Employment Standards TRIBUNAL

An appeal

- by -

AZ Plumbing and Gas Inc.
("AZ Plumbing")

- 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.: 2013A/78

DATE OF DECISION: March 25, 2014

DECISION

SUBMISSIONS

Allan Zastre	on behalf of AZ Plumbing and Gas Inc.
Christopher Earle	on his own behalf
Joe Leblanc	on behalf of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*Act*") AZ Plumbing and Gas Inc. ("AZ Plumbing") has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on October 18, 2013. In that Determination, a delegate of the Director ordered AZ Plumbing to pay its former employee, Christopher Earle, $6,507.11 in wages and interest. The Director also imposed two administrative penalties in the total amount of $1,000 for AZ Plumbing's contravention of sections 40 and 63 of the *Act*, for a total amount payable of $7,507.11.

2. AZ Plumbing appeals the Determination contending that the delegate failed to comply with principles of natural justice in making the Determination.

3. These reasons are based on the written submissions of the parties, the Section 112(5) "record" that was before the delegate at the time the decision was made and the Reasons for the Determination.

FACTS AND ARGUMENT

4. On January 20, 2013, Mr. Earle filed a complaint with the Employment Standards Branch, alleging that he was unjustly terminated from his employment. In his complaint information form, Mr. Earle wrote, in part, that on January 4, 2013, his employer "demanded that I empty my work van of its contents, demanded the company gas card, company cell phone (and accessories) and keys to be returned to him".

5. On January 9, 2013, Mr. Earle sent AZ Plumbing a "self-help" kit (which the Branch requires some employees to use in an effort to resolve their complaints directly with their employer), seeking "severance", or compensation for length of service. Allan Zastre, AZ Plumbing's owner/manager, responded to Mr. Earle's claim on January 15, 2013, declining Mr. Earle's request for compensation, stating that it was Mr. Earle's decision to end the employment. Mr. Zastre advised Mr. Earle that his job was still open and that he could return to work if he wanted to.

6. The delegate held a hearing into Mr. Earle's complaint on June 12, 2013. At issue before the delegate was whether or not Mr. Earle was entitled to overtime wages and compensation for length of service. The delegate concluded that AZ Plumbing had not demonstrated Mr. Earle had quit his employment and determined that Mr. Earle was entitled to compensation for length of service and overtime wages.

7. AZ Plumbing claims that the delegate failed to observe principles of natural justice in determining that Mr. Earle was entitled to compensation for length of service. It does not appeal the delegate's conclusion that Mr. Earle was entitled to overtime wages.

8. Briefly, the facts and argument before the delegate relevant to the appeal are as follows.

9. Mr. Earle began working for AZ Plumbing as a plumber on August 7, 2007. On January 4, 2013, Mr. Earle had a heated dispute with Mr. Zastre about working weekend shifts. Although Mr. Earle acknowledged that Mr. Zastre had the authority to establish the work schedule, he was upset that Mr. Zastre had changed the schedule without consulting him or advising him of changes that affected him.

10. Mr. Earle and Mr. Zastre also argued about whether Mr. Earle's ability to use the company van to travel to and from work at no cost to him was a perk.

11. Mr. Zastre's evidence was that when Mr. Earle replied that the van was not a perk, Mr. Zastre told him he could leave the van at the shop and take his own vehicle to and from work. The parties had further discussions about the weekend shifts and, according to Mr. Earle, the discussion ended when Mr. Zastre told him "you're done". Mr. Zastre testified that he could not recall making that statement.

12. Mr. Zastre's evidence was that Mr. Earle said that he would clean the van out immediately. Mr. Zastre and Mr. Earle went to the van together, and Mr. Earle told Mr. Zastre that he would unload the van at home and bring it back the following day. Mr. Zastre told Mr. Earle that he would ride with him and bring the van back himself.

13. Mr. Earle unloaded some equipment from the company van, after which he and Mr. Zastre drove to Mr. Earle's home. After Mr. Earle unloaded his personal tools from the van, Mr. Zastre drove it away.

14. Mr. Earle's position was that he did not quit his employment; rather, he was terminated when Mr. Zastre told him that he was "done". Mr. Earle also testified that he did not contact Mr. Zastre upon receiving Mr. Zastre's response to the self-help kit because Mr. Zastre had not called him to apologize.

15. Mr. Earle agreed that both he and Mr. Zastre were very upset that night and that the situation escalated beyond where it should have. Mr. Earle also agreed that another employee who was present that night told him to "settle down" and that he would cover the weekend shift for him. Mr. Zastre agreed that both parties were upset, although he says he did not yell.

16. On January 9, 2013, AZ Plumbing issued Mr. Earle a record of employment (ROE) indicating that Mr. Earle quit.

17. Mr. Earle also submitted a claim for Employment Insurance benefits. He spoke to an agent who advised him that she had spoken with Mr. Zastre, who told her that the words "you're done" meant that Mr. Earle was done being on call and that he had to leave the van at the shop.

18. Mr. Zastre acknowledged that Mr. Earle never said the words "I quit" or submitted a letter of resignation. He testified that he concluded that Mr. Earle had quit after Mr. Earle did not show up for work on January 7, 2013, a conclusion that was reinforced after he received Mr. Earle's request for severance pay on January 8, 2013. Mr. Zastre denied Mr. Earle's request for severance pay as follows:

> *Your employment with AZ Plumbing and Gas Inc. was never terminated by us, and at no time did we suggest that you terminate your employment with us.*
>
> *It was entirely your decision to terminate your employment with us; therefore we decline your request for payment.*

> *Your position with AZ Plumbing and Gas Inc. remains open should you decide that you would like to return to work.*

19. The delegate found that Mr. Zastre uttered the words "you're done" during the heated discussion between the parties over changes to the weekend work schedule. However, the delegate determined that Mr. Earle had misinterpreted the comment and that it was not proof that Mr. Zastre had fired him. The delegate also concluded that Mr. Zastre had misinterpreted Mr. Earle's comments about cleaning out the van to mean that he had quit.

20. The delegate noted that at no time did Mr. Earle state that he was quitting, nor did he tender a letter of resignation. The delegate noted that Mr. Zastre made the assumption that Mr. Earle had quit when Mr. Earle failed to show up for work the following Monday and then requested compensation for length of service on January 8, 2013. The delegate found that Mr. Zastre's assumption that Mr. Earle had quit was not evidence that he had done so.

21. The delegate noted that where there was a dispute as to whether an employee has quit, there must be clear, unequivocal evidence that the employee did quit:

> *In order to be discharged from the obligation A Z Plumbing was required to present evidence that shows Mr. Earle voluntarily formed and communicated the intent to quit his employment. The evidence must also show that Mr. Earle carried out some act or actions that are inconsistent with continued employment. The burden of proof was on A Z Plumbing to show on a balance of probabilities that Mr. Earle quit and they are discharged from the obligation to pay compensation. A Z Plumbing has not met their burden and it is my finding Mr. Earle is owed 4 weeks compensation.*

22. The delegate found that, despite the misunderstanding between the parties, the *Act* did not allow him to apportion responsibility between the parties.

ARGUMENT

23. In his appeal submissions on behalf of AZ Plumbing, Mr. Zastre essentially repeats the arguments he made before the delegate at the hearing. Mr. Zastre submits that when Mr. Earle contacted him requesting compensation for length of service, he wrote to Mr. Earle to tell him that his job was still open. Mr. Zastre notes that, during the hearing, Mr. Earle stated that he did not contact Mr. Zastre upon receiving this letter because Mr. Zastre had not called him to apologize.

ANALYSIS

24. 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;
- evidence has become available that was not available at the time the determination was being made.

25. The Tribunal has consistently said that the burden is on an appellant to persuade the Tribunal that there is an error in the Determination on one of the statutory grounds.

26. I have concluded that the complaint must be sent back to the delegate for a new hearing

27. Principles of natural justice are, in essence, procedural rights that ensure that parties know the case being made against them, are given the opportunity to reply, and have the right to have their case heard by an impartial decision maker. In my view, AZ Plumbing was denied an opportunity to respond to Mr. Earle's allegations.

28. It is clear the delegate had some difficulty deciding whether or not Mr. Earle quit or was fired. It appears that he found both parties responsible for the situation they found themselves in and, ultimately, was unable to make a clear determination. Because AZ Plumbing was unable to discharge its burden of proof to show on a balance of probabilities that Mr. Earle quit, the delegate made a decision in Mr. Earle's favour.

29. AZ Plumbing does not find that to be a satisfactory result, a sentiment I share. In my view, a fair process must include a fair and just adjudication of disputes. I am not able to find the process used in deciding this claim to be fair or clear.

30. There were a number of issues that appeared unaddressed that could have assisted the delegate in his conclusion. For example, neither party called the employee present that evening as a witness. The delegate might have, for example, drawn an adverse inference for the employer's failure to do so.

31. In addition, there was nothing in the Determination to indicate that Mr. Earle's allegation that Mr. Zastre "demanded his keys, cellphone etc." was addressed. In my view, evidence surrounding all of these allegations may well have assisted the delegate in assessing the circumstances surrounding the end of Mr. Earle's employment.

32. On December 17, 2013, I requested that the delegate provide submissions in response to the appeal, and specifically, to explain why, in assessing whether there was a quit or fire, he did not address the totality of Mr. Earle's allegations, in the complaint form, that "AZ Plumbing demanded the return of his cellular phone, accessories and keys".

33. The delegate responded as follows:

> *The reason that allegation was not addressed in the determination is because Mr. Earle did not make that allegation in his sworn testimony at the complaint hearing where it would be subject to cross-examination. The determination was based on the testimony given by the parties and the cross examination of that evidence. I believe I would be vacating my neutrality by introducing evidence into the proceedings that was not raised by one of the parties. The Tribunal has cautioned delegates to resist the temptation of assisting the parties to a dispute as it may give the appearance of bias. In SPC Holdings & Construction Ltd. BCEST #D005/11, Adjudicator Groves stated:*
>
> > *"It is not for the delegate to act in a pro-active way to advise the parties that their cases are insufficient, or to facilitate the parties in curing the problem. If the delegate does so it may well affect the parties' perception of the delegate's impartiality, leading to an allegation of bias".*
>
> *If Mr. Earle's complaint was resolved by an investigation rather than a complaint hearing the allegation that the Tribunal member is enquiring about would have undoubtedly come up. The statement/claims on the complaint form and the parties' reaction to them are the basis for a determination that flows from that process. However, this particular file was resolved via a complaint hearing where the sworn testimony given at the hearing was the basis for the determination.*

34. In my view, there are a number of difficulties with this analysis.

35. Firstly, one of the statutory purposes of the *Act* is to provide for "fair and efficient procedures" for resolving disputes over the application and interpretation of the *Act*. (s. 2(d)) To that end, the Director of the Employment Standards Branch has the statutory discretion to conduct an investigation to ensure compliance with the *Act*. (Section 76(2)) Practically speaking, the Director decides complaints either by investigating a complaint or through an adjudication process. In this case, the delegate decided to decide the complaint through an adjudication process. While the delegate's decision in this regard is not at issue, in my view, the result of the Branch's obligation to resolve complaints should not differ depending on whether the complaint is decided by way of oral hearing or investigation. The delegate seems to suggest that the result of Mr. Earle's complaint might have been different had he chosen to investigate it rather than decide it by way of an oral hearing. That choosing one form of complaint resolution over another might result in a different conclusion is, in my view, not a fair and just process. (see also, in particular, the Tribunal's decision in *JC Creations Ltd.*, BC EST # RD317/03)

36. Secondly, the Branch's processes are designed to enable parties to represent themselves at hearings. In practical terms, the vast majority of parties are self-represented. As such, they may be unfamiliar with quasi-judicial processes, including knowing what evidence they should present or what statements they should respond to. They may not understand issues such as credibility, relevancy, hearsay or bias.

37. While it is trite to say that the delegate cannot advocate for one party, give legal advice, guide parties on the law or suggest an approach to their case, as Adjudicator Groves rightly noted in the *SPC Holdings* decision cited by the delegate, it is both fair and appropriate for the delegate to give effect to the existing law without parties having raised it, such as awarding vacation pay where that may not have been specifically claimed in the complaint form. It is also incumbent on the delegate to ask questions about allegations a party may have already made, such as Mr. Earle did in this case in his originating document or complaint.

38. While the boundary between neutrality and assisting self-represented parties can be a thin one, in my view, it is an aspect of natural justice that the Director and her delegates play a role to ensure self-represented parties are fairly treated and ensure that one party has not, because of a lack of legal skill, fail to claim rights or put forward arguments already alluded to.

39. In *Newson v. Kexco Publishing Co. Ltd.* (1995), 17 BCLR (3d) 176 (CA) the court said:

> … Mr. Martinoff argued his appeal in person. …
>
> Our obligations, as with all litigants in persons, is to put our deepest understanding to the arguments being made without becoming advocates for the personal litigant or creating new arguments which he has not advanced. … (paras. 17 - 18)

40. Similarly, in *Hamilton v. Newfoundland (Workers' Compensation Review Division)* [1997] NJ No. 173 (Nfld. SCTD), the court said:

> The niceties of the arguments and the nuances of the legislative distinctions are undoubtedly lost to many unrepresented applicants who are usually unfamiliar with the forum in which they find themselves. Consequently, it is not unexpected that they do not raise issues which a represented litigant would quite readily identify and argue. This is why, in my view, a great degree of latitude must be given to those citizens who appear before administrative bodies or courts, armed only with their own common sense and the feeling that they have been "wrongly done by". In the final analysis the court must be their protector. (para 29)

41. When acting in an adjudicative capacity, the delegate must, as far as possible, diminish the disadvantage self-represented parties may suffer in the absence of counsel without conferring on a party a positive advantage over the other.

42. In this case, Mr. Earle made allegations in his complaint form which, if established, may have been significant in assessing his complaint. Once made, the delegate has a duty to inquire into those allegations at the hearing if they are not addressed by the party making them. Once addressed, the other party is then able to respond to them. The delegate cannot be said to be biased in such circumstances.

43. It may be that none of these issues, if fully canvassed, would have caused the delegate to arrive at a different conclusion. However, once the delegate made a decision to use an adjudicative process to resolve the complaint, he must ensure that both parties have the opportunity to both fully present their case and respond to all relevant evidence.

ORDER

44. Pursuant to section 115 of the *Act*, I order the Determination, dated October 18, 2013, be cancelled and I refer the matter back to the delegate for a new hearing on the issue of whether or not Mr. Earle quit his employment or was fired.

Carol L. Roberts
Member
Employment Standards Tribunal