

An appeal

- by -

Surekha Prasad

- 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 L. Roberts

FILE No.: 2005A/16

DATE OF DECISION: March 30, 2005

DECISION

SUBMISSIONS

Surekha Prasad	on her own behalf
Lynn Egan	on behalf of the Director of Employment Standards

OVERVIEW

This is an appeal by Surekha Prasad, pursuant to Section 112 of the *Employment Standards Act* ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued December 31, 2004.

Ms. Prasad worked as a salesperson for Colour Solutions Inc. ("CSI"), a computer and printer sales business, from July 22, 2002 until August 12, 2003. Ms. Prasad filed a complaint alleging that she was owed commission wages.

The delegate determined that CSI had not contravened the *Employment Standards Act*, and took no further action.

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

ISSUES

1. Did the Director's delegate fail to observe the principles of natural justice in making the Determination?
2. Has new and relevant information become available that was not available at the time the Determination was made that would lead the delegate to arrive at a different conclusion?

THE FACTS

Ms. Prasad alleged that she was paid by way of salary and commissions, and that she had not received her commission wages from April 2003 to July 2003 in the total amount of \$4,955.13.

Ms. Prasad participated in a mediation session with CSI on June 17, 2004. As the mediation was unsuccessful, the matter was set for a hearing on August 18, 2004. The Branch sent notice of the hearing by registered mail on June 22, 2004. Canada Post confirmed delivery of the notice on June 24, 2004.

A CSI representative appeared at the August 18, 2004 hearing, but Ms. Prasad did not. The Branch contacted Ms. Prasad, who said she had not received the notice of complaint hearing. Although Ms. Prasad was invited to appear at the hearing by teleconference, she declined. The delegate decided to re-schedule the hearing in light of Ms. Prasad's evidence she had not received notice of the hearing.

The Branch subsequently determined that the notice of hearing had been delivered to Ms. Prasad's residence, and signed for by her father. Ms. Prasad informed Branch staff that her father had not given the registered mail package to her.

The delegate then decided to conduct an investigation into Ms. Prasad's complaint rather than proceed by way of another hearing so as not to further inconvenience CSI.

The delegate summarized the complaint and evidence, and provided that information to Ms. Prasad and CSI for their response.

In her submission, Ms. Prasad stated that she had not attended the August hearing because she had been in an automobile accident, not because she had not received the hearing package as she originally asserted.

Ms. Prasad's July 15, 2002 letter of employment indicated that she was to be paid \$3,500 per month as a draw, and 25% commissions on sales in excess of \$7,500.00. In February, 2003, CSI sent Ms. Prasad a letter changing her remuneration effective April 1, 2003. The new rate of pay was to be \$3,500 per month as a draw, plus 25% commission wages on profits, "reconciled quarterly against advances with any overages paid within 30 days of the end of each quarter."

CSI submitted that Ms. Prasad was to be paid \$3,500 as a draw to be recovered against earned commissions. The delegate determined that Ms. Prasad was consistently paid \$3,500 per month. From April 1, 2003 to July 31, 2003, Ms. Prasad was paid \$10,209.90 as her draw, which was less than \$3,500 per month for that four month period due to some unpaid leave she had taken. During this period, her earned commissions were \$4,955.14.

At issue before the delegate was whether Ms. Prasad was entitled to commissions plus her draw, or commissions only with a salary paid as a draw against commissions.

Ms. Prasad argued that she was promised a guaranteed salary plus commissions during the hiring process, and that her written offer of July 15, 2002 indicating that her salary was to be a "draw" was not consistent with the verbal agreement. The delegate found that she did not need to make a factual finding on this document since it was not the agreement governing the period for which Ms. Prasad was making a claim for commission wages.

The delegate found that the change to Ms. Prasad's remuneration effective April 1, 2003 was not a fundamental alteration to her wages such that she could conclude that Ms. Prasad's employment had been terminated pursuant to section 66 of the Act. The delegate made no finding on this issue, concluding that CSI had met the minimum standards set out in the Act by providing written notice of the change in her employment contract. She determined that, because Ms. Prasad continued to work under this arrangement, she had accepted the new employment contract. The delegate found that Ms. Prasad's wages were paid based on an advance taken from her earned commissions rather than a salary plus commissions, and that this arrangement met the minimum standards set out in the Act.

The delegate determined that Ms. Prasad had been paid according to the terms of the April 1, 2003 contract and that Ms. Prasad had accepted these terms and conditions. The delegate concluded that the Act had not been contravened.

ARGUMENT

Ms. Prasad argues that she left her former employer for CSI based on the strength of verbal promises made to her, and that “dishonesty, lies and manipulation have taken a major role”. She also contends that she has a witness who could give evidence on her behalf.

Ms. Prasad argues that an oral hearing is required in order that she present her case.

The delegate submits that Ms. Prasad has not been denied natural justice. She submits that Ms. Prasad had knowledge of the opportunity to appear at a hearing, and failed to do so. She says that the hearing notice was delivered in accordance with section 122 of the Act. Although Ms. Prasad contended at that time that she had not been served, Ms. Prasad was given the opportunity to appear by telephone. Ms. Prasad declined, and did not seek an adjournment. When Ms. Prasad was later advised that the registered mail had been delivered, she contended that another family member had accepted the mail and had not delivered it to her. In her later submissions, Ms. Prasad submitted that the reason for her non-attendance at the August hearing was that she had been in an automobile accident.

The delegate submits that, in the circumstances, she decided to investigate the complaint because she did not want to further inconvenience CSI, who had attended both the mediation and the scheduled hearing. She says that Ms. Prasad was given full opportunity to present evidence and respond to CSI's submissions.

The delegate further submits that Ms. Prasad had every opportunity to present the evidence of her witness during the investigation of the complaint, and that this does not constitute new evidence.

ANALYSIS

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

...

- (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

Natural Justice

Principles of natural justice are, in essence, procedural rights that ensure parties a right to be fairly heard by an independent decision maker.

Parties alleging a denial of a fair hearing must provide some evidence in support of that allegation. (see *Dusty Investments Inc. dba Honda North BC EST #D043/99*)

I am not persuaded that Ms. Prasad was denied natural justice. She participated in a mediation session. She was aware of CSI's position respecting her complaint. Ms. Prasad was notified of the opportunity to

appear at a hearing at which she could present all of her evidence in support of her claim. She did not appear, did not seek an adjournment of the hearing, and declined to appear by teleconference.

The delegate then conducted an investigation into Ms. Prasad's complaint, providing a summary of CSI's position, and relevant documents. Ms. Prasad was given the opportunity to respond to CSI's evidence, including the opportunity to provide any witness statements that might support her allegations. I do not accept Ms. Prasad's assertions that "my view and facts have not been heard", and "my witness has not yet appeared". If the delegate has not heard Ms. Prasad's views or considered her witness statements, it is because Ms. Prasad has not presented them despite being given every opportunity to do so, not because the delegate refused or neglected to consider them.

The delegate reviewed all of the submissions prior to arriving at her decision, including Ms. Prasad's contention that she had an oral agreement with CSI that differed from her July 15, 2002 contract. The delegate found she did not have to make a determination on that issue, as the contract governing Ms. Prasad's remuneration for the period at issue was dated February 26, 2003, and was not an oral agreement.

I am unable to conclude that Ms. Prasad has demonstrated that she was denied natural justice.

New Evidence

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:

- (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 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.

Ms. Prasad says she has new evidence, specifically that of a witness to "an agreement". Although Ms. Prasad does not say what the witness could say with respect to any agreement, it is clear she had full opportunity to present the evidence of this witness to the delegate at any time during the investigation. Consequently, I find that the evidence is not new.

Further, although it is not clear from Ms. Prasad's submissions, I infer that the witness would speak to the oral agreement allegedly made between CSI and Ms. Prasad in July 2002. As noted above, the delegate made no findings on any oral agreement, if one existed. Rather, she based her decision about Ms. Prasad's remuneration solely on CSI's February, 2003 letter. Ms. Prasad does not say that her witness could give evidence about this letter. Therefore, I am also unable to find that this evidence would be relevant to the

material issue before the delegate, or that it would have led the delegate to a different conclusion on the issue before her, which was whether Ms. Prasad was entitled to commission wages.

The appeal is denied.

ORDER

I Order, pursuant to Section 114 of the Act, that the Determination dated December 31, 2004, be confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal