Employment Standards TRIBUNAL

An appeal

- by -

Hi-Tech Acrylic Products Inc.
("Hi-Tech")

- 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.: 2014A/41

DATE OF DECISION: May 29, 2014

DECISION

SUBMISSIONS

Deepak Chodha — counsel for Hi-Tech Acrylic Products Inc.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), Hi-Tech Acrylic Products Inc. ("Hi-Tech") has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the "Director") on March 3, 2014 (the "Determination").

2. The Determination concluded that Hi-Tech contravened Part 7, section 58 (vacation pay) and Part 8, section 63 (compensation for length of service) of the *Act* in respect of the employment of Ravinder Sekhon ("Mr. Sekhon") and ordered Hi-Tech to pay Mr. Sekhon wages and interest in the amount of $13,449.92. The Determination also levied two (2) administrative penalties against Hi-Tech totalling $1,000.00 for contraventions of sections 58 and 63 of the *Act*. The total amount of the Determination is $14,449.92.

3. Hi-Tech has appealed the Determination on the sole ground that the Director failed to observe the principles of natural justice in making the Determination. Hi-Tech seeks the Employment Standards Tribunal (the "Tribunal") to change or vary the Determination, although Hi-Tech does not explain how it wants the Determination varied or changed.

4. The Tribunal has decided this appeal is an appropriate case for consideration under section 114 of the *Act* and Rule 22 of the Tribunal's *Rules of Practice and Procedure* (the "*Rules*"). At this stage, I will assess the appeal based solely on the Reasons for the Determination (the "Reasons"), the written submissions of Hi-Tech's counsel, and the section 112(5) "record" that was before the Director when the Determination was made. If I am satisfied that Hi-Tech's appeal, or a part of it, has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, the Tribunal will invite Mr. Sekhon and the Director to file Reply submissions on the appeal, and Hi-Tech will be afforded an opportunity to make a final Reply to those submissions, if any.

ISSUE

5. The sole issue in this appeal is whether the Director breached the principles of natural justice in making the Determination.

THE FACTS

6. Hi-Tech is a British Columbia Company in the business of manufacturing acrylic bathroom products.

7. Hi-Tech was incorporated on November 30, 2000, with Gurdev Aulakh ("Mr. G. Aulakh") as its sole Director and Officer.

8. Hi-Tech employed Mr. Sekhon as its Operations Manager from January 2001 to April 3, 2012, at the rate of pay of $5,500.00 per month.

9. On July 17, 2012, Mr. Sekhon filed a complaint under section 74 of the *Act*, alleging that Hi-Tech failed to pay him regular wages, vacation pay, compensation for length of service and business expenses (the "Complaint").

10. On October 10, 2013, a delegate of the Director conducted a hearing of the Complaint (the "Hearing"). At the Hearing, Mr. Sekhon represented himself and Hi-Tech was represented by Mr. Bahadur Aulakh ("Mr. B. Aulakh"), Mr. G. Aulakh's son.

11. According to the Reasons, at the opening of the Hearing, Mr. Sekhon confirmed that his claim for regular wages had settled, and the only outstanding claims in his Complaint were for vacation pay, compensation for length of service and company expenses.

12. Based on the record adduced by the Director in the appeal, it appears that the delegate, before the Hearing, afforded Mr. Sekhon and Hi-Tech an opportunity to make submissions and both parties presented their reliance evidence which the delegate then forwarded to the other party.

13. I also note that both Mr. Sekhon and Hi-Tech, through its representative, Mr. B. Aulakh, adduced evidence at the Hearing and both parties had the opportunity to cross examine the other's witness.

14. At the Hearing, Mr. Sekhon's position was that he was terminated from his employment by Hi-Tech and owed compensation for length of service, vacation pay and business expenses he paid on behalf of Hi-Tech. Hi-Tech's position, as expressed by Mr. B. Aulakh, was that Mr. Sekhon quit his employment, was not owed any expenses and had already received more than his entitlement for vacation pay.

15. In the Reasons, with respect to Mr. Sekhon's claim for compensation for length of service, the delegate correctly relied on the test established for determining whether an employee quit or not delineated in *Burnaby Select Taxi Ltd. – and – Zoltan Kiss* (BC EST # D091/96) and concluded, for the following reasons, that Mr. Sekhon did not quit his employment but Hi-Tech terminated it:

> It is undisputed that Mr. Aulakh and Mr. Sekhon had a heated argument on April 3, 2012 over the cash deposits allegedly taken by Mr. Sekhon. There is nothing in the evidence to suggest that Mr. Sekhon was specifically terminated for this reason. Instead, the evidence satisfies me that following the argument, Mr. Aulakh told Mr. Sekhon to 'get out' and that Mr. Sekhon left in a taxi called by the company. I accept Mr. Aulakh told Mr. Sekhon to 'get out' and assisted him in leaving the premises.
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> Hi-Tech does not specifically advance the argument that Mr. Sekhon was fired for cause as a result of the allegations surrounding the missing cash deposits. However, although theft of money from a cash register or a scheme to defraud an employer would certainly justify summary dismissal, there was no evidence presented that Hi-Tech conducted an investigation into Mr. Sekhon's alleged dishonest act. Allegations of theft must be proven on clear and cogent evidence and such is not the case here.
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> For the above reasons, I find Mr. Sekhon did not quit his employment. Nor do I find Hi-Tech had just cause in the event they terminated the employment. The burden is on an employer to show that an employee has quit. In this case, the evidence, objectively and on balance, is more consistent with the conclusion that Mr. Sekhon was fired. I find Hi-Tech fired Mr. Sekhon and he is therefore entitled to compensation for length of service.

16. The delegate then went on to determine the amount of compensation owed to Mr. Sekhon for length of service.

17. With respect to Mr. Sekhon's claim for business expenses, the delegate was not persuaded that Mr. Sekhon had made out a sufficient case and dismissed this claim stating:

> …Mr. Sekhon's testimony with regard to his claim for payment of expenses lacked specificity. I note Mr. Sekhon was unable to provide any clarification on what items as listed remain outstanding and how he came to the amount of $1,992 as being owed. Further, Mr. Sekhon was unable to provide copies of his Visa statements, evidence that I find would be reasonably available to him, for the last six months of his employment to verify what expenses charged to his Visa have been paid by him. Conversely, the only evidence provided by him was a copy of a page taken from Hi-Tech's accounting ledger confirming the Vancity fund transfer arrangement as earlier described. The ledger shows certain ongoing monthly Visa charges to Mr. Sekhon's credit card; however, these amounts are not at issue here. Furthermore, the lack of details and specificity on these charges leave me unable to determine if these are personal or business expenses for which he seeks repayment. Accordingly, Mr. Sekhon's evidence has not satisfied me that he is owed any expenses as claimed. Hence, I find I am unable to award Mr. Sekhon any related amount for expenses.

18. With respect to vacation pay, Mr. Sekhon claimed that he was owed vacation pay for 2011 and 2012. However, Mr. B. Aulakh contended that Mr. Sekhon was responsible for accounting functions and he was not owed any vacation pay because he had already "paid himself" vacation pay of $8,720.89 by helping himself to two (2) customers' cash deposits in the amounts of $6,049.11 and $2,671.78. Mr. B. Aulakh provided two (2) customer invoices representing the said amounts in support of his argument. He further stated that Hi-Tech requested Mr. Sekhon to return the monies he had taken, but Mr. Sekhon refused to do so.

19. In preferring the evidence of Mr. Sekhon and awarding him vacation pay, the delegate reasoned as follows:

> Although Mr. Aulakh advanced a claim that Mr. Sekhon has already received his full vacation pay, there is no evidence from Hi-Tech to support this. Hi-Tech was unable to provide any documents such as a wage statement or a receipt from Mr. Sekhon acknowledging cash received for vacation pay or details of vacation pay calculations supporting the amount Mr. Sekhon allegedly received. In addition, the payroll records provided by Hi-Tech cannot confirm that Mr. Sekhon has been paid his vacation pay or what days, if any, Mr. Sekhon took for vacation. The last pay statement provided is for wages earned up to March 7, 2012.
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> Therefore, I find Mr. Sekhon is owed wages for vacation pay. In calculating the vacation pay amounts, I rely on the T4 and wage statements provided and Mr. Sekhon's testimony regarding vacation day's [sic] taken and final wages received for the period March 24 to April 3, 2012.

20. While the delegate does not, in context of her analysis of Mr. Sekhon's vacation pay claim, address Hi-Tech's allegation that Mr. Sekhon effectively stole two customer payments, I note the delegate addresses this allegation in the context of her analysis of Mr. Sekhon's claim for termination pay. She states that "there was no evidence presented that Hi-Tech conducted an investigation into Mr. Sekhon's alleged dishonest act".

SUBMISSIONS OF HI-TECH

21. The written submissions of Hi-Tech's counsel are very brief, and I propose to set them out verbatim below:

> This is an Appeal of a Determination by Employment Standards Branch. The followings [sic] are reasons and arguments for this Appeal:
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> 1. The Claimant, Ravinder Sekhon, quit and instead wanted Mr. Aulakh to give him a lay off [*sic*].

2. The Claimant had decided to pursue another project of his and handed over the company vehicle to Mr. Aulakh on the day his [*sic*] quit.

3. It was agreed that a proper account of the Claimant's wage and collection of the company will be dealt with one [*sic*] the Claimant is back from vacation/leave of absence.

ANALYSIS

22. As indicated previously, Hi-Tech has appealed the Determination on the ground that the delegate breached the principles of natural justice in making the Determination.

23. In *Imperial Limousine Service Ltd.* (BC EST # D014/05), the Tribunal explained the principles of natural justice as follows:

> Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the *Act*, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party. (See *BWI Business World Incorporated*, BC EST # D050/96.)

24. The onus lies with Hi-Tech to show that the delegate failed to observe any of the constituents of the principles of natural justice in making the Determination. In this case, Hi-Tech has simply made a bare assertion of breach of natural justice but not provided any evidence to support its claim. I find there is no evidence that Hi-Tech was denied an opportunity to learn the case against it, the right to present its evidence and the right to be heard by an independent decision maker. To the contrary, there is sufficient evidence showing that Hi-Tech was afforded an opportunity to learn the case against it, made pre-Hearing submission of evidence and actively participated in the Hearing.

25. Having said this, based on the very sparse submissions of counsel for Hi-Tech set out above, I find that Hi-Tech is disagreeing with the delegate's conclusions or findings of facts and is merely attempting to re-argue its case with a view to obtaining a more favourable outcome this time around. This Tribunal has repeatedly said in past cases that an appeal is not an opportunity for a dissatisfied party to re-argue its case and have a "second kick at the can". Moreover, to allow a party to re-argue its case on appeal is contrary to the stated objective of the *Act* in section 2(d), namely, to provide fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*.

26. Having said this, I note that although Hi-Tech has not invoked the error of law ground of appeal, I have considered it in context of the delegate's findings of fact. More particularly, while the Tribunal lacks jurisdiction over questions of fact, it has jurisdiction when the matter involves errors on findings of fact which may amount to an error of law. However, the onus is on the appellant to show that the delegate or the Director made a "palpable and overriding error" or that the finding of fact was "clearly wrong" to establish error of law (see *Re: Funk*, BC EST # D195/04). In this case, I am not sufficiently persuaded that the delegate, in making her findings of fact on each of the issues in dispute, made any palpable or overriding error, or reached a clearly wrong conclusion of fact, or acted without any evidence, or on a view of evidence that could not reasonably be entertained. To the contrary, I find the delegate's conclusions of fact on all material issues supported in evidence and do not find any reason to disturb those conclusions.

ORDER

27. Pursuant to section 114(1)(f) of the *Act*, I am dismissing Hi-Tech's appeal on the ground that it has no reasonable prospect that it will succeed. In accordance with section 115(1)(a) of the *Act*, I order that the Determination be confirmed as issued.

Shafik Bhalloo
Member
Employment Standards Tribunal