Employment Standards TRIBUNAL

An appeal

- by -

Craig Wayne Cunning carrying on business as Craig Cunning Construction
("Cunning")

- 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: Carol L. Roberts

FILE No.: 2006A/130

DATE OF DECISION: December 28, 2006

DECISION

SUBMISSIONS

Craig Cunning	on behalf of Craig Cunning Construction
Terry Hughes	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Craig Cunning carrying on business as Craig Cunning Construction ("Cunning"), pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued October 20, 2006.

2. Caraleee Pidcock worked for Cunning, a construction business, from April 2006 until May 25, 2006. Ms. Pidcock filed a complaint alleging that she was owed wages and vacation pay.

3. The Director's delegate held a hearing into Ms. Pidcock's complaint on September 18 and October 12, 2006. At issue before the delegate was whether Ms. Pidcock was Cunning's employee or sub contractor, and if she was an employee, whether she was entitled to wages.

4. The delegate determined that Ms. Pidcock was an employee, and that Cunning had contravened Sections 18 and 58 of the *Act* in failing to pay her wages and vacation pay. He concluded that she was entitled to wages and interest in the total amount of $1,833.50. The delegate also imposed a $1,000 penalty on Cunning for the contraventions of the *Act*, pursuant to section 29(1) of the *Employment Standards Regulation*.

5. Cunning contends that the delegate erred in "turning over private employee information" to Ms. Pidcock during the hearing. Mr. Cunning also alleges that the delegate failed to observe the principles of natural justice in not removing himself as a decision maker after Mr. Cunning complained to the "Office of the Privacy Commission" about his conduct during the hearing.

6. Section 36 of the *Administrative Tribunals Act* ("*ATA*"), which is incorporated into the *Employment Standards Act* (s. 103), and Rule 16 of the Tribunal's Rules of Practise and Procedure provide that the tribunal may hold any combination of written, electronic and oral hearings. (see also *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). Although Mr. Cunning sought an oral hearing, I conclude that this appeal can be adjudicated on the written submissions of the parties. This appeal is whether the delegate erred in law, an issue which does not turn on the credibility of the parties. There is also no need to hear *viva voce* evidence on the issue of whether there is a denial of natural justice. This appeal is decided on the section 112(5) "record", the submissions of the parties, and the Reasons for the Determination

ISSUE

7. Did the delegate err in law when he provided Ms. Pidcock with a copy of Mr. Cunning's personal journal of hours of work during the hearing in order that she could respond to his evidence?

8. Did the delegate fail to observe the principles of natural justice in making the Determination?

FACTS AND ARGUMENT

9. At the September 18, 2006 hearing, the delegate heard evidence from both Ms. Pidcock and Mr. Cunning. Mr. Cunning does not dispute that Ms. Pidcock assisted him in three renovation jobs, doing what he asked her to do, including measuring and cutting wood, rerouting wires, drywalling, setting tile, painting, cutting and installing trim, filling and sanding. All of her tools were supplied by Mr. Cunning., including a van, saws, hammers and drills. Mr. Cunning told her what hours she was to work. Occasionally he would be at the job site at the start of her work and the end of the day, other days he was not. He asked Ms. Pidcock what time she started and finished her work, and recorded those times in a black journal.

10. Ms. Pidcock received a cheque on May 13, 2006, which she understood was to represent work up to and including May 5, 2006. She did not receive a wage statement, but assumed she was an employee.

11. Mr. Cunning and Ms. Pidcock's relationship broke down over a job on May 25, and Mr. Cunning demanded Ms. Pidcock provide him with a daily report of all work she completed each day broken down by duties completed and time spent. Ms. Pidcock said she had not kept those records. At the hearing, Mr. Cunning took the position that Ms. Pidcock was hired as a sub contractor. The delegate asked Mr. Cunning to explain the basis of Ms. Pidcock's remuneration, as it was not based on a daily rate, by piece work, by fixed price or by the job. When asked how he had arrived at the amount he paid Ms. Pidcock on May 13, Mr. Cunning indicated it was based on "faith", based on what she told him. Ms. Pidcock said that the amount was based on Mr. Cunning's calculations after adding up her hours as recorded in his black journal. Mr. Cunning advised the delegate that he had not decided how he was going to pay Ms. Pidcock for the balance of the work.

12. The delegate found Ms. Pidcock's evidence to be the most credible, and based her hourly rate of pay on what she had been earning prior to going to work for Cunning, as well as the amount paid in the May 13 cheque.

13. In response to a Demand for Records issued August 4, 2006, Cunning submitted "employee deduction" payroll records for the period January through July 2006. Those records indicated that Cunning had only one employee for the period February through April. Two other employees appeared for the period June and July. There was no record of deductions for Ms. Pidcock. Ms. Pidcock reconstructed the hours she worked based on her memory. The delegate asked Mr. Cunning for his journal, and adjourned the hearing in order that he could provide it. Mr. Cunning indicated that he would deliver the original journal to the delegate's office on September 22, 2006, at which time the relevant portions would be photocopied and the journals returned to Mr. Cunning. Mr. Cunning did not provide the journals as promised, and did not return three telephone calls left for him between September 25 and 27.

14. The hearing was set to reconvene on October 12, and a second Demand for Records was issued, specifically identifying the journal. Copies of what appeared to be the daily journal were submitted by

fax on October 5. Some of the notations were illegible. A further Demand for production of the original journal was issued October 11 for the October 12 hearing.

15. The delegate notes that on October 12, Mr. Cunning faxed in a letter to the Branch expressing concerns about personal information in the journal, but did not seek an adjournment or indicate he would not be appearing at the hearing.

16. Mr. Cunning did not attend the hearing at the reconvened time. The delegate reviewed the copies of the journal with Ms. Pidcock. After hearing from her, he determined that the journal was not a complete and accurate record.

17. The delegate concluded that Ms. Pidcock was an employee, a conclusion Mr. Cunning appears not to dispute. He further determined that she was entitled to wages for 102.75 hours of work based on all of the evidence he had before him.

18. Mr. Cunning contends that during the hearing, the delegate "turned over" private information to Ms. Pidcock, and that he immediately launched a complaint with the "Office of the Privacy Commission". He submits that the delegate failed to observe the principles of natural justice in continuing with the hearing after he had made the complaint. He contends that the Determination is evidence of the delegate's bias against him.

19. Attached to Mr. Cunning's submission is a copy of an online complaint form sent to the Ombudsman's office on September 19, 2006. In that complaint, Mr. Cunning says, in part, as follows:

> My complaint seems to be more of an ethical question as well as a question of the personal privacy of some of my employee's. (sic) During an initial meeting between myself, Mr. Hughes and an individual who filed the complaint about me I was asked to produce employment records for all of my employees…. I supplied these at the request of the Ministry. During the interview Ms. Pidcock… asked to see these records. She was advised by Mr. Hughes that "these were private doccuments (sic) and as such he could not provide her with copies, however she was more than welcome to view them". Which she did.

20. The online complaint form indicates that the complainant will be contacted within 5 working days by telephone, fax or Canada Post. Mr. Cunning does not provide a copy of any response he might have received by the Ombudsman.

21. The delegate contends that the Determination speaks for itself. He says that the only information he received about a complaint to the "Office of the Privacy Commission" was a letter faxed to his office 12 minutes before the start of the October 12, 2006 hearing. The record submitted by the delegate indicates that on October 12, Mr. Cunning faxed a letter to the Branch, which reads, in part, as follows:

> As you are aware I have filed a complaint under the PIPED act to the Office of the Privacy Commission in reference to the improper handling of documents already provided by our office. As this journal contains substantial private information and I have yet to get a response from the Commission I am unwilling to turn the entire journal over to your office. I have no problem in coming to the office and allowing you to review the dates in question, in my presence to verify the authenticity of the faxes supplied. [reproduced as written]

22. The delegate further submits that no one in the Employment Standards Branch office in which he works has been contacted by anyone from a privacy agency, nor has he been contacted by the Ombudsman's office.

23. The delegate further submits that Mr. Cunning never raised an issue of conflict at the hearing on September 18, 2006, or at all. He argues that Mr. Cunning has failed to substantiate his bias allegation.

24. The delegate seeks to have the Determination confirmed.

25. In his reply submission, Mr. Cunning takes issue with Ms. Pidcock's evidence about her hours of work, and objects to other evidence considered by the delegate, including letters from two individuals for whom Cunning had performed work.

26. For the first time in his reply submission, Cunning also objects to the fines imposed by the delegate.

THE FACTS AND ANALYSIS

27. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

(a) the director erred in law

(b) the director failed to observe the principles of natural justice in making the determination; or

(c) evidence has become available that was not available at the time the determination was being made

28. The burden is on the appellant to discharge the burden of establishing the grounds of appeal. It is not an opportunity to "re-argue" a case heard by the delegate.

29. Having reviewed the Determination and the submissions of the parties, I am unable to conclude that the appellant has discharged this burden. I will deal with each ground of appeal separately.

30. Although it appears Mr. Cunning has one main issue, that is, with the delegate's handling of evidence at the hearing, he has characterized the complaint as an error of law, and a denial of natural justice. I will address each of Mr. Cunning's arguments in turn.

Error of Law

31. The Tribunal has adopted the factors set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)* (1998] B.C.J. (C.A.) as reviewable errors of law:

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 reasonably entertained; and

5. Exercising discretion in a fashion that is wrong in principle

32. Questions of fact alone are not reviewable by the Tribunal under section 112. In *Britco Structures Ltd*., BC EST #D260/03, the Tribunal held that findings of fact were reviewable as errors of law if they were based on no evidence, or on a view of the facts which could not reasonably be entertained.

33. The Tribunal must defer to the factual findings of a delegate unless the appellant can demonstrate that the delegate made a palpable or overriding error.

34. Cunning says that the delegate, in essence, erred in allowing Ms. Pidcock to review his journal, documents he provided to the delegate to substantiate his allegation that Ms. Pidcock was not entitled to wages.

35. It is the employer's responsibility to structure its affairs to comply with the *Act*, including maintaining records relating to employment and hours of work (*478125 B.C. Ltd. v. British Columbia (Director of Employment Standards)* BCEST D. 279/98). Cunning did not do so. The delegate was entitled to review whatever evidence Cunning had to support his allegations that Ms. Pidcock was not an employee, or entitled to wages. There is no evidence Cunning identified anything in the faxed documentation as being personal to a third person or irrelevant to Ms. Pidcock's claim, nor is there any evidence he requested the delegate not disclose it to Ms. Pidcock. He failed to appear at the reconvened hearing to make submissions on the documentation. I am unable to find that the delegate erred in law in any respect in the manner in which he treated the evidence. He had a duty to present the documents to Ms. Pidcock to enable her to respond to that evidence. Although he disclosed the journal to Ms. Pidcock, she was not allowed to make a copy, or remove it from the hearing room. I find no basis for the appeal on this issue.

36. Cunning also objects to the "fines", or monetary penalties assessed for his contraventions of the *Act*.

37. Section 98 of the *Act* provides that a person in respect of whom the Director makes a determination and imposes a requirement under section 79 is "subject to" a monetary penalty prescribed by the Regulations:

> 1) In accordance with the regulations, a person in respect of whom the director makes a determination and imposes a requirement under section 79 is subject to a monetary penalty prescribed by the regulations.
>
> (1.1) A penalty imposed under this section is in addition to and not instead of any requirement imposed under section 79. …

38. Section 29(1) of the *Employment Standards Regulations, B.C. Reg 396/95* sets out a schedule of monetary penalties for "a person who contravenes a provision of the *Act* or this regulation, as found by the director in a determination made under the Act or this regulation".

39. The section provides for escalating penalties for subsequent contraventions:

> (a) if the person contravenes a provision that has not been previously contravened by that person, or that has not been contravened by that person in the 3 year period preceding the contravention, a fine of $500;

> (b) if the person contravenes the same provision referred to in paragraph (a) in the 3 year period following the date that the contravention under that paragraph occurred, a fine of $2 500;
>
> (c) if the person contravenes the same provision referred to in paragraph (a) in the 3 year period following the date that the contravention under paragraph (b) occurred, a fine of $10 000.

40. Once the delegate finds a contravention, there is no discretion as to whether an administrative penalty can be imposed. Furthermore, the amount of the penalty is fixed by Regulation. Penalty assessments are mandatory. I find no error in the delegate's assessment of the monetary penalties.

Natural Justice

41. Principles of natural justice are, in essence, procedural rights that ensure parties a right to be heard by an independent decision maker. The principles include a requirement 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)

42. Impartiality was discussed by the Supreme Court of Canada in *R. v. R.D.S.*, [1997] 3 S.C.R. 484 as follows:

> [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.
>
> > 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 at 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..."
> >
> > 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". (at p. 24)

43. 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 bias 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.)

44. I am not persuaded that Cunning has demonstrated that the delegate was biased. The delegate was never advised that a complaint was made to the "Office of the Privacy Commission" prior to the Determination being made. Further, there is no evidence that a complaint was made to the "Office of the Privacy Commission" at any time. While it appears there was a complaint made to the Ombudsman's office, there is no evidence of a reply. In any event, the complaint does not disclose any basis for a conclusion that Cunning was denied natural justice. Cunning never challenged the delegate's ability to make a fair decision, and there is no evidence before me that the delegate was not impartial.

45. The appeal is dismissed.

ORDER

46. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated October 20, 2006, be confirmed in the amount of $2,833.50, plus whatever interest might have accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal