Employment Standards TRIBUNAL

An appeal

- by -

Donald Leishman

- 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: John Savage

FILE No.: 2006A/32

DATE OF DECISION: May 10, 2006

DECISION

SUBMISSIONS

Donald Leishman, for Himself

Rod Bianchini, for the Director of Employment Standards

OVERVIEW

1. Don Leishman ("Leishman") made a complaint against his employer, PC Patrol Inc. ("PC Patrol") claiming unpaid wages. The complaint was filed by internet on February 9, 2005.

2. Leishman serviced PCs and installed software for PC Patrol. His employment was short-lived. He commenced employment June 13, 2004. He received a record of employment dated August 19, 2004.

3. Leishman and PC Patrol are in general agreement as to the circumstances of his ceasing employment but there is an issue as to when the events took place. Leishman reported the theft of various items from his vehicle while on a service call for PC Patrol in early August 2004.

4. After reporting the theft to PC Patrol the company recalled its principal from holidays, Garfield McCormick ("McCormick").

5. McCormick was going to terminate Leishman but had second thoughts about that and instead wrote Leishman on August 4, 2004 that "it is company policy to hold individual technicians responsible for the value of the contents of their rolling cases and binders" and that Leishman was "personally responsible for the replacement value of each item" that had been stolen.

6. Together with the letter was a list of items which, when provincial sales tax was added, totaled $1257.67. McCormick insisted that Leishman pay him this amount subject to any inventory adjustment. After receipt of this letter and, not receiving replacement equipment to allow him to work as a technician, Leishman quit his employment. There is controversy over whether this occurred in the first or second week of August.

7. Leishman requested payment of his unpaid wages and expenses: $362.16 for unpaid wages and $62.95 for equipment. These were itemized for PC Patrol but went unpaid. A Record of Employment was issued and a cheque offered for $88.36 in vacation pay but it was refused by Leishman. McCormick insisted that Leishman owed PC Patrol money because of the theft.

8. There then followed a correspondence between Leishman and PC Patrol that did not lead to resolution of the dispute. Upon receiving the complaint the Delegate launched an investigation. The Delegate made a preliminary finding, reduced to writing that the complaint was out of time as he was of the view that Leishman's employment terminated during the first week of August, 2004.

9. Before receiving the Delegates preliminary finding Leishman moved his place of residence. The Delegate reports that he contacted Leishman by telephone and advised him of his preliminary finding as

his letter was returned undelivered. Receiving no further information from Leishman the Delegate made a ruling finding that Leishman's complaint was out of time.

10. Leishman appeals the finding of the Delegate arguing that the Director 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 made.

ISSUES

11. The issues in this appeal are:

(a) Whether the Delegate breached the rules of natural justice in issuing his Determination in the circumstances of this case, and

(b) Whether new evidence has become available that was not available at the time the determination was being made.

LEGISLATION

12. As noted above, the origin of this complaint is a dispute between the employee and the employer over the alleged failure of the employer to pay wages and reimburse the employee for expenses. Of course, an Employer cannot withhold the payment of wages by making deductions from those wages as it sees fit.

13. Section 21(1) of the *Employment Standards Act* R.S.B.C. 1996 c. 113 provides that, apart from statutory exceptions, "an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose". Nor can an employer require an employee to pay any of its business costs, except as provided by regulation: section 21(2) of the *Employment Standards Act*.

14. It is no answer to the requirements of the *Act* to argue that the employee signed a contract with contrary provisions. The provisions of the *Act* are minimum requirements and an agreement to waive the provisions of the *Act* is void: section 4 of the *Employment Standards Act*.

15. Moreover, an employer must pay all wages within 48 hours of terminating employment or within 6 days if the employee terminates the employment: section 18 of the *Employment Standards Act*.

16. Section 125 of the *Employment Standards Act* makes it an offence to contravene Parts 2-8 of the *Act*, which includes sections 18 and 21.

17. For an employee to pursue a remedy under the *Employment Standards Act*, however, he or she must make their complaint within 6 months of the termination of the employment as provided in section 74(3). There is no ability for the Director or this Tribunal to extend the time for making the complaint: *Act Keu*, BCEST #D257/96, *Re Lesiuk*, BCEST #D147/03.

18. Failure by an employee to file a written complaint within this period does not relieve an employer from liability for unpaid wages. An employee can still pursue a remedy in the Courts including Small Claims Court, claiming, for example, unpaid wages, non-reimbursed expenses, damages for wrongful dismissal, which includes constructive dismissal where an employee is forced to resign by the actions of the

employer, interest on these amounts, and even aggravated damages, where the conduct of the employer warrants sanction.

19. Moreover, if an offence has occurred, that is, there has been a breach of the *Act* as noted above, there is a two year limitation period for a prosecution to occur, calculated from the date the facts first come to the director's knowledge: section 124 of the *Employment Standards Act*.

20. So, while the mechanism of filing a complaint under the *Employment Standards Act* is an expeditious way of resolving employment disputes, failure to invoke in a timely way the appeal provisions of the *Act* does not leave the employee without a remedy.

21. As noted below, however, the issue in this appeal is a narrow one, i.e., whether the complaint was made in a timely way, and thus reflects the limited jurisdiction of this Tribunal.

DISCUSSION AND ANALYSIS

Natural Justice

22. Leishman claims that there was a breach of natural justice in the handling of his complaint by the Delegate. As I have noted, in this case there was no hearing but only an investigation.

23. An investigation under the *Employment Standards Act*, does not necessarily give rise to the full panoply of natural justice rights arising in a purely judicial context. Indeed, it has been held that the attributes of natural justice may vary according to the character of the decision and the context in which it applies: *Martineau v. Matsqui Disciplinary Board*, [1980] 1 S.C.R. 602.

24. The appropriate procedures to be followed will in each case depend on the provisions of the statute and the context in which they are applied: *Downing v. Graydon*, (1978) 29 O.R. (2d) 292. It has been held, for example, that the Director during an investigation should not be placed in a procedural strait-jacket: *Isulpro Industries Inc.*, BC EST #D405/98.

25. In the case of investigations the duty of fairness will almost always require notice to the employer and employee. The general principle is that notice must be adequate in all the circumstances in order to afford those concerned a reasonable opportunity to present evidence and argument, and to respond to the position of the other party. It will also give the parties other opportunities to resolve the dispute with the assistance of the Employment Standards Branch.

26. In this case Leishman was interviewed by an officer from the Branch. Representatives of his employer were also interviewed by the officer. Documents were received from both parties.

27. The investigation focused around whether the complaint was made in a timely manner. Although not referred to in the Determination, the Delegate sent a registered letter that outlined his proposed findings dated November 2, 2005. The letter was returned but the Delegate says its contents were subsequently discussed with Leishman. Leishman provided no further information and on February 2, 2006 the Delegate issued his Determination finding that the complaint was out of time.

28. The Determination of the Delegate finds that termination of employment occurred on or about August 4, 2004. In my opinion there is nothing in the procedures adopted by the Delegate or in the analysis the Delegate gave that gives rise to an inference that there was a breach of natural justice in the investigation of the complaint. Accordingly, I find that there is no merit to this aspect of the appeal.

New Evidence

29. Leishman attached to his submission a series of letters and emails involving exchanges between himself and McCormick as well as some statements from third parties. None of this material was before the Delegate.

30. With respect to the letters from third parties, they are somewhat vague in content and the authors, while supporting Leishman's general version of events, are themselves uncertain of the exact time frame.

31. With respect to the exchanges between Leishman and McCormick, there are two undated letters which were apparently delivered by hand August 18, 2004. These set forth Leishman's position that he was not responsible for the stolen materials but is owed $362.16 for unpaid wages and $62.95 for equipment he purchased for PC Patrol.

32. In addition to this correspondence there is a copy of an email from McCormick to Leishman dated August 18, 2004. In that email McCormick writes in response to Leishman's request for a meeting:

> "I am not sure what there is to work out, nor why we need to meet face-to-face. Give me your lawyer's name and I will have my lawyer contact him or her. I doubt that you can afford a lawyer, personally. PC Patrol, on the other hand, can easily afford to lose .40 cents on the dollar, just to see your credit ruined.
>
> This is going to be settled according to the inventory sheet. No sense hiding from it, or attempting to confuse issues. If we go to court, PC Patrol will present the documents you signed, and we will win, meaning that you will have a judgement on your bureau and that is worse than a collection. You will not be able to get a credit card, or credit card increase, mortgage, car or credit of any kind….".

33. A short time later on the same day another email is sent by McCormick:

> "Almost forgot. You may not pick up your pay cheque—it will be sent out. This is per Labor Relations. You are advised that you are not wlecome [sic] on our premises and are not to enter the offices, common areas or the third floor of 7 West 7th Avenue. If Heather sees you, she is to lock her door and call the police. This is per the VPD".

34. There followed a series of correspondence from Leishman to McCormick that is marked "Without Prejudice". The dispute was not resolved.

35. On November 12, 2004 McCormick emails Leishman as follows:

> "Subject: Change of Plans
>
> Hi Don,
>
> I just got off the phone with Credex and have decided not to take you to court after all. Rather, I will let the debt sit in collection for the next 6 years so that you cannot access outside credit and let them keep calling and pressuring you. Going to court would take a year away, and we wouldn't see your pre-judgment garnishing funds till that time, and they would have to stop calling you.
>
> This way you get to hear from Credex from time to time (better monitor that call display!!) until you pay me my money. I didn't realize just how good a job they were doing. Plus, after you pay me, if you don't think you should have paid it, you can take me to court. If you find a way to stop Credex from calling you, I will put it into a different collection agency, and the whole thing will start all over again. Whee!
>
> Have a good day, Donald!
>
> Garfield McCormick
> PC Patrol Inc."

36. There follows a series of letters between Leishman and the Credex that are marked "Without Prejudice" but are indicative of Leishman's attempts to stop Credex from contacting him.

37. On December 9, 2004 McCormick then emails Leishman, in part, as follows:

> "Subject: Merry Christmas
>
> Just got off the phone with Credex…looks like you were disputing the debt, trying to get them to remove the file from your credit bureau. Well, that isn't going to happen, as we have the papers to file here to sue you in small claims. Wait till you see what else we have in store for you!
>
> What will happen is that we will serve the papers, garnish your bank account (this will all happen on the same day so you can't hide the money) and then allow Credex to leave the item alive and well on your bureau until we have judgment. This takes about 1 ½ years in BC, so you will not be able to do anything credit-wise until we have settled this all off. PC Patrol will gladly pay Credex a commission on the file just to keep it alive.
>
> I can't believe what an irresponsible little shit you really are. Imagine how your son would feel, knowing his daddy runs from his mistakes then lets his family suffer as his credit goes to hell?...."

38. There are further emails of the same tenor from McCormick to Leishman.

39. Leishman filed the complaint that is the subject of this adjudication shortly after receiving this series of communications, perhaps in response to the same.

40. It is, of course, contrary to the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c.2, section 114(1) for a collector to harass a debtor, even if there is a debt. By section 189(4)(g) of the *Business Practices and Consumer Protection Act*, it is an offense under the *Offence Act*, RSBC 1996 c. 338, to breach section 114(1).

41. In some circumstances it can also be a *Criminal Code* offence to harass: *Criminal Code*, [R.S., 1985, c. C-46] ss.264(1) and (2).

42. The intentional infliction of mental suffering is an independent tort: *Wilkinson v. Downton* (1897), 2 Q.B. 57, *Kulyk v. Toronto Board of Education* [1996] O.J. No. 2972.

43. The issue before this Tribunal, however, is not whether the Employer and specifically McCormick engaged in a series of activities to intentionally harass its former employee, Leishman, or whether a collection agency is in breach of the provisions of the *Business Practices and Consumer Protection Act*, but the very narrow issue of whether the information contained in this correspondence constitutes new evidence that should be permitted to be adduced by Leishman in the determination of his complaint in this appeal.

44. Section 112(1)(c) of the *Employment Standards Act* provides a right of appeal where a party has "evidence has become available that was not available at the time the determination was being made". In deciding whether the Tribunal should receive new evidence on appeal the Tribunal noted in *Re Merilus Technologies Inc.*, [2003] BC EST #D171/03 that it has been guided by the test applied in civil courts for admitting fresh evidence on appeal.

45. The test for admitting new evidence on appeal involves the consideration of the following factors: (1) whether the evidence could, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or hearing, (2) the evidence must be relevant to a material issue in the appeal, (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 a material issue.

46. The narrow issue in this appeal is whether Leishman's employment terminated in the first or second week of August, 2004. While the series of emails noted above was not before the Delegate, and arguably might indicate something about the author of the emails, it does little to shed light on the limited issue before this tribunal, namely, whether Leishman's complaint was out of time, i.e., it is not highly probative of the date on which Leishman left his employment. Moreover, some of this information was available at the time of the investigation.

47. It is my opinion that the evidence concerning McKormick's conduct after the events, where it was not available at the time of the investigation, is not substantively probative of the issue concerning the timeliness of the complaint. This evidence therefore does not meet the test for admitting new evidence on appeal.

48. For these reasons I find there is no merit to this aspect of the appeal.

SUMMARY

49. There was no breach of natural justice during the investigation of the complaint. There is no basis for the introduction of the "new evidence" proposed to be introduced in an appeal of the Determination of the Delegate.

50. Since the complaint is out of time, Leishman cannot use the appeal provisions of the *Employment Standards Act* to pursue his claim against PC Patrol.

51. There is nothing in this ruling that precludes Leishman from pursuing any other avenues of redress.

ORDER

52. I order, pursuant to section 115 of the *Act*, that the Determination of the Director is confirmed.

John Savage
Member
Employment Standards Tribunal