Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

Cyberbc.Com AD & Host Services Inc.
operating 108 Tempo and La Pizzaria

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: John M. Orr, Panel Chair
Carol L. Roberts
David B. Stevenson

FILE No.: 2002/9

DATE OF DECISION: July 25, 2002

DECISION

OVERVIEW

This is an application by Cyberbc.Com AD & Host Services Inc. operating 108 Tempo and La Pizzeria ("the appellant" or "the employer") under Section 116 (2) of the *Employment Standards Act* (the "*Act*") for a reconsideration of a Decision #D693/01 (the "Original Decision") that was issued by the Tribunal on December 20, 2001.

A Determination was issued on September 7, 2001 concluding that the appellant had contravened the *Act* and ordered the appellant to pay certain wages to two employees. The appellant appealed the Determination to the Tribunal alleging that the Director's delegate was biased during the investigation. There were also certain substantive issues raised in relation to the wage claim.

The adjudicator in the original decision also noted a preliminary issue in regard to the calling of witnesses by the appellant at the hearing. The adjudicator declined to allow the witnesses to testify on the grounds that it was evidence not previously presented to the delegate during the investigation. The adjudicator dismissed the allegation of bias and confirmed the Determination of the substantive issues with a relatively minor correction in relation to a wage calculation.

The appellant now asks the Tribunal to reconsider the original decision. The appellant was not represented by legal counsel at the original hearing but is now represented. The appellant's counsel has presented a written brief setting out two grounds upon which, it is submitted, the Tribunal should reconsider the original decision. The first ground alleges bias by the delegate and the adjudicator at the original hearing. The second ground is that the appellant was not given a reasonable opportunity to respond to the complaints before the Director made a determination.

ANALYSIS

Having read the submissions by counsel for the appellant and the Director's delegate, we are satisfied that the allegations are sufficient to satisfy the first stage of the test for the exercise of the reconsideration power under section 116 of the *Act* as set out in *Milan Holdings Ltd.,* BCEST #D313/98. In *Milan,* the Tribunal sets out a two-stage analysis in the reconsideration process. The first stage is for the panel to decide whether the matters raised in the application for reconsideration in fact warrant reconsideration. In deciding this question the Tribunal should consider a number of factors such as whether the application is timely, whether it is an interlocutory matter, and whether its primary focus is to have the reconsideration panel effectively "re-weigh" evidence tendered before the adjudicator. We are satisfied that the application was timely and that the submissions raise significant issues of procedural fairness that go beyond the "re-weighing" of evidence. In fact the submissions raise the issue of whether the appellant was given any opportunity to present relevant evidence during the investigation and at the appeal hearing.

There are two issues raised by the appellant in this application for reconsideration. The first is the allegation of "bias". The second issue, which is an allegation that the appellant was not given a reasonable opportunity to respond, was raised for the first time in this application. Although we conclude that this issue should be referred back to the adjudicator, we have also addressed the appellant's allegations of bias.

Bias

At issue is whether the adjudicator failed to comply with the principles of natural justice.

Argument

The appellant alleges that, at the appeal hearing of this matter, 1) the adjudicator had a private conversation with the Director's delegate outside the hearing room during an afternoon break; 2) the adjudicator's treatment of him during the hearing led him to believe that the adjudicator favored the delegate over the appellant; and 3) the adjudicator had an exchange with the Director's delegate that left him with the impression that they had discussed the case prior to the hearing.

The appellant argues that this conduct gives rise to a reasonable apprehension of bias.

Analysis

One of the fundamental principles of natural justice is 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)

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. 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".

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 basis 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.

The appellant provided only his perception of what occurred. He provided no evidence from any other party appearing at the hearing.

As the Tribunal has noted in *Re: Dusty Investments Inc. d.b.a. Honda North,* BCEST #D043/99, the evidence presented should allow for objective findings of fact that demonstrate a reasonable apprehension of bias. The rationale for this requirement is anchored in the principle that a party against whom an allegation of bias is made does not have the opportunity to explain the circumstances in which the allegations arise or to deny the presence of a biased mind.

In *R. v. R.D.S.* (*supra*) the court held that there was a presumption that judges would carry out their oath of office requiring them to render justice impartially. This presumption is one of the reasons why the threshold for perceived judicial bias is high, and can only be displaced with 'cogent evidence'.

As with judges, there is a presumption that the adjudicator acted impartially. Employment Standards Tribunal adjudicators, like judges, take an oath of office, in which they swear they will discharge their duties as an adjudicator with independence and common law principles of natural justice.

That presumption is not overcome by presenting subjective and impressionistic evidence. The Tribunal finds no basis for the allegation of bias in the adjudicator's treatment of the appellant during the hearing, or the exchange between the delegate and the adjudicator at the hearing. There were other persons at the hearing that could have provided affidavit evidence as to what occurred.

The delegate submitted that that there was no private conversation between the adjudicator and the delegate at the hearing, and that would not have been possible in any event, given the layout of the room. She indicated that the hearing ran from 9:00 am to 4:00 pm with only two short breaks during the day. She states that the appellant was advised that he had a time limit in which to present his case, and if the evidence were not presented during that time, it would have to be done in writing. She recalled that the adjudicator cautioned the appellant to focus on the issues.

The Tribunal notes that, in general, unrepresented parties may be instructed by the adjudicator to present only relevant evidence. This caution may be more frequent as the hearing continues. That does not, however, support an allegation of bias.

More troubling to the Tribunal is the discussion between the adjudicator and the delegate during an afternoon break.

The delegate says that there were two delegates in attendance at the hearing. She indicated that they were the last to arrive and the hearing started immediately, so there was no opportunity for discussion prior to the hearing. The delegate acknowledged however that, during the break, there was a discussion between the adjudicator and at least one of the delegates. Her recollection, however, was that the conversation was extremely limited and no parts of the hearing or investigation were discussed.

In the opinion of the panel, the impugned conversation, no matter how innocent, is close to being inappropriate because of the risk of creating an appearance of bias. Having said this however, the Tribunal is not persuaded that in this case it is sufficient to substantiate a real likelihood or probability of bias that would warrant declaring the entire hearing a nullity. The conversation was clearly not a private one, as it was conducted in the presence of all the parties. Given that it was transparent, presumably the appellant could have participated in it. The Tribunal accepts that the discussion was limited and that the subject matter before the Tribunal was not a topic of conversation.

Although the allegations of the appellant are not, in the Tribunal's view, substantiated, the comments of the Court in *United Enterprises Ltd. v. Saskatchewan (Liquor and Gaming Licensing Commission*, [1996] S.J. No 798 (Q.B.) bear repeating:

> Judges and tribunals are not required to be aloof, but they are required to remain impartial. They must avoid any conduct which leads to the perception that they have a closer relationship with counsel for one side than with counsel for the other...It is essential that counsel for both sides are present any time there is contact between the judge and counsel for the litigants. It is also essential to avoid conduct which gives the perception of partiality by treating counsel for one side with more deference than counsel for the other.

On reviewing the totality of the allegations of bias the Tribunal is not satisfied that there is clear and cogent evidence to establish that there is real likelihood of bias in this case and this ground for review is rejected.

Opportunity to Respond

An officer of the appellant deposes that the corporation was not given a reasonable opportunity to respond to the complaints made by the two employees. He asserts that during the investigation the appellant repeatedly asked for details about the alleged wage claims. He further claims that the appellant fully co-

operated with the investigation but the details of the claims were not disclosed until the Determination was issued. Copies of correspondence are attached as exhibits to the affidavit. He alleges that prior to the Determination the appellant had not received any schedule of hours or days claimed by the employees in excess of those shown in the company records.

This lack of detail was significant, the appellant submits, in that claims were being made that were inconsistent with the employer's records and the employer had no opportunity to investigate the correctness of those claims or to present evidence to refute them.

The Director submits there is no requirement to disclose all documentation during the investigation process. The Director submits that the onus is on the employer to keep, and upon request, produce accurate records. It is also submitted that both the delegate and the adjudicator, on a balance of probabilities, found the employees' records to be more credible. The Director submits the appellant received the wage calculations as part of the Determination and therefore had ample opportunity to prepare a response before the hearing.

The employee records of hours and days worked, which were produced to support the wage claims, had not been shared with the appellant prior to the hearing. The records were produced at the hearing and the appellant was given a short break to review the documents. Counsel for the appellant points out that the witnesses subpoenaed by the appellant for the hearing in order to refute the claims made by the employees were not allowed to testify as this was alleged to be new evidence.

Section 77 of the Act says:

> 77. If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.

This provision reflects one of the statutory objectives of the Act to "provide fair and efficient procedures for resolving disputes over the application and operation of this Act". (s.2). While we have concluded that there is no foundation to the allegations of bias we are concerned that the employer was not given the opportunity to call all of the relevant evidence to address the issues that may have been revealed to him for the first time in the determination or at the hearing itself.

While the Tribunal has indicated that Section 77 does not necessarily require the production of the whole investigative file prior to issuing the determination and it is not intended to allow for a form of "discovery", there still must be meaningful disclosure of the details of the complaints in order to make the opportunity to respond reasonable and effective.

It is unfortunate that the unrepresented appellant framed his submission to the adjudicator at the original hearing in terms of bias as opposed to the application of section 77. The adjudicator dealt with the matter as a claim of bias and did not address the application of section 77. If the adjudicator had found that there had not been a reasonable opportunity to respond this could have been cured by allowing the appellant to fully address the issues at the hearing, *Re: O'Reilly* BCEST #RD 165/02.

It is not sufficient for the delegate to say that all of the disclosure was given in the Determination. The opportunity to respond to the allegations must be given during the investigative stage and prior to the delegate exercising her quasi-judicial authority to issue a Determination. Even if the *Act* does not specifically require "full disclosure" of the contents of the delegate's file, section 77 and the fundamental rules of procedural fairness require that the person under investigation be provided with sufficient details

and copies of pertinent documents in order to adequately respond to the complaint. This is the essence of fundamental fairness. The *Act* gives the Director very wide powers including the powers to impose penalties. Such powers must not be exercised without according a party a real, full, fair and reasonable opportunity to address the complaints.

If an adjudicator finds that a reasonable opportunity to respond was not given it is incumbent on the Tribunal to allow the party to fully present all relevant evidence at the appeal hearing that might have been given during the investigation or that may have come to light since the determination was issued.

In this case the adjudicator declined to hear the evidence of four witnesses who attended the hearing on behalf of the appellant. The adjudicator stated:

> 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

The above statement, while an accurate description of the approach taken by the Tribunal when confronted by a party seeking to introduce evidence that could have and should have been provided during the investigation of the complaint, is only an evidentiary rule designed to address the statutory objective of efficiency. It is not a substantive rule prohibiting the calling of evidence and the approach adopted by the Tribunal must also accommodate and balance the statutory objective of fairness. In *Tri-West Tractor Ltd.* BC EST #D268/96, the Tribunal, having stated the approach it intended to take and the statutory purpose behind it, was careful to note the following:

> The Tribunal will not necessarily foreclose any party to an appeal from bringing forward evidence in support of their case, but we will not allow the appeal procedure to be used to make the case that should have and could have been given to the delegate during the investigative stage.

In the circumstances of this case, it is alleged that the appellant had not had an opportunity during the investigation to respond to the specific claims made by the individuals of their hours worked, as that information was not provided to the applicant. This was not a case where the employer was 'sitting in the weeds', withholding available information from the delegate. The information upon which the delegate relied was apparently unknown until the Determination was issued. If those circumstances were established, then the appellant should have been given the opportunity to respond to them in the appeal.

CONCLUSION

As noted above, we have concluded that there is no substantial basis to support the allegations of bias in this case. However, it appears that there is a substantial likelihood that there may not have been compliance with section 77 in that the appellant may not have been given a reasonable opportunity to respond prior to the issuing of the Determination. While, in some cases, the opportunity to respond may be cured during the course of the appeal hearing, it appears that, in this case, that opportunity was not given to the appellant.

We conclude that this matter should be referred back to the original panel to re-hear the appeal and in particular to address the Section 77 issue and, if appropriate, ensure that the appellant is given the opportunity to present any evidence relevant to the matters being appealed.

ORDER

Pursuant to Section 116 of the Act we refer the matter back to the original panel to conduct a new hearing.

John M. Orr **Adjudicator** **Employment Standards Tribunal**	**Carol L. Roberts** **Adjudicator** **Employment Standards Tribunal**	**David B. Stevenson** **Adjudicator** **Employment Standards Tribunal**