Employment Standards TRIBUNAL

An appeal

- by -

Tyrone Daum
("Mr. Daum")

- 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:	David B. Stevenson
FILE No.:	2016A/97
DATE OF DECISION:	October 12, 2016

DECISION

SUBMISSIONS

Tyrone Daum on his own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the *"Act"*), Tyrone Daum ("Mr. Daum") has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the "delegate") on June 24, 2016.

2. Mr. Daum had filed a complaint alleging he had been an employee of Daniel J. Barker Law Corporation ("Barker LC") and that Barker LC had contravened the *Act* by failing to pay regular wages, statutory holiday pay, annual vacation pay and compensation for length of service.

3. The delegate issued a Determination in which it was found Mr. Daum was an employee of Barker LC, that Barker LC had contravened Part 3, sections 18 and 28 of the *Act* and that Mr. Daum was owed wages, statutory holiday pay and annual vacation pay in the amount of $221.70. The claim for compensation for length of service was denied. Administrative penalties were imposed on Barker LC in the amount of $1,000.00.

4. Mr. Daum has filed an appeal of the Determination, alleging the delegate erred in law and failed to observe principles of natural justice in making the Determination. Mr. Daum seeks to have the Determination varied or cancelled.

5. In correspondence dated July 27, 2016, the Tribunal notified the parties, among other things, that no submissions were being sought from any other party pending a review of the appeal by the Tribunal and, following such review, all or part of the appeal might be dismissed.

6. The section 112(5) record (the "record") has been provided to the Tribunal by the delegate and a copy has been delivered to Mr. Daum. Mr. Daum has been provided with the opportunity to object to its completeness. Mr. Daum has filed no objection to the completeness of the record and, accordingly, the Tribunal accepts it as being a complete record of the material that was before the Director when the Determination was made.

7. I have decided this appeal is appropriate for consideration under section 114 of the *Act*. At this stage, I am assessing the appeal based solely on the Determination, the reasons for Determination, the appeal, the written submission filed with the appeal, and my review of the material that was before the delegate when the Determination was being made. Under section 114(1), the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed in the subsection, which reads:

> *114 (1) At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of any appeal if the tribunal determines that any of the following apply:*
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> *(a) the appeal is not within the jurisdiction of the tribunal;*
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> *(b) the appeal was not filed within the applicable time limit;*
>
> *(c) the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process;*

> (d) *the appeal was made in bad faith or filed for an improper purpose or motive;*
>
> (e) *the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;*
>
> (f) *there is no reasonable prospect the appeal will succeed;*
>
> (g) *the substance of the appeal has been appropriately dealt with in another proceeding;*
>
> (h) *one or more of the requirements of section 112(2) have not been met.*

8. If satisfied the appeal or a part of it has some presumptive merit and should not be dismissed under section 114(1), Barker LC and the Director will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1), it is liable to be dismissed. In this case, I am looking at whether if there is any reasonable prospect the appeal can succeed.

ISSUE

9. The issue at this stage of the proceeding is whether the appeal should be dismissed under section 114 of the *Act*.

THE FACTS

10. I need not dwell extensively on the broader factual background relating to this appeal; that factual background is found in both the Determination and in an earlier appeal decision issued by the Tribunal in December 2015: *Daniel J. Barker Law Corporation*, BC EST # D138/15.

11. There are, however, aspects of this appeal concerning matters that followed the Tribunal's appeal decision, which cancelled an earlier Determination by a different delegate of the Director and referred the matter back for a new hearing before another delegate.

12. Following the December 2015 decision, the matter was assigned to the delegate who decided the Determination at issue in this appeal. The delegate set two days in March 2016 for a hearing on Mr. Daum's complaint, although only one day was required. The parties were sent a Notice of Complaint Hearing on January 8, 2016.

13. On January 15, 2016, Mr. Daum requested an order requiring the attendance of two persons at the complaint hearing. The request was denied. Three reasons were cited for the denial. On January 26, 2016, the request was resubmitted. The reasons for the earlier denial were addressed; principally, more detail was provided on the purpose for seeking the attendance of the two persons, which was stated as being to establish the daily hours each witness worked for Barker LC, their compensation and the approximate number of hours which Daniel J. Barker ("Mr. Barker"), the principal of Barker LC, attended the office. The second request was also denied on the basis the evidence being sought from the two persons was considered to be of limited probative value and could be provided by the respective parties to the complaint.

14. Mr. Daum sought to adduce documents relating to Mr. Barker's financial status in 2009. The request to have the documents admitted in evidence was denied. The delegate found the documents were largely irrelevant to the issues in dispute in the claim and that what little relevance they might have was outweighed by potential prejudice and confusion to the issues specifically related to the claim being made by Mr. Daum.

15. There was also a matter involving documents delivered and submissions made by Mr. Daum after the complaint hearing, which the delegate considered to be duplicative of evidence and argument provided at the complaint hearing.

16. The delegate's assessment of these matters is set out in the Determination at pages R6 – R7.

17. The issues considered in the Determination were whether Mr. Daum was an employee of Barker LC and, if so, whether he was owed wages.

18. The delegate found Mr. Daum was an employee of Barker LC for the purposes of the *Act* and that he was owed wages, including statutory holiday pay, and annual vacation pay in the amount set out in the Determination.

19. In his complaint and in evidence before the delegate, Mr. Daum submitted that he worked for Barker LC eight hours a day every business day, 30 minutes each weeknight and for unspecified periods of time each weekend, including long weekends and that Barker LC had agreed to pay him an hourly wage of $45.00 for all hours worked.

20. The delegate rejected both of these submissions, finding, on the hours and days of work, that while Mr. Daum was "diligent" in attending the Barker LC office during regular business hours, Mr. Daum, under an arrangement with Mr. Barker, used the office primarily for his own needs – to advance litigation in which he was a party and Mr. Barker was his legal counsel. The delegate found Mr. Daum was not required by Barker LC to be in the office at any particular time, but decided himself when he would attend. The delegate was not persuaded on the evidence that Mr. Daum ever performed work for Barker LC outside of regular business hours. In respect of the hourly wage, the delegate provided five reasons, all based on the evidence presented, for rejecting the claim by Mr. Daum for a $45.00 an hour wage rate.

21. The delegate did find Mr. Daum performed some work for Barker LC that was not related to his own litigation when he was asked to do so by Mr. Barker. This work formed the basis for the finding that Mr. Daum was an employee of Barker LC.

22. No records of hours of this work were kept by either party. Based substantially on the evidence of the tasks Mr. Daum performed for Barker LC, which "was not really in dispute and was supported by some documents", the delegate found Mr. Daum worked for two hours a day on each business day. The delegate applied minimum wage to the resulting hours to arrive at an amount that represented wages payable during the statutory wage recovery period.

23. The evidence indicated Barker LC had paid Mr. Daum some amounts of money over the period of employment. These amounts were pro-rated over the statutory recovery period and credited as wages paid to Mr. Daum by Barker LC.

ARGUMENT

24. At the forefront of the appeal is the assertion by Mr. Daum that the delegate was biased in favour of Mr. Barker and against him. In his appeal submission, Mr. Daum submits [the delegate] "felt insecure in his position as adjudicator over a senior lawyer of his association." Mr. Daum adds that if there was not actual bias, there was the appearance of bias that was "evident in the adjudicator's decision by misrepresentation that includes omitted facts and failing to put the rational [sic] and or explanation forward for his decision".

Mr. Daum says "a reasonable person apprised of the circumstances would conclude the adjudicator did not put his mind to the evidence and the issues and did not render an impartial, independent decision".

25. Mr. Daum says the delegate failed to observe principles of natural justice, pointing to several areas of the Determination where he submits there is evidence of a breach of principles of natural justice. Mr. Daum submits some of these also demonstrate bias.

26. Mr. Daum argues error of law arising in comments found in the Background section of the Determination, in findings concerning the credibility of evidence provided by the respective parties and in calculating hours of work and rate of pay.

ANALYSIS

27. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *Act*, which says:

> 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.*

28. A review of decisions of the Tribunal reveals certain principles applicable to appeals that have consistently been applied. The following principles bear on the analysis and result of this appeal.

29. Mr. Daum alleges bias against the delegate.

30. The Tribunal has addressed the onus on persons making allegations of bias in several decisions: see for example *Re: Dusty Investments Inc. d.b.a. Honda North*, BC EST # D043/99, and *Cyberbc.Com AD and Host Services Inc. operating as 108 Tempo and La Pizzaria*, BC EST # RD344/02 (Reconsideration of BC EST # D693/01).

31. In *Cyberbc.Com AD and Host Services Inc. operating as 108 Tempo and La Pizzaria*, *supra*, the Tribunal has stated:

> One of the fundamental principles of natural justice is that decision makers must base their decisions, and be seen to be basing their decisions, on nothing but admissible evidence (the rule against bias). The concept of impartiality describes "a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case" (*Valente v. The Queen*, [1985] 2 S.C.R. 673 at p. 685).
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> Impartiality was discussed by the Supreme Court of Canada in *R. v. R.D.S.*, [1997] 3 S.C.R. 484 as follows:
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>> [Impartiality] can also be described … as a state of mind in which the adjudicator is disinterested in the outcome, and is open to persuasion by the evidence and submissions.
>>
>> In contrast, bias denotes a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues.
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> The Supreme Court articulated the test for finding a reasonable apprehension of bias as follows:
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>> When it is alleged that a decision-maker is not impartial, the test that must be applied is whether the particular conduct gives rise to a reasonable apprehension of bias.… It has long been held that actual bias need not be established. This is so because it is usually impossible to determine whether

> the decision-maker approached the matter with a truly biased state of mind.... The manner in which the test for bias should be applied was set out with great clarity by de Grandpre J. in his dissenting reasons in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369. 394:
>
> [T]he 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... [The] test is "what would an informed person, viewing the matter realistically and practically- and having thought the matter through-conclude..."
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> This test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. Further, the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including "the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold".

An allegation of bias against a decision maker is serious and should not be made speculatively:

> An accusation of that nature is an adverse imputation on the integrity of the person against whom it is made. The sting and doubt about integrity lingers even when the allegation is rejected. It is the kind of allegation that is easily made but impossible to refute except by a general denial. It ought not be made unless supported by sufficient evidence to demonstrate that, to a reasonable person, there is a sound basis for apprehending that the person against whom it is made will not bring an impartial mind to bear upon the cause (*Adams v. British Columbia (Workers' Compensation Board)*, [1989] B.C.J. No 2478 (C.A.)
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> To say that someone is unable to give an unbiased decision when he sits, in whatever capacity, deciding things between other people, is an affront of the worst kind, and unless it is well founded upon the evidence, it is not something that should ever be said. (*Vancouver Stock Exchange v. British Columbia (Securities Commission)* (B.C.C.A.) September 28, 1999

As the Supreme Court in *S. v. R.D.S.*, *supra* stated:

> Regardless of the precise words used to describe the test (of apprehension of bias) the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed, an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice

The onus of demonstrating bias lies with the person who is alleging its existence. Furthermore, a "real likelihood" or probability of bias must be demonstrated. Mere suspicions, or impressions, are not enough.

The appellant provided only his perception of what occurred. He provided no evidence from any other party appearing at the hearing.

As the Tribunal has noted in *Re: Dusty Investments Inc. d.b.a. Honda* North, BCEST #D043/99, the evidence presented should allow for objective findings of fact that demonstrate a reasonable apprehension of bias. The rationale for this requirement is anchored in the principle that a party against whom an allegation of bias is made does not have the opportunity to explain the circumstances in which the allegations arise or to deny the presence of a biased mind.

In *R. v. R.D.S.* (*supra*) the court held that there was a presumption that judges would carry out their oath of office requiring them to render justice impartially. This presumption is one of the reasons why the threshold for perceived judicial bias is high, and can only be displaced with 'cogent evidence'.

As with judges, there is a presumption that the adjudicator acted impartially. Employment Standards Tribunal adjudicators, like judges, take an oath of office, in which they swear they will discharge their duties as an adjudicator with independence and common law principles of natural justice.

> That presumption is not overcome by presenting subjective and impressionistic evidence.

32. In the context of this appeal, the above principles can be summarized as follows:

> There is an onus on Mr. Daum to prove an allegation of bias on the evidence. The evidence must show a "real likelihood" or probability of bias. Mere suspicions, or impressions, are not enough. The evidence presented should allow for objective findings of fact that demonstrate a reasonable apprehension of bias. There is a presumption that the delegate acted impartially. Employment Standards Branch delegates take an oath of office, in which they swear they will discharge their duties with independence and within common law principles of natural justice. This presumption is one of the reasons why the threshold for perceived judicial bias is high, and can only be displaced with "cogent evidence".

33. Considering the applicable principles in light of the onus on Mr. Daum and the evidence provided, I reject completely and without reservation the allegations of bias against the delegate. There is not one scintilla of evidence showing the delegate was predisposed to a particular result adverse to Mr. Daum. Specifically, there is no indication the delegate was influenced in any way by Mr. Barker's status as a lawyer, which is the primary fact upon which the bias allegation is grounded. The only other basis for the allegations represent nothing more than challenges against the delegate acting judicially in making findings or reaching conclusions that do not accord with Mr. Daum's view of his case and with which he disagrees. Such is not a basis for finding bias.

34. As with allegations of bias, a party alleging a failure to comply with principles of natural justice must provide objectively cogent evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, the Tribunal briefly summarized the natural justice concerns that typically operate in the context of the complaint process:

> Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the *Act*, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party. (see *BWI Business World Incorporated*, BC EST #D050/96)

35. The central basis for the natural justice arguments lie in the procedural matters and the decisions made by the delegate in respect of them. The decisions of the delegate on those matters are predominantly one of discretion. In *Jody L. Goudreau and Barbara E. Desmarais*, BC EST # D066/98, the Tribunal stated it will not interfere with the exercise of discretion by a delegate unless it can be shown the exercise was an abuse of power, the delegate made a mistake in construing the limits of his/her authority, there was a procedural irregularity or the decision was unreasonable. Unreasonable, in this context, has been described as being:

> . . . a general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably". *Associated Provincial Picture Houses v. Wednesbury Corp.* [1948] 1 K.B. 223 at 229
>
> Absent any of these considerations, the Director even has the right to be wrong.

36. In *Goudreau*, the Tribunal stated the unreasonableness test as whether "the Director has considered immaterial factors or failed to consider material factors."

37. Although Mr. Daum may vehemently disagree with the delegate's decisions on the procedural matters it would not, in my view, be correct to interfere with the delegate's exercise of discretion in this matter. Nothing in the materials, including Mr. Daum's submissions, indicates that the delegate's decision in this respect was an abuse of process, a mistake by him in construing the limits of his authority, or involved procedural irregularity. There is no indication that the delegate considered irrelevant factors or failed to consider relevant factors. It appears from the Determination and the record that the delegate considered the request to summons the two persons and the request to produce documents relating to Mr. Barker's personal financial situation in 2009 to be of little or no value on the issues to be decided in the Determination. Mr. Daum has not shown a basis for a review of the discretion exercised on these matters. It also appears the delegate did not consider the post-hearing evidence and submissions from Mr. Daum added anything to the material and submissions already provided to the delegate. On analysis, I do not disagree with the delegate's assessment of the value of these matters to an expeditious resolution of the issues in dispute.

38. In any event, the arguments on these matters rely on assertions of fact that have no apparent foundation in the Determination or the record. If there is such support for those facts either in the Determination – as findings made by the delegate – or in the record, it is Mr. Daum's obligation to identify where those facts might be found and that they objectively support his argument; he has not done so. In the absence of such facts being on the record, these assertions invoke the ground of new or additional evidence, section 112(1)(c) of the *Act*, and Mr. Daum has neither relied on that provision or established a basis for the Tribunal accepting such factual assertions into the record on this appeal as new or additional evidence.

39. Nor has Mr. Daum provided any rational foundation for his contention that matters as innocuous as using the words "developed an arrangement", "in return for assistance" and "assistance" are unfair, unreasonable or have denied him procedural rights protected by principles of natural justice. The same holds for Mr. Daum's submission relating to the delegate's commenting that "Mr. Daum sought a registrar's review": there is nothing showing this turn of phrase by the delegate was wrong, unreasonable or interfered in any way with Mr. Daum's right to a fair hearing.

40. Mr. Daum says the delegate committed an error of law. The Tribunal has adopted the following definition of "error of law" set out by the British Columbia Court of Appeal 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 [in *Gemex*, the legislation was the *Assessment 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 reasonably be entertained; and
> 5. adopting a method of assessment which is wrong in principle.

41. The only specific references to error of law relates to the comment about Mr. Daum seeking a review of Mr. Barker's legal bill and to the calculation of hours of work and wage rate, but the appeal submission is replete with suggestions the delegate erred in law by failing to consider, or ignoring, evidence, by acting without evidence, by acting on a view of the facts that was unreasonable, by failing to provide adequate reasons and in findings, or their absence, on credibility.

42. The record is voluminous: comprising more than a thousand pages. An examination of the record and a reading of the Determination do not bear out the contention made by Mr. Daum of error of law. He has not demonstrated there is any basis for concluding the delegate failed to consider relevant and cogent evidence, ignored evidence, acted without evidence or took an unreasonable view of the evidence provided. It is clear from a reading of the Determination that the delegate was alert to the competing positions of the respective parties on the facts, as is reflected in the following excerpt from the Determination, at page R12:

> Mr. Daum and Mr. Barker gave evidence that at times strained credulity. Their narratives were largely irreconcilable and discerning fact from fiction was often a challenge.

43. Mr. Daum is obviously dissatisfied with many of the findings made by the delegate, but there clearly was an evidentiary foundation supporting them. Mr. Daum has not shown an error of law in the delegate's treatment of the evidence and the delegate's conclusions based on that evidence.

44. What is left is simply Mr. Daum's disagreement with findings of fact and with the conclusions based on them. The findings logically and reasonably justify the conclusions reached in the Determination.

45. An appeal is not simply another opportunity to argue the merits of a claim to another decision maker. An appeal is an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds. The grounds of appeal do not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the Director unless the Director's findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03.

46. I find no reviewable error in the Determination and no merit to this appeal. To summarize, I reach this conclusion for three reasons.

47. First, Mr. Daum has not shown the delegate was biased against him.

48. Second, Mr. Daum has not shown there was any failure by the delegate to observe principles of natural justice in making the Determination.

49. Mr. Daum has done nothing more in this appeal than challenge findings made in the Determination without satisfying the burden of showing any of those findings were based on a breach of natural justice.

50. Third, as noted above, the Tribunal must defer to findings of fact made in a Determination unless such findings raise an error of law. There is no error of law shown and none found. Mr. Daum is doing nothing more in this appeal than seeking to have the Tribunal ignore evidence that was provided to the Director and alter findings made in the Determination based, at least in part, on that evidence. There is no legal basis shown in the appeal for the Tribunal to do this.

51. Generally, the arguments made against the Determination have failed to take the "functional context-specific approach" adopted and applied by the Tribunal in such cases as *Kirk Edward Shaw*, BC EST # D089/10, *Worldspan Marine Inc.*, BC EST # D005/12, and *Robin Burne carrying on business as Agent 99 Express Services*, BC EST # D044/16. These decisions direct a reading of the Determination as a whole, in the context of the evidence and the arguments, with an appreciation of the purposes or functions for which they are delivered: see *R. v. R.E.M.*, 2008 SCC 51, from paragraph 15. Every finding and conclusion need not be explained and there is no need to expound on each piece of evidence or controverted fact; it is sufficient that the findings linking the evidence to the result can logically be discerned. In this case, the delegate has reached a result that

is grounded in the evidence and the material provided by the parties. Taken as a whole, the Determination is reasonable and logical. The onus on Mr. Daum is not satisfied by attacking irrelevant and insignificant elements of the Determination; his appeal must address the "whole" and demonstrate a reviewable error.

52. I find there is no reasonable prospect this appeal will succeed; the purposes and objects of the *Act* would not be served by requiring the other parties to respond to this appeal and it is, accordingly, dismissed.

ORDER

53. Pursuant to subsection 114(1) of the *Act*, I order this appeal be dismissed. Pursuant to section 115 of the *Act*, the Determination dated June 24, 2016, as it applies to Mr. Daum, is confirmed.

David B. Stevenson
Member
Employment Standards Tribunal