Employment Standards TRIBUNAL

An appeal

- by -

Carol Johnson

- 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.: 2006A/12

DATE OF DECISION: March 9, 2006

DECISION

SUBMISSIONS

Carol E. Johnson	on her own behalf
Mary Walsh	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Carol E. Johnson, pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued December 19, 2005.

2. Ms. Johnson worked as a collector for Wiggins Adjustments Limited ("Wiggins"), a collections agency, from May 12, 1993 until mid June, 2005. Ms. Johnson filed a complaint alleging that she was owed vacation pay and compensation for length of service. Ms. Johnson subsequently withdrew that part of her complaint dealing with vacation pay, and the Director's delegate held a hearing into the remaining issue on November 30, 2005. Ms. Johnson appeared on her own behalf. Wiggins was represented by its two Directors, Grant Fraser and Larry Fraser.

3. Following the hearing, the delegate determined that Ms. Johnson had voluntarily quit her employment, and that she was not entitled to compensation for length of service. The delegate concluded that Wiggins had not contravened the *Employment Standards Act.*

4. Ms. Johnson contends that new evidence has become available that was not available at the time the Determination was being made.

5. This appeal is decided on Ms. Johnson's appeal document and attached submission, the delegate's submissions, the section 112(5) "record", and the Reasons for the Determination.

ISSUES

6. Has new and relevant evidence become available that would lead the delegate to a different conclusion on the issue of whether Ms. Johnson had quit her employment, thus entitling her to compensation for length of service?

7. Did the delegate fail to comply with the principles of natural justice in making the Determination?

8. Did the delegate err in law in concluding that Ms. Johnson had quit her employment and was not entitled to compensation for length of service?

ARGUMENT

9. Ms. Johnson contends that the delegate failed to call one of her witnesses during the hearing. She says that after her hearing had concluded, a delegate called her to say that she had forgotten to contact her witness, Melinda Avery. Ms. Johnson included a letter from Ms. Avery as the new evidence on appeal.

10. Ms. Johnson also says that it was never her intention to quit her job, but that "Mr. Fraser's attitude and method of treating people has made it impossible to stay there".

11. The delegate contends that the appeal is without merit, and should be dismissed.

12. The delegate acknowledged that, at the start of the hearing, Ms. Johnson indicated that she had a witness available to provide evidence by teleconference. However, the delegate says at the conclusion of her evidence, Ms. Johnson was given the opportunity to present any other evidence, and she said she had none. The delegate acknowledged that she did not specifically ask Ms. Johnson about her decision not to call the previously identified witness, as she might have done. Consequently, she says that after the hearing had concluded, another branch officer contacted Ms. Johnson to inquire into whether Ms. Johnson still wanted to call her witness, and that a suitable time would be arranged for the parties to hear the witness. Ms. Johnson indicated she would not call the witness. The delegate submitted a sworn affidavit from the other branch officer, Joyce Graham, in support of this assertion.

13. In her January 31, 2006 affidavit, Ms. Graham deposes that on December 1, 2005, she spoke with Ms. Johnson and advised her that Ms. Walsh inadvertently failed to ask her about her witness, and asked whether she wished to have Ms. Walsh arrange a teleconference call for the purposes of hearing Ms. Avery's testimony. Ms. Graham further deposes that Ms. Johnson advised her that she had decided she no longer wanted Ms. Avery to be contacted since Ms. Avery had just stated a new job. Although Ms. Johnson offered to submit a written statement from Ms. Avery, Ms. Graham told her that Ms. Avery had to be made available in person for the purposes of cross examination. At that time, Ms. Graham deposes, Mr. Johnson indicated that she did not want to have her witness contacted.

14. The delegate submits that Ms. Johnson's decision to decline calling Ms. Avery amounts to a failure to exercise due diligence to obtain all relevant evidence. She further submits that the "new evidence", an unsworn letter, is not the best evidence available and should, if admitted, be accorded less weight. She submits that this new, hearsay evidence, should not be used to cancel or vary the Determination; at best, the most appropriate remedy would be to send the matter back to the Director.

15. The delegate further submits that, in any event, the "new evidence" would not be determinative of this appeal even if it was allowed. She says that Ms. Johnson acknowledged during the hearing that she sought an advance on her vacation pay to compensate for the waiting period for her EI benefits rather than using her existing vacation entitlement, and there was no obligation on the employer to agree to her request.

THE FACTS AND ANALYSIS

16. The following facts are set out by the delegate.

17. On June 10, 2005, Wiggins told a number of its employees, including Ms. Johnson, that it was temporarily laying off employees for financial reasons. Wiggins told Ms. Johnson that she would be paid to June 15, 2005, but that she was not required to work beyond June 10, 2005. Wiggins told Ms. Johnson

that the recall date was September 1, 2005. Ms. Johnson in fact took medical leave on the advice of her doctor, and, with Wiggins' assistance, applied for EI benefits. Ms. Johnson sought an advance from Wiggins when she became aware there would be a waiting period for the benefits. Wiggins denied her request.

