Employment Standards TRIBUNAL

An appeal

- by -

Tony Perri
("Perri")

- 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

TRIBUNAL MEMBER: Carol Ann Hart

FILE No.: 2004A/199

DATE OF DECISION: January 25, 2005

DECISION

SUBMISSIONS

Tony Perri	on his own behalf
Patricia Hampton	on behalf of Metasoft Systems Inc.
Ted Mitchell	on behalf of the Director of Employment Standards

OVERVIEW

This is an appeal by Tony Perri ("Perri") pursuant to section 112 of the *Employment Standards Act* (the "*Act*") of a Determination issued on 8 October 2004 by a delegate for the Director of Employment Standards (the "Director"). Perri was employed as a Sales Representative from 1 April 2003 to 28 November 2003 by Metasoft Systems Inc. ("Metasoft"), an information technology consulting and software development firm. Perri resigned from his employment after accepting a new position with another employer.

Perri alleged in his complaint that Metasoft had failed to pay commissions as required under section 74 of the *Act.* The Delegate for the Director conducted a hearing on 27 September 2004. Following the hearing, the Delegate for the Director determined that no commissions were owing to Perri, and Metasoft had not contravened the *Act.*

Although Perri sought an oral hearing, I am satisfied that this matter can be decided based on the written submissions of the parties.

The appeal is brought on the grounds that the Delegate for the Director failed to observe the principles of natural justice in making the determination and that there was new evidence which was not available at the time the determination was made.

ISSUES

The issues to be decided in this case are:

1. Did the Delegate for the Director fail to observe the principles of natural justice?

2. Has new and relevant evidence become available that would have led the Delegate for the Director to a different conclusion?

ARGUMENT

Appellant's Submissions

On the Appeal Form under the heading State your Grounds for Appeal: Perri wrote as follows: "*Misrepresented evidence and omitted key facts. Hear new evidence*."

Omission or Misrepresentation of Evidence

Perri contended that the Delegate for the Director had omitted "*some very key facts*" and had misrepresented some evidence in the determination. The appellant made the following submissions:

1. The Delegate for the Director wrote in the determination that Perri had given notice to terminate his employment on Tuesday Nov. 25th, but he had, in fact, given notice in the week prior.

2. Clear statements of witness Bob Mawhinney were misrepresented in the determination. A note sent by electronic mail from Bob Mawhinney, Investment Advisor, to Tony Perri on 15 November 2004 was provided with the appellant's submission.

3. Ms. Hampton, the representative for Metasoft had "*contradicted herself many times*" in her testimony during the hearing, and this had not been included in the determination. Perri wrote: "*That is very important because the possibility that she was lying exists through all of her contradictions".*

4. The Delegate for the Director had failed to include in the determination Perri's evidence that he was "*forced to sign that agreement* [the employment contract] *even if [he] did not agree with any of the terms, before [he] would be allowed to work there*".

New Evidence

Perri wrote that he had the following new evidence:

(a) A witness was: "*willing to state that the owner of the company, Trevor Skillen, has asked her [Ms. Hampton] to lie on many occasions for the company's interest*".

(b) Evidence that Stacey Shute had been told to leave her desk and go for coffee when the mail arrived, and of "*some cheques being pulled off her desk so as not to be included in the processing of them on the day that they are received!*".

(c) Evidence that company policy was only followed for the benefit of the company.

(d) Evidence that the company had "*given other employees the option of taking their vacation days at the end of the employees' employment at the company in hopes that more revenue cheques will come in the mail and therefore they can get paid commission on, and this was not offered to [him]*".

(e) Testimony of a former employee who had worked in the area of payroll and accounting that Metasoft changed its company policies very often for the benefit of the company.

In his final written submission dated 21 December 2004, Perri wrote about what he referred to as "*irregularities not presented in the original hearing*".

Respondents' Submissions

In the respondents' written submission dated 6 December 2004, Patricia Hampton wrote that Metasoft had "*disclosed fully and honestly all information pertaining to this case*", and agreed with the decision issued by the Delegate for the Director.

Delegate for the Director's Submissions

The Delegate for the Director responded to each of the appellant's points as follows:

Omission or Misrepresentation of Evidence

1. *"Even if the complainant's assertion were undisputed, he has not provided information which alters the finding that he is not owed wages…*

2. *Whatever misunderstanding that may genuinely exist, there is no apparent dispute that through his use of vacation time, Mr. Mawhinney remained on the payroll (if not the job site) for a longer period of time than the complainant, after giving notice of his intent to terminate employment. This afforded Mr. Mawhinney an opportunity to receive payment of commissions for a longer period of time after leaving the job site than the complainant. That said, the finding that the complainant is not owed commissions remains unaltered…*

3. *The complainant provides no specific information to support his assertions. The Determination includes a description of evidence found by the Delegate to be useful and necessary to determine the issues. The Delegate is satisfied that the employer representative was credible and that her evidence given under oath was truthful...*

4. *There was no evidence before the Delegate that the complainant stated any objections about this provision to the employer at the time when he was hired. Further no evidence was presented that the complainant was somehow incompetent or incapable of exercising free will in regard to whether or not he accepted what was a condition of employment…"*

New Evidence

"(a) It is not apparent that the complainant's new witness has any first hand knowledge or information which would bear directly on the subject complaint...

(b) The complainant has provided no new information, rather, he is re-arguing the position he took during the hearing. The complainant's speculation about what might have happened is not evidence which supports his allegation that mail was mishandled…

(c)-(e) The Act does not require that employers provide employees with this option, as above. Neither was any provision regarding such an option set out in the offer letter or the Plan. It is the employer's prerogative to make an offer of this sort to employees as it sees fit…"

ANALYSIS

Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

(a) the delegate for the Director erred in law

(b) the delegate for 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.

The burden of establishing an error in the determination rests with the appellant. The grounds for appeal are set out in s.112 of the *Employment Standards Act.* A Tribunal may not set aside findings of fact made by the Delegate for the Director unless, in reaching conclusions, the Delegate for the Director erred in law or failed to observe the principles of natural justice; or the Tribunal finds that the determination ought to be set aside because new evidence has become available that was not available at the time it was made.

Denial of Natural Justice

Principles of natural justice are essentially procedural rights ensuring that parties know the case against them, and have the right to respond, and the right to be heard by an independent decision maker.

Although Perri submits that the Delegate for the Director failed to observe the principles of natural justice, there is no evidence that Perri was not given a fair opportunity to be heard. The parties had the opportunity to present documents and witnesses in support of their positions. Perri did not allege that the Delegate for the Director refused to consider his evidence or submissions, or was not an independent decision maker.

Perri suggests that the Delegate for the Director omitted some key facts in the determination. Two of the allegations advanced in this regard related to the evidence given by witnesses Bob Mawhinney and Patricia Hampton. It was contended that Mr. Mawhinney's evidence had been misrepresented, and that Ms. Hampton had contradicted herself and was possibly untruthful in giving her evidence. Even if Mr. Mawhinney's evidence had been accepted in the determination exactly as it was outlined in the electronic mail message dated 15 November 2004, it was not shown that the decision reached by the Delegate for the Director would have been different. Perri did not provide any specific examples of concerns about Patricia Hampton's testimony, and he did not indicate how he would prove that Ms. Hampton had contradicted herself or that her evidence was untruthful.

Perri maintained that the Delegate for the Director had erred by indicating in the determination that Perri had given notice on Tuesday November 25th, when he had given notice in the previous week. It was not shown that the conclusions in the determination would have been different if the Delegate for the Director had found that Perri had given notice in the week before 25 November 2004.

I turn now to the contention of Perri that in order to be able to work for Metasoft, he was forced to sign the employment contract even if he did not agree with the terms. The fact that the Delegate for the Director did not mention this evidence in the determination does not amount to a breach of natural justice.

There was no indication that there was any reason why the appellant could not make his own decision as to whether or not to sign the contract before commencing his employment. Furthermore, the appellant did not demonstrate that this matter was relevant to the conclusions reached by the Delegate for the Director.

In my view, in the course of reaching his conclusions, the Delegate for the Director conducted a thorough review of the evidence, carefully evaluated and weighed that evidence, and heard and considered the parties' arguments. The Delegate for the Director was entitled to determine whether or not the evidence of the representative for Metasoft was reliable and credible. The Delegate for the Director weighed the evidence adduced by the Metasoft against the evidence advanced by the appellant and reached conclusions about the strength of the parties' respective positions. The decision of the Delegate for the Director to prefer the case made by Metasoft over the case made by Perri does not constitute a failure to observe the principles of natural justice. Furthermore, the determination does not demonstrate any denial of natural justice on its face.

Accordingly, the allegation the Delegate for the Director misrepresented evidence or omitted key facts from the determination, and this amounted to a breach of natural justice, is dismissed.

New Evidence

In *Bruce Davies and others, Delegate for the 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 Delegate for 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 Delegate for the Director to a different conclusion on the material issue.

Perri outlined the new evidence which he had not presented in the original hearing. There is no information in the submission as to why the evidence in question was not available at the time of the investigation, or could not have been submitted to the Delegate for the Director. Perri did not explain why the witness testimony which he now seeks to submit was not presented at the original hearing.

It is not appropriate for the Tribunal to interfere with the findings of fact made by the Director if they do not amount to the kind of errors contemplated by s.112, even if the Tribunal might not have reached the same findings of fact. The Delegate for the Director had the parties before him. He heard and weighed their evidence, and assessed their credibility.

On appeal, the Tribunal does not conduct a re-investigation. Nor does it re-hear the case. The Tribunal is being asked by the appellant, in effect, to rehear the appellant's evidence and arguments and reach

different conclusions than those reached by the Delegate for the Director. This is not the role of the Tribunal. The appeal must be confined to those grounds listed in subsection 112(1), as set out above.

The appellant did not show that the new evidence had high probative value. In other words, I was not persuaded that the new evidence Perri seeks to submit would have led the Delegate for the Director to a different conclusion on a material issue, if he had the opportunity to consider the evidence at the hearing.

I cannot find that Perri has satisfied the test set out above in the *Bruce Davies* case for new evidence to be considered.

Appellant's Final Submission

Perri raised a new issue in his final submission dated 21 December 2004. He maintained that although he had received vacation pay, he had "*never received the time accrued*". Perri asserted that he was owed 6.5 days of vacation entitlement at the end of his employment. If he had taken the vacation time in question at the end of his employment, he would have remained an employee at the time the cheques from customers had arrived, and would therefore have been entitled to his commissions.

The issue of vacation entitlement was first raised as an issue by Perri in his final submission on the appeal, and was apparently not raised before the Delegate for the Director. He has submitted new evidence on that issue which was not presented to the Delegate for the Director. When the Tribunal exercises its jurisdiction under the *Act*, it is exercising an appellate function and correcting any errors that might have been made by a Delegate for the Director. An issue raised on appeal for the first time by a party who failed to raise the issue before the Delegate for the Director, is not properly before the Tribunal. I am not prepared to admit or consider new evidence advanced by the appellant in support of new issues which were not raised before the Delegate for the Director. I further note that because Perri raised the new issue in his final submissions for the appeal, Metasoft and the Director did not have the opportunity to respond to it.

In any event, section 57 of the *Act* provides that an employer must give an employee an annual vacation of at least 2 weeks after 12 consecutive months of employment. Perri was employed by Metasoft from 1 April 2003 to 28 November 2003, which was a period of less than 12 months. Employers are not required to give vacation time off during an employee's first year of employment.

The final written submissions of the appellant concerning the payment made by Visa by a customer after the date Perri's employment ceased, and Stacy Shute's practices regarding payments received from clients, were raised with the Delegate for the Director and considered in the determination.

The appellant wrote in the final submissions that there were: "*multiple irregularities with regard to employee rights and privileges"* and that *"the use of intimidation and misinformation in the workplace created an environment that did not allow the employee to question decisions made by management, or to acquire the necessary information to make informed decisions about the employment"*. Perri further indicated that he had a witness who could testify about the points set out in the final submissions. In addition, Melanee Henderson, a witness who was unable to attend the original hearing, would be available to attend a new hearing to present evidence in support of the appellant's claim.

The appellant did not explain how such evidence would relate to his claim, and did not indicate how the determination might change if the evidence were accepted. The issues were apparently not raised with

the Delegate for the Director. Perri did not provide any reasons why these witnesses could not have been present to testify at the hearing before the Delegate for the Director, or any details concerning the evidence they might provide.

The appeal is dismissed.

ORDER

Pursuant to Section 115 of the Act, I Order that the determination dated 8 October 2004 is confirmed.

Carol Ann Hart
Member
Employment Standards Tribunal