Employment Standards TRIBUNAL

An appeal

- by -

Malibu Rayz Tanning Ltd.
("Malibu")

- 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: Carol L. Roberts

FILE No.: 2004A/139

DATE OF DECISION: September 28, 2004

DECISION

SUBMISSIONS

John Boem	on behalf of Malibu Rayz Tanning Ltd.
Rod Bianchini	on behalf of the Director of Employment Standards
Rochelle Christie	on her own behalf

OVERVIEW

This is an appeal by Malibu Rayz Tanning Ltd. ("Malibu"), pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued June 29, 2004.

Rochelle Christie filed a complaint with the Director alleging that Malibu failed to pay her wages. Following a hearing on hearing on May 13, 2004, the Director's delegate determined that Malibu had contravened sections 18, 45 and 58 of the Act in failing to pay Ms. Christie wages, annual vacation pay and statutory holiday pay. The delegate assessed administrative penalties in the amount of $2,500 for each of Malibu's contraventions of the Act, noting that these were second contraventions within a three year period.

The delegate ordered that Malibu pay a total amount of $9,823.51 to the Director on Ms. Christie's behalf.

Mr. Boem alleges that the delegate failed to observe the principles of natural justice in making the Determination, and that new evidence has become available that was not available at the time the Determination was made.

Although the appellant sought an oral hearing, I have determined, based on the submissions of the parties, that the matter can be adjudicated based on their written submissions.

ISSUES

Did the delegate observe the principles of natural justice in making the Determination?

Has Malibu demonstrated that new evidence has become available that was not available at the time the Determination was being made that would have led the Director to a different conclusion on the material issue?

FACTS AND ARGUMENT

Ms. Christie worked as a receptionist for Malibu, a tanning studio, from May 31, 2003 until October 8, 2003. On November 24, 2003, she filed a complaint alleging that she had not been paid all wages owing.

On May 13, 2004, Malibu's owner, Mr. Boem, and Ms. Christie attended a hearing before the delegate on Ms. Christie's complaint. The delegate's decision indicates that, after records were presented and initial submissions were made, the parties requested a settlement meeting. The delegate suspended the hearing and advised the parties that, if the settlement discussions were unsuccessful, the hearing would continue. The parties were unable to reach an agreement, and the mediator advised Mr. Boem that the hearing would reconvene in fifteen minutes. The delegate was advised that Mr. Boem left the settlement conference in anger and advised that he would not return. The delegate proceeded with the hearing in the absence of Malibu's representative. Later that afternoon, Mr. Boem contacted the delegate requesting a meeting to review payroll records that he did not present earlier that day. The delegate advised him that the hearing was concluded and that no further evidence would be presented, but indicated that he would "meet him to allow the presentation of records only." On May 20, 2004, Mr. Boem met with the delegate and immediately sought the assistance of a mediator to settle the matter. A mediator met with Mr. Boem, and once again Mr. Boem left the meeting in anger and did not return.

After considering the evidence presented by Ms. Christie, and Mr. Boem's admission that some wages were owed, the delegate concluded that Ms. Christie was entitled to wages in the amount set out above. At the start of the hearing, Mr. Boem objected to evidence presented by Ms. Christie, alleging that she had photocopied documents without permission, and that this evidence ought not be admitted. Malibu presented no other evidence. The delegate determined that, at the meeting of May 20, 2004, Mr. Boem presented no additional relevant records.

The delegate determined that Mr. Boem had knowledge of the allegation and an opportunity to respond to the allegations. He further noted that the Director had the jurisdiction to assist the parties in resolving the complaint by a number of methods including mediation and adjudication. He further noted that Mr. Boem was given notice of the hearing and, although he appeared initially, chose to leave before the hearing had concluded. He further noted that Mr. Boem was given a second opportunity to present documents, which he also left before fully participating. The delegate concluded that Mr. Boem had the opportunity to respond to the complaint.

The delegate determined that the records presented by Ms. Christie should be allowed and relied on. He determined that they should not be excluded simply because they were photocopied without the knowledge or consent of Mr. Boem. The delegate noted that Ms. Christie's evidence was that her schedule of hours of work was common knowledge and an accurate assessment of her hours of work. He also noted Ms. Christie's evidence that the records ought to have come to her in any event. The delegate considered Mr. Boem's sole argument in favour of exclusion of the documents was that they had been copied without his permission, and that this constituted theft. Although Mr. Boem alleged that he had proper payroll records, those records were with his accountant, and he did not have time to retrieve them. Mr. Boem also acknowledged that the documents presented by Ms. Christie were an accurate reflection of her hours of work and confirmed they were an accurate copy of original document. The delegate noted that Malibu had the obligation of maintaining proper employer records, and, in light of Mr. Boem's admissions, found them to be reliable.

Following a review of those documents, the delegate determined that, in the absence of any conflicting evidence, Ms. Christie was entitled to wages, overtime wages and statutory wages.

ARGUMENT

The basis for Mr. Boem's appeal is somewhat difficult to discern. I infer that, although Mr. Boem does not dispute the finding that wages were owed, he objects to the imposition of the administrative penalties:

> No discrepancy for wages owed how all fines is not needed.
>
> I wish to have a oral hearing got discuss the fines from employment standards...And if I failed to comply, why were all the ridiculous fines all pile up then. were given at one time not each individual times. This is my second complaint but number 1 and 2 stem from the same problem same period. [reproduced as written]

It is also clear that Mr. Boem feels he was not treated fairly in that a decision was made before his evidence was heard:

> The person in question stole money and documents not just schedule. Since I did not charge them and no one helps me. I go to meeting which should consist of me, the person in question, mediator and no one else. This is where problems started. I was told abruptly that I will owe more. Then was confronted by mediator. And he threaten me. Told me make his day. I would like to talk to someone with lawyer present since now the girl will be charged.
>
> I have a hard problem explaining myself. To people. Who already seemed liked they made a decision…. I just need someone to hear me and what happened. Now I hired Neil Cobb to defend me because I feel that I'm being bulied pick on. [reproduced as written]

In a reply submission, Mr. Boem says:

> ..when attending meetings like at employment standards, there should be mediator, complaint and employer. Not noone else interfering with personal business. Nor should I feel bullied in the corner so much that I would have to walk out or be threatened by one of this men…[reproduced as written]

Mr. Boem seeks to have the mediator who threatened him to be disciplined.

Mr. Boem says at the time of the hearings, all his records were at his accountant's, and that the reason he walked out was because of the way he was treated, not because of the amount owing.

The Director's delegate submits that Malibu had three attempts to settle the complaint with a mediator, all of which were unsuccessful. He also says that Malibu had a number of opportunities to provide records relating to the complaint and failed to do so. Finally, the delegate submits that Malibu has not provided any evidence that new evidence has become available, or why any such evidence was not presented at the hearing. The delegate submits that the appeal documentation discloses no basis for changing the decision.

Ms. Christie says that she first heard that she was accused of theft in Malibu's appeal documents. She states that another employee was dismissed from Malibu in August 2003 after being accused of theft and that no evidence was ever presented to support that accusation.

Ms. Christie says she photocopied the documents one week prior to quitting her work, and that no documents were ever taken from her employer.

ANALYSIS

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

The burden of establishing that the Determination is incorrect rests with an Appellant. Having reviewed the submissions of the parties, I am unable to find that the appellant has discharged that burden.

Although Mr. Boem's submission does not expressly say as much, it appears that he sets out three grounds for his appeal.

In *Triple S Transmission Inc.* (BC EST #D141/03), the Tribunal noted that, although most lawyers generally understand the fundamental principles underlying the "rules of natural justice" and the other grounds identified under the Act, the grounds for an appeal "are often an opaque mystery to someone who is untrained in the law." The Tribunal member expressed the view that the Tribunal should not "mechanically adjudicate an appeal based solely on the particular "box" that an appellant has – often without a full, or even any, understanding – simply checked off." Accordingly, I will address each of the statutory grounds of appeal in light of Mr. Boem's submissions.

Error of law

I infer from Mr. Boem's submission that the delegate erred in imposing administrative penalties in the total amount of $7,500 for the three contraventions of the *Act*.

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.
>
> …

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".

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.

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*.

As the Tribunal recently noted in Summit Security Group Ltd. (BC EST #D059/04, Reconsidered BC EST #D133/04), administrative penalties under the Act are part of a larger scheme designed to regulate employment relationships in the non-union sector. The Tribunal determined that penalties are generally consistent with the purposes of the Act, and the design of the penalty scheme established under section 29 meets the statutory purpose of providing fair and efficient procedures for the settlement of disputes over the application and interpretation of the Act.

While Mr. Boem contends that the amount of the penalties is unfair to him as a small business owner, and that the arose as a result of the same "problem", the Tribunal has no jurisdiction to change the amounts of those penalties, or conclude that they should not be imposed once a contravention has been found. In *Douglas Mattson* (BC EST #DRD647/01) the Tribunal found that it could not ignore the plain meaning of the words of a statute and substitute its view of the legislative intent based solely on its judgement about what is "fair" or "logical". Further, in *Actton Super-Save Gas Stations Ltd.* (BC EST #D067/04) the Tribunal concluded that the Act provides for mandatory administrative penalties without any exceptions: "The legislation does not recognize fairness considerations as providing exceptions to the mandatory administrative penalty scheme."

I am unable to conclude that the delegate erred in either imposing the penalty, or in determining the amount of that penalty.

Failure to observe principles of natural justice

Principles of natural justice are, in essence, procedural rights that ensure parties know the case against them, the right to respond, and the right to be heard by an independent and impartial decision maker. In this case, Mr. Boem does not say that he was not given an opportunity to be heard. He does allege that the decision maker had prejudged his case, an allegation that the delegate did not reply to.

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)

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 someway predisposed to a particular result, or that is closed with regard to particular issues.

The Supreme Court articulated the test for finding a reasonable apprehension of bias as follows:

> 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)

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 eh 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.)

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.

Mr. Boem's allegations are that he was threatened and bullied by the mediator, and treated unfairly by the delegate. It is unfortunate that the delegate did not respond to these very serious allegations. However, I

have considered the allegations only as they relate to the decision maker, or the delegate. While the Tribunal does not condone threats or bullying behaviour, on which the Tribunal makes no findings in the context of this appeal, because they are not made against the delegate, they will not be addressed further.

I infer from Mr. Boem's submissions that he takes the position that the decision maker had a closed mind. It appears that Mr. Boem objected to the admission of some material presented by Ms. Christie, and, during the mediation session, became upset with the delegate's ruling and chose not to continue with the hearing. Evidentiary rulings in favour of the complainant are not sufficient to demonstrate a closed mind. In any event, the delegate gave Mr. Boem a second opportunity to provide material that might support his position even after the hearing concluded.

In my view, the fact that the delegate allowed Mr. Boem a second opportunity to provide material demonstrates that he was alive to the issue of fairness, and that his mind was not closed to Mr. Boem's arguments. There is no evidence that the delegate pre-judged the complaint.

I also note that Mr. Boem does not dispute the determination that wages are owed. Even if Mr. Boem had established to my satisfaction that the delegate had pre-judged the complaint, which he has not, the result would not differ in light of this acknowledgement. Any defects in the hearing by the delegate would be cured by the Tribunal, and Mr. Boem has been given full opportunity to demonstrate why the Determination was wrong. The only outstanding issue is that of the imposition of administrative penalties, which I have addressed above.

New Evidence

In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D 171/03 the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:

- 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;
- the evidence must be relevant to a material issue arising from the complaint;
- the evidence must be credible in the sense that it is reasonably capable of belief; and
- the evidence must have high potential probative value, in the sense that , if believed, it could on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

Mr. Boem does not indicate what the new evidence is or why it could not have been provided at the hearing. Although he says the documents were at his accountant's, he gives no reason why he could not have obtained the relevant documents from his accountant for the purposes of the hearing.

Given that Mr. Boem appears to concede the wages owing, and provides no information on how the new evidence might have led the delegate to a different conclusion, I find no basis for this ground of appeal.

Therefore, the appeal is dismissed.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination dated June 29, 2004 be confirmed in the amount of $9,823.51, together with whatever interest may have accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal