Employment Standards TRIBUNAL

An appeal

- by -

Autofolks Parts Inc.
(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: Kenneth Wm. Thornicroft

FILE No.: 2012A/28

DATE OF DECISION: May 24, 2012

DECISION

SUBMISSIONS

Shiraz Omar	on behalf of Autofolks Parts Inc.
Ali Allawy	on his own behalf
Joy Archer	on behalf of the Director of Employment Standards

INTRODUCTION

1. This is an appeal filed by Autofolks Parts Inc. (the "Employer") pursuant to subsection 112(1)(c) of the *Employment Standards Act* (the "*Act*"). The Employer appeals a Determination and accompanying "Reasons for the Determination" both issued on February 15, 2012. By way of the Determination, the Director of Employment Standards ordered the Employer to pay its former employee, Ali Allawy (the "Employee"), the total sum of $10,532.30 representing 8 weeks' wages as compensation for length of service (see *Act*, section 63) together with concomitant vacation pay (section 58) and interest (section 88). Further, and also by way of the Determination, the Employer was ordered to pay two separate $500 monetary penalties (section 98). Thus, the Employer's total obligation under the Determination is $11,532.30.

2. The Employer's position at the May 3, 2011, complaint hearing before the delegate was that it had just cause to terminate the Employee (see subsection 63(3)(c)) based on a number of alleged errors and other deficiencies on the latter's part. The delegate rejected the Employer's just cause allegations. The Employer now says that it has new evidence that corroborates its "just cause" position and asks the Tribunal to cancel the Determination, presumably on the basis that this new evidence conclusively shows that it had just cause to terminate the Employee. If I were satisfied that the employer's ground of appeal was meritorious, I would not cancel the Determination but, rather, would refer the matter back to the Director for a further hearing and review. However, as will be seen, I find that this "new evidence" is not admissible and, in any event, is of very limited, if any, probative value.

3. I might add that, quite apart from the "just cause" issue, the Employer does not challenge the delegate's unpaid wage calculations.

4. I am adjudicating this appeal based on the parties' written submissions and the Employer and Employee, as well as the Director of Employment Standards' delegate, all filed submissions in this matter. I have also reviewed the section 112(5) "record" that was before the Director's delegate when she issued the Determination.

5. The Employer applied for a suspension of the Determination (section 113), however, the Tribunal denied that application in reasons for decision issued on May 1, 2012 (see BC EST # D038/12).

BACKGROUND FACTS

6. The Employer operates an automotive repair business in Langley and employed the Employee as a mechanic for over 9 years before the latter's termination. The delegate found that the Employer advised the Employee that he was being terminated due to a lack of work since the business was having difficulties attracting customers. This fact was corroborated by the Record of Employment ("ROE") the Employer issued to the

Employee that identified a "shortage or work" (code "A") as the reason for the termination of the Employee's services. I note that the Employer could have chosen to record code "M" (dismissal) on the ROE but did not do so. The ROE is a form that employers must complete and issue following the termination of an employee's services (for whatever reason) and requires the person issuing the ROE to certify as follows: "I am aware that it is an offence to make false entries and hereby certify that all statements on this form are true". Thus, in essence, the Employer's current position is that it knowingly issued a false ROE (and thus committed an offence under the federal *Employment Insurance Act*) – an assertion that hardly enhances the Employer's credibility in these proceedings.

7. Further, the Employer, under the signature of its principal Mr. Shiraz Omar (who has represented the Employer throughout these entire proceedings), also issued a glowing reference letter to the Employee in which it "highly recommended" the Employee and praised him, among other things, as a "vital member of our Auto repair shop", "hard working", "well disciplined", "honest", "very well organized", "efficient", "a team player", "a good technician" and a "great asset". It is hard to conceive that this was the same person described by Mr. Omar in his evidence before the delegate. Again, Mr. Omar either lied before the delegate or lied in his reference letter – either way, it does not say much for his credibility.

