Employment Standards TRIBUNAL

An appeal

- by -

Olympic Motors (WC) IV Corporation carrying on business as Kia Vancouver ("Kia")

- 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: Shafik Bhalloo

FILE No.: 2016A/157

DATE OF DECISION: January 4, 2017

DECISION

SUBMISSIONS

Brandon Wiebe	counsel for Olympic Motors (WC) IV Corporation carrying on business as Kia Vancouver

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), Olympic Motors (WC) IV Corporation carrying on business as Kia Vancouver ("Kia") has filed an appeal of the Determination issued by a delegate of the Director of Employment Standards (the "Director") on September 30, 2016.

2. The Determination found that Kia had contravened sections 18 (wages) and 63 (compensation for length of service) of the *Act* and section 46 (production of records) of the *Employment Standards Regulation* ("*Regulation*") in respect of the employment of Joseph Frye ("Mr. Frye") and ordered Kia to pay Mr. Frye wages in the amount of $7,948.29 including accrued interest and to pay administrative penalties in the amount of $1,500.00.

3. Kia's appeal alleges that the Director erred in law in making the Determination and requests the Tribunal to "rescind" or cancel the Determination. It is noteworthy that counsel's appeal submissions dispute only the Director's finding of contravention of section 63 of the *Act* by Kia and do not challenge the Director's other findings. More specifically, counsel's submissions do not challenge the Director's findings that Kia contravened sections 18 of the *Act* and 46 of the *Regulation*.

4. In correspondence dated November 14, 2016, the Tribunal notified the parties, among other things, that no submissions were being sought from any of them pending a review of the appeal by the Tribunal and that following such a review all, or part, of the appeal might be dismissed.

5. The section 112(5) "record" (the "Record") was provided to the Tribunal by the Director on November 25, 2016, and a copy of the Record was delivered to Kia, who was given the opportunity to object to its completeness. In correspondence dated December 13, 2016, Kia's counsel advised that Kia has no objection to the completeness of the record. Accordingly, the Tribunal accepts it as complete.

6. Kia's counsel has requested an oral hearing. I have reviewed the file and considered counsel's request. As credibility is not essential to the disposition of this appeal and no oral evidence is otherwise required, I have concluded that this case is appropriate to consider under section 114 of the *Act*. Accordingly, I will assess the appeal based solely on the Determination, the Appeal and written submissions of Kia and my review of the Record that was before the Director when the Determination was being made. Under section 114(1) of the *Act*, the Tribunal has the discretion to dismiss all or part of the appeal without a hearing of any kind, for any of the reasons listed in that subsection. If satisfied the appeal or part of it has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, the Director and Mr. Frye will be invited to file further submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1) of the *Act*, it will be dismissed.

ISSUE

7. The issue to be considered at this stage of the proceeding is whether there is reasonable prospect that Kia's appeal can succeed.

THE FACTS AND FINDINGS OF THE DIRECTOR

8. As the appeal is primarily challenging the Director's finding that Kia contravened section 63 of the *Act*, I will only refer to those facts presented by the parties at the Hearing and noted in the Determination that are *relevant* to the outcome of the appeal.

9. Kia is a company that was incorporated under the laws of British Columbia on January 17, 2005, and operates a car dealership.

10. Kia employed Mr. Frye as a business manager from May 11, 2015, to January 16, 2016.

11. On February 26, 2016, Mr. Frye filed a complaint against Kia under section 74 of the *Act* alleging that the latter contravened the *Act* by failing to pay him all wages (the "Complaint")

12. The delegate of the Director conducted a hearing into Mr. Frye's Complaint on May 26, 2016 (the "Hearing").

13. The Hearing was attended by Barry Horn, Kia's Managing Director – West Coast Operations ("Mr. Horn) and by Mr. Frye on his own behalf.

14. Mr. Frye testified at the Hearing that he never quit his employment with Kia but in his heated conversation, on January 16, 2016, with Mr. Horn pertaining to a 2014 Kia Optima car he was provided to drive that had suffered an accident, the Employer told him aggressively to leave. Mr. Frye interpreted the Employer's words to mean that he had been terminated.

15. Mr. Horn, on the other hand, testified that he never fired Mr. Frye and understood Mr. Frye's actions, specifically, walking out on Kia and not returning to work, to mean he quit his job.

16. Mr. Horn confirmed that his verbal discussion with Mr. Frye pertaining to the vehicle accident was indeed heated and he did not deny that he told Mr. Frye to leave his office during this discussion.

17. In the "**FINDINGS AND ANALYSIS**" section of the Determination, the delegate of the Director explains that section 63 of the *Act* establishes a liability on an employer to provide an employee with compensation for length of service upon termination and under subsection (3) the employer is discharged from that liability if the employer can show that the employee was given proper written notice of termination or equivalent wages, or a combination of both, or if the employee quit, retired, or was terminated for cause.

18. The delegate then discusses that the onus is on the Employer, Kia, to establish Mr. Frye quit his employment. He also explains the test for determining whether an employee quit his employment is delineated in *Burnaby Select Taxi Ltd.* (BC EST # D091/96). He states that the right to quit is personal to the employee and there must be clear and unequivocal facts to support the conclusion that this right has been voluntarily exercised by the employee. The legal test for establishing when an employee can be determined to have quit his employment involves both a subjective and an objective element. Subjectively, the employee must form an

intention to quit employment and, objectively he must carry out an act inconsistent with his continued employment.

19. In concluding that Kia failed to discharge its burden to establish Mr. Frye quit, the delegate reasons as follows:

> I have considered the totality of the evidence and find insufficient evidence to show the Complainant quit or was otherwise terminated with just cause as a result of the verbal disagreement on his final day. There is no evidence to indicate that Mr. Frye formed the intent to quit and carried out an action inconsistent with his continued employment. The evidence indicates that there was a heated verbal interaction between Mr. Horn and Mr. Frye which resulted in Mr. Frye being told to leave which Mr. Frye understood to mean his employment was terminated by the employer. The evidence was that Mr. Horn was upset with the Complainant around a car accident that occurred 2–3 months earlier and confronted him about reimbursement. In the course of this dispute, Mr. Horn swore at the Complainant and instructed him to leave the premises. Mr. Horn's position that he understood Mr. Frye's actions of leaving and not returning to Kia Vancouver to mean he had quit his employment are not sufficient for me to conclude no compensation for length of service is owed. There is no evidence to indicate the employer made any concerted efforts to contact Mr. Frye and confirm the status of the employment relationship following the meeting. Accordingly, the employer has not met the burden of establishing it has discharged the liability to pay compensation for length of service to Mr. Frye.

APPEAL SUBMISSIONS OF KIA

20. In his written submissions on appeal, counsel for Kia advances the following three arguments supplemented with the Statutory Declaration of Mr. Horn purportedly containing the evidence he provided to the delegate at the Hearing:

i. The delegate erred in law by unreasonably concluding that Kia terminated Mr. Frye's employment;

ii. The delegate misapplied section 63 of the *Act* by failing to consider whether Mr. Frye had abandoned his employment; and

iii. Kia had cause to terminate Mr. Frye's employment.

21. With respect to the first argument, counsel submits that at the Hearing, the delegate considered if Kia had established whether Mr. Fry had quit his employment and that while the delegate delineated the applicable test for quitting that involves both a subjective and an objective element, counsel submits that, with regard to the subjective element, the delegate erred in concluding that there was no or insufficient evidence to indicate that Mr. Frye formed the intent to quit and carried out an action inconsistent with his employment. Counsel goes on to explain more particularly as follows:

> Kia Vancouver submits that this finding of fact is not supported by the evidence. Mr. Frye was in a meeting with Mr. Horn. There was a dispute about who should pay for the damages to a company car that had been in Mr. Frye's control. The meeting concluded with Mr. Frye being told to leave the office. After that, he left the office, and left the store during business hours, and never returned. In effect, Mr. Frye abandoned his employment. The objective facts can be used to infer Mr. Frye's subjective intent (see *Danroth v Farrow Holdings Ltd.,* 2005 BCCA 593 at paragraph 8 where the Court of Appeal states that an intention to resign may arise from an employee's conduct). By failing to remain at work and by failing to return to work the next day and then failing to dispute the fact that his employer had entered Code E: Quit on his ROE, The objective facts all point to the result that Mr. Frye either abandoned employment

> or quit his employment. Mr. Frye's statement that he never intended to quit at the hearing must be measured against the objective facts surrounding his abandonment of employment.
>
> Mr. Frye's assertion that he never intended to quit might be more persuasive if he in fact had been told to leave the premises of Kia Vancouver. However, such as finding is not a parent in the parties' summaries of evidence.
>
> When making his findings of fact and applying these to the test of whether Mr. Fry had quit his employment, the Delegate states that Mr. Frye was "instructed… to leave the premises" (Reasons, page R 5, emphasis added).
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> There is nothing in the summary of evidence to support that Mr. Frye was told to leave the premises of Kia Vancouver. Mr. Frye's evidence is that "he was aggressively told to leave" (Reasons, page R 3). Mr. Horn's evidence is that he "does not deny Mr. Frye was told to leave his office" (Reasons, page R 4, emphasis added).
>
> Further, Mr. Horn's evidence is that he told the delegate at the hearing that he did not tell Mr. Frye to leave the office, but rather, at the conclusion of the meeting, Mr. Frye stood up over his desk in an aggressive manner and told Mr. Horn "Fuck you, I'm out of here, I'm gone" (Barry Horn Statutory Declaration, paragraph 5(i)).
>
> Based on the foregoing, Kia Vancouver submits that the Delegates finding that Mr. Frye was instructed to leave the premises is not a fact that is reasonably supported by the summary of evidence. Vancouver Kia further submits that the Delegate's conclusion that Mr. Frye's employment was terminated by Kia Vancouver is not a conclusion that can be reasonably entertained based on the objective facts set out by the Delegate and the parties' Summary of Evidence.

22. In the result, counsel submits that the Tribunal should substitute a finding that Mr. Frye either abandoned or quit his employment with Kia on January 16, 2016.

23. With respect to the second argument that the delegate misapplied section 63 of the *Act* by failing to consider whether Mr. Frye had abandoned his employment, counsel submits:

> ... the Delegate listed the parties' evidence with regard to Mr. Frye's departure from Kia Vancouver as Mr. Frye stating he was told to leave and Mr. Horn denying that he had told Mr. Frye to leave his office. There is nothing in the summary of evidence that suggests Mr. Frye was told to leave the premises of Kia Vancouver.
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> Mr. Horn's evidence was that he understood Mr. Frye's actions, namely, "walking out on Kia Vancouver and not coming back to work, to mean he quit his job" (Reasons, page R3). Given this evidence, it was clear that Kia Vancouver's position at the hearing was that Mr. Frye was not entitled to statutory termination pay because either (a) he had abandoned his employment; or (b) he had quit his employment. Necessarily, given the facts, Kia Vancouver's position that Mr. Frye quit his employment was based on the position that Mr. Frye had abandoned his employment.
>
> In every contract of employment, there is an implied term that an employee must attend work. Whether or not an employee has abandoned his or her employment is considered objectively, i.e. would a reasonable person have a understood from the employee's words and actions, that he or she had abandoned the contract of employment (*Pereira v. The Business Depot Ltd.*, 2011 BCCA 361 at paragraph 47).

24. Based on the forgoing reasons, counsel argues that a reasonable person would conclude that Mr. Frye had abandoned his employment when he left Mr. Horn's office and then left Kia and failed to return.

25. Finally, counsel contends that Kia also had just cause to terminate Mr. Frye's employment because he failed to advise the Dealer Principal of the damage caused to Kia's car by his son. Counsel states that the accident

occurred in October 2015 but Kia did not learn of the accident until January 2016 when the vehicle was in the body shop and Kia received a call from the body shop looking for a purchase order presumably for repairs to be performed on the car. In the ensuing meeting between Mr. Horn and Mr. Frye, counsel states (relying upon paragraph 5(i) of the Statutory Declaration of Mr. Horn in the Appeal) "Mr. Frye was grossly insubordinate to Mr. Horn, standing over Mr. Horn's desk in an aggressive manner and telling the latter "Fuck you, I'm out of here, I'm gone" after Mr. Horn asked him to pay for the damage to the car caused by his son."

26. Counsel notes that although cause was not at issue in the hearing before the delegate, it is or should be a consideration with respect to the issue of Mr. Frye's abandonment or quitting of employment.

27. Counsel concludes his submissions by asking the Tribunal, in the circumstances, to rescind the administrative penalty imposed on Kia by the Determination for contravention of section 63 of the *Act*.

ANALYSIS

28. Section 112(1) of the *Act* provides that a person may appeal the 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;
>
> (c) evidence has become available that was not available at the time the determination was being made.

29. The burden is on the appellant to persuade the Tribunal that there is an error in the Determination on one of the statutory grounds listed in section 112(1) above.

30. As indicated above, Kia's appeal is based on the "error of law" ground of appeal in section 112(1)(a).

31. In *Gemex Developments Corp. v. British Columbia (Assessor) of Area #12 – Coquitlam*, [1998] B.C.J. No. 2275, the BC Court of Appeal defined error of law inclusively as follows:

> 1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
> 2. a misapplication of an applicable principle of general law;
> 3. acting without any evidence;
> 4. acting on a view of the facts which could not reasonably be entertained; and
> 5. adopting a method of assessment which is wrong in principle.

32. Counsel's first argument, under error of law ground of appeal, is that the delegate acted on a view of facts which cannot reasonably be entertained because his conclusion that Kia terminated Mr. Frye's employment is a conclusion that does not follow from the evidence set out by the delegate in the Determination. More particularly he states the delegate wrongly concluded, with regard to the subjective element of the test for determining whether an employee quit his employment, that there was no evidence to indicate Mr. Frye formed an intent to quit and carried out an action inconsistent with his employment. He goes on to explain that in the heated discussion that took place between Mr. Horn and Mr. Frye in the former's office on January 16, 2016, Mr. Horn told Mr. Frye to leave his *office*. He states, Mr. Horn did not ask Mr. Frye to leave Kia's *premises*. He adds that Mr. Frye's assertion at the Hearing that he never intended to quit might be more

persuasive if he in fact had been told to leave Kia's *premises* but that is not apparent in the parties' evidence summarized in the Determination. He further adds, relying on the Statutory Declaration of Mr. Horn, at the conclusion of Mr. Frye's meeting with Mr. Horn, Mr. Frye stood over Mr. Horn's desk and in an aggressive manner told him "Fuck you, I'm out of here, I'm gone". I note this evidence is not contained in the summary of the parties' evidence in the Determination but something Mr. Horn states in his Statutory Declaration he testified at the Hearing. In the circumstances, counsel argues that the delegate's conclusion or finding of fact, at page R5, that Mr. Frye was instructed to leave the *premises* is not a fact that is reasonably supported by the summary of evidence of the parties in the Determination and the delegate's conclusion that Mr. Frye's employment was terminated by Kia is also not a conclusion that can be reasonably entertained based on the objective facts. Counsel submits the Tribunal, therefore, should substitute a finding that Mr. Frye abandoned or quit his employment with Kia on January 16, 2016.

33. I am not persuaded by Kia that the delegate erred in law and acted on a view of facts which could not be reasonably entertained. While I agree that the summary of Mr. Horn's evidence in the Determination shows, at the Hearing, he testified that on January 16, 2016, he told Mr. Frye to leave his *office,* Mr. Frye's evidence is that he was *aggressively told to leave*. There does not seem to be any mention in the summary of Mr. Frye's evidence that he was asked to leave the *office* or *premises*. Having said this, under the heading **VI. Findings and Analysis** in the Determination, at page R5, paragraph 2, the delegate, on the one hand states "[t]he evidence indicates that there was a heated verbal interaction between Mr. Horn and Mr. Frye which resulted in Mr. Frye being told to *leave* which Mr. Frye understood to mean his employment was terminated by the Employer", in a later sentence, in the same paragraph, the delegate states "[i]n the course of this dispute, Mr. Horn swore at the Complainant and instructed him to *leave the premises" (italics mine)*. I do not think the delegate, by injecting the term *premises* in his analysis, came to the wrong conclusion when assessing Mr. Frye's subjective intention to quit. Subjectively, the facts must point to an intention on the part of Mr. Frye to quit. While it is arguable that Mr. Frye leaving Kia on January 16, 2016, satisfies the objective aspect of the act of quitting, I am not convinced, based on a balance of probabilities, that his leaving was a voluntary act performed with a subjective intention to terminate his own employment. He was confronted by Mr. Horn about the car accident and asked to reimburse Kia for the cost of repairs to the car. The discussion got heated and the delegate notes that "Mr. Horn swore at the Complainant" and, Mr. Frye, (based on the Statutory Declaration of Mr. Horn) also swore at Mr. Horn and he left Kia stating that "I'm out of here, I'm gone". An emotional outburst or things stated in anger over job frustration are not to be taken as really manifesting (subjectively) intention by the employee to sever his employment relationship (See *Re University of Guelph,* (1973) 2 L.A.C. (2d) 348). In the result, I do not find the delegate acted on a view of facts which could not reasonably be entertained in concluding either that Kia failed to establish with sufficient evidence that Mr. Frye quit his employment or that Kia terminated Mr. Frye's employment.

34. I also do not find this to be a case of the delegate misinterpreting or misapplying section 63 of the *Act* as contended by counsel. More particularly, counsel states that the delegate misapplied section 63 of the *Act* by failing to consider whether Mr. Frye had abandoned his employment. Counsel again refers to the evidence of the parties summarized in the Determination and argues that nothing in the summary of evidence suggests that Mr. Frye was told to leave the *premises* by Mr. Horn; he was simply told to leave Mr. Horn's *office*. As Mr. Frye left Mr. Horn's office and he then left the *premises* of Kia and failed to return, counsel argues that a reasonable person would have concluded that Mr. Frye had abandoned his employment. I find that the delegate did indeed consider all the evidence to determine whether Mr. Frye had quit or abandoned his employment and it was open to the delegate, on the evidence, to conclude that Kia failed to establish Mr. Frye quit his employment or abandoned it. As indicated above, while it is arguable that Mr. Frye leaving Kia on January 16, 2016, satisfies the objective aspect of the act of quitting, it should be noted that this act could just as easily be interpreted as an indication that Mr. Frye thought he had been terminated from his employment by Kia when asked by Mr. Horn to *leave*. Further, as indicated above, I am not convinced, based

on my earlier reasons, that Mr. Frye's leaving Kia's premises was a voluntary act performed with a subjective intention to terminate his own employment.

35. Having said this, I also point out that a different delegate or this Tribunal could have made other findings on the evidence and come to a different conclusion on the same facts, but that is not the basis for interfering with the delegate's determination. This Tribunal does not have to agree with delegate's conclusions of fact provided the delegate did not commit an error of law within the meaning of error of law in *Gemex, supra.* I do not find the delegate erred in law here.

36. I also do not find anything turns on the Record of Employment ("ROE") Kia issued to Mr. Frye. Mr. Horn states in his Statutory Declaration that this document was submitted to the Branch prior to the Hearing and it contains "Code E: Quit". Mr. Horn states Mr. Frye did not call him or anyone else at Kia to ask that the ROE be revised nor did Mr. Frye dispute that he had quit his employment. I do not think that a self-serving determination or notation by the employer in the ROE of the employee combined with the employee's inaction to contact his employer to challenge the notation is determinative of whether the employee quit or not. I can surmise many an employee whose employment is severed from their employer in difficult circumstances as in this case where they would be reluctant to contact their employer.

37. Finally, I note that counsel, under the heading **Just Cause** in his appeal submissions, argues that Kia had just cause to terminate Mr. Frye's employment based on his failure to advise the Dealer Principal of the damage caused to the car by his son. He delineates two grounds for alleging just cause, namely, Mr. Frye's failure to comply with Kia's company reporting policy with regard to accidents and his "insubordinate" attitude toward Mr. Horn in the January 2016 meeting. In *Renshaw Travel* (BC EST # D050/08), the Tribunal held that it was a contravention of the appeal provisions of the *Act*, the Tribunal's *Rules of Practice and Procedure* as well as the objectives of the *Act* for a party to raise a new issue on appeal for the first time. An appeal is not a *de novo* hearing; it is not an opportunity for a party with an unfavorable determination at the Employment Standards Branch level, whether after an investigation or a hearing, to raise new issues which the respondent has not had an opportunity to address in earlier proceedings. Therefore, I will not address Kia's allegation of just cause nor any supporting materials and submissions related to this allegation.

38. I also note that while Kia contends, additionally, that the evidence of just cause it is now presenting in the appeal is relevant to the issue of Mr. Frye's abandonment or quitting of his employment, I do not find it so.

39. For all of the above reasons, I find there is no reasonable prospect that this appeal can succeed and I dismiss it.

ORDER

40. Pursuant to section 115 of the *Act*, I confirm the Determination issued on September 30, 2016, and I dismiss this appeal pursuant to section 114(1)(f) of the *Act*.

Shafik Bhalloo
Member
Employment Standards Tribunal