



An appeal

- by -

K.M.S. Tools & Equipment Ltd.

(“KMS”)

- 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.: 2015A/34

DATE OF DECISION: April 20, 2015

DECISION

SUBMISSIONS

Ryan Hare, General Manager

on behalf of K.M.S. Tools & Equipment Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), K.M.S. Tools & Equipment Ltd. (“KMS”) has filed an appeal of a Determination issued by the Director of Employment Standards (the “Director”) on January 21, 2015. In that Determination, a delegate of the Director determined that KMS had contravened sections 58 and 63 of the *Act* in failing to pay Mark Brennenstuhl compensation for length of service and vacation pay. The delegate found that Mr. Brennenstuhl was entitled to wages and accrued interest in the total amount of \$3,539.32. The delegate also imposed a \$500 administrative penalty on KMS for its contravention of section 63 for a total amount payable of \$4,039.32.
2. KMS appeals the Determination contending that the delegate erred in law.
3. These reasons are based on KMS’s written submissions, 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. KMS operates a tool sales business. Mr. Brennenstuhl was employed with KMS in various capacities from March 23, 2005, until July 2014. At the time his employment ended, Mr. Brennenstuhl’s job title was Warehouse Supervisor, a position he had held for approximately one year prior to the end of his employment.
5. According to the Determination, which KMS does not dispute, on July 25, 2014, KMS advised Mr. Brennenstuhl that it no longer required a warehouse supervisor and offered him a position in the warehouse at a lower wage and with fewer responsibilities. KMS did not suggest that this position was comparable to that of warehouse supervisor. Mr. Brennenstuhl declined the position, electing to be “laid off” and agreed to return to KMS’s premises on July 28, 2014. On July 28, KMS’s Human Resource Manager advised Mr. Brennenstuhl that he would be paid four weeks’ severance and four weeks’ working notice. At the conclusion of the meeting with the Human Resource Manager, Mr. Brennenstuhl received a termination letter which indicated that he had declined to work the notice period. KMS paid Mr. Brennenstuhl’s final pay, including four weeks’ wages, to him later that week.
6. On August 15, 2014, Mr. Brennenstuhl filed a complaint under the *Act*, alleging that KMS had contravened the *Act* in failing to pay him compensation for length of service.
7. The Director’s delegate held a hearing on December 16, 2014. Mr. Hare appeared at the hearing on KMS’s behalf along with Regan Funk, the Human Resource Manager, and Brett Katnich, KMS’s warehouse manager.

8. The parties agreed on the following facts:
- Following a financial review, KMS decided to eliminate Mr. Brennenstuhl's position. Mr. Hare, Mr. Katnich and Ms. Funk met with Mr. Brennenstuhl on July 25, 2014, at which time Mr. Brennenstuhl was told that he could be laid off or relocate to a warehouse position.
 - Mr. Brennenstuhl decided to be laid off rather than work at a lower paid position and KMS told him to consider his decision over the weekend and that he would be required to return to work on Monday, July 28. Severance pay, or compensation for length of service, was not discussed at that meeting. Mr. Katnich walked Mr. Brennenstuhl to the warehouse where Mr. Brennenstuhl collected his personal effects and said goodbye to some colleagues, then to his vehicle.
 - On Monday, July 28, 2014, KMS told Mr. Brennenstuhl that he was entitled to eight weeks' wages or wages in lieu of notice. It advised Mr. Brennenstuhl that he was expected to work a four week notice period and would receive four weeks' wages as compensation for length of service.
9. The evidence of the parties differed at this point. Ms. Funk's evidence was that she typed up a resignation letter while Mr. Brennenstuhl waited. The letter said that Mr. Brennenstuhl's employment was terminated due to a shortage of work, that he would be paid eight weeks' notice of layoff, four of which would be working notice and four weeks of which would be paid in lieu of work. The letter continued "given the (sic) Mark has declined the 4 weeks working notice a final pay cheque will be prepared that will include any hours worked from July 24th to present day plus 4 weeks' severance ans (sic) any vacation pay owed to him".
10. Mr. Brennenstuhl's evidence was that he asked to receive the wages and complete his working notice at a later time, which KMS refused. He testified that he informed KMS that he would accept four weeks' severance and deal with the remaining entitlement "later".
11. The delegate determined that Mr. Brennenstuhl's employment ended on July 28, 2014.
12. The delegate found that KMS did not dispute Mr. Brennenstuhl's entitlement to compensation for length of service totalling eight weeks' wages. The delegate noted that pursuant to section 63 of the *Act*, KMS had the discretion to provide compensation, written working notice, or a combination of the two to meet the employer's obligation. The delegate determined that Mr. Brennenstuhl was not provided with written notice of his impending termination; rather, he was given a letter setting out KMS's understanding that he had refused to work the notice period and terminating his employment with immediate effect. The delegate found that KMS's intentions were made clear by the letter, which stated that Mr. Brennenstuhl's "final paycheque will be prepared", directly contradicting the heading of the letter which indicated that the termination was effective September 22, 2014. The delegate concluded that KMS had no grounds to end Mr. Brennenstuhl's employment effective July 28, nor had Mr. Brennenstuhl stated or objectively demonstrated, through his actions, an intent to quit his employment. The delegate found that KMS had not fully discharged its liability under section 63.

Argument

13. KMS contends that Mr. Brennenstuhl quit his position and that he is not entitled to any additional compensation. Mr. Hare contends that Mr. Brennenstuhl was aware that he had the right to work through his four week notice period but decided to quit instead. KMS argues that it paid Mr. Brennenstuhl four weeks' "severance" even though it was not obliged to after he quit.

14. Attached to KMS's appeal is a "statement" by Regan Funk setting out her version of the events leading up to Mr. Brennenstuhl's departure on July 28, 2014.

ANALYSIS

15. 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;
- (c) evidence has become available that was not available at the time the determination was being made.

16. 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.

17. The burden of establishing the grounds for an appeal rests with an Appellant. KMS must show clear and convincing reasons why the Tribunal should interfere with the delegate's decision on one of the three stated grounds of appeal. A disagreement with the result, in and of itself, is not a ground of appeal.

18. I am not persuaded that KMS has met that burden.

Error of Law

19. The Tribunal has adopted the factors set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)* (1998] B.C.J. No. 2275 (B.C.C.A.) as reviewable errors of law:

1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment 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 reasonably be entertained; and
5. adopting a method of assessment which is wrong in principle.

20. Questions of fact alone are not reviewable by the Tribunal under section 112. In *Britco Structures Ltd.*, BC EST # D260/03, the Tribunal held that findings of fact were reviewable as errors of law if they were based on no evidence, or on a view of the facts which could not reasonably be entertained.

21. The Tribunal must defer to the factual findings of a delegate unless the appellant can demonstrate that the delegate made a palpable or overriding error.

22. The delegate found that KMS had no grounds to terminate Mr. Brennenstuhl's employment, a conclusion KMS does not dispute. In fact, KMS conceded that it had an obligation to pay Mr. Brennenstuhl eight weeks' notice or wages in lieu of notice as compensation for length of service. KMS paid Mr. Brennenstuhl four weeks wages and asked him to work the remainder of the notice period, or for four additional weeks.

23. KMS says that the delegate erred in concluding that Mr. Brennenstuhl did not quit when he was asked to work the remaining four weeks.

24. As the Tribunal stated in *Burnaby Select Taxi* (BC EST # D091/96):

The right to quit is personal to the employee and there must be clear and unequivocal facts to support a conclusion that this right has been voluntarily exercised by the employee involved. There is both a subjective and an objective element to a quit: subjectively, the employee must form an intent to quit employment; objectively, the employee must carry out an act inconsistent with his or her further employment.

25. I find no error in the delegate's conclusion. The burden is on the employer to establish that an employee quit, on clear and unequivocal facts. Mr. Brennenstuhl's evidence at the hearing was that he would consider working the notice period "later". Although KMS was represented by three people at the hearing, it appears it did not dispute that evidence. Furthermore, KMS issued Mr. Brennenstuhl a paycheck which it indicated was his final pay.

26. I am unable to find that, on the evidence presented at the hearing, the delegate erred in finding no clear and unequivocal evidence that Mr. Brennenstuhl quit his employment.

27. I dismiss the appeal on this ground.

New Evidence

28. KMS submitted additional documentation in the form of a "statement" of Ms. Funk, in support of its appeal. Although not set out as a ground of appeal, I have considered this statement as a basis for the appeal. I note that the statement is unsworn, and that Ms. Funk appeared at the hearing before the delegate on December 16, 2014.

29. In *Re Merilus Technologies* (BC EST # D171/03) the Tribunal established the following four-part test for admitting new evidence on appeal:

- (a) 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;
- (b) the evidence must be relevant to a material issue arising from the complaint;
- (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
- (d) the evidence must have high 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. The "new evidence" was clearly available during the adjudication of Mr. Brennenstuhl's complaint. Although it is not entirely clear, the Determination suggests that Ms. Funk gave evidence at the hearing. Given that the delegate already heard and considered this evidence, I find no basis for this ground of appeal. If Ms. Funk testified about her version of events, the delegate concluded that her evidence was insufficient to discharge the employer's obligation of demonstrating that Mr. Brennenstuhl quit his employment.

31. The appeal is dismissed.

ORDER

32. I Order, pursuant to section 115 of the *Act*, that the Determination, dated January 21, 2015, be confirmed together with whatever interest may have accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal