements, is a clear instance of a failure to observe the principles of natural justice.

25. I conclude that Mr. Keenan's appeal must succeed on this ground.

26. With respect to remedy, the Tribunal in *JC Creations Ltd*., above, instructively quotes from the Supreme Court of Canada in *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643 at paragraph 23:

> I find it necessary to affirm that the denial of a right to a fair hearing must always render a hearing invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have.

27. The appropriate remedy in this case is to send the matter back to the Director for another hearing or investigation that observes all aspects of procedural fairness. Further, my view is that the hearing or investigation should be carried out by a Delegate other than the one who carried out the investigation in this case. This is in order to remove the possibility of a reasonable apprehension of bias in the new hearing:

> One species of reasonable apprehension of bias arises where a decision-maker is asked to conduct a quasi-judicial adjudication having already formed a negative view about a person's credibility. As wisely noted in *British Columbia Nurses' Union v. British Columbia Women's Hospital*, [1997] B.C.J. No. 855 (C.A.) at para. 14:
>
> > It is, in my opinion, completely unrealistic to expect a decision maker to free his or her mind from a previous conclusion that someone is, in essence, lying, and to reach a new and entirely balanced conclusion free from that previous settled decision on the basis of new evidence which may do nothing more than add another piece to the total puzzle of credibility and fact finding.

28. In this case, the Delegate made a detailed finding of credibility regarding Mr. Keenan and Mr. Spence in the Determination. Therefore, in my view, for the same Delegate to carry out the new investigation or hearing would give rise to a reasonable apprehension of bias. I would like to reiterate my earlier conclusion, however, that there is no evidence of actual bias by the Delegate in this case. The direction to

have another delegate of the Director carry out another investigation or hearing is to preclude a reasonable apprehension of bias from arising in a future determination.

29. In light of my conclusions, it is not necessary for me to decide the questions raised by Mr. Keenan's other arguments regarding procedural fairness.

New Evidence

30. Mr. Keenan also appealed the Determination under Section 112(1)(c) of the *Act*, on the ground that evidence has become available that was not available at the time the Determination was being made. He refers to the August 21 Determination, which Mr. Keenan says shows the information used to adjudicate his claims was false.

31. When a person appeals a Determination on this ground, all of the following four conditions must be met before the evidence will be considered by the Tribunal:

1. the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;

2. the evidence must be relevant to a material issue arising from the complaint;

3. the evidence must be credible in the sense that it is reasonably capable of belief; and

4. the evidence must have high probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

(Bruce *Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D171/03).

32. The Delegate says in her submissions that a Determination issued with respect to one complainant does not constitute evidence for another complainant; that the information contained in the August 21 Determination is specific to the investigation conducted in that investigation; that the August 21 Determination has no probative value and is not relevant to a material issue arising from Mr. Keenan's complaint; and that it would not have led the Director to a different conclusion on the material issue. In his reply submission, Mr. Keenan says that the August 21 Determination meets all four conditions.

33. After reviewing the submissions of the Delegate and Mr. Keenan, and reviewing the August 21 Determination, I have concluded that the August 21 Determination should not be considered by the Tribunal because it fails to meet the fourth condition outlined in *Davies*. In my view, the part of the August 21 Determination that could potentially be relevant to a material issue in Mr. Keenan's complaint is the finding that Mr. Spence hired Mark Anderton, another employee of the Employer (and in fact one of the witnesses interviewed in the investigation of Mr. Keenan's complaint). However, this finding, in my view, would not have led the Delegate to a different conclusion on the material issue of whether Mr. Keenan was a manager under the *Act*. This is because the Delegate concluded in the Determination that Mr. Keenan did not direct or supervise human resources, and the Delegate's conclusions would only have been reinforced by the August 21 Determination had it been available at the time.

ORDER

34. Pursuant to Section 115 of the *Act*, I order that the Determination dated August 14, 2006 be cancelled and sent back to the Director for another investigation or hearing with a different Delegate.

Yuki Matsuno
Member
Employment Standards Tribunal