Employment Standards TRIBUNAL

An appeal

- by -

David Anderson
("Mr. Anderson")

- 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: Shafik Bhalloo

FILE No.: 2011A/31

DATE OF DECISION: May 10, 2011

DECISION

SUBMISSIONS

David Anderson	on his own behalf
Robert Peterson	Counsel for Central Coast Regional District
Alan Phillips	on behalf of the Director of Employment Standards

OVERVIEW AND FACTS

1. David Anderson ("Mr. Anderson") commenced employment with Central Coast Regional District ("CCRD"), a regional governmental agency, in 2004 as a Regional Economic Development Officer.

2. On June 1, 2010, Mr. Anderson filed a complaint against CCRD under section 74 of the *Employment Standards Act* (the "*Act*") alleging that CCRD contravened the *Act* by failing to pay him regular wages and annual vacation pay.

3. On December 16, 2010, a delegate of the Director of Employment Standards (the "delegate") conducted a hearing into Mr. Anderson's complaint (the "Hearing") and, based on the evidence of both Mr. Anderson and CCRD, concluded that Mr. Anderson worked for CCRD at various times in and during January to March 2010 while he was on a short-term disability leave from CCRD. For this work, the delegate calculated Mr. Anderson was entitled to wages totalling $5,850.42 and CCRD, in failing to pay him the said amount, contravened section 17 of the *Act*. Accordingly, the delegate ordered CCRD to pay Mr. Anderson the said amount plus accrued interest of $131.24, pursuant to section 88 of the *Act*, for a total of $5,981.66. The Delegate also imposed on CCRD an administrative penalty of $500 pursuant to section 29 of the *Employment Standards Regulation*.

4. However, with respect to Mr. Anderson's claim for annual vacation pay earned, but not paid in 2009, the delegate reviewed sections 57 and 58 of the *Act* and dismissed Mr. Anderson's complaint, stating:

> The employment contract (the "contract") between the Complainant and the CCRD provides for the Complainant to receive five weeks (25 days) paid vacation per year. The Complainant was allowed to take, and took, vacation in the year he earned it. The contract shows the Employer uses a calendar year for vacation purposes.
>
> The documentary evidence provided by the Employer, which I find as fact, shows the Complainant was entitled to take up to 25 days vacation in 2008, and took 16.5 days vacation, carrying over the balance of 8.5 days into the 2009 calendar year.
>
> The Complainant's carry-over of 8.5 days, plus the 25 day 2009 entitlement, results in 33.5 days vacation being available in 2009. The Employer's evidence, which I find as fact, is the Complainant took 13.5 days vacation in 2009.
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> Section 57(2) of the *Act* requires that the vacation be taken within 12 months after the year of entitlement. As noted above, of the total 33.5 vacation days available in 2009, the Complainant took 13.5 days, leaving the balance of 20 days. These would be required to be taken by the end of 2010 as per s. 57(2), and further, the Complainant would also be entitled to 25 days vacation for 2010 (required to be taken by December 31, 2011). The date of the hearing into the complaint made by Mr. Anderson was December 16, 2010. The Employer's liability for the 2009 vacation entitlement must be discharged by the end of the

> 2010 calendar year. *I have no knowledge of what transpired between the parties on this matter following December 16th, and am therefore unable to conclude the Employer has contravened the [sic] Section 57 of the Act. As a result, I must dismiss this aspect of the complaint.* (*Emphasis Added*)

5. On March 17, 2011, Mr. Anderson, pursuant to section 112(1) of the *Act*, appealed that part of the Determination wherein the delegate dismissed his vacation pay claim.

6. Mr. Anderson's appeal is based on two (2) grounds noted on the Appeal Form, namely, that the Director of Employment Standards failed to observe the principles of natural justice in making the Determination and that evidence has become available that was not available at the time the Determination was being made.

7. Mr. Anderson seeks an Order changing or varying the Determination although he does not clearly indicate how he wants the Determination varied. I would think that he is seeking the Tribunal to find that vacation pay is owed to him and cancel the delegate's Determination on this issue.

8. Mr. Anderson does not seek an oral hearing before the Tribunal and while the Tribunal has discretion whether to hold an oral hearing on an appeal, I have decided an oral hearing is not necessary in order to decide this appeal. Instead, I will decide the appeal based on the section 112(5) "record" submitted by the Director, the written submissions of the parties, and the Reasons for the Determination.

ISSUE

9. The issues to be determined in this appeal are twofold, namely:

   i. Did the Director fail to observe the principles of natural justice in making the Determination?

   ii. Is there now new evidence that has become available that was not available at the time the Determination was being made and, if so, does that evidence justify changing or varying the Determination?

SUBMISSIONS OF MR. ANDERSON

10. With respect to the natural justice ground of appeal checked off in the appropriate box on the Appeal Form, Mr. Anderson has not provided any supporting submissions.

11. With respect to the new evidence ground of appeal, Mr. Anderson has attached to his Appeal Form two (2) letters from CCRD to himself, dated September 13, 2010, and March 15, 2011, respectively. Both letters are from CCRD's Chief Administrative Officer, Ms. Joy MacKay ("Ms. MacKay"). The first letter contains the reference heading "Termination of Employment" and advises Mr. Anderson that CCRD is considering terminating his employment without alleging cause and invites him "to submit in writing any information" he would like Ms. MacKay to consider before CCRD makes its final decision in the matter.

12. The second letter, which is dated approximately one (1) month after the Determination, terminates Mr. Anderson's employment and offers him severance pay.

13. In Mr. Anderson's very brief handwritten submissions, which start on the first page of the Appeal Form, he states:

> ER31259, Page R2, Section II, last sentence is incorrect (see attached) – I've fileded [*sic*] a complaint within ESA Section 83 recently + section 57…

14. The balance of Mr. Anderson's written submission on that page is cut off and not legible, but it appears that Mr. Anderson is referring to the second section in the Reasons for the Determination headed "Background" wherein the delegate, in the last sentence, states "Mr. Anderson remains in the employ of the CCRD at the time of this writing". It would appear that Mr. Anderson is disputing that fact finding in the Reasons.

15. In the balance of the handwritten submissions, which appear in a single separate handwritten document attached to the Appeal Form and titled "Addendum 1, Re: Section 57. ER31259", Mr. Anderson states:

> It is my contention the employee's vacation entitlement was never discharged – I'm unable to document this allegation because there are no cancelled cheques. – the employer had significant opportunity to pay it out, but refused to do so (or acknowledge the entitlement). To paraphrase/summarize: I don't view this as a 'use it or lose it situation' – I see 'use it or get paid out environment' – please refer to Addendum 2 employment agreement, which permits a vacation carry over.

SUBMISSIONS OF THE DIRECTOR

16. With respect to the natural justice ground of appeal, the Director submits that Mr. Anderson's allegation of denial of natural justice "is without foundation" as Mr. Anderson "has provided no detail or reasons regarding how he was denied natural justice". In the circumstances, the Director asks the Tribunal to reject this ground of appeal.

17. With respect to the new evidence ground of appeal, the Director submits that the first of the two (2) letters, dated September 13, 2010, entitled "Termination of Employment" existed at the time of the Hearing and should have been submitted at that time. As there is no explanation for why Mr. Anderson did not submit that letter, the Director submits that it does not meet the threshold test for admissibility of new evidence set out in the Tribunal's decision in *Re: Merilus Technologies Inc.* (BC EST # D171/03) and, therefore, this letter fails to qualify as new evidence and should not be considered.

18. With respect to the second letter of CCRD, dated March 15, 2011, the Director states that this letter came into existence three (3) months after the date of the Hearing and approximately one (1) month after the Determination was issued. While this document was not available at the time the Determination was made, it relates to a "new issue and is not germane to the subject matter of the hearing conducted on December 16, 2010" and, therefore, this document, too, should not be allowed as new evidence.

19. The Director further submits that, with respect to Mr. Anderson's dispute with his finding of fact that Mr. Anderson was an employee of CCRD at the time the Reasons for the Determination were written, neither party, at the Hearing, provided any evidence to the contrary.

20. With respect to the balance of the handwritten submissions of Mr. Anderson referred to under the previous heading, the Director submits that it is unclear what Mr. Anderson is requesting this Tribunal to do. According to the Director, the delegate in the Determination notes that "the employer had until the end of the calendar year 2010 to discharge its liability for the appellant's 2009 vacation pay entitlement, and, because the Hearing took place on December 16, 2010, it was not possible to determine whether or not the employer had discharged this liability". In the circumstances, the Director argues that the delegate's conclusions in the Determination "were reasonable and correct based on the oral and documentary evidence provided at the time of the hearing". The Director, therefore, argues that Mr. Anderson has failed to demonstrate any basis for either of his appeal grounds and therefore his appeal should be dismissed.

SUBMISSIONS OF CCRD

21. Counsel for CCRD, in two (2) separate submissions, in solidarity with the Director's submissions referred to earlier, argues that Mr. Anderson has not shown any basis to demonstrate a breach of natural justice by the Director in making the Determination.

22. With respect to the new evidence ground of appeal, CCRD's counsel argues that neither of the letters in question form new evidence. In the case of the first letter, dated September 13, 2010, counsel indicates that Mr. Anderson was sent this letter by way of Registered Mail through Canada Post, but it was returned after Mr. Anderson failed to pick it up in a timely manner. However, counsel states that CCRD also sent an electronic copy of the same letter to Mr. Anderson on September 13, 2010, and Mr. Anderson replied to this email on September 14, 2010. Therefore, argues counsel, Mr. Anderson was in possession of this letter in advance of the Hearing and before the Determination was made.

23. Counsel for CCRD also adds that while it is not probative in Mr. Anderson's appeal, CCRD has paid Mr. Anderson his unused vacation entitlement and thus has discharged its legal duty to Mr. Anderson in respect of the vacation entitlement.

ANALYSIS

24. With respect to the natural justice ground of appeal, I note that the Tribunal has repeatedly explained in previous decisions that the principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; to present their evidence; and to be heard by an independent decision maker (see *Re: Imperial Limousine Service Ltd.*, BC EST # D014/05). This Tribunal has also noted in past decisions that the onus is on the appellant claiming a breach of natural justice to demonstrate, on a balance of probabilities, violation of its natural justice or procedural rights. In this case, Mr. Anderson has not adduced any material or evidence in support of his claim of breach of natural justice on the part of the Director. He is simply making a bare assertion. Accordingly, I dismiss Mr. Anderson's natural justice ground of appeal.

25. With respect to the new evidence ground of appeal, I note that the Tribunal in *Re: Merilus Technologies Inc.*, *supra*, faced with the issue of whether to accept fresh evidence on appeal, decided that it should be guided by the test applied in civil courts for admitting fresh evidence on appeal. That test is a four-fold test as follows:

> (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.

26. The criteria above are conjunctive and therefore the party requesting the Tribunal to admit new evidence must satisfy each of them before the Tribunal will accept and consider the purported new evidence on appeal.

27. In this case, neither of the two (2) letters submitted by Mr. Anderson on appeal constitute new evidence. The first letter entitled "Termination of Employment", dated September 13, 2010, existed approximately two (2)

months prior to the Hearing and almost four (4) months before the Determination was made, and Mr. Anderson has not offered any, or any credible, explanation as to why he did not produce it at the Hearing or prior to the Determination. Therefore, it fails on the first of the four-fold criteria in *Re: Merilus Technologies Inc.*, *supra.* While I need not therefore consider the balance of the conjunctive criteria in *Re: Merilus Technologies Inc.*, *supra*, I note that the document would also not qualify under at least two (2) more criteria under in the case. More particularly, I do not find anything in the letter relevant to a material issue arising from Mr. Anderson's complaint, nor is there any evidence in the letter that has high, or any probative value that could have led the Director to a different conclusion on a material issue.

28. With respect to the second letter, dated March 15, 2011, wherein CCRD terminates Mr. Anderson's employment and offers him a severance settlement, while this letter came into existence after the Determination was made, like the first letter, it is not relevant to a material issue arising in the complaint, nor does it have any probative value in the sense that, if believed, it could have led the Director to a different conclusion on a material issue. Therefore, this document, too, does not qualify as new evidence, and I refuse to consider it.

29. With respect to the written submissions of Mr. Anderson, these submissions appear to claim that the employer, CCRD, failed to pay him vacation pay earned in 2009. However, at the time of the Hearing, December 16, 2010, as noted by the delegate in the Reasons for the Determination, CCRD's liability for the 2009 vacation entitlement "must be discharged by the end of the 2010 calendar year". In my view, the delegate correctly dismissed Mr. Anderson's claim for vacation pay as there was, at the time of the Hearing, some time left before the end of 2010 for the employer to give Mr. Anderson an opportunity to either take vacation or be paid for the same, and it would have been premature at that point for the delegate to rule on that claim.

30. I also note that while Mr. Anderson appears to dispute that he was in the employ of CCRD as found by the delegate in the Reasons for the Determination, I am persuaded by the delegate's appeal submissions that neither party gave evidence that Mr. Anderson was not in the employ of CCRD at the time of the Hearing. Further, while I have rejected the March 15, 2011, of CCRD adduced by Mr. Anderson as new evidence in his appeal, I note that this letter contains a termination notice from CCRD to Mr. Anderson, together with a severance offer which would suggest that Mr. Anderson was employed at the time of the Hearing (as well as at the time the Determination was issued) and, therefore, neither section 58(3) nor section 18(1) of the *Act* governing the timing of the payment of all wages owing, including vacation pay, after the employer terminates the employee's employment would have been relevant considerations in the delegate's decision in the Determination.

31. If at the end of 2010 (after the Determination was made), Mr. Anderson's vacation entitlement remained unpaid and became an issue (although I note in the appeal submissions of CCRD's counsel that CCRD has paid Mr. Anderson his vacation entitlement), Mr. Anderson would be entitled to bring a separate complaint under the *Act*.

32. For all the reasons set out above, I dismiss Mr. Anderson's appeal.

ORDER

33. Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued.

Shafik Bhalloo
Member
Employment Standards Tribunal