Employment Standards TRIBUNAL

An appeal

- by -

Abbotsford Concrete Products Ltd.
(the "Employer")

- 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: Yuki Matsuno

FILE No.: 2010A/17

DATE OF DECISION: April 27, 2010

DECISION

SUBMISSIONS

Cliff Leach	on behalf of Abbotsford Concrete Products Ltd.
Karpal Singh	on behalf of the Director of Employment Standards

OVERVIEW

1. Abbotsford Concrete Products Ltd. (the "Employer") appeals a Determination of the Director of Employment Standards (the "Director") issued December 24, 2009 (the "Determination"), pursuant to section 112 of the *Employment Standards Act* (the "*Act*").

2. In the Determination, a delegate of the Director (the "Delegate") found that the Employer had contravened section 63 of the *Act* when it did not give Carolyn Simpson ("Ms. Simpson) compensation for length of service upon termination of employment. The Delegate ordered the Employer to pay Ms. Simpson $1,502.90, including interest calculated under section 88 of the *Act*.

3. The Delegate also imposed a $500.00 administrative penalty on the Employer for contravening section 63 of the *Act*, as prescribed by section 29 of the *Employment Standards Regulation*. The total amount of the Determination is $2,002.90.

4. The Determination was made after an investigation and a hearing regarding Ms. Simpson's complaint, which was filed on September 22, 2008. The hearing into the complaint was held on January 27, 2009. Ms. Simpson attended and gave evidence at the hearing; she was assisted by an advocate. David Galloway, the Employer's Director of Finance, represented the Employer at the hearing and gave evidence. Three other employees of the Employer also gave evidence at the hearing. Both parties also submitted documents for consideration by the Delegate.

5. The Employer now appeals on all three grounds available under section 112(1) of the *Act*. I find that I am able to decide this appeal on the basis of the parties' submissions and the Record. I have reviewed and carefully considered these documents in coming to my decision.

BACKGROUND AND THE DETERMINATION

6. The Determination outlines the following background: The Employer operates a manufacturing facility that produces interlocking concrete paving stones. Ms. Simpson was hired as an accounts payable clerk on June 5, 2006, at the rate of pay of $2,950.00 per month. She last worked on March 3, 2008, and then went on medical leave. On April 8, 2008, the Employer issued an amended Record of Employment ("ROE") stating Ms. Simpson quit her employment.

7. The Delegate outlined in the Determination that the sole issue to be determined was whether Ms. Simpson is entitled to compensation for length of service pursuant to section 63 of the *Act*, particularly (a) was Ms. Simpson terminated pursuant to section 66 of the *Act* and (b) did Ms. Simpson quit her employment, or did the Employer terminate her employment? The Delegate determined that:

a) Ms. Simpson was not constructively dismissed when the Employer suspended her benefits on March 25, 2008, retroactive to March 4, 2008. Ms. Simpson had argued that this constituted a fundamental change to a condition of her employment and should be determined to be a termination of employment under section 66 of the *Act*.

b) Ms. Simpson did not quit her employment. Rather, the Employer terminated her employment on April 8, 2008. The Employer argued that she quit because she told one of the other employees that she could no longer do her job; requested her vacation pay and amended ROE; and told an Employment Insurance ("EI") agent that she quit her employment on her doctor's advice.

ISSUE

8. Did the Delegate err in law or fail to observe the principles of natural justice in making the Determination, or has evidence become available that was not available at the time the Determination was made?

ARGUMENT AND ANALYSIS

9. As the party bringing the appeal, the Employer has the burden of showing that the Determination is wrong and should be varied or cancelled. I have considered all the arguments of all parties and refer only to those which are relevant to the outcome of the appeal.

Error of Law

10. The Tribunal uses the test outlined in *Britco Structures Ltd.*, BC EST # D260/03 to determine whether an error of law has been made. An error of law could result from:

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 reasonably be entertained; and
5. adopting a method of assessment which is wrong in principle (in the employment standards context, exercising discretion in a fashion that is wrong in principle: *Jane Welch operating as Windy Willows Farm*, BC EST # D161/05).

11. The Employer's argument is that the Delegate was wrong in concluding that Ms. Simpson did not quit her employment and therefore was entitled to compensation for length of service under section 63 of the *Act*. The Employer says that the Delegate did not consider certain facts in the Determination and that he may have erred in his analysis of the facts. In its submissions, the Employer details its interpretation of the testimony given at the hearing and of various documents that were before the Delegate such as doctor's notes; EI agents' notes; the return to work plan; and the ROE and other EI documents.

12. On the other hand, the Delegate says that the Employer is trying to reargue its case by reintroducing the same evidence that was before the Delegate. He points out that the Employer's disagreement with the Determination does not make his findings incorrect. The Delegate says that the Employer's appeal does not make out an error of law; that all evidence submitted by all parties and the witnesses at the hearing were considered by the Delegate; and the Determination was not based solely on Ms. Simpson's evidence.

13. From the Employer's point of view, it appeared that Ms. Simpson quit her employment based on statements about her ability to work, her request for vacation pay and an ROE, her failure to request an extension of her medical leave, and her picking up her belongings at work. The Employer also says that there is evidence that Ms. Simpson quit on the advice of her doctor. However, it is not the Employer's own assessment of the situation that determines whether an employee quit or not. Rather, the law takes a broader perspective. As the Delegate points out in the Determination, citing in part *Burnaby Select Taxi* (and *Zoltan Kiss*, BC EST # D91/96, reconsidered and upheld BC EST # D122/96), the act of resigning employment is personal to the employee and there must be clear and unequivocal evidence supporting a conclusion that the employee has voluntarily exercised his or her right to resign. There is both a subjective and objective element to the act of resigning employment – the subjective element occurs the employee forms an intention to quit, and the objective element occurs where the employee carries out an act which is inconsistent with further employment.

14. The Delegate went through the facts with considerable thoroughness in the Determination and concluded that the evidence before him did not show clearly and unequivocally that Ms. Simpson quit. Included in his analysis was a proper application of the law, in which the Delegate considered the facts relating to both the subjective and objective elements of a resignation. He found, based on the evidence before him, that Ms. Simpson's employment was terminated on April 8, 2008, when the ROE was issued. As a result, he found that Ms. Simpson did not quit her employment and was therefore entitled to compensation for length of service under section 63 of the *Act*.

15. The Employer says the Delegate was wrong in his findings of fact and encourages the Tribunal to make alternative findings. However, the opportunities to appeal a determination under section 112 of the *Act* do not include appeals of findings of fact. The Employer has not brought forward any evidence of an error of law, and I see none after reviewing the Determination. The Employer's appeal fails on this ground.

Failure to Observe the Principles of Natural Justice

16. The principles of natural justice concern themselves with procedural fairness. The basic components of the principles of natural justice are: the right to know the case against oneself and respond; the right to an unbiased decision maker who both hears and decides the case; and the right to receive reasons for the decision.

17. Nothing in the Employer's arguments address this ground of appeal. In my review of the documents, including the Determination, it is clear that the Delegate followed the principles of natural justice. The Employer was informed of the case against it and had an opportunity to respond during the investigation stage and at the hearing. At the hearing, both parties had an opportunity for the parties to present their evidence to the Delegate and state their case. The Employer presented evidence and called witnesses. Finally, there is no evidence that there was bias on the part of the Delegate, and the Delegate provided reasons for his decision in the Determination. The Employer has not shown that the Delegate failed to observe the principles of natural justice in making the Determination.

New Evidence

18. The Appellant indicates on its appeal form that evidence has become available that was not available at the time the Determination was being made. In order for an appeal to succeed on the ground that new evidence has become available, the Appellant must establish that all of the following four conditions have been met before the evidence will be considered:

1. 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;

2. the evidence must be relevant to a material issue arising from the complaint;

3. the evidence must be credible in the sense that it is reasonably capable of belief; and

4. 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.

(*Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST # D171/03)

19. The Employer submits two groups of what it says is new evidence: (1) two copies of two doctor's notes: the originals as provided to EI by Ms. Simpson, on which the EI Board of Referees based their decision; and a second altered set, faxed later to the Employer by Ms. Simpson; and (2) a decision of the EI Umpire dated December 21, 2009, upholding the Board of Referees' decision disqualifying Ms. Simpson from receiving EI benefits.

20. With respect to the two sets of doctor's notes, the Employer says that the notes sent to EI in support of Ms. Simpson's application for medical benefits were recopied with the words "EI" removed from the top; these altered copies were then sent to the Employer. The Employer says Ms. Simpson altered the copy of the doctor's note so as to give the impression that she had not quit. The Delegate says that this is not new evidence because both sets of notes were considered by him in the course of making the Determination and further, the doctor's notes were not the only evidence considered by him in concluding that Ms. Simpson had not quit her employment. The Delegate further points out that the Employer had an opportunity to cross-examine Ms. Simpson during the hearing on the inconsistencies between the two documents, but chose not to do so.

21. I conclude that the two sets of doctors' notes are not new evidence. These notes were available and in fact were included by the Employer as part of the evidence that it submitted to the Delegate; they form part of the Record. The Delegate had the opportunity to consider both sets, as well as all the other evidence in coming to the Determination. As these notes are not new evidence, I will accord them no further consideration under this ground of appeal.

22. With respect to the Umpire's decision, the Employer appears to suggest that it constitutes evidence that Ms. Simpson quit her employment and is not entitled to compensation for length of employment as a result. In response, the Delegate says that an Umpire's decision does not have high probative value as new evidence that would have changed his findings. He refers to his Determination in which he points out (with respect to a decision regarding Ms. Simpson made by an EI Board of Referees) that a decision under the statutory scheme of the federal *Employment Insurance Act* is not determinative of a complaint under the *Employment Standards Act*.

23. The Umpire's decision appears to meet the first and third conditions listed in *Bruce Davies,* above. Having been issued on December 21, 2009, it is plausible that the Umpire's Decision may not have been available to be presented to the Delegate before he issued the Determination on December 24, 2009. I also find that the decision is credible. However, the Umpire's decision does not meet the second and fourth conditions, for related reasons. The Appellant puts forward the Umpire's decision to show that Ms. Simpson resigned her employment. However, as the Delegate points out, the Umpire's decision is issued under a completely different statutory regime - federal Employment Insurance legislation. It is an appeal decision that considered the Board of Referees' decision within the limited jurisdiction of the Umpire to hear these cases under the

Employment Insurance Act. In the absence of any evidence of its relevance to the question of whether Ms. Simpson is entitled to compensation for length of service under the *Employment Standards Act,* I find that the Umpire's decision is not relevant to any material issue arising from the complaint. The Umpire's decision has little probative value for similar reasons; I agree that with the Delegate that even if the Umpire's decision had been before him, he would not have come to a different conclusion on the question of Ms. Simpson's entitlement to compensation for length of service under the *Act*. I conclude that I cannot consider the Umpire's decision.

RESULT

24. The Employer's appeal is dismissed.

ORDER

25. Pursuant to Section 115 of the *Act*, I order that the Determination dated December 24, 2009 be confirmed in the amount of $2,002.90, together with any interest that has accrued under Section 88 of the *Act*.

Yuki Matsuno
Member
Employment Standards Tribunal