

An appeal

- by -

Warren Dingman
(“Mr. Dingman”)

- 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.: 2010A/123

DATE OF DECISION: November 23, 2010

DECISION

SUBMISSIONS

Warren Dingman	on his own behalf
Katherine Wulf	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal filed by Warren Dingman (“Mr. Dingman”) pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) of a determination that was issued by a Delegate of the Director of Employment Standards (the “Director”) on July 30, 2010 (the “Determination”). The Determination dismissed Mr. Dingman’s complaint that his employer, VPS Security Patrol (2009) Inc. (“VPS”), contravened the *Act* by failing to pay him for special clothing and laundry expenses.
2. Mr. Dingman appeals the Determination pursuant to section 112(1)(a) and (b) of the *Act*. In particular, Mr. Dingman submits that the Delegate erred in law in concluding that the blue pants worn by him while working for VPS did not constitute “special clothing”. Mr. Dingman also submits that the Delegate failed to observe the principles of natural justice in making the Determination because the Delegate did not conduct a hearing of his complaint before making the Determination.
3. By way of a remedy, Mr. Dingman is seeking the Tribunal to cancel the Determination.
4. Pursuant to section 36 of the *Administrative Tribunals Act* (the “*ATA*”), which is incorporated in the *Act* (pursuant to s. 103), and Rule 17 of the Tribunal’s *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. In my view, this Appeal can be adjudicated on the basis of section 112(5) “record”, the written submissions of the parties and the Reasons for the Determination.

ISSUES

5. 1. Did the Director err in law concluding that Mr. Dingman’s blue pants did not meet the definition of “special clothing” pursuant to section 25 of the *Act*?
6. 2. Did the Director breach the principles of natural justice in making the Determination without holding a hearing into Mr. Dingman’s complaint?

FACTS

7. At all material times, VPS operated a security business and provided contracted security services to United Protection Services Inc. (“UPS”).
8. VPS employed Mr. Dingman as a security guard from October 5, 2009, to December 28, 2009, and thereafter VPS was not in a position to continue to operate its business. As a result, after December 28, 2009, UPS took over the payroll of VPS’ employees. Mr. Dingman worked with UPS from January 2 to January 4, 2010, for a total of three (3) shifts before resigning from his employment with UPS.

9. On or about January 7, 2010, Mr. Dingman filed a complaint against VPS (but not against UPS) alleging that VPS failed to pay him regular wages, annual vacation pay and statutory holiday pay. He subsequently claimed compensation for the cost of laundering special clothing and replacement cost of a pair of blue pants that he wore while he worked as a security guard for VPS. While his claims pertaining to regular wages, annual vacation pay and statutory holiday pay were resolved before the Determination was made, Mr. Dingman's claims for the cost of laundering special clothing and replacement of the cost of blue pants were not and proceeded through the complaint process leading to the Determination.
10. By way of background, VPS required its security guards to wear a blue shirt and jacket that displayed the company's logo when working for UPS. When VPS hired Mr. Dingman, he was provided with one (1) company blue shirt and a jacket to wear during work. He wore his own pair of blue pants at work.
11. When he ceased working for VPS, Mr. Dingman returned the shirt and jacket to VPS. VPS paid him \$69.75 reimbursement for the expense of laundering the shirt, but nothing for the jacket or his blue pants. It should be noted that Mr. Dingman did not have any receipts for laundering the jacket or his blue pants and in the case of the jacket, he did not claim any costs for laundering it. Mr. Dingman simply claimed that he was owed \$186.00 for the expense of special clothing, including the cost of laundering the special clothing. He argued that VPS made a partial payment to him when it paid him \$69.75.
12. In support of his claim, Mr. Dingman submitted that he purchased the blue pair of pants he wore at work at Mark's Work Wearhouse in Victoria, BC approximately four (4) or five (5) years ago before he started work with VPS, and he did not have a receipt for them. However, after his employment with VPS, the pants were worn out and he threw them in the garbage, and claimed \$50.00 for the replacement cost of the pants in his complaint. He argued that the blue pants were special clothing in his employment with VPS as VPS had purchased a pair of pants for one (1) of its security guards.
13. As for Mr. Dingman's claim for laundry expenses, he informed the Delegate, during the investigation of his complaint, that he calculated laundry expenses based on \$1.55 per item, per shift, and he had worked 45 shifts. Therefore, he submitted, the cost of laundering two (2) items at \$1.55 per item is \$3.10 per shift, multiplied by 45 shifts for a total \$139.50.
14. VPS, on its part, indicated that it gave one (1) or two (2) blue shirts and a jacket displaying the company's logo to its security guards when they commenced employment. In the case of Mr. Dingman, VPS only provided a single shirt to him because he worked on a part-time basis for VPS.
15. VPS further stated that while its security guards were asked to wear blue or black pants for work, they could choose which colour or style they wanted. Employees could wear cargo pants, dress pants or any other style as long as they were black or blue, but not jeans. VPS also claimed that security guards were told that they did not have to purchase any special brand, nor shop at any specific retailer for their pants.
16. VPS argued that the blue pants Mr. Dingman wore did not constitute "special clothing" and that VPS should not be required to clean the pants, nor pay to replace them. VPS also provided a colour photograph of several employees, including Mr. Dingman, taken around Christmas 2009 in which Mr. Dingman was wearing the pants in question, which were fairly old and, according to VPS, worn out. The photograph also showed pants worn by other security guards of various styles and various shades of blue and, in one case the employee was wearing a black pair of pants.
17. With respect to Mr. Dingman's contention that VPS purchased a pair of pants for one of their security guards, VPS explained that the employee in question was a very large man who wore XX size clothing and

requested VPS to buy the pants for him because he could not afford them. VPS argued that its decision to assist someone in financial need, in purchasing pants for him, did not make the pants special clothing, as defined under the *Act*.

18. According to VPS, it paid \$1.55 per shift to launder the shirt it provided to Mr. Dingman for a total of \$69.75, and that was sufficient compensation to Mr. Dingman and no further money was owed to him.
19. The Delegate reviewed section 25 of the *Act* governing special clothing as well as the definition of special clothing in section 1 of the *Act* and reasoned as follows in concluding that the blue pants did not constitute special clothing:

I accept the evidence provided by the Employer that he did not tell the Complainant to wear a specific type or brand of pants. Neither was the Complainant told to use a special retailer or manufacturer. This was supported by the photograph of the security guards that showed the employees in various styles of pants and colours. The evidence suggests that the Complainant could choose how to dress as long as the pants were blue or black.

...

The Complainant argued that the Employer purchased one pair of pants for one employee. However, I do not find that purchasing an article of clothing for one employee makes the blue pants ‘special clothing’ or otherwise creates a requirement for the Employer to do so for everyone. I accept the Employer’s evidence that he purchased the pants due to one employee’s financial difficulties. The Employer did not provide pants for any of the other security guards.

The evidence is uncontested that the Complainant was required to wear blue or black pants at work. It is recognized that in certain sectors an employee is required to follow a certain ‘dress code’. For example, in the restaurant industry, employees are often required to follow a dress code: black pants and white shirt.

The difference between special clothing and a dress code lies in the employee’s freedom to decide how to meet the required standard. The employer is not required to provide and maintain clothing to meet a ‘dress code’.

In this case, the Complainant was left to decide how to meet the employer’s dress requirements. The Complainant’s blue pants are typical of clothing worn by employees in the security business. The blue pants did not contain any company logo. They could be any type of blue or black pants that most people would have in their closet. In this case, the Complainant had a pair that was four or five years old.

I find that the blue pants worn by the Complainant do not meet the definition of special clothing.

20. The Delegate then relied on the \$1.55 figure for laundry expense for each item referred to in the Tribunal’s decision in *Westguard Security Services (1986) Inc.*, BC EST # D071/01, as an adequate amount for the cost of laundering special clothing, and concluded that since the pants did not fall under the category of “special clothing”, VPS had adequately compensated Mr. Dingman to launder the shirt. In the alternative, the Delegate noted that in the *Westguard* decision, the adjudicator stated that he supported the calculation of \$1.55 for laundry expense per shift and therefore VPS would not owe Mr. Dingman \$1.55 to launder the shirt and pants separately in any event. Accordingly, the Delegate dismissed Mr. Dingman’s complaint, holding that the latter was not owed any further money.

SUBMISSIONS OF MR. DINGMAN

21. Mr. Dingman’s written submissions, in support of his appeal, are separated under three (3) separate headings. The first two (2) headings set out his submissions in support of his grounds of appeal under sections 112(1)(a) and (b), namely, his allegations that the Director erred in law and failed to observe the principles of

natural justice in making the Determination. Under the final heading, he reiterates the remedy he is seeking; namely, cancellation of the Determination and “a proper hearing to present a complete case in this matter”.

22. With respect to the error of law ground of appeal, Mr. Dingman notes that the Delegate failed to do a proper investigation of his complaint. Prior to the involvement of the Delegate responsible for the Determination, another delegate (the “First Delegate”) was involved in the investigation of the complaint, and he scheduled a mediation between the parties which was to be attended by VPS’ representative, Mr. Toulmin, but the latter failed to attend. According to Mr. Dingman, the history leading up to and including the failed mediation is missing in the Reasons for the Determination and so is the First Delegate’s involvement in the matter. Mr. Dingman finds this “very troubling”.
23. He further states that if the Delegate making the Determination properly investigated the Complaint, she “would discover that Mr. Toulmin’s statements about the uniforms are an outright lie”. According to Mr. Dingman, Mr. Toulmin twice stated to him that he was ordering uniforms, which included pants, as they were a required part of the uniform. According to Mr. Dingman, this statement was made to other employees in his presence. He also submits that had the delegate attended VPS’ offices in Victoria, she would have been able to see complete uniforms, including pants, hanging in the office.
24. With respect to the second ground of appeal; namely, “natural justice”, Mr. Dingman notes that after using the Self Help Kit and filing his complaint against VPS and then arranging a mediation session that was not attended by Mr. Toulmin on behalf of VPS, he was told by the First Delegate that he “would get a hearing” and, in fact, he “waited months to get a hearing date”.
25. Mr. Dingman claims that he made repeated calls to the Employment Standards Office and to the First Delegate in order to find out when that date would be, but later discovered that his complaint had been transferred to another delegate, the Delegate who ultimately made the Determination. Further, instead of getting a hearing date, the new Delegate sent him “a decision on the matter”.
26. Mr. Dingman submits that he requires “a proper hearing in order to present a complete case to the Director of Employment Standards”. He contends that he has been denied his “right to a hearing” and this is a breach of the principles of natural justice.

SUBMISSIONS OF THE DIRECTOR

27. The Director submits that Mr. Dingman never provided to the Delegate information that uniform pants were hanging at VPS’ business, but even if he had provided such information, it is inconsistent with the information provided by VPS that other employees wore their own pants as evidenced in a picture of some employees taken previously and adduced in the investigation by VPS.
28. Furthermore, the Director submits that in the case of Mr. Dingman, both VPS and Mr. Dingman agree that Mr. Dingman wore his own blue pants to work, which were four (4) to five (5) years old, and that during Mr. Dingman’s employment with VPS, the latter did not provide uniform pants to Mr. Dingman. Any suggestion by VPS that it was ordering pants for its employees is “something that will happen in the future and is irrelevant”, according to the Director.
29. The Director reiterates that VPS provided information that employees could wear any pants as long as they were blue or black, and did not require the pants to be of any particular style or brand. This, again, is evidenced by the photograph VPS produced showing all employees wearing different types of pants, according to the Director.

30. The Director further notes that the delegate, in the Determination, dealt with Mr. Dingman's allegation that he should be compensated \$1.55 per item per shift for washing the blue pants and washing the uniform shirt. However, argues the Director, Mr. Dingman fails to identify in his appeal where an error of law occurred.
31. With respect to the natural justice ground of appeal, the Director notes, pursuant to section 76 of the *Act*, complaints could be resolved by mediation, investigation or adjudication. Here, argues the Director, the Delegate was appointed to proceed under section 76 after a failed mediation session and she reviewed the matter and determined that an oral hearing was not necessary in this case and this was within her discretion to do. In support of this assertion, the Director refers to the decision of the Tribunal in *Re Ken Eng*, BC EST # D045/08, where the Tribunal member stated:
- Under the *Act*, a delegate has a number of procedural tools (investigation, adjudication and mediation among them) to use in resolving a complaint. The Delegate had the discretion to choose what he considered to be the most appropriate procedure for this complaint, i.e. an investigation. He gave Mr. Eng sufficient notice of the change in procedure. No breach of natural justice principles is apparent.
32. The Director further submits that the Delegate in this case telephoned Mr. Dingman on or about May 26, 2010, and identified herself and the purpose of her call, and asked Mr. Dingman several questions with regards to his complaint and told him that she would be investigating this matter and sending him a letter as a follow up to the conversation. The Delegate then followed-up with a letter to Mr. Dingman on May 28, 2010, confirming the information Mr. Dingman provided to her and requested a further response from Mr. Dingman. Thereafter, the Delegate spoke to Mr. Dingman on two (2) separate occasions and received a letter from Mr. Dingman. The Delegate thereafter sent Mr. Dingman two (2) further letters.
33. The Director further submits that if Mr. Dingman was concerned about having a hearing, he never asked the Delegate about a hearing or a hearing date, which is rather curious if he, as he claims, was waiting for months for a hearing date.
34. According to the Director, Mr. Dingman was afforded an opportunity to present his case, and he provided his arguments, and the Delegate considered them. According to the Director, Mr. Dingman has not shown why a hearing in this case would be necessary or how he was prejudiced by not having a hearing. In the circumstances, the Director submits that Mr. Dingman is not owed further wages under the *Act* and that the appeal should be dismissed and the Determination confirmed.

FINAL REPLY OF MR. DINGMAN

35. In his Final Reply, Mr. Dingman accuses the Delegate and the Employment Standards Branch (the "Branch") as "playing fast and loose with the rules and regulations of the Employment Standards Act in order to avoid what they believe are costly hearings and to deliver determinations which are employer friendly".
36. Mr. Dingman also alleges that it is "an outright lie" that he never asked the Delegate about a hearing of his complaint. He reiterates that he asked the First Delegate "repeatedly when and where (his) hearing was going to be held" and subsequently asked the Delegate who ultimately made the Determination about a hearing in his first telephone conversation with her.
37. Mr. Dingman also accuses the Branch of bias, referring to a letter sent to him by the Branch setting out the high percentage of employees whose complaints are settled at mediation as proof that the Branch "puts undue pressure and coerces employees to settle claims without proper hearings". Mr. Dingman concludes his Reply by alleging that the Branch "systematically den(ies) the rights of employees to proper hearings by forcing them through mediation sessions which are neither mandated in the Act nor mandatory according to

the Branch's own guidelines and the Executive Director's own admissions". He submits that he has "been denied a hearing outright which is grossly unfair".

ANALYSIS

38. Section 25 of the *Act* provides that an employer who requires an employee to wear special clothing must provide it to the employee without charge. Section 25 reads as follows:

Special clothing

- 25 (1) An employer who requires an employee to wear special clothing must, without charge to the employee,
- (a) provide the special clothing, and
 - (b) clean and maintain it in a good state of repair, unless the employee is bound by an agreement made under subsection (2).

39. Section 1 of the *Act* provides an inclusive definition of "special clothing":

'Special clothing' includes a uniform and a specified brand of clothing.

40. Based on the evidence adduced by the parties during the investigation of Mr. Dingman's complaint as set out in the Reasons for the Determination and the section 112(5) "record", I find that the single blue shirt and jacket displaying the company logo for UPS provided by VPS to Mr. Dingman constituted special clothing under section 25 of the *Act*. However, Mr. Dingman's pair of blue pants does not. I agree with the Delegate that the blue pants Mr. Dingman purchased several years prior to working with VPS, but which he used in his employment with VPS, do not constitute special clothing, but qualify as dress code. I base my decision on the evidence that although VPS required its security guards to wear blue or black pants for work, VPS did not dictate which of the two (2) colours they were required to wear, nor the style or brand of pants. VPS also did not direct its security guards to shop at any particular retailer for pants. In my view, the requirement of VPS that its security guards, including Mr. Dingman, wear pants that were either black or blue qualified as a dress code; that is, a rule or guideline regarding the manner of dress acceptable while working for VPS. VPS left with Mr. Dingman and other security guards the discretion to decide what type of blue or black pants they chose to wear and where they chose to procure the pants. In my view, the Delegate correctly determined that Mr. Dingman's blue pants did not constitute special clothing under section 25, and that VPS, therefore, did not owe Mr. Dingman any monies for the cost of the blue pants nor for laundering them.
41. While Mr. Dingman claims in his appeal that VPS' representative, Mr. Toulmin, said to him that "he was ordering uniforms, which included pants, from United Protection Services as they were a required part of the uniform", I agree with the Delegate that what Mr. Toulmin or VPS decided to do in the future, namely have control over the particular pants that their security guards would wear with the jacket and shirt already provided, is irrelevant in determining whether the pants the security guards, and particularly Mr. Dingman, wore during the latter's employment with VPS constituted special clothing under section 25.
42. In the circumstances, I do not find any error, and particularly any error of law, in the Determination made by the Delegate pertaining to Mr. Dingman's blue pants, and reject Mr. Dingman's error of law ground of appeal.
43. With respect to the natural justice ground of appeal, I note that in the submissions of Mr. Dingman, including the Final Reply submissions, he argues that he was denied natural justice, partly because "a proper hearing" of

his complaint was not held, and therefore he was not afforded an opportunity to “present a complete case to the Director”. Mr. Dingman submits that he has a “right to a hearing”. In my view, nowhere in the *Act* is the Branch or the Director required to conduct a hearing of a complaint. Under section 76 of the *Act*, where an employee has submitted to the Director a complaint under section 74, the Director is required to accept and review the complaint, and the Director, under subsection (2), may conduct an investigation to ensure compliance under the *Act* and *Regulation*.

44. Having said this, I note that a hearing of a complaint is not an automatic right of the complainant under the *Act*, nor is it a right enshrined in the principles of natural justice at common law. As indicated by the Tribunal in *Re D. Hall & Associates Ltd.* [2000] B.C.E.S.T.D. No. 251:

At common law, natural justice does not dictate that the only fair hearing is an oral hearing according to the traditional civil trial model in which *viva voce* evidence is led and witnesses are cross examined. It has long been recognized that what is procedurally fair varies with the circumstances. Administrative tribunals are created as an alternative to courts, and it would therefore be wrong to automatically import the full panoply of trial procedures onto such tribunals.

Several factors inform the content of the duty of fairness at common law. These include the nature of the decision being made, the terms of the statute, the impact of the decision on the individual, any legitimate expectations occasioned by agency promises or procedural practices and the agency’s own choice of procedures made in light of its institutional constraints. The common law’s concern is not for perfect or idealized justice, but for a hearing in which each side has been given a meaningful opportunity to be heard: *Baker v. Canada (Administer of Citizenship and Immigration)* (1999), 174 D.L.R. (4th) 193 (S.C.C.). Even in those administrative contexts requiring ‘full and fair consideration of the issues’, where a claimant’s ‘important interests are affected by the decision in a fundamental way’, an oral hearing is not necessarily a pre-condition to fairness: *Baker*, paras. 32 – 34. The courts themselves recognize that fundamental justice in civil proceedings does not require a full trial proceeding, and that justice may be done in summary proceedings, even in the face of conflicting evidence: *Johnston v. Island Scales Ltd.*, [1999] B.C.J. No. 1892 (S.C.), citing *Inspiration Management Ltd. v. McDermid* (1989), 36 B.C.L.R. (2^d) 202 (C.A.).

45. In my view, in this case, there is no evidence whatsoever that the Delegate’s decision to issue the Determination after investigating Mr. Dingman’s complaint without holding a hearing prevented Mr. Dingman a meaningful opportunity to be heard or the Delegate an opportunity to make full and fair consideration of the issue in this case of whether Mr. Dingman’s blue pants constituted “special clothing” under section 25 of the *Act*. Therefore, I find that an in-person hearing of Mr. Dingman’s complaint was not a necessary pre-condition to fairness here, and that Mr. Dingman has not been denied natural justice in this case on that basis alone.
46. Mr. Dingman, under both the “error of law” as well as the “natural justice” grounds of appeal, has mentioned the attempted mediation that the First Delegate attempted to facilitate between the parties but at which VPS’ Mr. Toulmin failed to attend. Mr. Dingman questions why the details of the failed mediation were not made light of in the Reasons for the Determination. I do not find anything turning on that in this appeal. The Branch, as indicated in its own fact sheet available to all, conducts mediations on a “without prejudice” basis. Nothing said or proposed during a mediation forms part of the record if the parties fail to agree or, in this case, fail to attend at the scheduled mediation and the matter proceeds to an adjudication, as Mr. Dingman’s complaint did in this case. It is not necessary for the Delegate or the Director to have mentioned the attempted or failed mediation in the Reasons for the Determination. The failure of VPS or its representative to attend mediation does not impact at all on the penultimate issue in this case, being whether Mr. Dingman’s blue pants, which were used in his employment with VPS, constituted “special clothing”.

47. Finally, I also note that Mr. Dingman in his Final Reply has made numerous allegations against the Delegate and the Branch, including allegations of bias and “playing fast and loose with the rules and regulations” putting “undue pressure” and “coercing employees to settle their claims without proper hearings”. I find those allegations baseless and without any foundation.
48. In the circumstances, I dismiss Mr. Dingman’s appeal.

ORDER

49. Pursuant to section 115 of the *Act*, this appeal is dismissed and the Determination, dated July 30, 2010, is confirmed.

Shafik Bhalloo
Member
Employment Standards Tribunal