Employment Standards TRIBUNAL

An appeal

\- by -

ARA Development Ltd.
("ARA")

\- 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 Nos.: 2007A/145 & 2007A/146

DATE OF DECISION: January 29, 2008

DECISION

SUBMISSIONS

M. C. Stacey	on behalf of ARA Development Ltd.
Lynn Egan	on behalf of the Director of Employment Standards
Erich Jaeger	on his own behalf

OVERVIEW

1. This is an appeal by ARA Development Ltd., ("ARA"), pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued October 18, 2007.

2. Erich Jaeger was employed as a project manager for ARA, the owner/developer of a condominium project, from November 15, 2005 until November 15, 2006. Mr. Jaeger filed a complaint alleging that ARA had contravened the Act in failing to pay him overtime wages, annual vacation pay, compensation for length of service and bonus wages. The vacation pay issue was resolved prior to the hearing.

3. The Director's delegate held a hearing into Mr. Jaeger's complaint on July 23, 2007, at which time Mr. Jaeger introduced into evidence material that ARA had not previously had an opportunity to review. The hearing was continued on September 17, 2007, at which time Mr. Jaeger withdrew his claims for overtime and compensation for length of service. The sole issue before the delegate was whether Mr. Jaeger was entitled to bonus wages.

4. The delegate determined that ARA had contravened Sections 18 and 58 of the *Employment Standards Act* in failing to pay Mr. Jaeger wages and annual vacation pay on those wages. She concluded that Mr. Jaeger was entitled to wages and interest in the total amount of $8,234.34. The delegate also imposed a $500 penalty on ARA for the contravention of the *Act*, pursuant to section 29(1) of the *Employment Standards Regulation*.

5. ARA contends that the delegate erred in law in finding a valid written or oral contract for the payment of a completion bonus to Mr. Jaeger. ARA also sought a suspension of the Determination pursuant to Section 113 (2) of the *Act*.

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 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). Although ARA sought an oral hearing, I conclude that this appeal can be adjudicated on the written submissions of the parties. Although the issue turns solely on the issue of the credibility of the parties, I have determined that the appropriate remedy in such circumstances is to send the matter back to the delegate for rehearing. This appeal is decided on the section 112(5) "record", the submissions of the parties, and the Reasons for the Determination.

ISSUE

7. Did the delegate err in preferring Mr. Jaeger's evidence over that of Mr. Marzara, ARA's representative, in finding that there was a valid contract to pay Mr. Jaeger a bonus?

FACTS AND ARGUMENT

8. The facts as determined by the delegate are as follows.

9. Mid way through the development of a condominium project, ARA's sole director, Esmaeil Marzara, terminated the employment of the project manager. According to Mr. Marzara, the project was behind schedule. Mr. Jaeger was the successful applicant for the new project manager's position. The previous project manager was paid $2,500 per month. Mr. Marzara offered Mr. Jaeger $4,000 per month, Mr. Jaeger sought a salary of $6,500. The parties agreed that Mr. Jaeger would be paid $5,000 per month and agreed on a six month project completion deadline. Mr. Jaeger began work on November 15, 2005. An occupancy permit was issued for the project on November 2, 2006. Mr. Jaeger's employment was terminated November 15, 2006.

10. At the hearing, Mr. Jaeger testified that Mr. Marzara did not agree to his salary request of $6,500 per month, offering instead a $7,500 bonus if he continued to work to the end of the project. According to Mr. Jaeger, the bonus represented six months' wages at a rate of $1,500 per month. He contended he was entitled to the bonus as he had met the terms of the agreement.

11. Mr. Marzara denied that he agreed to pay Mr. Jaeger a bonus. His evidence was that he may have suggested to Mr. Jaeger that if the project was finished in six months he would "buy him a plane ticket". Mr. Marzara testified that ARA had a formal employment contract which Mr. Jaeger refused to sign.

12. Mr. Jaeger disputed Mr. Marzara's evidence, testifying that it was he who asked for an employment contract. When no contract was presented, Mr. Jaeger said that he had his lawyer prepare a written employment agreement setting out his rate of pay and bonus. The letter read as follows:

> *November 23, 2005*
>
> *ARA Development Ltd.*
> *#600 – 837 West Hastings Street*
> *Vancouver, B.C. V6C 3N5*
>
> *Attention: Essy Marzara, B.B.A.*
> *President, CEO*
>
> *Dear Sirs;*
>
> *This letter will serve to document the employment agreement between ARA Development Ltd. and Erich Jaeger.*
>
> *Effective November 16, 2005, ARA Development Ltd. agrees to employ Erich Jaeger as a project manager at $5,000 per month payable bi-monthly. In addition, upon issuance of an occupancy permit for the Windgrove Apartment Project at 1642-56th Street in Delta, B.C. ARA Development Ltd. agrees to pay Erich Jaeger a bonus of $7,500.00.*

ARA Development Ltd. also agrees to pay Erich Jaeger a gas allowance of $350.00 per month.

Please sign below indicating your acceptance of the terms and conditions of this agreement.

Yours truly,

Erich Jaeger.

On behalf of ARA Development Ltd., I hereby agree with the terms and conditions of the employment agreement with Erich Jaeger.

ARA DEVELOPMENT Ltd.

Essy Marzara, B.B.A.
President, CEO

13. On examination by ARA's counsel, Mr. Jaeger conceded that the agreement was prepared by his accountant and reviewed by his lawyer.

14. Mr. Jaeger testified that he met Mr. Marzara on November 16, 2006 and each signed the employment agreement in each others' presence. On examination by ARA's counsel, Mr. Jaeger said that the meeting occurred on November 23, 2006.

15. Mr. Marzara's signature appears in red ink, Mr. Jaeger's appeared in blue. Mr. Marzara claimed that the document was fraudulent. While conceding that the signature was his, he contended that it was computer generated. When questioned by ARA's counsel, Mr. Jaeger testified that one of ARA's employees took the document and added the last paragraph, including space for Mr. Marzara's signature. When counsel questioned Mr. Jaeger about the identical print and margins, Mr. Jaeger testified that the employee actually "reprocessed" the entire document in the computer and returned two copies to Mr. Jaeger and Mr. Marzara for their signatures. He asserted that they each signed both copies and retained one.

16. Mr. Marzara testified that he suspected a former office employee of preparing the fraudulent document, but he did not identify that employee. He acknowledged that office staff had access to his computer generated signature. He testified that the way his name was typed on the document was inconsistent with the way his correspondence was prepared. He testified that he never used his degree (B.B.A.) on correspondence, that he rarely used the terms "President" or "CEO" and that he never used the term "President, CEO" together.

17. The delegate stated that, to the extent necessary, she relied on the test of credibility set out in *Faryna v.* Chorney ((1952) 2 D.L.R. 354, B.C.C.A.).

18. She noted that Mr. Jaeger's calculations were in error; that if $7,500 was to represent additional salary for six months, the monthly rate was $1,250 not the $1,500 asserted by Mr. Jaeger.

19. The delegate found it "strange" that Mr. Marzara had not been more forceful in getting Mr. Jaeger to enter into an employment contract if that was his usual practise. She also stated that she would have found it "helpful" if Mr. Marzara had produced an example of the types of contracts he entered into at the hearing to support his assertion.

20. The delegate noted that Mr. Marzara's business card identified him as "Essy Marzara, B.B.A., President, C.E.O." which was identical to the style on the agreement.

21. The delegate did not accept Mr. Marzara's evidence that the document was fraudulent:

> *I do not accept Marzara's story that Jaeger's employment agreement document is fraudulent. If his story is correct, Marzara has had a copy of this document in his possession for a very long time in preparation for this hearing and it just does not seem plausible that he would not use more diligence in investigating his employees using his computer-generated signature without authorization.*
>
> *My examination of the document in question leads me to conclude Marzara's signature is authentic and is not computer generated. It would be rather absurd for a computer generated signature to be processed in red ink and, more compellingly, the signature shows normal pressure points of light and dark areas, ruling out the probability of it being computer generated. Therefore, based on a balance of probabilities, I find Marzara did sign the employment agreement.*

22. The delegate cited the Tribunal's decision in *Werachi Laoha* (BC EST #D370/01) in setting out other principles to consider in assessing the credibility of the parties. She identified those to include the manner of the witnesses, their ability to recall details, the consistency of what is said, the reasonableness of the story, the presence or absence of bias, interest or other motive and the capacity to know. She concluded:

> *Although Jaeger's recount of the creation of the employment agreement was rather shaky and he appeared pressured under cross-examination, I find the primary details to have a ring of truth. Jaeger wanted to memorialize his verbal employment contract to writing. He prepared, or had prepared on his behalf, his understanding of the terms regarding his salary and bonus wages. He took that document to his employer, either with the last paragraph already written on the document or the document was re-processed in ARA's office with the last paragraph being added at that time. If Marzara is correct that he does not sign correspondence in the style suggested by his business card, it is more probable than not that Jaeger or his accountant wrote the final paragraph and typed Marzara's name based on the information from his business card. I find that both Jaeger and Marzara signed the employment agreement in the presence of each other. Jaeger signed with blue ink and Marzara signed with red ink.*

23. The delegate decided that, even without the employment agreement, she would find Mr. Jaeger entitled to a $7,500 bonus upon completion of the project:

> *I accept his testimony that during salary negotiations the parties agreed on a salary plus a bonus upon completion if Jaeger remained until the end of the project. ARA had already suffered production delays caused (presumably) by the poor management of the former project manager and it is clear Marzara wanted some stability and an early completion date. I find Marzara offered this bonus as an incentive to achieve these goals.*

24. The delegate concluded that Mr. Jaeger was entitled to the bonus as wages under the *Act*. She also determined that he was entitled to vacation pay on those wages.

25. Counsel for ARA submits that the delegate erred in applying a purely objective test in assessing the parties' credibility and in preferring Mr. Jaeger's evidence over that of Mr. Marzara.

26. Mr. Stacey relies on *Gordon v. McDonald* ([2005], B.C.J. No. 2721, 2005 BCCA 621) in which the Court of Appeal distinguished *Faryna* in circumstances where there was conflicting direct evidence between the parties but neither could put forth much circumstantial evidence in their favour. Specifically, counsel submits that the delegate failed to assess either the demeanour of the parties or other factors relevant to Mr. Jaeger's credibility, including four internal inconsistencies in his evidence and two contradictory statements. Mr. Stacey also argues that the delegate undertook no detailed analysis of the evidence of the parties except to say that she preferred Mr. Jaeger's evidence and gave no reason for her negative assessment of Mr. Marzara's credibility.

27. Counsel further submits that the delegate erred in law by drawing a conclusion on the authenticity of the signature on the letter based on her own analysis of ink and type and in the absence of any expert evidence. Counsel relies on *Eastern Townships Investment Co. V. McLennan*, [1920] B.C.J. No. 1 (S.C. & C.A.) in contending that even expert evidence of handwriting analysis should be viewed with circumspection.

28. Finally, and in the alternative, Mr. Stacey contends that the delegate acted on a view of the facts which could not be reasonably entertained and for which there was no evidence in support. He relies on *R. v. Cabral*, ([2002] B.C.J. No. 646, 2002 BCCA 154) in arguing that, where a decision maker's assessment of credibility does not take accurate account of the evidence, the judgement will be unreasonable and not supported by the evidence. He says that the delegate's finding that Mr. Jaeger took the employment contract to Mr. Marzara with the last paragraph already written is unsupported by the evidence and in conflict with Mr. Jaeger's evidence. Similarly, he contends that the delegate's conclusion that Mr. Jaeger or his accountant wrote the final paragraph and typed Mr. Marzara's name based on the information on his business card to be unsupported by the evidence, as was her conclusion that the document was reprocessed in ARA's office.

29. ARA's counsel also says that the delegate erred in law finding that there was an oral contract without any corroborative proof. He submits that the evidence before the delegate did not support a conclusion that ARA entered into a contract at a rate which was double the salary of its previous project manager, in addition to paying a $7,500 bonus.

30. ARA seeks an oral hearing because, it contends, that is the only way to ensure each party can state its case fairly on appeal.

31. The delegate submitted the record that was before her at the hearing.

ANALYSIS

32. 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

33. 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

34. The issue before the delegate turned on the credibility of the parties and one allegedly forged document. The delegate was obliged to apply a "clear and credible" standard of proof of credibility and reliability on a balance of probabilities.

35. The Tribunal is limited in its review of Determinations. Those limitations are of particular significance in cases that turn on issues of credibility because credibility is a matter particularly within the purview of the delegate, who has heard the evidence first hand and observed the parties and any witnesses. (see *Volzhenin v. Haile* ([2007] B.C.J. No. 1209, 2007 BCCA 317) As a result, the delegate's analysis and reasons for preferring the evidence of one party over another is one which must be carried out diligently and carefully. Further, the delegate's reasons must be sufficiently adequate to enable the Tribunal to determine whether the assessment was sound.

36. There was a direct conflict in the evidence of the parties. The leading decision on determining the credibility of witnesses is *Faryna v. Chorny,* [1952] 2 D.L.R. 354 (B.C.C.A.):

> The real truth of the story of a witness…must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. (at p. 356-7)

37. There are other factors which should be weighed in assessing the credibility of a party or witness: their motives, their powers of observation, their relationship to the parties, the internal consistency of their evidence, and inconsistencies and contradictions in relation to other witnesses' evidence. Furthermore, not only must the credibility of the witness be assessed, but the reliability of the evidence must also be analyzed. In other words, the oral evidence of the parties must be tested in light of all the other evidence.

38. The delegate gave no reason why she rejected Mr. Marzara's evidence or why she preferred Mr. Jaeger's evidence either with respect to either the making of the document or the oral agreement. Although the delegate noted several inconsistencies in Mr. Jaeger's evidence, she does not say how this affected his credibility, if at all. She found his "recount of the creation of the employment agreement was rather shaky and he appeared pressured under cross-examination" but concluded, nevertheless, that the primary details had "the ring of truth". The delegate identified no inconsistencies in Mr. Marzara's evidence and made no comments at all on his demeanour. The delegate's conclusions on Mr. Marzara's evidence appeared to rest not on his credibility but on her own analysis of the allegedly fraudulent document.

39. Although the delegate undertook an analysis of the other evidence, her conclusions were based on incomplete or a mistaken view of the facts. For example, although the delegate commented negatively on Mr. Marzara's failure to investigate the "rogue" employee who allegedly used his computer generated signature without authorization, she does not apply the same standard with Mr. Jaeger, who presumably could have obtained the evidence of the accountant who allegedly prepared the document in the first instance. She also apparently drew negative inferences from Mr. Marzara's failure to bring signed examples of his standard employment contracts to the hearing, although she did not explicitly say so.

40. Furthermore, although the delegate cites factors in assessing credibility outlined in *Werachi Laoha*, she does not assess the evidence in light of these factors. The delegate did not assess the motives of the parties. She does not assess Mr. Jaeger's assertion that he was to obtain a six month bonus at $1,500 per month when his math demonstrated the monthly amount was calculated incorrectly or why the bonus represented six month wages rather than, for example, one year. Nor does she assess the plausibility that Mr. Marzara would pay a $7,500 bonus in addition to double the monthly wage of the previous project manager when the project took six months longer to complete than the parties agreed upon.

41. The delegate also drew conclusions from her own analysis of the handwriting. While I agree that it is unusual to have computer generated signatures generated in red ink, she has no expertise in handwriting analysis that would enable her to conclude that Mr. Marzara signed the document. I find that she erred in drawing conclusions in this way. Although the kind of ink used may be a factor to consider, along with other factors, in arriving at her conclusion, that conclusion would have carried more weight had she, for example, heard from members of Mr. Marzara's staff who had responsibility to authorize his computer generated signature.

42. Furthermore, her conclusion that it was "more probable than not that Jaeger or his accountant wrote the final paragraph and typed Marzara's name based on the information from his business card" is not based on the evidence of either of the parties.

43. I find that the delegate's reasons for her conclusion inadequate. I conclude that she erred in law by drawing unreasonable conclusions, failing to properly analyze the evidence and making a manifest error.

44. Having arrived at this conclusion however, I have decided that this is not an appropriate case for me to hold an oral hearing. To do so would not be any more efficient than referring the matter back to the Director. I therefore order that the Determination be cancelled and the matter be referred back to the Director for a new hearing. As there would be a reasonable apprehension of bias if the delegate were asked to rehear matters on which she has already made a decision, the most appropriate remedy is to order a new hearing before a different delegate. (see *Director of Employment Standards (re: Ningfei Zhang)* BC EST #RD 635/01)

45. In light of my conclusion on the merits of the appeal, I need not address the suspension request. The Tribunal received a cheque in the amount of $500.00, or an amount equivalent to the administrative penalty, from ARA with its appeal and suspension request. The Tribunal has provided that to the Director to be held in trust pending a decision on the request. That amount should be returned to ARA.

ORDER

46. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated October 18, 2007, be cancelled. The matter is referred back to the Director of Employment Standards for a new hearing before a different delegate.

Carol L. Roberts
Member
Employment Standards Tribunal