18. Mr. Fraser testified that, after Wiggins denied Ms. Johnson's request for an advance, she quit in order to receive her outstanding vacation pay. Ms. Johnson testified that she only quit after she was denied both an advance and a subsequent advance on her "holiday pay".

19. Wiggins called its bookkeeper, Pat Segarich, as a witness. Ms. Segarich testified that she completed Ms. Johnson's ROE to indicate that Ms. Johnson would be taking medical leave. Subsequently, the Employment Insurance Office contacted Ms. Segarich to inquire into Ms. Johnson's status, and advised Ms. Segarich that Ms. Johnson said that she had quit, and that it would be changing her status. Ms. Segarich testified that EI told her she need not issue a new ROE. Ms. Segarich also testified that Ms. Johnson was upset that Wiggins would not give her an advance and told Ms. Segarich that she would have to quit.

20. Ms. Johnson's evidence was that she quit because she needed money and that was the only way she could get her holiday pay in advance. Ms. Johnson stated that she had not planned on quitting but was forced to do so. She also agreed at the hearing that Ms. Segarich told her not to quit.

21. The delegate reviewed the Tribunal's decision in *Burnaby Select Taxi* (BC EST #D091/96) in analyzing whether Ms. Johnson's acts constituted a quitting of her employment. She found sufficient evidence of both a subjective and objective indication that Ms. Johnson had quit, and that she was not owed compensation for length of service.

22. 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

23. Although the grounds of appeal are set out as new and relevant evidence, the allegations contained in the appeal document and submissions relate to the other grounds of appeal as well. As noted by the Tribunal in *Triple S Transmission Inc.* (BC EST #D141/03), although most lawyers generally understand the fundamental principles underlying the "rules of natural justice" and the other grounds identified under the Act, the grounds for an appeal "are often an opaque mystery to someone who is untrained in the law." The Tribunal found that appeals should not be "mechanically adjudicate[d]… based solely on the particular "box" that an appellant has – often without a full, or even any, understanding – simply checked off."

24. Thus, I will consider the appeal submissions in light of the three grounds of appeal.

Error of law

25. Ms. Johnson says that she had no intention of quitting her job. However, her appeal document says that she found it "impossible" to stay at Wiggins because of Mr. Fraser's "attitude". There is nothing in the facts of this appeal that suggests that Ms. Johnson was dissatisfied with the attitude of any of the Directors. It is only on appeal that she states that she left for reasons unrelated to the employer's refusal to give her an advance. While this reason is different from the reason for quitting she gave at the hearing, neither establishes that the delegate erred in finding that Ms. Johnson had formed an intent to quit and acted on it. Even if Ms. Johnson now suggests that she did not want to quit, there was sufficient evidence before the delegate to support her conclusion on this issue. I find no basis to allow the appeal on this ground.

Natural Justice

26. Principles of natural justice are, in essence, procedural rights that ensure parties know the case against them, the right to respond, and the right to be heard by an independent decision maker.

27. Ms. Johnson says there is new and relevant evidence in the form of a witness not called by the delegate. The delegate has acknowledged that she inadvertently failed to specifically ask Ms. Johnson at the conclusion of her evidence whether she wished to call her witness. Once she realized her failure, Ms. Johnson was given another opportunity to have her witness give oral evidence. Although Ms. Johnson was willing to have her witness provide a written statement, the evidence is that she decided not to call that witness to give oral evidence. Ms. Johnson has not rebutted Ms. Graham's affidavit evidence in this respect. It was open to the delegate to properly infer that Ms. Johnson made that decision based on her priorities and circumstances. (see *D'Hondt Farms*, BC EST #RD021/05). Therefore, I am unable to conclude that there was a denial of natural justice.

New Evidence

28. Ms. Johnson now says that she has new evidence, which is the written statement of that witness she chose not to call to give oral evidence at the hearing.

29. In *Bruce Davies and others, 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:

1) 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;

2) the evidence must be relevant to a material issue arising from the complaint;

3) the evidence must be credible in the sense that it is reasonably capable of belief; and

4) 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

30. Ms. Avery's letter says that she was with Ms. Johnson when Ms. Segarich told her that if she wanted her holiday pay she would have to quit first.

31. The delegate gave Ms. Johnson the opportunity to call Ms. Avery to give her evidence. Ms. Johnson chose, for her own reasons, not to call her witness. The first criterion of the test has not been met.

32. While the evidence is relevant to the issue of whether Ms. Johnson did or did not quit, I am also unable to conclude that it would have led the delegate to a different conclusion on that issue, for reasons noted above.

33. As the delegate has correctly pointed out, this unsworn document has not been subjected to cross examination and therefore carries less weight than the oral evidence given by Ms. Segarich, which directly conflicted with Ms. Avery's statement. It does not appear that Ms. Johnson asked Ms. Segarich about the statement she allegedly made in front of Ms. Avery and Ms. Johnson.

34. However, even if the delegate had accepted this evidence, Wiggins was under no obligation to pay Ms. Johnson her vacation pay. There was sufficient evidence before the delegate to support her conclusion that Ms. Johnson both formed the intention to quit, and did so. This "new" evidence would not have led to a different conclusion on that point.

35. The appeal is denied.

ORDER

36. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated December 19, 2005, be confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal