Employment Standards TRIBUNAL

An appeal

- by -

Talon Security Services Incorporated

- 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: John Savage

FILE No.: 2004A/156

DATE OF DECISION: November 9, 2004

DECISION

SUBMISSIONS

Theresa Robertson, Delegate of the Director of Employment Standards

Gwenda Garrett for Talon Security Services Incorporated

INTRODUCTION

This appeal was determined to be heard by written submissions.

Talon Securities Services Incorporated ("Talon") operates a security business. Naim Hashimi ("Hashimi") was employed as a security guard from August 28, 2003 to April 5, 2004 at $9.00 per hour.

On April 5, 2004 he quit his employment. He later called Gwenda Garrett ("Garrett), the manager of Talon, over his unpaid wages and a dispute arose over the timing of the pay and some $700 which was deducted from his pay as a cash advance.

On April 15, 2004 Hashimi filed a complaint with respect to overtime pay and the deduction of the cash advance. The overtime issue was resolved through mediation.

The hearing before the Delegate proceeded on the issue of whether Hashimi received a cash advance. Hashimi denied that he received any cash advance. Garrett testified that she gave him a cash advance on the night of March 26/27, 2004.

One other witness testified for Talon on this issue. Glen Charrington testified that Garrett told him that she was giving Hashimi an advance to purchase a motorcycle. He was unable to testify as to when this occurred and what amount was mentioned.

Garrett also produced cash withdrawal slips showing that she withdrew $800 from payroll accounts in two installments on March 26/27, 2004. On the front of the withdrawal slips she had written a note that one withdrawal of $500 was partly for Hashimi ($400) and partly for herself. On the other withdrawal slip for $300 she had made a note indicating this withdrawal was for Hashimi.

There is no record of Hashimi ever acknowledging receipt of a cash advance and the Delegate noted that Hashimi had not signed the withdrawal slips.

Garrett also testified and produced telephone records that she had received a phone call from Hashimi the night of March 26, 2004 requesting a cash advance. She produced a telephone record that showed she had received a call that night, but the record did not indicate from whom the call was received.

On this evidence the Delegate concluded that although "… Ms. Garrett's explanation of how she came to give Mr. Hashimi the cash advance is detailed and reasonable …in the face of Mr. Hashimi's absolute denial in this regard, there is no evidence that unequivocally proves her account".

Talon filed an appeal of the Delegate's decision on the basis that evidence has become available that was not available at the time the Determination was being made: "4 witnesses previously unable to testify because of work schedules are now able to".

ISSUE

Should the case be remitted back to the Director to entertain new evidence because witnesses who were not available earlier because of work schedules are now available to testify?

SUBMISSIONS

Talon seeks to have the hearing reopened on the basis that "…there were other people that had knowledge of the monies that I had given Mr. Hashemi (sic) in cash. Because those people we (sic) unable to attend and because I had been previously told that letters from them would not hold much evidence, I was without their support at that time".

The nature of the specific evidence sought to be introduced is not elaborated on but appears from the submission to be conversations that Garratt had with other persons on the night she says she gave the advance to Hashimi.

Talon says there was "very briefly" mention made of this at the hearing but the Director's Delegate denies this.

The Delegate says that the notice of hearing was sent to the appellant on June 8, 2004 giving nearly one month's notice of the hearing, and no request for an adjournment was made.

DISCUSSION & ANALYSIS

Subsection 112(1) of the *Employment Standards Act*, R.S.B.C. 1996, Chap 113, sets out the grounds on which an appeal may be made to the Tribunal from a Determination of the Director:

> 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:
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> (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 being made.

With respect to the introduction of new evidence, subsection 112(1)(c), Adjudicator Stevenson noted in *Davies, et. al. v. Director of Employment Standards*, BC EST# D171/03, at page 3, that this Tribunal has been guided by the test applied in civil courts for admitting fresh evidence on appeal:

> We take this opportunity to provide some comments and guidance on how the Tribunal will administer the ground of appeal identified in paragraph 112(1)(c). This ground is not intended to

> allow a person dissatisfied with the result of a Determination to simply seek out more evidence to supplement what was already provided to, or acquired by, the Director during the complaint process if, in the circumstances, that evidence could have been provided to the Director before the Determination was made. The key aspect of paragraph 112(1)(c) in this regard is that the fresh evidence being provided on appeal was not available at the time the Determination was made. In all cases, the Tribunal retains a discretion whether to accept fresh evidence. In deciding how its discretion will be exercised, the Tribunal will be guided by the test applied in civil Courts for admitting fresh evidence on appeal. That test is a relatively strict one and must meet four conditions:
>
> (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;
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> (b) the evidence must be relevant to a material issue arising from the complaint;
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> (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
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> (d) 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.

The proposed evidence has been described above. It is clear from Talon's submission that the proposed evidence was known before the hearing of the complaint. In fact, Talon suggested in their submission this evidence was mentioned "very briefly" during the hearing before the Delegate. In these circumstances can criterion (a) be satisfied?

In this case because the evidence was already known by Talon prior to the hearing of the appeal, the evidence had been "discovered" prior to the hearing of the appeal. Applying the test in *Davies* the issue is whether such evidence "…could not, with the exercise of due diligence, have been … presented to the Director during the investigation or adjudication of the complaint….".

In my opinion the reasons given by Talon are not sufficient to satisfy the requirement to exercise due diligence to bring the evidence to the Director.

In this case the hearing was set about one month subsequent to the Notice of Hearing. The witnesses appear to have been available but for their employment obligations. If Talon was of the view that it was important to their case to have these witnesses present evidence the proper course was to request an adjournment of the hearing, or to request a continuation of the hearing to hear this evidence at a later date.

The provisions of the *Employment Standards Act* are available to employers and employees to expeditiously resolve disputes while observing the principles of natural justice. Section 77 of the *Act* requires the Director to "… make reasonable efforts to give a person under investigation an opportunity to respond". In this case a hearing was ordered and the parties were therefore given an opportunity to present their evidence to the Delegate.

A party that is aware of evidence that supports their case must make a decision prior to a hearing whether to introduce such evidence, or, if a witness is not available, whether to request an adjournment of the hearing to allow this evidence to be introduced later. If there are good reasons why a witness is not

available that may be grounds for an adjournment of the hearing. Failure to grant an adjournment might well breach the Director's obligation under Section 77 of the *Act*.

In this case no adjournment was requested. It is not open to a party to wait for a Determination and then, if unsuccessful, apply to introduce known evidence at a later date.

In the circumstances the appeal is without merit.

ORDER

The Determination of the Director is confirmed.

John Savage
Member
Employment Standards Tribunal