

An appeal

- by -

Golden Rock Products Inc.
("GRP")

- 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.: 2008A/19

DATE OF DECISION: April 17, 2008

DECISION

SUBMISSIONS

Paul Simonson	on behalf of Golden Rock Products Inc.
Ed Wall	on behalf of the Director of Employment Standards
Richard Vandergrift	on his own behalf

OVERVIEW

1. This is an appeal by Golden Rock Products Inc., ("GRP"), pursuant to Section 112 of the *Employment Standards Act* ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued February 15, 2008.
2. Richard Vandergrift worked as a machine operator for GRP, which operates a seasonal quarry business, from June, 2004. He was laid off on December 15, 2006 and rehired on March 27, 2007. On July 30, 2007, Mr. Vandergrift filed a complaint alleging that he was owed compensation for length of service.
3. The Director's delegate held a teleconference hearing into Mr. Vandergrift's complaint. On November 26, 2007, Mr. Simonson sought to have an in person hearing rather than a teleconference hearing as he was of the view that credibility was an important issue for the delegate to consider. The delegate denied the request on the basis that credibility was not at issue and key facts were not in dispute.
4. Following the hearing, the delegate determined that GRP had contravened Section 63 of the Act in failing to pay Mr. Vandergrift compensation for length of service and annual vacation pay. He concluded that Mr. Vandergrift was entitled to wages and interest in the total amount of \$720.68. The delegate also imposed a \$500 penalty on GRP for the contraventions of the Act, pursuant to section 29(1) of the *Employment Standards Regulations*.
5. GRP contends that the delegate failed to observe the principles of natural justice in making the Determination and asks to have it cancelled.
6. Section 36 of the *Administrative Tribunals Act* ("ATA"), which is incorporated into the *Employment Standards Act* (s. 103), and Rule 16 of the Tribunal's Rules of Practice and Procedure provide that the tribunal may hold any combination of written, electronic and oral hearings. (see also *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). GRP did not seek an oral hearing and I conclude that this appeal can be adjudicated on the section 112(5) "record", the submissions of the parties and the Reasons for the Determination.

ISSUE

7. Did the delegate fail to observe the principles of natural justice in making the Determination or make any other reviewable error?

FACTS AND ARGUMENT

8. On June 13, 2007, Mr. Vandergrift suffered an injury when a rock struck him on the head and he was off work for a period of time. When he returned to work in early July, 2007, he did not feel that GRP took his injury seriously and on July 11, 2007, he verbally advised his supervisor, Mr. Patterson, that he would be quitting his employment two weeks later. Mr. Patterson's evidence was that he asked Mr. Vandergrift to "think it over". Mr. Patterson told GRP's owners, Vince and Paul Simonson, about Mr. Vandergrift's intentions and was directed to accept Mr. Vandergrift's resignation effective the end of the next working day. On July 12, 2007, Mr. Patterson told Mr. Vandergrift that his resignation had been accepted and that he was no longer employed.
9. Mr. Simonson testified that he advised Mr. Patterson to accept Mr. Vandergrift's resignation early because he was at risk of re-injuring himself and, according to the Determination, "felt there was no value to keeping him at the workplace". GRP contended that it was not liable to pay Mr. Vandergrift compensation for length of service on the basis that he resigned his employment. Mr. Vandergrift argued that he had been fired.
10. The delegate applied the test outlined in *Zoltan Kiss* (BC EST #D091/96) and concluded that in accepting Mr. Vandergrift's resignation early, GRP deprived him of the two weeks employment he intended to complete. The delegate calculated Mr. Vandergrift's entitlement by averaging the last eight weeks during which he worked his normal or average hours.
11. On appeal, GRP argues that "it has the right to protect itself against delinquent employees" and that Mr. Vandergrift was delinquent because, while he was off work on disability, he worked on his truck. When GRP raised the issue with him, apparently Mr. Vandergrift suggested it could not assess his ability to work because of a lack of medical training. GRP acknowledged that Mr. Vandergrift had a doctor's note indicating that he was unable to work due to injury.
12. GRP contends that Mr. Vandergrift's credibility was at issue because of issues with WCB benefits he received. It also argues that, in giving his two weeks' notice, Mr. Vandergrift was in fact quitting. Mr. Simonson repeats his argument before the delegate, which was that there was a real risk of Mr. Vandergrift re-injuring himself in the two weeks he would be remaining at the work site.
13. Mr. Simonson also asserts that the hearing ought to have been held in person as credibility was at issue and that, if it had, there would have been a "fair outcome".
14. The delegate submits that the facts before him were not disputed either at the hearing or on appeal and that the sole issue was whether Mr. Vandergrift was quit or fired. He submits there is no error in failing to consider irrelevant information; that is, whether Mr. Vandergrift was able to perform work on his truck while he was away from work on disability as confirmed by his doctor.
15. The delegate submits that whether Mr. Vandergrift was fired or GRP accepted his resignation early amounted to the same thing under the *Act* because in both cases the employer "initiate[d] the cessation of employment". He submits that giving notice speaks of future intentions while quitting speaks of an immediate action.

16. The delegate further submits that GRP cannot terminate an employee because it believes an employee will take some action in the future (such as re-injuring himself) and that giving notice of an intention to quit does not constitute just cause for termination.
17. The delegate submits that, where facts are not disputed, it is not necessary to hold in person hearings and argues that GRP has not demonstrated how it was denied natural justice.
18. Mr. Vandergrift contends that he was denied an opportunity to work his last two weeks and that he is entitled to his severance. Mr. Vandergrift also submitted some medical documents that I have not reviewed as I do not consider them relevant to the grounds of appeal.
19. In reply, GRP submits that the fact that Mr. Vandergrift rebuilt his truck while on disability is relevant as it speaks to Mr. Vandergrift's credibility and honesty. GRP makes additional submissions on Mr. Vandergrift's workplace injury which I also find not necessary to refer to.

ANALYSIS

20. 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
21. In *J.C. Creations Ltd. (Re)* (BC EST #RD317/03), a reconsideration panel of the Tribunal determined that the Tribunal should consider the substance of the appeal regardless of whether an appellant has checked off the correct boxes. Although GRP has only ticked the natural justice box, I infer they are also appealing the Determination based on an error of law and I have addressed both issues.
22. The burden of establishing the grounds for an appeal rests with an Appellant. GRP must provide persuasive and compelling evidence that the delegate failed to observe the principles of natural justice, or erred in law in concluding that Mr. Vandergrift was entitled to compensation for length of service.
23. In essence, GRP's appeal is a disagreement with the result. As I understand the essence of its submission, it should not be liable to pay Mr. Vandergrift compensation for length of service because of Mr. Vandergrift's alleged dishonesty and fraud with respect to WCB benefits. GRP's appeal document does not identify any errors of law or describe how it is of the view it was denied natural justice other than to say that the delegate ought to have held an oral hearing.
24. The Tribunal has adopted the factors set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)* (1998] B.C.J. (C.A.) as reviewable errors of law:
- 1. A misinterpretation or misapplication of a section of the 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 be reasonably entertained; and
5. Exercising discretion in a fashion that is wrong in principle

25. Principles of natural justice are, in essence, procedural rights that ensure that parties know the case being made against them, the opportunity to reply, and the right to have their case heard by an impartial decision maker. There is no evidence GRP was denied the opportunity to make its case or to respond to Mr. Vandergrift's claim. Given that GRP acknowledged that it instructed Mr. Patterson to accept Mr. Vandergrift's resignation early, there were no issues of credibility for the delegate to make determinations about. I find no basis for this ground of appeal.
26. Section 63 of the Act sets out an employer's liability for compensation for length of service. That statutory liability is discharged if an employee is paid compensation, or the employee quits or is terminated for just cause.
27. As noted by the delegate in *Zoltan Kiss* (B.C. E.S.T #D 091/96) the Tribunal held that:
- 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.
28. There was no dispute that Mr. Vandergrift exercised his right to quit two weeks from July 11, 2007. GRP pre-empted his decision and terminated his employment the following day. Those facts were not disputed. I find no error of law in the delegate's conclusion that Mr. Vandergrift's employment was terminated.
29. GRP appears to be contending, for the first time, that it had grounds for terminating Mr. Vandergrift's employment because he committed fraud or was dishonest. There was no evidence before the delegate, nor has any been presented to me, that Mr. Vandergrift committed fraud. The record discloses that Mr. Vandergrift had a note from a doctor indicating he was unable to work, a fact conceded by GRP at the hearing. In the absence of any evidence providing grounds for terminating Mr. Vandergrift's employment, I find no error in the delegate's conclusion and dismiss the appeal.

ORDER

30. I Order, pursuant to Section 115 of the Act, that the Determination, dated February 15, 2008, be confirmed, together with whatever interest may have accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal