Employment Standards TRIBUNAL

An appeal

- by -

Mark Rosen carrying on business as Youth Employment Skills
("Rosen")

- 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: Margaret Ostrowski, Q.C.

FILE No.: 2009A/117

DATE OF DECISION: November 17, 2009

DECISION

SUBMISSIONS

Mark Rosen	on behalf of himself carrying on business as Youth Employment Skills
Kristine Booth (the "Delegate")[1]	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Rosen pursuant to section 112 of the *Employment Standards Act (*the *"Act")* from a Determination issued by the Director of Employment Standards on July 29, 2009. In that decision, the Director found that Rosen had contravened the *Act* by failing to pay wages (pursuant to section 18 of the *Act*) in the amount of $712.05, and accrued interest (pursuant to section 88 of the *Act*) in the amount of $11.33. Administrative penalties totalling $1,500.00 were imposed by the Director in the amount of $500.00 for each contravention in regards to sections 16, 34 and 9 of the *Act*. The total amount ordered in the Determination to be paid by Rosen is the sum of $2,223.38.

2. The Tribunal has reviewed the Determination, the submissions of the parties and the section 112(5) record and has determined that a decision can be made without an oral hearing as there are written submissions from the parties setting out their respective positions.

3. Rosen has appealed the Determination on the grounds that the Delegate failed to observe the principles of natural justice in making the Determination. He stated that the entire investigation was handled with bias from the beginning. Additionally, in a submission accompanying the grounds for appeal, Rosen stated that the Director erred when she failed to consider that if Rosen had employed children under the age of twelve years, it was through no fault on his part and that he did all he could to prevent it. He further stated that the Director further erred by not considering that when the "contractors" worked less than two hours, it was always their choice to do so. These last two points in Rosen's submission are more in the nature of errors in law and therefore I will analyze these submissions in that light.[2] Rosen did not appeal the finding that the workers were determined to be employees and not independent contractors. He agreed to pay 4% vacation pay to the employees at the end of each year and to pay the minimum wage during training.

ISSUES

4. The issues to be determined by the Tribunal are as follows:

   a. Did the Director fail to observe the principles of natural justice in making the Determination?

   b. Did the Director err in law?

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[1] In this decision I have differentiated between the "Delegate" and the "Director". A delegate represents the Director in carrying out work under the *Employment Standards Act* but in this case, Rosen has alleged bias on the part of the Delegate in her personal capacity so I refer to her as a Delegate when writing in the specific rather than the general.

[2] Regarding the adoption of a liberal view of grounds of appeal, I refer to the analysis in *Triple S. Transmission Inc.*, BC EST # D141/03

BACKGROUND

5. Rosen operates a business selling candy bars door to door; he employs salespersons to sell the candy bars and they receive one dollar for each bar sold. It appears that the salespeople hired were all young people who wanted to make some pocket money. He said that before hiring them, he had verbal assurance from both the parent and child that he/she was at least twelve years old. The employees [3] also completed a written form in which they were requested to supply their date of birth.

6. Rosen had established a work practice such that if an employee wished to work less than two hours, he or she could request to be returned home early. Many reasons were given by the employees for leaving work after less than two hours such as sickness, inclement weather, demands of homework, parents request, etc. In all of those circumstances, Rosen did not pay the minimum daily pay as required in section 34 of the *Act*.

7. Rosen states in his submissions that contact from the Employment Standards Branch was initiated by the Delegate calling him at his home and asking questions without identifying herself or her interest. The Delegate submitted that she began communicating with Rosen by a letter dated June 23, 2008. Rosen took issue with the fact that the complaint was filed by the Delegate, she also handled the investigation, and she made the decision. Rosen said that a colleague of the Delegate verbally accosted him on the street and said things like "You're not supposed to be doing this. I'm going to talk to Kristine about this tomorrow." He said that after he called the Regional Director at the local office, he received a letter of apology. The Delegate submitted that: fair process was followed in the investigation, that Rosen was informed of employer obligations under the *Act*, that there was various correspondence between herself and Rosen, preliminary findings were sent, further arguments were received, some matters settled out, and a Determination rendered in due course.

ANALYSIS

8. Pursuant to amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are limited to the following as set out in section 112(1):

> 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 made.

9. Rosen has appealed on ground (b) on his Appeal Form 1. In his submissions he made arguments that are in the nature of errors of law (ground (a)). These are the two grounds that I will consider in the analysis.

