



An appeal

- by -

Anthony Furtado

- 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: Robert E. Groves

FILE No.: 2012A/13

DATE OF DECISION: May 1, 2012

DECISION

SUBMISSIONS

Anthony Furtado	on his own behalf
Carol Wagner	on behalf of Cold Logic ULC
Karpal Singh	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal brought by Anthony Furtado (the “Appellant”), who challenges a determination dated January 12, 2012, (the “Determination”) issued by a delegate (the “Delegate”) of the Director of Employment Standards (the “Director”) in which the Delegate dismissed the Appellant’s complaint that his employer, Cold Logic ULC, (“Cold Logic”) had contravened section 8 of the *Employment Standards Act* (the “Act”).
2. I have reviewed the Appeal Form, the Determination, the Reasons for the Determination, the record provided by the Director pursuant to section 112(5) of the *Act*, the submissions of the parties, and the submissions of the Delegate.
3. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act*, and Rule 17 of the Tribunal’s *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings when it decides appeals. A review of the material that has been delivered by the parties persuades me that I may decide the merits of this appeal on the basis of the written documentation before me without conducting an oral or for that matter an electronic hearing.

FACTS

4. The Appellant was employed by Cold Logic from October 18 to 27, 2010.
5. The Appellant responded to an advertisement for a Refrigeration Maintenance Technician that Cold Logic had placed on Craigslist. The advertisement stated that Cold Logic was seeking to recruit individuals with a 5th Class Stationary Engineers certificate (Refrigeration Endorsement) “with a strong background in warehouse facility repairs and maintenance.” In addition to work involving the maintenance and repair of refrigeration equipment, the advertisement also stipulated that the successful candidate would be responsible for “[g]eneral facility repairs (HVAC, electrical, dock repairs, plumbing, material handling equipment fire alarm, sprinkler systems, racking systems, etc), preventative maintenance, and project work...” It also required that he “[p]erform other duties as assigned.”
6. Dave Olson, a Maintenance Manager for Cold Logic, interviewed the Appellant. The Appellant asserted that he and Olson discussed the Appellant’s qualifications to perform refrigeration work, and that he would do other work “when time permits.” Olson kept no notes of the interview and the Delegate does not appear to have communicated with him directly.
7. Cold Logic’s Human Resources Manager, Carol Wagner, advised the Delegate that Olson would have told the Appellant that refrigeration work would have been but a part, albeit an important part, of the work the Appellant would be required to perform.

8. The CV the Appellant provided to Cold Logic indicated that he had the experience to perform “advance Building Operation maintenance,” and that he had familiarity with, among other things, “electrical and electronics controls.”
9. The Appellant signed an employment letter on October 15, 2010. The letter stated that the Appellant’s position was “Refrigeration Technician.” The letter did not outline the Appellant’s job duties.
10. When the Appellant commenced work, he was assigned to the Cold Logic warehouse in Langley. It was a dry goods warehouse. It was not a refrigerated site. Cold Logic opened a second warehouse in Cloverdale in January 2011, some months after the Appellant’s employment ended. The Cloverdale premises were refrigerated.
11. As the Langley site was not refrigerated, the Appellant was assigned to duties that did not include refrigeration work. Indeed, at no time during his short tenure with Cold Logic did the Appellant perform work that took advantage of his refrigeration qualifications. Instead, the principal work the Appellant was asked to perform during this period was warehouse maintenance work, particularly electrical work. More specifically, the Appellant was asked to remove power chargers and conduits, and a three phase electrical panel. Later, he was asked to remove bolts from tall metal poles.
12. On October 27, 2010, the Appellant was dismissed. His termination letter stated, among other things, that he was not a “good fit” for the company.
13. The Appellant alleged that he was dismissed due to an injury he had suffered while performing his work, and because of his age. Later, he alleged a breach of section 8 of the *Act*, which reads:
 8. An employer must not induce, influence or persuade a person to become an employee, or to work or to be available for work, by misrepresenting any of the following:
 - (a) the availability of a position;
 - (b) the type of work;
 - (c) the wages;
 - (d) the conditions of employment.
14. The nub of the Appellant’s argument before the Delegate, and on appeal, is that he was hired as a Refrigeration Technician, but was never asked to perform refrigeration work. Instead, he was assigned to general repair duties, including duties involving electrical components for which he did not hold a valid British Columbia certification. He states that the reason he did not complain to his superiors that he was not doing the work for which he thought he had been hired was that he was afraid of losing his job.
15. Cold Logic has argued, throughout, that the advertisement for the Appellant’s job, and the discussion he had with Olson, made it clear that while the company required that the Appellant have a refrigeration qualification, there was more to the job than looking after a refrigeration system. What Cold Logic was looking for, in addition, was an individual “with a strong background in warehouse facility repairs and maintenance,” which included the duties the Appellant was actually asked to perform during the time he worked for the company.
16. In dismissing the complaint, the Delegate accepted Cold Logic’s characterization of the information that was provided to the Appellant during the pre-hiring phase, and determined that the evidence did not support a finding that the position was misrepresented to him in a manner that contravened section 8.

ISSUE

17. Has the Appellant established that the Determination must be varied or cancelled, or that the matter must be referred back to the Director for consideration afresh?

ANALYSIS

18. The appellate jurisdiction of the Tribunal is set out in section 112(1) of the *Act*, which reads:
- 112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:
- (a) the director erred in law;
 - (b) the director failed to observe the principles of natural justice in making the determination;
 - (c) evidence has become available that was not available at the time the determination was being made.
19. Section 115(1) of the *Act* should also be noted. It says this:
- 115 (1) After considering whether the grounds for appeal have been met, the tribunal may, by order,
- (a) confirm, vary or cancel the determination under appeal, or
 - (b) refer the matter back to the director.
20. The Appellant's Appeal Form indicates that his appeal is grounded on assertions that the Delegate erred in law and failed to observe the principles of natural justice. I will deal with the second allegation first.
21. A challenge to a determination on the basis that there has been a failure to observe the principles of natural justice raises a concern that the procedure followed by the Delegate was unfair. The principles of natural justice mandate that a party must have an opportunity to know the case he is required to meet, and an opportunity to be heard in reply. The duty is imported into proceedings conducted at the behest of the Director under the *Act* by virtue of section 77, which states that if, as occurred here, an investigation is conducted, the Director, and a delegate acting on her behalf, must make reasonable efforts to give a person under investigation an opportunity to respond.
22. It is clear from the Appellant's submissions that his disagreement with the Determination rests with the weight the Delegate accorded to certain facts over others, and the substantive conclusions the Delegate reached, in the end. I see nothing in the material before me, however, which supports a finding that the Appellant was not made aware of the arguments that were being presented on behalf of Cold Logic, or that the Appellant was deprived of an opportunity to respond to them. Indeed, he did respond to them, repeatedly.
23. The record also reveals that the Appellant delivered multiple submissions in which he set out in detail the matters he wished the Delegate to consider in support of his own position. None of the communications generated by the Delegate, or the Reasons for the Determination, lead me to suspect that the Delegate failed to properly consider the Appellant's submissions.

24. In these circumstances, I cannot accept the Appellant's assertion that the Delegate failed to observe the principles of natural justice. This aspect of the Appellant's appeal is dismissed.
25. The Appellant also alleges that the Delegate erred in law in deciding that Cold Logic did not misrepresent either the availability of the position, the type of work, or the conditions of employment when it offered him the Refrigeration Technician position.
26. The Appellant's argument on this point appears to rest on the assumption that in order for Cold Logic to avoid a finding that it has contravened section 8 it had to assign the Appellant refrigeration work as soon as his employment commenced, and since that did not happen a contravention has occurred. I cannot agree.
27. Misrepresentation, in law, is any manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts (see *Black's Law Dictionary*, revised 4th edition, at 1152).
28. While the October 15, 2010, employment letter referred to the Appellant's position as "Refrigeration Technician," it failed to specify any of the duties he would be required to perform. In the absence of evidence demonstrating that these words define, as a matter of custom, specific duties, and not others, it is my opinion that in the circumstances of this case they were meant to describe a position in which the Appellant would be expected to perform refrigeration work, to be sure, but that there were other forms of work that would be required of him. Indeed, the advertisement stated clearly that the Appellant's duties would include "warehouse facility repairs and maintenance.... General facility repairs..., electrical..., preventative maintenance..., project work..., [and] other duties as assigned." Moreover, the Appellant acknowledged that he and Olson discussed that the work would involve duties other than refrigeration work. Nowhere does the Appellant assert that Olson told him his work would be exclusively refrigeration work.
29. The evidence Cold Logic provided to the Delegate stated that it was a new company at the time the Appellant was hired, along with 15 to 20 other employees. The company was in transition, and everyone was aware that a period of time might pass until its operations were fully organized and all the new hires would commence to perform their primary job duties.
30. Cold Logic did not open its refrigerated warehouse in Cloverdale until January 2011. The inference is that if the Appellant had not been dismissed, his refrigeration qualifications might have been employed to advantage at that location. In the end, however, it matters little. When the Appellant commenced to work for Cold Logic he was asked to perform the other "warehouse facility repairs and maintenance" duties for which, in part, the company had decided he should be hired. He performed those types of duties until he was dismissed on October 27, 2010, barely a week later.
31. Since neither party denies that Cold Logic represented to the Appellant that he could expect to perform other duties apart from purely "Refrigeration Technician" duties, it cannot be said that Cold Logic contravened section 8 when it asked him to perform those other duties during his brief tenure with the company.
32. Whether the electrical work the Appellant was asked to perform was work that he was qualified to do is, in my opinion, an issue that is distinct from the issue whether Cold Logic contravened section 8. The advertisement made reference to the Appellant's performing "electrical" work, and the Appellant's CV indicated he had training and experience in electrical systems.
33. The Appellant argues, however, that he was asked to perform electrical work for which he did not have the requisite certification. Cold Logic disagrees. I cannot say, on the evidence presented, whether the Appellant

is correct in his assertion. But even if he is, I am of the view that while it may be an important issue in another regulatory forum, it is not dispositive of the issue before me, which rests solely on a consideration of section 8. As I have indicated, since the evidence demonstrates that the Appellant must have known he would be doing other work apart from refrigeration work, including electrical work, at the time he was hired, the fact that he was asked to do electrical work when he commenced his employment cannot ground a successful complaint under section 8 of the *Act*.

ORDER

34. Pursuant to section 115 of the *Act*, I order that the Determination dated January 12, 2012, be confirmed.

Robert E. Groves
Member
Employment Standards Tribunal