Employment Standards TRIBUNAL

An appeal

- by -

564355 BC Ltd. carrying on business as Bob Erskine Trucking
("Erskine")

- 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: Carol L. Roberts

FILE No.: 2007A/129

DATE OF DECISION: January 3, 2008

DECISION

SUBMISSIONS

Bob Erskine	on behalf of 564355 BC Ltd. dba Bob Erskine Trucking
Ken White	on behalf of the Director of Employment Standards
Conrad Schulz	on his own behalf
Owen LaBounty	on his own behalf

OVERVIEW

1. This is an appeal by 564355 B.C. Ltd. dba Bob Erskine Trucking, ("Erskine"), pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued September 28, 2007.

2. Conrad Schulz and Owen LaBounty ("the complainants") were employed as truck drivers by Erskine from 2004 until October 2, 2006. They filed complaints alleging that they were entitled to compensation for length of service.

3. The Director's delegate held a hearing into the complaints on July 11, 2007. The issue before the delegate was whether the complainants quit or were fired. The employer was represented by counsel, the complainants represented themselves.

4. The delegate determined that the complainants had been terminated from their employment and that Erskine had contravened Sections 58 and 63 of the *Employment Standards Act* in failing to pay the complainants compensation for length of service and annual vacation pay. He found the complainants were entitled to wages and interest in the total amount of $4,275.31. The delegate imposed a $1,000 penalty on Erskine for the contraventions of the Act, pursuant to section 29(1) of the *Employment Standards Regulation*.

5. Erskine contends that the delegate failed to observe the principles of natural justice in making the Determination. Erskine also contends that evidence has become available that was not available at the time the Determination was being made.

6. Section 36 of the *Administrative Tribunals Act* ("*ATA*"), which is incorporated into the *Employment Standards Act* (s. 103), and Rule 16 of the Tribunal's Rules of Practise and Procedure provide that the tribunal may hold any combination of written, electronic and oral hearings. (see also *D. Hall & Associates v. Director of Employment Standards et al.,* 2001 BCSC 575). Although Erskine sought an oral hearing, I conclude that this appeal can be adjudicated on the section 112(5) "record", the written submissions of the parties and the Reasons for the Determination.

ISSUES

7. Did the delegate fail to observe the principles of natural justice in not excluding the complainants from the hearing room during the hearing of each other's evidence?

8. Is there new and relevant evidence that was not available at the time the Determination was being made?

FACTS

9. It appears from the Determination that there was no dispute that Mr. Erskine had no issues with respect to the performance of the complainants before their last day of work. It also appears there was no dispute that, before the last day of their work at Erskine, there had been no yelling or shouting incidents between the parties and that neither complainant had either sworn at Mr. Erskine. The evidence before the delegate indicates that at either the end of September or the beginning of October there was a heated conversation between Mr. Erskine and the complainants at the workplace involving a dispute over their pay. As noted above, the issue before the delegate was whether the complainants were fired, thus entitling them to compensation for length of service, or whether they had quit, in which case they were not entitled to compensation.

10. The delegate heard evidence from Mr. Erskine, two witnesses on Erskine's behalf as well as the complainants. There was evidence that the dispute ended when Mr. Erskine told the complainants to give him back their fuel cards and get off the property. At no time did Mr. Erskine tell either of the complainants that they were fired. He also did not ask them whether they had quit.

11. The Determination indicates that a witness for Erskine, Ms. Kinski, testified that she overheard Mr. Schulz say "you can take your job and shove it". Erskine's bookkeeper gave evidence that she was aware Mr. LaBounty had other employment as of October 11, 2006. She also said that on October 11, 2006, Mr. LaBounty signed a document acknowledging that he had received his overtime wages. A third witness for Erskine, Mr. Urquhart, acknowledged that he spoke to Mr. LaBounty in October about taking a part time job with him but he could not recall exactly what date that was. Mr. Urquhart also testified that Mr. Erskine told him that Mr. LaBounty had quit his job.

12. Mr. LaBounty's evidence was that he did not understand deductions from his paycheque and that, after discussing the situation with Mr. Schultz, they decided to speak to Mr. Erskine. He testified that Mr. Erskine said "you quit" to which he replied "no", after which Mr. Erskine told him to return his fuel card and get off the property. He acknowledged that he swore at Mr. Erskine but only after Mr. Erskine had sworn at him. He denied calling Mr. Erskine or the bookkeeper any names and did not know why he had been fired. He said that the last day he worked was on September 29, 2006 and that he began working for another employer on October 10, 2006. He said that he signed a note acknowledging receipt of overtime pay only.

13. Mr. Schulz's evidence was that Mr. LaBounty called him about a problem with his paycheque and together with Mr. LaBounty he went to see Mr. Erskine. He also said that Mr. Erskine asked him whether he quit his job, to which he replied "no, but we have a problem we need to discuss". Mr. Erskine then asked Mr. Schulz and Mr. LaBounty for their fuel cards. When Mr. Schulz asked Mr. Erskine whether he wanted to talk about the situation, Mr. Erskine replied that he didn't and asked them to get off the property. There was a further conversation about a taped conversation about missing money orders before

the complainants drove away. Mr. Schulz acknowledged that he did not report for work after the incident because Mr. Erskine had told him that he quit and thrown him off the property.

14. Erskine's counsel argued that the complainants had quit their jobs, relying on four Tribunal decisions (*Gutierrez* (BC EST #D108/05) *Clough* (BC EST #D218/96) *Change* (BC EST #D244/97) and *Harron* (BC EST #D402/97). Counsel contended that the complainants' actions demonstrated that they quit. She said that the date of the incident coincided with the date on Mr. Schulz' Record of Employment (ROE). Mr. Labounty had already found alternative employment by that date.

15. Mr. LaBounty contended that he had not quit but had been fired when Mr. Erskine asked him for his fuel card back and kicked him off the property. He argued that if Mr. Erskine had not fired him why would he not have called him that night to dispatch him to his worksite the following day. He argued that it would have made no sense for him to quit his job to work for another employer for lower wages and no benefits.

16. The delegate considered the test set out in *Zoltan Kiss* (BC EST #D091/96) to assess whether the complainants quit or were fired:

> The right to quit is personal to the employee and there must be clear and unequivocal facts to support a conclusion that this right has been voluntarily exercised by the employee involved. There is both a subjective and objective element to a quit; subjectively, the employee must form the intent to quit employment; objectively, the employee must carry out an act inconsistent with his or her employment.

17. The delegate preferred the complainants' evidence to that of Mr. Erskine. He found that they had a clear recollection of the events of October 2, whereas Mr. Erskine's recall was "strained" and "at times he could not recall what was said or whether the statement was said by Schulz or LaBounty". He noted that Mr. Erskine did not recall what date the incident occurred. The delegate found that date to be October 2, 2006 based on the ROE issued to Mr. Schulz on October 6. The delegate placed little weight on Ms. Kinski's evidence because even Mr. Erskine had not heard the statement "you can take this job and shove it" and he was standing next to Mr. Schulz.

18. The delegate found Mr. Urquhart's evidence to be of little assistance in determining whether the complainants quit or were fired.

19. Overall, the delegate found the evidence of the complainants to be clear and to have the ring of truth. He assessed their version of events against that of Mr. Erskine and found it to be more plausible.

20. The delegate found no subjective evidence to support Mr. Erskine's contention that the complainants had formed the intention to quit. Therefore, he concluded that he did not have to address the objective portion of the test. He found that neither complainant had said that they quit and that Mr. Erskine terminated their employment when he took away their fuel cards, told them to get off his property and did not call them again to dispatch them to any further jobs.

21. The delegate concluded that the complainants were entitled to compensation for length of service.

ARGUMENT AND ANALYSIS

22. 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

23. The burden of establishing the grounds for an appeal rests with an Appellant. Erskine must provide persuasive and compelling evidence that the delegate failed to observe the principles of natural justice. A disagreement with the result, in and of itself, is not a ground of appeal. Furthermore, an appeal is not an opportunity to re-argue a case that has been advanced before the delegate.

24. The Tribunal must defer to the factual findings of a delegate unless the appellant can demonstrate that the delegate made a palpable or overriding error.

Natural Justice

25. Principles of natural justice are, in essence, procedural rights that ensure that parties know the case being made against them, the opportunity to reply, and the right to have their case heard by an impartial decision maker.

26. The principles include a requirement that decision makers must base their decisions, and be seen to be basing their decisions, on nothing but admissible evidence.

27. Mr. Erskine says that the delegate failed to observe the principles of natural justice by allowing the complainants to sit through each others' evidence while denying his witnesses the opportunity to sit through the evidence of other witnesses. This, he says, gave the complainants an unfair advantage.

28. The delegate heard the two complaints as one because they were fired at the same time. The complainants were parties in their own right and as such, were entitled to be in the hearing room while the delegate heard the employer's evidence. While there is no doubt they were witnesses to each other's complaint, Erskine was represented by counsel and there is nothing in the record that indicates that counsel objected to the delegate's method of proceeding. Furthermore, Erskine's counsel also had the ability to question the complainants about the possibility they had "tailored" their evidence. It does not appear that was ever suggested to them. Therefore, even if there was an "unfair advantage" as Mr. Erskine characterized it, his counsel accepted the delegate's method of proceeding, a procedure the employer cannot now take issue with.

29. I find no basis for this ground of appeal.

New Evidence

30. 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.

31. Mr. Erskine enclosed a copy of telephone records from October 2, 2006 which he suggests disproves the statement made by Mr. Schulz at the hearing that the employer did not call him the day he left the job site. This is evidence that was available during the hearing and ought to have been entered into evidence if it was considered relevant at the time. On that basis alone I find the document fails to meet the new evidence test. I also find the new evidence to be of no probative value. Evidence of an attempted phone call does not go to the issue of whether the complainants were fired or quit.

32. Mr. Erskine also says "it is my belief that Owen LaBounty did in fact obtain his employment with Fast Freight prior to October 2, 2006 and had planned to leave his employment with Bob Erskine Trucking". Mr. Erskine's belief is not evidence nor does it constitute a ground of appeal.

33. Mr. Erskine makes other assertions about a tape recording which, in my view, are not relevant to the issue before the delegate. However, even if a tape recorded discussion between Mr. LaBounty and Erskine's bookkeeper about a motor home could be found to be relevant to the issue of whether the complainants quit or were fired, in the absence of any evidence about the making of the tape, including the date it was made and any submissions as to why it was not presented at the hearing, I decline to conclude that it meets the "new evidence" test.

34. The appeal is denied.

ORDER

35. I Order, pursuant to Section 115 of the Act, that the Determination, dated September 28, 2007, be confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal