

An appeal

- by -

Mickie Becker  
("Becker")

- 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

**TRIBUNAL MEMBER:** David B. Stevenson

**FILE No.:** 2004A/87

**DATE OF DECISION:** July 14, 2004

## DECISION

### SUBMISSIONS

Mickie Becker	on her own behalf
Berhane Semere	on behalf of the Director
Brian Garland and Tammy Tugnum	on behalf of Cariboo Chevrolet Oldsmobile Pontiac Buick GMC Ltd.

### OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) brought by Mickie Becker (“Becker”) of a Determination that was issued on April 8, 2004 by a delegate of the Director of Employment Standards (the “Director”).

Becker had filed a complaint with the Director claiming she was owed regular wages by her former employer, Cariboo Chevrolet Oldsmobile Pontiac Buick GMC Ltd. (Cariboo GM), for working in excess of 40 hours in a week.

Following an oral hearing on March 10, 2004, the Director issued the Determination, which found Becker had not established that she was owed wages and that no further action would be taken on her claim.

Becker says the Determination is wrong for several reasons and seeks to have the Tribunal review her claim and vary the Determination.

Becker has not requested an oral hearing on the appeal. In response to the question whether she believes an oral hearing on the appeal is necessary, Becker says, “No, I believe the evidence has been given, just not thoroughly considered.” The Tribunal has carefully reviewed the appeal and the materials on file and agrees that an oral hearing is not necessary in order to decide this appeal.

### ISSUE

The issue in this appeal is whether Becker has shown any error in the Determination that justifies the intervention of the Tribunal to vary it.

### THE FACTS

Becker was employed by Cariboo GM from August 9, 1995 to September 22, 2003, when she was terminated from her position as a service manager. She filed a complaint with the Director on, or about, November 10, 2003 alleging she was owed regular wages for working in excess of 40 hours in a week during her last six months of employment with Cariboo GM. A claim for length of service compensation was initially raised but was not pursued under the *Act* as Becker chose to have the matter of her dismissal addressed in another forum. In response to the complaint, Cariboo GM took the position that Becker had not worked in excess of 40 hours in a week during the claim period.

The Director processed the complaint by way of an oral hearing, which was held on March 10, 2004. Both parties called several witnesses in support of their respective positions.

The Determination contains an outline of the evidence given by the parties and the witnesses and an analysis of that evidence. Cariboo GM had not maintained proper payroll records for Becker. Becker had provided a record of the hours she had worked during the claim period, but that record was found by the Director to be unreliable and of no use in determining the actual hours worked by Becker in a week. On that point, the Determination states:

I find that the records of hours of work presented by Ms. Becker cannot be taken at face value in the determination of her actual hours of work. Evaluation or further scrutiny of the records vis-à-vis the sworn testimonies of the witnesses, including the witnesses called by Ms. Becker herself, the check-in/out as per the log alarms, the admission by Ms. Becker that she did not register her hours of work on a daily basis but sometimes after a week, the fact that the calendar was not at her office but at home, all when taken together, raise credibility or reliability gaps in those records.

Other evidence is cited in the Determination that went to the finding made by the Director about the reliability of Becker's records.

## ARGUMENT AND ANALYSIS

The burden is on Becker, as the appellant, to persuade the Tribunal that the Determination was wrong and justifies the Tribunal's intervention. An appeal to the Tribunal is not a re-investigation of the complaint nor is it intended to be simply an opportunity to re-argue positions taken during the investigation. The grounds upon which an appeal may be made are 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.*

Becker's appeal challenges the decision of the Director on each of the above grounds. I shall deal with each in turn.

Becker has indicated the appeal is grounded, in part, on fresh evidence becoming available that was not available at the time of the Determination (see paragraph 112(1)(c) of the *Act*). This ground of appeal relates to a telephone record which Becker says confirms her testimony about discussions which took place between her and Tammy Tugnum, the General Manager of Cariboo GM, on August 15<sup>th</sup>.

The Tribunal has established that fresh evidence which an appellant seeks to submit with an appeal will be tested against the following criteria:

- (a) 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;

- (b) the evidence must be relevant to a material issue arising from the complaint;
- (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
- (d) the evidence could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

Applying the above criteria, I am unable to accept the evidence provided. As the Director has noted in responding to the appeal, the central issue was whether the records of hours worked provided by Becker were reliable. The telephone record, which relates to calls made on August 16<sup>th</sup>, might, if accepted, suggest there were discussions as described by Becker between her and Ms. Tugnum on that day, and by inference on August 15<sup>th</sup>. The telephone record does not, however, confirm that Becker was at work past 3:30 pm on August 15<sup>th</sup> or, more particularly, that this evidence, either on its own or considered with other evidence, could have led the Director to a different conclusion about the reliability of Becker's records of hours worked.

Becker alleges the Director erred in law. At its root, this part of Becker's appeal does nothing more than take issue with the findings made by the Director from the facts presented at the oral hearing and seek to change them in this appeal. In her appeal submission, Becker says the error of law arises from the Director allowing Cariboo GM to use evidence that had not previously been disclosed to her. This part of the appeal refers to the Director allowing Cariboo GM to introduce alarm records from July 1 and August 15, 2003 and to question Becker on those records. Becker says she was caught by surprise by these records and was unable to recall the events of those days at the hearing. Her inability to recall those events in a way that would explain the discrepancy between the information on the alarm records and her record of hours worked was referred to in the Determination as one factor affecting the Director's perception of the reliability of her records. She says she now has a clear recollection of what happened on these days and the appeal proceeds to describe her recollection. Essentially, she says that while the alarm records for July 1 may be correct, she recalls that she took work home and performed some hours of work there. In respect of August 15, she reiterates her position that she worked until approximately 5:25 pm that day, and says the evidence of one of the witnesses who had testified she was "nowhere to be found at 3:30 pm" on that day, are wrong; that the witness was either mistaken or lying.

No error of law, other than one which might be associated with a failure to comply with principles of natural justice (which I will address next), is apparent and this aspect of the appeal is dismissed.

Becker says the Director failed to observe principles of natural justice in making the Determination. Becker identifies a number of matters that might relate to this ground of appeal, including the Director allowing Cariboo GM to introduce the alarm records, failing to ensure a fair hearing and failing to "thoroughly consider all the evidence presented".

Becker also raises concerns relating to the conduct of the Director which suggest the Director was not impartial. Specifically, Becker alleges the Director, on two occasions, laughed during her presentation. In their submission, the representatives for Cariboo GM specifically deny parts of that allegation. In addressing such an allegation, the test to be applied is whether the particular conduct gives rise to a reasonable apprehension of bias (see *R. v. R.D.S.*, [1997] 3 S.C.R. 484). The test is an objective one and requires clear evidence which allows for objective findings of fact demonstrating a reasonable apprehension of bias (see *Dusty Investments Inc., c.o.b. Honda North*, BC EST #D043/99 (Reconsideration of BC EST#D10/98)). Such findings may not be based on the subjective perceptions of one of the parties involved.

Becker has not provided any evidence that the conduct of the Director occurred at all. In any event and accepting such conduct did occur, Becker has not demonstrated such conduct demonstrates a reasonable apprehension of bias on the part of the Director.

In reaching this conclusion, I have given no effect to the denials made by the Director in reply to the appeal. Such denials are both unseemly and quite unhelpful (see *P.P.G. Industries Canada Ltd. v. A.-G. Can.* (1975), 65 D.L.R. (3d) 354 (S.C.C.) and *C.D. Lee Trucking Ltd. v. B. C. Labour Relations Board and others*, B.C.J. No. 2776, November 26, 1998, Vancouver Registry No. A981590).

Turning to the other natural justice grounds, as with the “error of law” ground, the arguments raised under this ground of appeal also do little more than challenge findings made by the Director concerning the reliability of Becker’s records of hours of work. Becker has not established that the decision of the Director to allow Cariboo GM to introduce the alarm records and question Becker based on those records was unfair or otherwise denied her an opportunity to make her case. While “trial by ambush” should be avoided, it is not inconceivable that parties may find relevant, or potentially relevant, documents right up to the date the Director has set for the oral hearing on the complaint and seek to rely on them in some way at the hearing. The principle responsibility of the Director in processing a complaint, which might include conducting an oral hearing, is to ensure the process is fair. There is no objective indication that it was not fair. There is no indication, for example, that Becker objected to the introduction of the records or sought, and was denied, an adjournment to review those records and consider her position on them. In my view, Becker should not have been surprised that Cariboo GM would have sought to rely on any available evidence that either weakened Becker’s position or strengthened theirs. The existence of the alarm records was certainly within Becker’s knowledge.

Becker suggests the hearing was unfair because she “may have misunderstood” the Director when explanation of how questioning would take place was discussed. She says:

... he [the delegate] said there would be no leading question allowed. I took it that I was not allowed to ask anyone leading questions my witnesses or theirs. But I have since learned that I should have been able to ask leading questions of their witnesses. Even though Mr. Semere could see that I was struggling with the questioning, at no time did he make any attempt to clarify the rules.

I restate that the principle responsibility of the Director was to ensure a fair process. I also reiterate that there is no objective indication the process was not fair. It is apparent that Becker had the opportunity to present her own case, had the opportunity to hear the case presented by Cariboo GM and to respond to it, including the opportunity to challenge evidence presented and cross-examine witnesses – even if she believed her cross-examination was not as effective as it could have been – and had the opportunity to make argument.

Becker says she was denied an opportunity to challenge the credibility of witnesses for Cariboo GM when the Director refused to allow her to bring evidence of the bonus system at Cariboo GM and show how those witnesses’ “bonuses” could be affected if her wage claim was successful. The response of the Director is that it was not apparent how evidence of the bonus system, accepting such evidence showed the witnesses had a monetary interest in the outcome, would signify a lack of credibility in those witnesses. I have some sympathy for Becker on this point. It is somewhat facile, and self serving, for the Director to say the evidence was considered to be irrelevant because it was not clear how it could have influenced the witnesses’ testimony when the Director refused to hear it. My view might be otherwise if the Director had addressed this matter in the Determination, indicating at least that the parties had been

allowed to make submissions, which identified the nature of the evidence and its purpose, and that it was apparent the evidence had little or no probative value. That did not, however, occur in this case. There is nothing in the Determination addressing this procedural ruling or, more particularly, expressing any reasons for it.

On the other hand, I am not satisfied this defect justifies the Tribunal's varying the Determination as requested by Becker. The appeal does not indicate the evidence which Becker sought to introduce concerning the bonus system had any purpose other than showing the witnesses had a monetary interest in the outcome of her claim. Implicit in her argument is a suggestion that such interest should raise a presumption of untruthfulness. That would be incorrect. It is simply one factor that could have been referred to when deciding credibility issues. The general perception of the Director, based on the totality of the evidence and knowing that most of the witnesses were employed by Cariboo GM, was that all the witnesses "testified honestly" based on their observations of and interaction with Becker. As well, and in any event, the appeal is devoid of any objective basis upon the Tribunal could find all of the witnesses for Cariboo GM lacked credibility such that their evidence should be discounted or ignored.

Becker has not shown the Director failed to observe principles of natural justice in making the Determination.

Finally, in her last submission on the appeal Becker has provided excerpts from the transcript of a human rights meeting involving Becker, Ms. Tugnum and Brian Garland, the President of Cariboo GM. Becker says some of the comments made confirm Ms. Tugnum was aware of the hours Becker was working and at no time indicated that if she submitted time tickets she would be paid. Even if I allowed that material at this point (which I do not), I can see nothing in it that is inconsistent with the position taken by Cariboo GM in response to her wage claim nor any confirmation that Becker's record of hours worked is accurate and valid.

In sum, I can find no error in the Determination that would justify the Tribunal's intervention to vary it as requested and the appeal is dismissed.

## **ORDER**

Pursuant to Section 115 of the *Act*, I order the Determination dated April 8, 2004 be confirmed.

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**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**