Employment Standards TRIBUNAL

An appeal

- by -

686786 B.C. Ltd. operating as Preferred Industrial Supply
("PIS")

- 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

TRIBUNAL MEMBER: Carol L. Roberts

FILE No.: 2005A/31 and 2005A/39

DATE OF DECISION: April 19, 2005

DECISION

SUBMISSIONS

Rolf Effertz	on behalf of 686768 B.C. Ltd.
Lynn Egan	on behalf of the Director of Employment Standards
Kimberly Flood	on her own behalf

OVERVIEW

This is an appeal by 686768 B.C. Ltd. operating as Preferred Industrial Supply ("PIS"), pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued January 18, 2005.

Kim Flood worked as a receptionist/data entry person for PIS, an industrial sales business, from November 12, 2003 until July 14, 2004. Ms. Flood filed a complaint alleging that she was owed regular wages, sick pay, annual vacation pay and compensation for length of service.

The Director's delegate held a hearing into Ms. Flood's complaint on January 5, 2005. Mr. Effertz appeared on behalf of PIS, and Ms. Flood appeared on hers own behalf.

The delegate determined that PIS contravened Sections 18, 58 and 63 of the *Employment Standards Act* in failing to pay Ms. Flood wages, annual vacation pay and compensation for length of service. She concluded that Ms. Flood was entitled to wages, in the total amount of $741.68, including interest. The delegate also imposed a $1,500 penalty on PIS for the three contraventions of the Act, pursuant to section 29(1) of the *Employment Standards Regulations.*

PIS alleges that the delegate erred in law, failed to observe the principles of natural justice in making the Determination, and that evidence had become available that was not available at the time the Determination was being made.

PIS also sought a suspension of the Determination until the appeal is heard.

Although Mr. Effertz sought an oral hearing, I am satisfied that this matter can be decided based on the written submissions of the parties. In light of my decision on this issue, and for the reasons that follow, it is unnecessary to consider the suspension request.

ISSUES

1. Did the delegate err in law in finding that Ms. Flood's employment was terminated as a result of a substantial change in the conditions of her employment?

2. Did the delegate demonstrate bias against PIS?

3. Has new evidence become available that was not available at the time the Determination was being made that would have lead the delegate to conclude that Ms. Flood had been hired for a definite term, and thus, that her employment had not been terminated?

THE FACTS AND ARGUMENT

Mr. Effertz and Ms. Flood's father Thomas Flood, were officers and directors of an industrial supply company called E-RS Preferred Supply Inc. Each owned 50% of the shares.

Ms. Flood was hired by E-FS on November 12, 2003. The delegate found that, at some point prior to Ms. Flood's hire, Mr. Effertz had ceased being an officer/director of E-FS, although he remained involved in the management of the company. E-FS ceased operation on January 31, 2004. For the period November 12, 2003 until January 31, 2004, Ms. Flood's wages were paid by cheques signed by both Mr. Flood and Mr. Effertz.

On February 1, 2004, PIS, a new company of which Mr. Effertz was the sole officer and director, continued an industrial supply business in the same leased premises with the same assets (including inventory, fixtures, office furniture, computers, and customers). E-FS did not terminate Ms. Flood's employment or issue her an ROE, nor did it pay her annual vacation pay. The delegate determined that Ms. Flood's employment was continuous.

PIS did not open for business on July 2, 2004, and Mr. Effertz told Ms. Flood to take the day off. She was not paid any wages for that day. On July 11, 2004, Mr. Effertz told Ms. Flood not to work on July 12, 2004. She was paid for four hours work on that day.

On July 13, 2004, after Ms. Flood had worked for four hours, Mr. Effertz proposed that she work different hours. In a letter of the same date, PIS indicated that it would no longer be able to offer Ms. Flood full time hours, but that it wished to retain her services on a part-time basis, with her hours of work being from 1:00 p.m. to 5:00 p.m. Tuesday through Thursday. It continued as follows:

"In the event that circumstances change there remains the possibility your hours will be reviewed and changed accordingly. Thank you for your understanding during these difficult times."

Ms. Flood took the balance of the day off to consider the proposal. The following day, she faxed Mr. Effertz a letter declining the proposed new hours and requesting her final wages and Record of Employment (ROE). The ROE indicated that Ms. Flood worked from February 1, 2004 until July 12, 2004, and that she had quit her employment.

Mr. Effertz contended that the letter constituted a proposal only, that it was not to take effect immediately, and that he anticipated that further discussions would follow. He stated that it was necessary to reduce Ms. Flood's hours of work for economic reasons, and denied that the letter constituted a termination of Ms. Flood's employment.

The delegate determined that Mr. Effertz had substantially changed the conditions of Ms. Flood's employment in unilaterally reducing her weekly hours of work from 40 to 12 without notice. She determined that Ms. Flood would "endure transportation problems" if she accepted the reduced hours, as well as suffer a real economic impact as a result of the substantial alteration in her employment contract.

The delegate determined that Ms. Flood's employment was terminated pursuant to section 66 of the Act, and that she was entitled to compensation for length of service pursuant to section 63.

The delegate determined that Ms. Flood was not entitled to sick pay. However, she found that Ms. Flood was entitled to wages for the four hours she worked on July 13, and vacation pay for the period November 12, 2003 until July 31, 2004. She also determined that PIS's failure to include Ms. Flood's wages for the period November 12, 2003 until January 31, 2004 in the calculation of her vacation pay constituted a contravention of section 58 of the Act.

ANALYSIS AND DECISION

Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

(a) the director erred in law

(b) the director failed to observe the principles of natural justice in making the determination; or

(c) evidence has become available that was not available at the time the determination was being made

Errors of Law

The primary issues before the delegate (and those which PIS disputes on appeal) were whether Ms. Flood's employment was continuous, whether her employment was substantially altered such that her employment was terminated, and if so, whether she was entitled to compensation for length of service. PIS contends that Ms. Flood was hired for a specific term, as she was filling in for an employee on pregnancy leave, and that the delegate erred in finding a contravention of section 63 of the Act. PIS submits that the delegate ought to have considered section 65(1) (b) in her analysis of whether the terms of Ms. Flood's employment were substantially altered. In light of this argument, I infer that PIS does not take issue with the delegate's conclusion that Ms. Flood's employment was continuous from November 12, 2003.

There was no evidence before the delegate that Ms. Flood was hired for a definite term. Although PIS initially argued that it had new evidence that was not available at the time the Determination was being issued, it did not offer any new evidence in its appeal submissions other than making the assertions noted above. However, in its reply to the delegate's appeal submissions that PIS did not argue section 65(1)(b) in the hearing, PIS submitted an April 2, 2005 letter from Stacy Brind, a former employee of E-FS. In that letter, Ms. Brind wrote that she was the data entry/receptionist for E-FS, leaving on maternity/parental leave on August 22, 2003. She wrote that she "would be wanting to return back to E-FS Preferred Supply Inc. and assume my previous duties at a time that I felt would be best for me to return back to work."

Ms. Flood denies that there was any discussion at the time of her hire about her replacing another employee on maternity leave. She also says she had no discussions with Mr. Effertz prior to being hired.

In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D171/03 the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:

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 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.

This evidence does not meet the Tribunal's test for new evidence. Ms. Brind's statement could have been presented at the hearing. Furthermore, even if the evidence had been considered by the delegate, I am not persuaded it would have led the delegate to a different conclusion. Ms. Brind says that she would return to work when she felt it best to do so. This "new evidence" does not support the employer's position that Ms. Flood been hired for a definite term, and, had it been presented at the hearing, I am not persuaded it would have led the delegate to conclude otherwise.

I find no basis for this ground of appeal.

Natural Justice

Principles of natural justice are, in essence, procedural rights that ensure parties a right to be heard by an independent decision maker. The principles include a requirement that decision makers must base their decisions, and be seen to be basing their decisions, on nothing but admissible evidence (the rule against bias). The concept of impartiality describes "a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case" (*Valente v. The Queen*, [1985] 2 S.C.R. 673 at p. 685)

Impartiality was discussed by the Supreme Court of Canada in *R. v. R.D.S.,* [1997] 3 S.C.R. 484 as follows:

> [Impartiality] can also be described ...as a state of mind in which the adjudicator is disinterested in the outcome, and is open to persuasion by the evidence and submissions.
>
> In contrast, bias denotes a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues.

Allegations of bias against a decision maker are serious and should not be made speculatively.

The PIS contends that the delegate demonstrated bias in Ms. Flood's favour in analyzing whether a condition of Ms. Flood's employment had been substantially altered such that her employment had been terminated. Mr. Effertz says that the delegate referred to the effects the decision had on Ms. Flood, but did not refer to any of the effects such a decision might have had on PIS. (I infer that Mr. Effertz is referring

to the economic situation PIS found itself in). He also contends that the delegate demonstrated bias in rejecting his evidence that Ms. Flood's hours of work were open to negotiation.

Section 66 of the Act provides that, if a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated. Conditions of employment can include wages, benefits and hours of work, as well as where the work is to be performed.

The delegate has discretion in determining whether the employer's decision to reduce Ms. Flood's hours of work by over one half constitutes a substantial alteration to a condition of her employment. The Tribunal will only interfere with that discretion if it can be shown that it was an abuse of power, there was a mistake in construing the limits of that discretion, there was a procedural irregularity, or the decision was unreasonable. (see: *Kevin Jager* (BC EST #D244/99)) I am unable to find any basis for the review of the delegate's discretion in this instance.

The delegate was required to assess the credibility of the parties on the issue of whether the change was made unilaterally. She rejected Mr. Effertz's testimony that Ms. Flood's hours of work were open to negotiation. She is entitled to make that finding. Simply because she preferred Ms. Flood's evidence on those points does not demonstrate that she was biased. Furthermore, on the basis of the documentary evidence she had before her, I conclude that her findings were entirely reasonable.

While PIS gave no reasons for the reduction of Ms. Flood's hours of work in its July 13, 2004 letter, Mr. Effertz suggested at the hearing, and on appeal, that the decision was made for economic reasons. Although there may have been *bona fide* economic reasons behind PIS's decision to curtail Ms. Flood's hours of work, that reason, in and of itself, may lead the Director to consider that employment has been terminated. (see: *Director of Employment Standards* BC EST #D219/998)

I find no evidence the delegate was biased against PIS.

Finally, PIS contends that the delegate failed to observe the principles of natural justice in "imposing a $500.00 fine" for failing to pay vacation pay from November 2003 until January 2004. PIS contends that it paid Ms. Flood all vacation entitlement which it believed she was entitled to. PIS also seeks a "waiver" of the $500.00 penalty imposed for non-payment of the 4 hours Ms. Flood worked on July 13, 2004 on the basis of an administrative error. It contends that the "fine" is severe and unwarranted.

Section 29(1) of the *Employment Standards Regulations, B.C. Reg 396/95* sets out a schedule of monetary penalties for "a person who contravenes a provision of the *Act* or this regulation, as found by the director in a determination made under the Act or this regulation".

The section provides for escalating penalties for subsequent contraventions:

> (a) if the person contravenes a provision that has not been previously contravened by that person, or that has not been contravened by that person in the 3 year period preceding the contravention, a fine of $500;
>
> (b) if the person contravenes the same provision referred to in paragraph (a) in the 3 year period following the date that the contravention under that paragraph occurred, a fine of $2 500;

(c) if the person contravenes the same provision referred to in paragraph (a) in the 3 year period following the date that the contravention under paragraph (b) occurred, a fine of $10 000.

Once the delegate finds a contravention, there is no discretion as to whether an administrative penalty can be imposed. Penalty assessments are mandatory, and are not assessed on fairness considerations. (see *Actton Super-Save Gas Stations Ltd.* (BC EST #D067/04) and *Douglas Mattson* (BC EST #DRD647/01)) (See also, generally, Marana Management Services Inc. operating as Brother's Restaurant (BC EST #D160/04)).

The appeal is dismissed.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination, dated January 18, 2005, be confirmed in the amount of $2,241.68, plus whatever interest might have accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal