An appeal

- by -

Thomas C. Moore
("Appellant")

- 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: Rajiv K. Gandhi

FILE No.: 2016A/64

DATE OF DECISION: November 22, 2016

DECISION

SUBMISSIONS

Thomas C. Moore	on his own behalf
Christopher Hart	counsel for Skinner Bros. Transport Ltd.
John DaFoe	on behalf of the Director of Employment Standards

OVERVIEW

1. Skinner Bros. Transport Ltd. (the "Employer") operates a logistics, transportation, and propane sales business in Fort Nelson, British Columbia, and employed the Thomas C. Moore (the "Appellant") between August 29, 2011, and February 27, 2015.

2. The Appellant's employment was terminated effective April 3, 2015, by way of written notice delivered on February 3, 2015, ostensibly due to deteriorating economic conditions.

3. Rather than accepting working notice, the Appellant resigned on February 13, 2015, giving two weeks' notice. In his written letter, the Appellant claimed the erosion of benefits, loss of responsibility, and threat of wage reduction as the reasons for his early departure.

4. On February 16, 2015, the Appellant initiated legal proceedings in the Fort Nelson Registry of the Provincial Court of British Columbia (Small Claims Court) seeking damages arising out of what I interpret to be a claim of constructive dismissal (the "First Small Claims Action"). That action does not yet appear to have been resolved.

5. On February 19, 2015, the Appellant filed a complaint with the Employment Standards Branch (the "First Complaint").

6. On February 20, 2015, the Appellant commenced a second action in Small Claims Court (the "Second Small Claims Action") seeking, amongst other things, payment of overtime wages, statutory holiday pay, and compensation for the loss of what the Appellant calls an "accommodation benefit". That action now appears to have been withdrawn.

7. A delegate of the Director of Employment Standards (the "Delegate") heard the First Complaint on May 21 and May 29, 2015.

8. On August 21, 2015, the Appellant filed a second complaint with the Employment Standards Branch (the "Second Complaint") seeking compensation from the Employer for the loss of an "accommodation benefit", which the Appellant alleged to be a benefit of his employment withdrawn by the Employer as retaliation for the First Complaint, contrary to section 83 of the *Employment Standards Act* (the "*Act*").

9. According to section 83 of the *Act*:

> *83 An employer must not:*
>
> *(a) refuse to employ or refuse to continue to employ a person,*

> *(b) threaten to dismiss or otherwise threaten a person,*
>
> *(c) discriminate against or threaten to discriminate against a person with respect to employment or a condition of employment, or*
>
> *(d) intimidate or coerce or impose a monetary or other penalty on a person,*
>
> *because a complaint or investigation may be or has been made under this Act or because an appeal or other action may be or has been taken or information may be or has been supplied under this Act.*

10. The Director issued a determination (the "First Determination") on December 1, 2015, relating to the First Complaint. In it, the Director addressed the Appellant's entitlement to overtime wages according to section 40 of the *Employment Standards Act* (the "*Act*") and section 37.3 of the *Employment Standard Regulation* (the "*Regulation*"), statutory holiday pay according to sections 45 and 46 of the *Act*, vacation pay according to section 58, and compensation for length of service according to section 63.

11. The Second Complaint was heard by way of a teleconference on December 3, 2015 (the "Hearing"), and dismissed by way of a determination (the "Second Determination") issued by the Director on April 27, 2016.

12. The Appellant now seeks to quash the Second Determination, arguing that:

(a) the Director erred in law;

(b) the Director failed to observe the principle of natural justice; and

(c) evidence has become available that was not available at the time the Second Determination was made,

all permitted grounds for appeal according to sections 112(1)(a), 112(1)(b), and 112(1)(c) of the *Act*.

13. In considering this appeal, I have reviewed:

(a) the First Determination;

(b) the Second Determination;

(c) the record before the Director in the Hearing (the "Record");

(d) submissions from the Director received on July 13, 2016 and September 15, 2016;

(e) submissions from the Employer, received on September 15, 2016; and

(f) thirty separate submissions received from the Appellant between May 24, 2016, and September 23, 2016, including a 54 second video clip (the "Video Clip").

14. For the reasons that follow, I dismiss this appeal.

FACTS AND ANALYSIS

The Record

15. On a preliminary basis, the Appellant objects to the completeness of the Record. In six different submissions, he asks for the inclusion of certain documents that, he says, have been omitted from the Record, including the Video Clip.

16. The Director's response confirms the prior inclusion of most documents listed by the Appellant, but adds to the Record two pieces of correspondence. The Video Clip was not added, although the Director acknowledged possession of the same.

17. Documents delivered to the Tribunal by the Director pursuant to section 112(5) of the *Act* are presumed to constitute the complete record. It is the Appellant who bears the burden of establishing, *prima facie*, that the record is incomplete (see *Super Save Disposal Inc. and Actton Transport Ltd.,* BC EST # D100/04, at page 18).

18. I am satisfied that the Appellant has met that burden, as it relates to the Video Clip.

19. I accept that the Video Clip as subsequently provided by the Appellant is the same Video Clip that was originally delivered to the Director, and I agree that it should form part of the Record for the purposes of this appeal, whether or not I ultimately consider it to be relevant to my deliberations.

20. I accept, as complete, the remainder of the Record as supplemented by the Director, and I decline to make any further order with respect to the same.

Scope of the Hearing

21. Much of this appeal is driven by the Appellant's belief that the Director was wrong to have limited the scope of matters addressed during the Hearing. The Appellant argues that, in doing so, the Director has denied his "right to be heard".

22. If I agree with the Appellant, the remedy would be to return this matter to the Director for a new hearing, or further investigation. If I do not agree, however, substantial portions of the Appellant's submissions in this appeal become irrelevant, because they address facts and claims immaterial to those matters adjudicated at the Hearing.

23. For that reason, I will answer the "scope" question before assessing the individual grounds for appeal advanced by the Appellant.

24. By way of the Second Complaint, the Appellant sought compensation based on his argument that the Employer's agreement to provide accommodation was withdrawn in retaliation for the First Complaint. The Appellant also alleged that his entitlement to the personal use of a vehicle, cellular telephone, and computer were adversely affected.

25. The Appellant's claim for compensation does not extend beyond what he says is the cost of replacement accommodation, some $775 per month, or $3,100 in the aggregate. This amount is consistent with the amount claimed in the Second Small Claims Action for the loss of an "accommodation benefit".

26. The Appellant does not appear to seek specific reimbursement for the alleged loss of any right to the personal use of a vehicle, cellular telephone, or computer; rather, he argues these losses as the reason for his resignation.

27. At the outset of the Hearing, and in view of the First Complaint and the First Small Claims Action, the Director confirmed his intention to focus exclusively on the Appellant's "claim for housing costs incurred as a result of the Employer's decision to cease providing him housing on their premises".

28. In this appeal, the Appellant argues no requirement to particularize his complaint with precision; instead he relies on a decision of the Tribunal in *Cownden and Cownden*, BC EST # D069/01, at page 6 to support expanding the scope of the Hearing by making additional claims not described in the complaint forms, and adducing additional evidence during the adjudication:

> *In order to present a claim for filing with the Director, all the claimant need do is identify, in writing, that the complaint is a complaint under the Act. There is no requirement for the employee to particularize the details of the claim made. It is not essential that the complainant set forth the complaint with precision. The information must be sufficient to disclose an alleged violation of the Act. If those minimum requirements are set out, the Delegate will investigate the complaint. If, during the course of an investigation of a compensation for length of service complaint, the Delegate discovers an overtime complaint, I see no restrictions in the Act on the jurisdiction of the Delegate to investigate the complaint provided there is some disclosure that the "complaint is an hours of work or overtime complaint".*

29. Section 76(3) of the *Act* provides that:

> *76 (3) The director may refuse to accept, review, mediate, investigate or adjudicate a complaint or may stop or postpone reviewing, mediating, investigating or adjudicating a complaint if:*
>
> …
>
> *(e) there is not enough evidence to prove the complaint;*
>
> *(f) a proceeding relating to the subject matter of the complaint has been commenced before a court, a tribunal, an arbitrator or a mediator,*
>
> *(g) a court, a tribunal or an arbitrator has made a decision or an award relating to the subject matter of the complaint*
>
> …

30. The Director's authority under section 76(3) is discretionary (see *Karbalaeiali v. British Columbia (Employment Standards)* 2007 BCCA 553, at paragraphs 10 to 12). In my humble opinion, that discretion is not an "all, or nothing" discretion. If the Director has discretion to refuse to adjudicate a complaint, the Director has discretion to refuse to adjudicate part of a complaint (or, to limit the scope of the complaint) where one or more of the criteria listed in section 76(3) is satisfied.

31. In my view, *Cownden* confirms the Director's discretion to expand the scope of a complaint where evidence uncovered by the Director or during an adjudication warrant expansion, provided that there is disclosure, and provided further that the affected parties have an opportunity to respond (see *Urban Sawing & Grooving Company Ltd.,* BC EST # D112/05). There is nothing in the Tribunal's reasons that would, however, force the Director to exercise that discretion or otherwise entitle a complainant to wield the Director's discretionary authority like some sort of sword.

32. It would be improper, in the words of this Tribunal, to "interfere with the exercise of discretion unless it can be shown the exercise was an abuse of power, the Director made a mistake in construing the limits of her authority, there was a procedural irregularity, or the decision was unreasonable." (see *Godreau and Desmarais*, BC EST # D066/98, at page 4).

33. On my reading:

(a) the First Determination clearly addresses the Appellant's claims with respect to the "erosion of benefits", including personal use of company equipment and other matters about which the Appellant testified at the Hearing, in the context of entitlement to compensation for length of service arising out of an alleged constructive dismissal;

(b) the Notice of Claim relating to the First Small Claims Action, a copy of which is included in the Record, addresses the same issues by pleading "fundamental changes' in the Appellant's employment contract,

and, in that light, there is nothing abusive, irregular, or otherwise unreasonable in the Director's decision to limit the scope of the Hearing to the question of the loss of accommodation.

34. One of the overarching purposes of the *Act* is to ensure fair and efficient procedures for resolving disputes. A multiplicity of proceedings is neither fair, nor efficient.

35. I therefore decline to interfere with the Director's exercise of discretion to limit the scope of the Hearing.

Did the Director err in law?

36. An "error of law" exists where:

(a) a section of the Act has been misinterpreted or misapplied;

(b) an applicable principle of general law has been misapplied;

(c) the Director acts in the absence of evidence;

(d) the Director acts on a view of the facts which can not reasonably be entertained; or

(e) the Director adopts a method of assessment which is wrong in principle.

(see *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam),* [1998] B.C.J. No. 2275 (BCCA) at paragraph 9).

37. Notwithstanding the disjointed nature of the Appellant's submissions, I understand him to argue several instances in which he says the Director incorrectly interpreted or failed to adequately consider the evidence. That is, the Appellant says that the Director acted on an unreasonable view of the facts, or otherwise adopted the wrong method of assessment.

38. Oft repeated by this Tribunal, an appeal is not a *trial de novo*. It is not my function to make findings of fact in place of, or in addition to, findings made by the Director. This is true even where I do not necessarily agree with the Director.

39. My ability to interfere with the Director's findings of fact is limited to circumstances where the Appellant has established, on a balance of the probabilities, that "a reasonable person, acting judicially and properly instructed as to the relevant law…" would not have reached the same conclusion (see *3 Sees Holdings Ltd.*, BC EST # D041/13, at paragraph 27).

40. Bearing in mind the limited scope of the Hearing, the Appellant's arguments in this appeal appear to me to miss the point.

41. There is no dispute, on the evidence, that the Appellant was living in the Employer's accommodation or that he was asked to leave. The proper question is whether the Employer forced the Appellant to leave that accommodation in retaliation for the First Complaint.

42. If the answer is "no", as the Director concluded, it is ultimately irrelevant whether the Appellant was entitled to an "accommodation benefit".

43. If the Appellant does not convince me that "no" is a patently unreasonable answer, this ground of appeal must fail.

44. Having read the Appellant's thirty separate submissions multiple times, I find no argument against the Director's conclusion, at Hearing, that the dwelling from which the Appellant was ejected was required for use by another employee, whose return and need had been previously disclosed and discussed. Whatever else that may be, it is not a violation of section 83 of the *Act*.

45. I am, therefore, unable to conclude that the Director erred in law, and I reject this part of the appeal.

Did the Director violate the principles of natural justice?

46. The Appellant also challenges the Determination on the basis that the Director has failed to observe the principles of natural justice.

47. Those principles require the Director, always, to act fairly, in good faith, and with a view to the public interest (*Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48 at paragraph 2). Fairness, in turn, means that all parties involved have the right to notice, the right to know the case to be met and the right to answer it, the right to cross-examine witnesses, the right to a decision on the evidence, and the right to counsel (*Tyler Wilbur operating Mainline Irrigation and Landscaping*, BC EST # D196/05, at paragraph 15).

48. In the context of the Hearing scope, I have addressed and rejected the Appellant's arguments concerning his "right to be heard".

49. In a somewhat haphazard fashion, the Appellant also argues several other breaches of the principles of natural justice. I address each, briefly:

(a) The Appellant argues that the Director's failure to grant the Appellant's request for disclosure of additional documents, and subsequent failure to notify the Appellant of the Employer's request to adjourn the Hearing, violates a principle of natural justice. On October 30, 2015, the Appellant delivered a request to the Employer for the disclosure of twenty-three different sets of documents, supplemented by further requests through to November 12, 2015. On November 26, 2015, the Director, having concluded that the Appellant's requests fell outside the scope of the Second Complaint, declined to order the production of documents, or to grant the Employer's request for an adjournment. The Director's decision was sound, in that the documents demanded were not relevant to the Second Complaint.

(b) The Appellant contends that the Employer's disclosure of documents only two days before the Hearing amounts to a breach of the principles of natural justice. While I accept that the Employer could have produced materials before that date, I find that the same materials were disclosed to the Appellant in the context of the First Complaint and, as such, there is no prejudice to the Appellant.

(c) The Appellant says that an interruption of the Appellant's cross examination of a witness during the Hearing, by an incoming telephone call, amounts to a breach of the principles of natural justice. It is unclear to me how, ultimately, the Appellant was prevented from concluding his cross-examination of that witness, or what evidence he was unable to elicit as a result. While it is preferable that a hearing not be interrupted by outside distractions, it is sometimes unavoidable, and in these circumstances I am unable to conclude that the Appellant has suffered any prejudice based on the materials before me.

(d) The Appellant sees, as a breach of the principles of natural justice, the fact both counsel for the Employer and the Director had muted their telephones during the Hearing. Phones are generally muted, to allow evidence to be heard without interference. In my view, the Appellant's argument on this issue falls flat.

(e) The Appellant says that the Director was wrong to cut short the Appellant's cross-examination of a witness with respect to the Employer's refusal to produce a letter of reference. As that was an issue falling outside the scope of the Hearing, this argument is without merit.

(f) The Appellant appears to argue that the Director's preference of the Employer's witnesses over his own evidence means that Determination was not based on all the evidence. There is nothing in the materials before me suggesting that the Director did anything other than consider the relevant evidence.

(g) Finally, the Appellant says that the Director's failure to fully consider or address the Appellant's letter of resignation was wrong. In my view, however, the letter of resignation is evidence relating to the Appellant's claim for constructive dismissal, forming the subject matter of the First Complaint and the First Small Claims Action. It has no bearing on the subject matter of the Second Complaint.

50. Ultimately, I find that the Appellant has failed establish any breach of the principles of natural justice, and I reject the Appellant's challenge to the Determination under section 112(1)(b) of the *Act*.

Has new evidence has become available?

51. The final part of the Appellant's appeal is predicated upon new evidence that he says was not available at the time the Second Determination was made.

52. In *Davies et. al.*, BC EST # D171/03, the Tribunal held that the onus rests with an appellant to meet a strict, four-part test before any exercise of discretion to accept and consider fresh evidence:

(a) the evidence must not, with the exercise of due diligence, have been discoverable or presentable to the Director during the adjudication and before the Second Determination;

(b) the evidence must be relevant to a material issue arising from the complaint;

(c) the evidence must be reasonably capable of belief; and

(d) the evidence must have high potential probative value, in the sense that it could, if believed, have led the Director to a different conclusion on the material issue.

53. If any one part of the Davies test is not satisfied, the application to adduce fresh evidence must fail.

54. The Appellant proffers the First Determination as his "new" evidence. However, the First Determination was issued on December 1, 2015, and received by the Appellant on December 2, 2015. It is referenced in the Second Determination and was clearly considered by the Director. It is not "new evidence".

55. Several of the Appellant's other submissions attach documents. In my view, none of these documents:

(a) are new, in the sense that they could not have been presented to the Director before the Hearing,

(b) are relevant to the material issue arising out of the Second Complaint; or

(c) would, in my opinion, have led the Director to a different conclusion.

56. The Appellant has not met any of the thresholds established in *Davies*. The appeal under section 112(1)(c) of the *Act* cannot succeed.

Apprehension of Bias

57. Finally, the Appellant says that the Determination reveals a bias on the part of the Director because, during the hearing, the Director's delegate asked only three questions and produced a Determination with which the Appellant strongly disagrees.

58. There is nothing in any of the materials that, to me, indicates any form of bias. Bias is not shown just because the Director prefers one body of evidence over another, or because the Director makes findings which do not support the various claims advanced by the Appellant.

59. In my view, no informed person, having thought the matter through, would suggest that there is bias or a reasonable apprehension of bias, and I find that the Appellant has failed to satisfy his burden to demonstrate otherwise.

Conclusion

60. The Appellant has not convinced me that the Second Determination should be set aside or varied.

ORDER

61. I dismiss this appeal, and confirm the Second Determination according to section 115(1)(a) of the *Act*.

Rajiv K. Gandhi
Member
Employment Standards Tribunal