1. Failure to Observe Principles of Natural Justice

10. Rosen has appealed the Determination on the basis that he was denied natural justice. He states that: "the most important reason [for the appeal] is the manner and means in which the

[3] I refer to his salespersons as employees as they were deemed to be such in the Determination and not independent contractors.

complaint/investigation/determination were handled" and alleges bias – "the entire process was biased from the beginning." Natural justice requires that a party has an opportunity to know the case against him or her, and it includes the right to be heard by an unbiased decision maker who has heard the evidence, and the right to receive reasons for the decision. The onus in on the appellant who has alleged a breach of natural justice to persuade the Tribunal on a balance of probabilities that there was a denial of natural justice.

11. Rosen submitted allegations of fact to support his position that there was bias and lack of a fair process in the conduct of his file:

> *i.* "no complaint was ever filed to the local branch of the Ministry…Kristine Booth, who became aware of my company during her off hours, initiated the complaint. I believe she began investigating by calling me at home and asking a series of questions WITHOUT identifying herself or her actual interest. …It was only after several months that she finally admitted that she had initiated the complaint based on something that occurred during her off hours and not because an actual stakeholder made a complaint…Ms. Booth filed her own complaint."
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> *ii.* "Ms. Booth was handling the investigation… It would seem that, since she filed the complaint, she had already made her decision that I was in contravention of the Act."
>
> *iii.* "Before the investigation was finalized and a determination was made, Ms. Booth again suggested that I should pay all the amounts she recommended so as to avoid penalties associated with contravening sections of the Act. Again, this confirms that she had already made her decision."
>
> *iv.* "…a colleague of Ms. Booth…verbally accosted me on the street. He said such things as, "I know who you are" and "You're not supposed to be doing this. I'm going to talk to Kristine about this tomorrow….It was after this complaint that an official investigation began."
>
> *v.* "Is it fair for someone to act as complainant, investigator, judge, and jury?"

12. I will not separate the analysis of the allegation of bias and allegation of lack of fair process as the facts overlap and may be considered to pertain to either or both allegations.

13. There have been many instances of higher courts considering and articulating what could be considered "reasonable apprehension of bias". Note that what the courts considered is a *reasonable apprehension* of bias and that a finding of actual bias is not required. In *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] S.C.R. 369, de Grandpre J. enunciated the test for reasonable apprehension of bias as follows:

> …the apprehension of bias must be a reasonable one held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision maker], whether consciously or unconsciously, would not decide fairly?

14. The standards for reasonable apprehension of bias depend on the statutory context, that is, the nature of the function being performed in the context of the objectives of the relevant legislation. This is noted in *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)* (1992), 89 D.L. R. (4th) 289 (S.C.C.) at p. 299 -300:

> It can be seen that there is a great variety of administrative boards. Those that are primarily adjudicative in their functions will be expected to comply with the standards applicable to courts. That is to say, the conduct of the members of Boards should be such that there is no reasonable apprehension of bias with

> regard to their decision. At the other end of the scale are boards with popularly elected members such as those dealing with planning and development whose members are municipal councillors. With those boards, the standard is much more lenient. In order to disqualify the members the challenging party must establish that there is prejudgment of the matter to such an extent that any representations to the contrary would be futile. Administrative boards that deal with matters of policy will be closely comparable to the boards composed of municipal councillors. In those boards, a strict application of the reasonable apprehension of bias test might undermine the very role which has been entrusted to them by the legislature….
>
> This does not of course, mean that there are no limits to the conduct of board members. It is simply a confirmation of the principle that the courts must take a flexible approach to the problem so that the standard which is applied varies with the role and function of the Board which is being considered.

15. In regards to the *Act*, the Reconsideration decision of BC EST # D313/98 sets out a good analysis of the proposition that common law bias standards may be modified by legislation (a proposition reinforced in *Brosseau v. Alberta (Securities Commission*, [1989] 1. S.C.R. 301). I adopt the reasoning in that Employment Standards Tribunal decision and set out an excerpt as follows:

> The office of Director is unique, significant and central to the effectiveness of the *Employment Standards Act.* Under Part 10 of the Act, the Director is given a series of quintessential investigative powers….She may, with or without complaint, investigate a person to ensure compliance with the Act: s. 76…
>
> 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 give a person under investigation an opportunity to respond". This modification of the common law standard is legislative recognition that the Director's role is more subtle and more complicated than can be expressed by the label "quasi-judicial". On completing an investigation, the director may make a determination: s. 79(1). ….The Act specifically envisions the same delegate investigating and determining one or more related matters…the Director's delegates must conduct themselves professionally and must exercise objective good judgment by proceeding where the evidence takes them in the course of the investigation. …A delegate cannot enter upon an investigation with a personal agenda, with a financial stake in the outcome or with a mind closed to the outcome. On the other hand, the Director's delegate cannot be expected to check his or her experience at the door. Based on experience, patterns will inevitably arise within various firms or sectors that give rise to an expectation that an investigation will probably conclude a certain way.

16. Further, in defining the parameters of bias, superior courts have confirmed that suspicion of bias is not sufficient for a finding of bias. In the case of *R. v. R.D.S*; [1997] 3 S.C.R. 141, Cory J. stated that:

> …the English and Canadian case law does properly support the appellant's contention that a real likelihood of probability of bias must be demonstrated, and that a mere suspicion is not enough"

17. There are several issues raised by Rosen regarding bias and lack of fair process that can be dealt with by reference to the legislation. Rosen takes issue with the fact that no complaint from any of his employees was filed. A complaint from an employee is not required – section 76(2) of the *Act* states that:

> 76(2) The Director may conduct an investigation to ensure compliance with this Act and the regulations, whether or not the director has received a complaint.

18. Furthermore, the Director does not have to conduct the investigation him/herself; he/she has power to delegate under section 117 (1) of the *Act*:

> 117(1) Subject to subsection (2), the director may delegate to any person any of the director's functions, duties or powers under this Act, except the power to delegate under this section. [section (2) is repealed]

19. Accordingly, there is no reasonable apprehension of bias or lack of fair process because there was no complaint received by the Director.

20. Rosen challenges the fact that a delegate chosen by the Director can both handle the investigation and make the decision. I appreciate the observation of Rosen that it seems contrary to natural justice that the investigator is also the decision-maker. In our court system of justice, the investigator is not the judge. However as described in paragraph 13 above, the *Act* specifically envisions the same delegate investigating and making a determination:

> **Determinations and consequences**
> 79. (1) If satisfied that a person has contravened a requirement of this Act or regulations, the director may require the person to do one or more of the following…

21. Previously there was a section in the *Act* that specifically did not allow a director to delegate to the same person both the function of conducting investigations and imposing penalties, but that section was repealed in 2002. That repealed section 117(2) read as follows:

> (2) The director may not delegate to the same person both the function of conducting investigations into a matter under section 76 and the power to impose penalties in relation to the matter. [section 98].

22. The legislature has therefore decided to allow the duality of functions of investigator and decision-maker for the purposes of this *Act*. Accordingly, I find no lack of fair process or reasonable apprehension of bias due to the fact that the Delegate was both the investigator and the decision-maker in this case.

23. Rosen submitted that the Delegate had made her decision before allowing him to respond.[4] I have reviewed the correspondence carefully in this regard and find that the written correspondence from the Delegate for the most part includes a request for a response from Rosen in the form of evidence and/or argument. For instance:

i. June 23, 2008 – "I wish to hear your response, and ask that you contact me so that we can arrange a time to discuss these issues."

ii. September 5, 2008 – "I wish to hear your decision how it is you have chosen to continue operating".

iii. December 18, 2008 – "My understanding of how your business operates was outlined in my letter dated October 9, 2008. In this letter, I also provided preliminary findings of how the facts would be applied to the Act and appropriate tests… If you have any additional evidence you would like me to consider, please provide it to me by January 5, 2008, along with the demanded records."

[4] The B.C. Supreme Court in *Heading v. Delta (District)* (1994), 22 M.P.L.R. (2nd) 256 (B.C.S.C.) set out the three classifications of bias as being pecuniary, institutional and attitudinal. In that case, the petitioner was claiming attitudinal bias and was seeking judicial review of a board of variance decision because two of the board members had visited the subject property prior to the hearing and spoken to the applicant. In reaching a factual determination as to whether there was attitudinal bias, the Court looked to whether the member in question had an attitude, a predirection or a prejudgment that might raise a reasonable apprehension of bias. In this case, Rosen appears to be alleging attitudinal bias by the Delegate.

iv. March 30, 2009 – "Please find my preliminary finding below. If you have any further information and evidence you wish me to consider, please provide it to me by April 14, 2009. I will issue a determination based on the best available evidence."

24. Rosen took advantage of the several opportunities to provide further evidence and was also provided extensions by the Delegate to do so. The letter of October 9, 2008, from the Delegate to Rosen sets out the definitions and tests that are generally used in a Determination regarding the distinction between employees and independent contractors and the letter set out evidence sent by Rosen to support the Delegate's view that he was an employer with employees. Indeed in Rosen's letter of December 5, 2008, to the Delegate, he states that: "You wrote that my business relationship with my sub-contractors was an employer-employee relationship, but you said it was YOUR view. Nowhere did it say that this was an official determination." I also note that as a result of discussion and the correspondence, Rosen was convinced by her view and he agreed to provide vacation pay and to ensure that he does not employ anyone under the age of twelve again (and he therefore avoided the paying of penalties). There was evidence also that the Delegate's preliminary findings included a miscalculation that she adjusted in Rosen's favour in the Determination. I cannot conclude that the Delegate had made her decision before allowing him to respond.

25. Rosen's complaint that "the evidence I have provided has been picked over and ignored as only to reinforce Ms. Booth's position and does nothing to arrive at the truth" misses the point that there is legislation and case law that must be complied with. For instance Rosen states in his letter of May 29, 2009 that:

> I've included several letters from past and present contractors and their parents. These letters confirm that they willingly entered into agreements with me, that I have treated them fairly, and that they wish to continue with the present arrangement. …I have also enclosed a letter of support from Leonard Krog, MLA Nanaimo, who feels that my business practices are sound, that I treat the kids fairly, and I provide a valuable experience and opportunity for the kids.

26. I have no doubt that this is all true and that there are supportive employees and persons in the community but it misses the point that these work practices offend legislation that is in place for the protection of the public in general and cannot be waived by contract. I have looked at all the evidence carefully – some evidence can be given no weight such as a letters from supporters as that point of view is not relevant in regards to the sections of the *Act* that are being considered here - other evidence is important in an analysis of the facts in the context of binding case law and statute. Not all evidence is given equal weight. I am not persuaded that Rosen's evidence and arguments were overlooked and ignored and that there was a prejudgment – what I see here to be the case is that the evidence not in his favour was sufficiently strong that a preliminary finding was not difficult to arrive at.

27. There are two incidents, however, referred to by Rosen that could be troubling but are not sufficiently proven for me to find a reasonable apprehension of bias or a lack of fair process. *Firstly*, Rosen alleges and says that "he believes" that the Delegate phoned his home and asked questions without identifying herself or her actual interest. That is certainly extraordinary and I notice that the Delegate states in her submissions that: "the Appellant was first contacted by the Branch by way of letter dated June 23, 2008." She does not specifically rebut the allegation that she called Rosen at home and did not identify herself before that date. If it was not true, it would have been helpful for the Delegate to so deny. Rosen said that she also admitted at a later date that she initiated the complaint based on something that occurred during her off hours - this allegation is not rebutted. It leaves me with some suspicion that there is truth to the allegations. However, I cannot rely on suspicion for a finding of apprehension of bias (as the law in paragraph 14 above sets out) that the Delegate was operating on a personal agenda. I find that the evidentiary burden in this matter has not been met - as there was no identification of the person on the phone to Rosen and no phone records to connect the Delegate with the phone call, I cannot conclude that she made that call to his home. I also am not convinced that a work practice noticed by an employee of the Employment Standards Branch in off hours cannot be subject to investigation.

Should an off-duty policeman who sees a wanted fugitive be required to expunge any details of who and what he saw when he goes on the job? I think not. However at all times professionalism must be maintained, objective good judgment exercised, and the off-hours information obtained must not be used in the furtherance of a personal agenda.

28. There is a reference to a letter from Rosen dated December 4, 2008, in the Director's submissions in which Rosen states that "Kristine Booth, someone whom I have been in direct contact with and whose actions on behalf of the Ministry have been dealt with in a most professional and courteous manner, is handling my case". I agree this would contradict Rosen's allegations of bias and lack of fair process on behalf of the Delegate. However, a copy of this letter was not in the Record and I therefore give it little weight.

29. *Secondly*, Rosen describes an incident where he was accosted on the street by a colleague of the Delegate (see paragraph 10 above). It is not clear to me that the colleague was a work colleague at the Employment Standards Branch, whether this is an allegation of a breach of the *Privacy Act* [RSBC. c. 373], and who the apology came from – the Branch or the individual (a copy of the apology letter was not included the documentation in the Record.) There are too few details here for me to make a finding that there were serious irregularities in the investigation process.

30. In conclusion, I have reviewed Rosen's allegation of bias and lack of a fair process and I am unable to conclude that the Determination was tainted with a reasonable apprehension of bias by the Delegate against Rosen and I am unable to conclude that there was a lack of fair process. I wish it noted that it required a thorough reading of the materials in this matter several times for me to arrive at that conclusion and I wish to make it clear that I have an understanding of Rosen's concerns but it is legislation and common law that govern findings. It is for the Employment Standards Branch to review the paragraphs in this decision governing allegations by Rosen, which allegations I concluded lacked sufficient evidence to find apprehension of bias or lack of fair process, to see if their practices require review.

2. Errors of Law

31. The *Act* does not provide for an appeal based on errors of fact and the Tribunal does not consider such appeals unless such findings raise an error of law (*Britco Structures Ltd.*, BC EST # D260/03). The Tribunal has adopted the following definition of "error of law" set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)* [1998] B.C.J. 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 be reasonable be entertained; and

5. adopting a method of assessment which is wrong in principle.

32. Rosen alleges that the Delegate erred when she failed to consider that if Rosen had employed children under the age of twelve years, it was through no fault on his part, he did all he could do to prevent it and did so in good faith and that it was entirely inadvertent. In essence, he is arguing that he did not have an intention to hire children under twelve years and that intention is necessary for the finding of a breach of the *Act*. I agree that he may not have had the specific intention to hire underage children but I find little effort on his part

that would reflect due diligence. In fact, I find that he turned a blind eye to contrary information in his own records. His evidence was that he relied on the oral representations from the parent and child that the child was over twelve years old. There was no corroborating evidence confirming that this occurred. Even if I accept that there was direct questioning of the parent and child in every case, it is remarkable that he did not review his own standard application/permission forms which ask for the birth date of the employee. The permission forms from the employees in evidence at the hearing indicate that two salespersons were under twelve years of age – one employee was born on January 9, 1997 and worked in October 2008, and the other employee was born July 17, 1997 and started work in September 2008. Obviously those two employees did not hide the fact that they were underage at the time of employment. Rosen does not deal with this particular evidence in his submissions – that all he had to do was read his own records to determine the age of his employees. He cannot ignore evidence that is in his own records of employees being underage and then protest that he did not have a requisite intention to hire underage employees. I find no error in the Determination on this issue.

33. Rosen alleges that the Delegate erred when she failed to consider that the employees themselves were the ones that requested to work less than the two hours and that it did not benefit Rosen to cut their hours short. The work practice was such that the employees worked in teams and if one employee wanted to leave early, then the remaining employees in the team would also be taken home. Section 34 of the *Act* reads as follows:

> **Minimum Daily Hours**
>
> **34 (1)** Subject to subsections (2) and (3), if as required by an employer an employee reports for work on any day, the employer must pay the employee for a minimum of 2 hours at the regular wage whether or not the employee starts work, unless the employee is unfit to work or fails to comply with Part 3 of the *Workers Compensation Act*, or a regulation under that Part.

34. I have reviewed the submissions of the Delegate and of Rosen. There is acknowledgement from the Delegate that "When an employee asks to leave work before completing the minimum daily hours prescribed in section 34 of the Act, and the employer agrees, the employer must be able to show that the employee initiated the request to leave work early. The onus is on the employer to establish this." I am in agreement with this position as otherwise it would leave employers open to unscrupulous employees who could leave work fifteen minutes after arriving and ask to be paid for the minimum two hours; however the employer must maintain records in this regard. Rosen unfortunately did not. And if both of the pair of employees are leaving due to illness, homework, etc. of one of them, it would follow that the other member of the pair would either have to be paid for the two hour minimum or voluntarily sign to leave. Because of the lack of documentation on this issue as to which employees left and for what reason, I confirm the Determination in this regard that there has been no error in law.

ORDER

35. Pursuant to section 115 of the *Act,* I order that the Determination dated June 16, 2009, be confirmed.

Margaret Ostrowski, Q.C.
Member
Employment Standards Tribunal