Employment Standards TRIBUNAL

An appeal

- by -

Cyberbc.Com AD & Host Services Inc.
Operating 108 Tempo and La Pizzeria

- 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

ADJUDICATOR: Wayne R. Carkner

FILE No.: 2001/679

DATE OF HEARING: December 12, 2001

DATE OF DECISION: December 20, 2001

DECISION

This decision is based on extensive written submissions from all parties as well as oral evidence and argument provided at a hearing in 100 Mile House on December 12, 2001. Prior to the commencement of the hearing it was requested that all witnesses be excluded from the hearing. I concurred with this request.

APPEARANCES

For the Appellant	Mike Houhou ("Houhou")
	Frank Houhou
	Bruce Cathro ("Cathro")
	Bev Cathro
For the Respondents	Steven King ("King") – via speakerphone
	Jason Fouchier ("Fouchier")
For the Director	Tracey Thompson (the "Delegate")
	Ruth Atterton

OVERVIEW

This is an appeal by Cyberbc.Com AD & Host Services Inc. operating 108 Tempo and La Pizzaria (the "Appellant"), pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*), of a Determination issued by the Director of Employment Standards (the "Director") on September 7, 2001. The Determination concluded that the Appellant had contravened Sections 40, 58 and 63 of the *Act* and ordered the Appellant to pay, as remedy to Steven King, $2,803.88 for wages, overtime, annual vacation pay, compensation for length of service (CLOS) and interest pursuant to Section 88 of the *Act.* The Determination further ordered the Appellant to pay, as remedy to Jason Fouchier, $4,284.60 for overtime, statutory holiday pay, vacation pay and interest. The Appellant alleges that the Director showed a bias for the Respondents while conducting the investigation of King's and Fouchier's complaints as well as attempting to coerce his witnesses not to testify at this hearing. The Appellant further alleges that King quit his employment and is not entitled CLOS. The Appellant states that Fouchier was a manager", as defined by the *Act,* and is not entitled to overtime pay and statutory holiday pay. The Appellant further states that the hours credited to King on Monday's did not constitute work and should be excluded from the calculations of the remedy. Finally the Appellant alleges that there were errors in the calculations of remedy for both King and Fouchier.

ISSUES

1. Did the Delegate of the Director show a bias against the Appellant while conducting the investigation of the Respondents' complaints and while conducting interviews of the Appellant's witnesses prior to this hearing?

2. Was Jason Fouchier a "manager" as defined by the Act?

3. Did Steven King quit his employment?

4. Were the duties performed by King on Mondays "work" as defined by the Act?

5. Were there errors in the calculations of remedy?

PRELIMINARY ISSUE

Should I exercise my discretion and allow new evidence to be admitted by

the Appellant through oral evidence? Said evidence was not provided to the Director during the investigation of the Respondents' complaints.

FACTS & ANALYSIS

Preliminary Issue

The Appellant had served four summonses for witnesses to attend at the hearing to provide oral evidence. None of these witnesses had any involvement in the Director's investigation. It is longstanding Tribunal jurisprudence, as well as procedure under the rules of evidence, that new evidence, that was available at the time the investigation was being conducted, will not be allowed unless there is a compelling reason provided by the party wishing to enter the evidence. To allow evidence of this nature would in fact have a negative implication in allowing a proper investigation to be conducted. The person being investigated could "lay in the weeds" and impede the investigating officer from conducting a proper and through investigation. In the case at hand, the only reason provided by the Appellant was that he didn't think about talking to the proposed witnesses until after the Determination was issued. This is <u>not</u> a compelling reason to allow new evidence. I therefore disallowed this evidence to be called.

The Appellant requested to call two of the witnesses to support the allegations of bias. Cathro and Bev Cathro were interviewed by the Delegate after the Determination had been issued. The Appellant alleged that the Delegate attempted to coerce these witnesses not to testify. Based on these allegations I allowed these two witnesses to be called to testify on this issue only.

Allegations Of Bias

The Appellant alleged that the Delegate showed bias by accepting the evidence of the Respondents over his evidence. The Appellant further alleged that Cathro and Bev Cathro were coerced to withdraw written statements that they had provided to the Appellant and suggested that the Delegate attempted to scare the witnesses away from testifying by telling them that they would have to testify in court in Vancouver.

It became apparent through the Appellant's testimony that there was no evidence of bias during the investigation. The Appellant simply concluded that the Delegate was biased as the results of the investigation went against him.

The Delegate testified that she had contacted Cathro and Bev Cathro to ensure that they understood the reasons for the written statements that they provided to the Appellant. She testified that they were unaware that the statements were for an appeal before this Tribunal. She denied attempting to coerce the witnesses into withdrawing their statements. She also denied telling the witnesses that they would have to go to Vancouver to testify.

I directly questioned Cathro as to his discussion with the Delegate. He concurred with the evidence of the Delegate. He testified that he was asked to provide the Appellant with a written statement but was not aware that the statement would be used in an appeal before this Tribunal. He also testified that the Delegate did not tell him he would have to testify in Vancouver. He presumed he would have to go to Vancouver as this type of proceeding, to his knowledge, rarely occurred in 100 Mile House. He stated that he was neither coerced nor pressured by the Delegate to withdraw his written statement nor was it suggested to him, by the Delegate, not to testify before this Tribunal.

I also directly questioned Bev Cathro. She was also emphatic that she was not coerced by the Delegate to withdraw her written statement or to withhold her testimony.

I find that the issue of bias rises from the fact that the Appellant did not like the conclusions in the Determination and not from any factual points.

Regarding this issue the Court of Appeal stated in *Adams v. Workers' Compensation Board,* B.C.C.A., (1989) 42 B.C.L.R. 228, at 231-232:

> "An accusation of this nature is an adverse imputation on the integrity of person against whom it is made. The sting of the doubt about integrity lingers even when the allegation is rejected. It is the kind of allegation easily made but impossible to refute except by a general denial. It ought not to be made unless supported by sufficient evidence to demonstrate that, to a reasonable person, there is a sound basis for apprehending that the person against whom it is made will not bring an impartial mind to bear upon the cause."

In this case no evidence of bias was provided. Indeed, the witnesses called by the Appellant were emphatic that the Delegate approached them in a neutral and professional manner. As for the Appellants testimony on this issue, there were no facts whatsoever provided to show any bias, let alone a perception of bias, by the Delegate.

It is unfortunate that this allegation is put forward so regularly by Appellants whose only assertion is that a bias has occurred because Determinations have found in favour of Respondents. As outlined in the quotation above, a person, even with a complete lack of evidence, cannot do anything but make a "general denial". In my mind this attacks the credibility of the person lodging these unsubstantiated allegations and colours the credibility of their testimony.

I therefore dismiss this ground of appeal.

Was Jason Fouchier A "Manager" As Defined By The *Act*?

The Appellant asserted that Fouchier was a manager. He testified that Fouchier scheduled the shifts for five employees, ordered supplies, did data input on the computer and authorized hours of work. He asserted that Fouchier has the right to hire and fire employees. He asserted that these were Fouchier's prime duties and that pumping gas was a secondary function.

Frank Houhou, the Appellant's father, testified that Fouchier made up schedules for the employees. He testified that the hours of work were entered by employees into the "Red Book" on a daily basis. He testified that he worked the same hours each day and these hours were worked into the schedules. He further testified that one employee worked at Save On Foods and she would provide her available hours to work on a three-week basis. Based on these hours Fouchier would build a schedule for two other employees and himself around the hours provided.

Fouchier testified that he built the schedules around those hours for himself and two other employees. He stated that he did not have the authority to change the hours of Frank Houhou or the employee who worked at Save On Foods. He further testified that this scheduling only took a few minutes to draw up. He testified that he had no authority to hire or fire employees but could make recommendations to the Appellant. Regarding the ordering of supplies, Fouchier testified that he would make up a list of supplies when they were low in stock and provide the list to the Appellant who would then order the supplies. He testified that he had only inputted a minimal amount of data into the computer once or twice. He testified that most of his working day involved pumping gas and dealing with customers. I accept this evidence.

Fouchier's preponderance of duties consisted of pumping gas and dealing with customers. The scheduling was incidental to his prime functions.

I find that Fouchier was not a "manager" as defined by the *Act*.

Did Steven King Quit His Employment?

The Appellant alleges that King quit his employment. On King's last day of employment there was an altercation over sandwiches that were made the previous night by another employee. The Appellant testified that after the discussion King just walked out and never returned. The Appellant conceded that he never followed up with King to see if he was coming back to work until long after King had filed a complaint and he had spoken with the Delegate. The Appellant testified that it was a quiet discussion and denied throwing the sandwiches.

Frank Houhou testified that he had overheard part of the conversation and that he never overheard the Appellant tell King to go. However Frank Houhou's evidence showed that he was not present in the store for the entire conversation, as he had to attend to duties at the gas pumps outside. He testified that he did not see any sandwiches thrown.

King testified that the Appellant approached him ranting about the sandwiches not being made properly. He stated that the Appellant threw the sandwiches on the floor and berated him. He stated that he told the Appellant that the sandwiches were made by someone else the night before. He testified that the Appellant stated that he didn't care and that he, King, could just go. King testified that he then left the store and never heard from the Appellant until long after he had filed his complaint with Employment Standards. He testified that he did not quit but was told to leave by the Appellant.

I accept King's evidence.

It was stated as follows in the Tribunal's decision *Burnaby Select Taxi Ltd. –and- Zoltan Kiss,* BC EST #91/96:

> The right to quit is personal to the employee and there must beclear and unequivocal facts to support a conclusion that this right has been exercised by the employee involved. There is both a subjective and an objective element to a quit: subjectively, the employee must form an intent to quit; objectively, the employee must carry out some act inconsistent with his or her further employment. The rationale for this approach has been stated as follows:
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> > ". . . the uttering of the words "I quit" may be part of an emotional outburst, something stated in anger, because of job frustration or other reasons, and as such it is not to be taken as really manifesting an intent by the employee to sever his employment relationship." Re University of Guelph, (1973) 2 L.A.C. (2d) 348

These elements are not present in this case. Based on the test of a balance of probabilities I must conclude that King did not quit his employment and is entitled to CLOS.

Did The Duties Performed By King On Monday's Constitute "Work" As Defined In The *Act*?

Evidence was provided that showed that King traveled to William's Lake almost every Monday with the Appellant. Either the Appellant's vehicle or King's was used to make these trips. At William's Lake the Appellant and King would pick up supplies for the Appellant's businesses. The Appellant asserted that King was not required to make these trips and that he came along of his own behest. There was disputed evidence as to how often these trips were made and the duration of these trips. There was also disputed evidence regarding whether or not a trip to Kamloops occurred on one of these Mondays.

In the Determination the Director also confronted this disputed evidence and accepted King's version. In the hearing the Appellant was not very persuasive in encouraging me to disregard King's evidence and accept his (the Appellant's) evidence. As the burden of proof to show the Delegate has erred in the facts contained in the Determination and as the Appellant has failed to meet this onus I must conclude that these trips occurred as testified to by King.

The Appellant's payroll records showed King on a day off on most Mondays and showed that he received no wages for these Mondays.

Based on the evidence before me I must conclude that these trips constituted "work" as defined by the *Act* and that King is entitled to payment of wages for the time claimed for said work.

Were Their Errors In The Calculations Of Remedy?

King's Remedy

King asserted that he was not paid overtime on the payroll. He stated that if he worked extra hours he would be paid straight time in cash. He testified that he kept track of all hours that he worked at home on a calendar. As no record of these hours showed on the Appellant's payroll records the Delegate, properly, accepted King's records for the purpose of calculating the remedy. During the hearing the Appellant tested the Delegate's calculations against King's records finding several inconsistencies. After being questioned by the Delegate it was discovered that the Appellant was referring to a preliminary calculation sheet that the Delegate had provided for the purposes of settlement discussions and this sheet was not as detailed as the sheets containing the final calculations. I have reviewed these sheets against King's records and find that they are accurate.

Fouchier's Remedy

The Delegate submitted that she had erred in the Determination by calculating the the remedy from February 2000 at $8.00 per hour. She submitted that Fouchier's rate of pay should have been $7.15 per hour commencing in March 2000 and $8.00 per hour effective July 2000. With

the Delegate's written submission a calculation sheet was provided with a request to vary the remedy for Fouchier to read $3,079.56. The Appellant was unable to present any additional evidence to disprove the validity of Fouchier's records, which were used by the delegate to calculate the remedy.

CONCLUSIONS

1. I find that there is no evidence to support any allegations of bias or to support any perception of bias either during the investigation of the Respondents' complaints nor during the interviews with the Appellant's witnesses prior to the commencement of this hearing.

2. I find that Jason Fouchier was not a "manager" as defined under the *Act.*

3. I find that Steven King did not quit his employment with the Appellant and is entitled to compensation for length of service.

4. I find that the duties performed by Steven King on Mondays constituted "work" as defined by the *Act* and the he is entitled to wages for said work.

5. I find that the calculations for remedy for Steven King are accurate and properly reflect the remedy he is entitled to. I further find that the calculations of remedy for Jason Fouchier were in error and that the amount of remedy that Fouchier is entitled to is varied to read $3,079.56.

ORDER

Pursuant to Section 115 of the *Act* I order that the Determination dated September 7, 2001 be varied to the extent that the remedy for Jason Fouchier shall read $3,079.56, instead of $4,284,60, plus any accrued interest pursuant to Section 88 of the *Act*. I further order that the rest of the Determination be confirmed with the addition of any accrued interest pursuant to Section 88 of the *Act.*

Wayne R. Carkner
Adjudicator
Employment Standards Tribunal