

An appeal

- by -

Kensington Cabinets Ltd.
(“KCL”)

- 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.: 2010A/146

DATE OF DECISION: January 11, 2011

DECISION

SUBMISSIONS

Mark McRae	on behalf of Kensington Cabinets Ltd.
Shawn LaLande	on his own behalf
Megan Roberts	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Kensington Cabinets Ltd., (“KCL”), pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination of the Director of Employment Standards (“the Director”) issued September 8, 2010.
2. Shawn LaLande filed a complaint alleging that KCL had contravened the *Act* by failing to pay him vacation pay and compensation for length of service.
3. A delegate of the Director held a hearing into Mr. LaLande’s complaint on August 30, 2010. KCL was represented by Mr. McRae, its sole Director and Officer, and Carol Minchinton, Mr. McRae’s spouse. Mr. LaLande appeared on his own behalf.
4. Following the hearing, the Director’s delegate determined that KCL had contravened Sections 58 and 63 of the *Act* in failing to pay Mr. LaLande annual vacation pay and compensation for length of service. The delegate determined that Mr. LaLande was entitled to \$3,930.42 in wages and interest. The delegate imposed a \$1,000 penalty on KCL for each of the contraventions, pursuant to section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”).
5. KCL contends that the delegate failed to observe the principles of natural justice in making the Determination. KCL further says that evidence has become available that was not available at the time the Determination was being made and seeks to have the Determination varied.
6. Section 36 of the *Administrative Tribunals Act* (“*ATA*”), which is incorporated into the *Employment Standards Act* (s. 103), and Rule 17 of the Tribunal’s *Rules of Practice 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). This decision is based on the written submissions of the parties.

ISSUES

7. Whether or not the delegate failed to comply with the principles of natural justice.
8. Whether or not there is new and relevant evidence available that was not available at the time the Determination was being made.

FACTS

9. KCL operates a cabinet manufacturing and sales business. Mr. LaLande was employed as KCL's General Manager from October 2007 until his employment was terminated without written notice on February 3, 2010.

Vacation Pay

10. According to the agreement between the parties, Mr. LaLande was entitled to two weeks paid vacation each year. Mr. LaLande claimed that he did not receive all his vacation pay.
11. KCL did not keep a record of Mr. LaLande's vacation days or vacation pay because Mr. LaLande maintained his own time records. KCL contended that Mr. LaLande took all vacation time owed to him when the business was closed over the Christmas holidays.
12. Mr. LaLande did not consider the Christmas holiday period as his vacation time as he often worked in excess of 80 hours per pay period. Although Mr. LaLande did not have any agreement with KCL to bank overtime or take time in lieu, he believes the paid time off during the holiday period was compensation for the additional hours worked.
13. The delegate found that there was no agreement that Mr. LaLande could take time off over Christmas as compensation for additional hours worked.
14. The delegate ultimately determined that Mr. LaLande was entitled to \$1,476.93, or the difference between the statutory minimum payment and the vacation pay KCL paid him.

Compensation for Length of Service

15. KCL began experiencing financial problems in late 2008 which continued through 2009. In December 2009, Mr. LaLande approached KCL with a proposal for financial assistance. Mr. McRae agreed to this proposal and the plan was implemented. Mr. LaLande's employment was terminated in early February for what KCL asserted was just cause. KCL alleged that Mr. LaLande had attempted to "sabotage" the company, and acted in his own interests, rather than the interests of KCL. Mr. LaLande denied the allegations.
16. The delegate found no evidence that Mr. LaLande was attempting to displace Mr. McRae or cheat him out of his business. The delegate dismissed KCL's suggestion that Mr. LaLande had a plan to take over the business or misappropriate KCL's revenues. She noted that Mr. McRae both understood and agreed to the proposal and that it was not until creditor issues surfaced on January 29, 2010, that the agreement fell apart. The delegate found that Mr. LaLande continued to perform his duties and support KCL by making arrangements to advance money to pay suppliers on February 3, 2010, just prior to his termination. She found no evidence Mr. LaLande ever competed with KCL while he was an employee and noted that he did not establish his own business until well after he was terminated. She found no evidence that he used his position with KCL to market his company or obtain customers for it while in the employ of KCL. The delegate concluded that KCL had not satisfied her that it had cause to terminate Mr. LaLande and concluded that he was entitled to two weeks compensation for length of service plus vacation pay on that amount.

ARGUMENT

17. Attached to KCL's appeal is a letter from a fellow employee regarding Mr. LaLande's absence from work during the employee's first week of employment with KCL. KCL states that the delegate did not take these days into account when determining Mr. LaLande's vacation pay. Although Mr. LaLande also objects to the delegate's treatment of his unpaid hours of work, he did not file a separate appeal of the Determination. I also note that, as a manager, he was not entitled to overtime wages under Part 4 of the *Act* in any event.
18. KCL also disputes the delegate's conclusion that Mr. LaLande was not dismissed for cause and thus entitled to compensation for length of service. It submits that Mr. LaLande's actions during the months leading to his termination were a clear attempt to jeopardize the company and immediate termination of his employment was necessary to prevent "irreparable damage" to KCL.
19. The delegate contends that the appeal is without merit, and seeks to have it dismissed. She contends that KCL has not established that the delegate failed to observe the principles of natural justice. She contends that KCL's submissions represent an attempt to re-argue its case on the merits because it disagrees with the findings.
20. The delegate submits that the new evidence appears to be the statement made by Mr. Jones as well as evidence about Mr. LaLande's demeanor and reaction at the time of his termination. The delegate notes that Mr. Jones attended the hearing as KCL's witness and that his evidence was available at the time of the hearing. She says that the Notice of Hearing clearly informed KCL of its responsibility to ensure that any records or evidence they intended to produce or rely on at the hearing had to be submitted to the Branch 14 days prior to the hearing. She submits that the information as to Mr. LaLande's absence from work was available at the time of the hearing and cannot now be considered. The delegate further submits that, even if this "new" evidence were to be considered, KCL has not demonstrated how it would have led her to a different conclusion. She contends that even if Mr. LaLande had taken the days off during the time suggested, there is no indication that this was in fact time for which annual vacation would be paid.

ANALYSIS

21. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
 - the director erred in law;
 - the director failed to observe the principles of natural justice in making the determination; or
 - evidence has become available that was not available at the time the determination was being made.
22. The essence of KCL's appeal is that the Determination is wrong. A disagreement with the result, in and of itself, is not a ground of appeal, nor is an appeal an opportunity to re-argue a case that has been advanced before the delegate. An appellant must show clear and convincing reasons why the Tribunal should interfere with the delegate's decision on one of the three stated grounds of appeal.
23. 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. KCL does not say how it was denied the opportunity to present its case or to respond fully to Mr. LaLande's complaint, and the record does not disclose any basis for this ground of appeal.

24. The Tribunal has adopted the factors set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)* (1998] B.C.J. (C.A.) as reviewable errors of law:
1. A misinterpretation or misapplication of a section of the 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 be reasonably entertained; and
 5. Exercising discretion in a fashion that is wrong in principle
25. 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. I understand KCL's appeal to say that, although the delegate did not err in her factual findings, her conclusion that KCL was not justified in terminating Mr. LaLande's employment for cause was wrong in law. I have considered the appeal on this basis.
26. Section 63 of the *Act* establishes a statutory liability on an employer to pay length of service compensation to an employee on termination of employment. An employer may be discharged from that liability where the employer is able to establish that the employee is dismissed for just cause.
27. Where termination for cause is asserted, the delegate must analyze the conduct of the parties to determine whether the employee, by his behaviour, has undermined or repudiated the employment relationship. Each case must be examined on its own particular facts and circumstances with a view to determining whether the conduct is reconcilable with sustaining the employment relationship.
28. I have reviewed the delegate's lengthy recitation of the facts and arguments and reviewed the record. KCL's appeal is, in essence, an attempt to re-argue the case it made before the delegate.
29. I am not persuaded that the delegate erred in concluding that KCL had failed to substantiate just cause for Mr. LaLande's termination. There is simply no evidence that Mr. LaLande's conduct undermined KCL. In fact, the evidence suggests the opposite. Mr. LaLande voluntarily agreed not to cash several weeks' paycheques in an effort to keep KCL financially viable, even though he had a right to those wages when the cheques were issued. The undisputed evidence is that Mr. LaLande performed his duties for KCL until the day his employment was terminated. Indeed, just before his employment was terminated, Mr. LaLande made arrangements to advance money to pay suppliers on February 3, 2010. In my view, these are not the actions of an employee who is "self-serving" or about to do "irreparable damage" to KCL, as KCL asserts.
30. The relationship between the parties disintegrated after they took steps to establish a new company that would assume the assets of KCL. Whatever Mr. LaLande's conduct in that respect was, the fact is that Mr. McRae was a director, officer and shareholder in the new company. As such, he consented and indeed participated in the new direction. His dispute with Mr. LaLande is largely in relation over his conduct related to that company, not Mr. LaLande's performance as an employee. Mr. LaLande's conduct in relationship to that company is irrelevant to the issue of whether or not KCL had just cause to terminate Mr. LaLande's employment.
31. I dismiss the appeal on this ground.

New Evidence

32. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST # D171/03, 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.
33. Mr. Jones appeared at the hearing and gave evidence on KCL's behalf. The information provided on appeal was well within Mr. Jones' knowledge at the time of the hearing. As such, it does not constitute "new evidence". Furthermore, even had this evidence been presented to the delegate at the hearing, I am not persuaded that it would have led the delegate to a different conclusion on the issue of whether or not Mr. LaLande was entitled to vacation pay.
34. The appeal is dismissed.

ORDER

35. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated September 8, 2010, be confirmed, together with the interest that has accrued since that date.

Carol L. Roberts
Member
Employment Standards Tribunal