8. The delegate ultimately concluded – and I find this to be the only reasonable conclusion to be drawn from the evidence before her – that when the Employer terminated the Employee, the former was not aware of its liability to pay compensation for length of service under section 63 of the *Act*. It would appear that this matter was first drawn to the Employer's notice when the Employee brought it to the Employer's attention as part of the "self-help kit" protocol that obliges a complainant to first attempt to recover their unpaid wages from their employer directly. I note that the Employer never responded to the Employee in any fashion.

9. It was only when the Employer realized that it was facing a significant unpaid wage liability under section 63 that it morphed its position from "shortage of work" to "just cause. This was a colourable and transparent attempt to avoid paying the Employee his rightful wages and the delegate, not surprisingly, saw right through it.

THE EMPLOYER'S REASON FOR APPEAL

10. As noted above, the Employer asks the Tribunal to cancel the Determination because "evidence has become available that was not available at the time the determination was being made" (subsection 112(1)(c)). This evidence takes the form of various assertions contained in a 1¼-page memorandum appended to the Employer's Appeal Form. Briefly, the Employer says that a former employee, Leon (Liangping Xie), will provide testimony about the Employee's poor work performance and various other failings. Apparently, Mr. Xie moved to China and thus was not available to testify at the complaint hearing.

11. There is nothing in the material before me to indicate that Mr. Xie is now willing to travel to Vancouver to testify at a new hearing although, I suppose, his evidence could be given by teleconference. In the latter event, of course, I fail to see why he could not have testified by teleconference on May 3, 2011, (the date of the complaint hearing). There is an implied suggestion in the Employer's material that Mr. Xie is no longer living in China but there are no further details about his current residency. Indeed, there is nothing in the material before me corroborating the assertion that Mr. Xie was in China at the time of the complaint hearing.

FINDINGS AND ANALYSIS

12. Proffered "new evidence" must be principally evaluated on the four criteria set out in *Davies et al.* (BC EST # D171/03 at page 3). The first criterion refers to due diligence in discovering and presenting the evidence – in this case, the Employer was aware that it was required to bring all of its evidence to the complaint hearing. This point was specifically set out in the February 16, 2011, "Notice of Complaint Hearing" that directed the parties to provide advance notice of the names of witnesses and to provide a summary of their anticipated testimony. A similar direction was contained in the "factsheet" entitled "Adjudication Hearings" that was attached to the hearing notice. Despite this clear direction, the Employer *never* made any effort to identify Mr. Xie (let alone provide a summary of his evidence) before the complaint hearing. The Employer says that it identified Mr. Xie at the hearing as a possible witness but the Employer did not seek an adjournment and even if it had done so, I am of the view the delegate would have been quite right to refuse to adjourn the proceedings. It must be remembered that the delegate was presiding at a complaint hearing and was not conducting an investigation – it was up to the parties, *as they were clearly instructed*, to bring *all* of their evidence to the hearing.

13. The second *Davies* criterion refers to materiality and, on balance, the proposed evidence is material in the sense that it relates to an issue that was before the delegate, namely, the Employee's conduct. However, this evidence fails to pass the third criterion – credibility. As presented, it is pure hearsay with absolutely no guarantee of veracity. All I have before me is a statement from *Mr. Omar* regarding what *Mr. Xie* will say if given the opportunity to testify. I do not have a sworn statement (or even an unsworn one) from Mr. Xie – I have no idea whether the statements attributed to him actually represent his true views regarding the matters in question. Accordingly, I cannot find that the fourth criterion, namely, that the proposed evidence has high probative value, is satisfied.

14. Since all four conditions must be satisfied – and only one condition is satisfied in this case – I find that the evidence does not meet the test for admissibility and thus this appeal must be dismissed.

ORDER

15. Pursuant to section 115(1)(a) of the *Act*, the Determination is confirmed as issued in the total amount of $11,532.30 together with whatever additional interest that has accrued under section 88 of the *Act* since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal