Employment Standards TRIBUNAL

An appeal

- by -

Applied Plastics Technology Inc.
- and by -
Robert P. Taylor

- 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

ADJUDICATOR: Lorne D. Collingwood

FILE No.: 2001/698 and 2001/699

DATE OF HEARING: December 15, 2001

DATE OF DECISION: January 31, 2001

DECISION

OVERVIEW

Applied Plastics Technology Inc. (referred to as "APT" and "the employer") has appealed, pursuant to section 112 of the *Employment Standards Act* ("the *Act*"), a Determination issued by a delegate of the Director of Employment Standards (the "Director") on September 12, 2001.

Robert P. Taylor appeals that same Determination.

The Determination stems from a complaint by Taylor. The Determination is in part that Taylor quit and that he is not entitled to compensation for length of service. The Determination goes on to order that Taylor be paid $3,297.10 in wages, what are said to be overtime wages in the main.

Taylor, on appeal, complains that an improper investigation was conducted by the delegate. He also claims that he was misunderstood by the delegate and that there is not clear and unequivocal evidence to show that he quit. I find this appeal to be less than convincing.

APT, on appeal, shows me that the Determination is probably in error. It also complains that the delegate failed to show how it is that it must pay $3,297.10 to Taylor. The delegate's counter argument is that the Determination should be confirmed because the employer was uncooperative and APT is seeking to introduce new evidence on appeal, evidence which could have been submitted at the investigative stage but was not. I have decided that this is a case where new evidence should be accepted and I have referred the matter of quantum back to the Director with an order that the Director show how amounts are calculated. The Determination, as it stands, does not meet the requirements of section 81 of the *Act* and, if the Determination is wrong, it is not because the employer deliberately withheld information or failed to cooperate but for reason of inadvertent errors by the employer and the delegate.

An oral hearing was held in this case.

APPEARANCES:

Henrik Jensen	For APT
Robert P. Taylor	On his own behalf

ISSUES TO BE DECIDED

At issue is the matter of whether there is or is not evidence to support a conclusion that the employee quit. Underlying that issue is one of credibility.

The employee, in his written submission, questions whether "the investigation followed the correct protocol". The employee believes that the investigation failed to bring out the truth.

The amount of the award is an issue. Underlying this issue is a matter of whether the Tribunal should or should not accept information which could have been produced at the investigative stage but was not.

What I must ultimately decide is whether it is or is not shown that the Determination ought to be varied or a matter referred back to the Director for reason of an error or errors in fact or law. There is in this case no possibility of the Determination being cancelled because it is accepted by the employer that Taylor is owed some amount of money.

FACTS

APT is a manufacturer of plastic products. The company is owned and operated by Henrik Jensen, Torben Jensen and Steven Arnold.

Robert Taylor started working for APT on August 22, 1995. Taylor is a fully qualified tool and die maker and he is fully versed in the operation of CNC machines. That made him a very valuable employee. APT had no other person on staff with that combination of training and experience and such people are in very short supply in British Columbia.

After the birth of his daughter, who is still an infant today, Taylor requested that he be allowed to set his own hours of work so that he would be free to look after the child when his wife was at work or unavailable for some other reason. APT allowed him to do so. And with that, Taylor started working afternoons and at night. That meant that he often worked alone and without immediate supervision.

Several months passed. By late January, 2001, the employer had reached the conclusion that it had to put an end to Taylor's irregular work hours. That was for the following reasons: The employer had contacted the Employment Standards Branch and found that Taylor's hours of work are not a modified work week allowed by the *Act* and that he was entitled to overtime pay for all work beyond 8 hours in a day. Taylor had fallen asleep at work on more than one occasion. Taylor had been assigned a large project and the project was over budget and some 200 hours behind schedule. Taylor's irregular hours were making shop floor communications difficult. Taylor was believed to be working on his own projects during work hours and it was thought that he was using the APT's equipment while doing so. Someone had been using APT's computers to visit pornographic websites and the employer suspected that Taylor was doing so on company time. Taylor had brought pornographic magazines to work and that was of concern to the employer.

Taylor's employment was terminated on or about the 29th of January, 2001. The employer and the employee do not agree on the circumstances of the termination. They provide two very different versions of the truth.

Taylor claims that he was terminated as follows: He reported for work at 3:45 p.m. on the 29th and he found his door locked. He was almost immediately approached by the three partners.

Henrik Jensen (henceforth referred to as "Jensen") told him that he was no longer an employee as of Friday, the 26th of January. Taylor suggested that the employer "not jump to any conclusions": He should at least be kept on so that he could train someone else on how to operate the CNC machine. The partners demanded that he work normal hours and stop using their equipment for his own projects. Taylor in response said "that even if they would recant the termination, (he) was not sure whether (he) would be able to change (his) hours … or work without access to the equipment … ." After meeting for over two hours, Taylor thought that he was not getting anywhere and so he asked how soon his severance package would be ready. He was told that it would be ready on Thursday but the partners led him to believe that they were prepared to rethink his termination and that he would soon hear back from them on whether he would be kept on. Taylor began packing up his equipment but when nothing was heard from the partners, he decided that the termination was final and he went home. There was no further contact with the partners. Taylor called APT's payroll department on Thursday, February 1, 2001 and asked for severance pay. He was at that time told by a payroll clerk that it was her understanding that he had quit and that he was not therefore entitled to severance pay.

The employer denies telling Taylor that he had been fired as of the 26th. It is the testimony of Jensen that the partners, on meeting Taylor, gave him an ultimatum, either he arrange for a sitter or nanny and agree to working normal hours by the following Friday (February 2, 2001) or he would at that point be served with working notice of termination. Jensen tells me that APT needed Taylor and that the purpose of meeting with him was to see if there were not some way that he could work normal work hours. Jensen tells me that Taylor contacted his wife after the meeting with the partners. Shortly after that, he approached Jensen. This time he demanded a raise and that he be allowed to keep working flex hours and on his own projects, explaining that he and his wife did not want their child raised by a babysitter and that his job was not worth the pay and the 'headaches' that went with it. Jensen responded by saying that a raise and flex hours were both out of the question. Taylor then demanded that the employer prepare his final paycheque, he packed up his things and left. The next day his car was found parked outside of a company called "Max B Machine Shop" ("Max B").

It is not shown that Taylor went to work for Max B on the 30th of January. Taylor did go to work for Max B soon after leaving APT but there is not evidence to establish what day he started work. I am told that one of APT's employees spotted Taylor's car at Max B on the 30th. It does not necessarily follow from that information that Taylor was working for Max B on that day. It may only be that he was seeking work.

The Determination is that Taylor quit. Taylor, in a written submission, told the delegate that he had been told by the employer that "as of Friday (he) was no longer an employee of Applied Plastics". The delegate took that to mean Friday, February 2, 2001. Doug Smith, one of APT's employees, was interviewed and he is reported to have said that Taylor told him on the 29th that "they gave me a choice to work regular hours or I was out of there". In deciding the employee

quit, the delegate has this to say:

> "Although, the versions of what happen on Monday, January 29, 2001 greatly differ, Taylor left on January 29, 2001 before Jensen had come back to talk to him (Jensen had left the premises according to Taylor) and before the date he stated that the employer told him that he was finished. … "

APT was unable to hire a person with Taylor's qualifications. It was forced to muddle along with a person on staff and the project went from what the employer describes as "bad to worse".

Taylor, on being refused severance pay, filed a complaint with the Director. Taylor claims that the delegate gave his version of events along with a copy of his claim to the employer at the outset of the investigation, that is, at the point of first contact. I accept that as fact as the delegate has had nothing to say on this.

ARGUMENT & ANALYSIS (Taylor's appeal)

Taylor appears to believe that the reason that he was not awarded compensation for length of service is that it was his word against that of three partners and a witness. He also suggests that there is something fundamentally wrong with the investigation. He puts it this way,

> "I am now fully aware that my word will not stand against the word of more than one person, in spite of the inconsistencies in their statements, and there is no reversing the negative effect on the investigation of the dismissal case, caused by an improper approach to the investigation, as I pointed out in my appeal letter to the Tribunal."

The employee is concerned that the employer was not asked to provide its own fresh account of events but could just respond to each of his statements. And I find that the negative effect of which he speaks is a belief that there was then no need for the employer to tell the truth.

The first of his two complaints with the delegate's decision-making process is nonsense and so is the second. A Determination has to be reasonable. It must be logical. There must be facts to support it. And that is true of this case. The Determination is based on an analysis of the facts as the delegate understood them to be, namely, that Taylor left the employer without waiting to hear from the partners and before the date that the delegate thought that Taylor was referring to when he said that the employer said that he was no longer employed as of Friday.

There is no obviously proper point at which documents should be disclosed to the other party. The employer has the right to know the case against it. The delegate had to at some point disclose all of that which is alleged and important out of fairness to the employer. And as I see it, that can be done at first contact with the employer or after a certain amount of probing. There is no hard and fast rule on doing so, nor should there be.

The employee complains that, as the delegate chose to proceed in this case, the employer did not have to tell the truth. I fail to see how that is so. But it cannot in any event be said that the Determination is based on false information which was supplied by the employer. The Determination is not for reason of anything that the employer had to say at all. It is based on what Taylor himself had to say. The delegate has reached the conclusion that Taylor quit because Taylor was understood to say that he left the employer without waiting to hear from the partners, and that he left before the date that the employer said that he was no longer employed, the delegate having been led to believe that Taylor was referring to Friday, February 2, 2001. It is absolute gibberish to suggest that the Determination reflects some failure on the employer's part to tell the truth.

I now turn to the substance of the appeal.

Taylor, on appeal, has attacked the underpinnings of the Determination. He tells me that it was not ever his position that the employer told him that he was no longer an employee of APT as of Friday, February 2, 2001. Taylor tells me that he was referring to Friday, January 26, 2001. He also tells me that, while it is true that he left APT without waiting to hear back from the partners, they led him to understand that they were going to get back to him forthwith and he left when they did not. The delegate has failed to respond to these claims and I must, as such, accept that Taylor was in fact misunderstood. The Determination has been turned on its head. I am forced to decide between two competing versions of the truth on the basis of credibility.

Deciding credibility is never an easy task. There is much to consider. The manner of witnesses is of some interest (Is a witness clear, forthright and convincing or evasive and uncertain?). Of greater importance are factors like the ability of each witness to recall details; the consistency of what is said; reasonableness of story; the presence or absence of bias, interest or other motive; and capacity to know. As the Court of Appeal in *Faryna v. Chorny* (1952) 2 D.L.R. 354, B.C.C.A., has said, the essential task is to decide what is most likely true given the circumstances.

> "The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities that a practical and informed person would readily recognise as reasonable in that place and in those conditions."

It is the employer's version of events that I find credible. It is in harmony with what is likely to be the case. Taylor, on the other hand, is uncertain of what was said. He is foggy on a most important detail. He is inconsistent. His story is unlikely given what is known to be true.

The matter of whether Jensen did or did not tell Taylor that he was fired as of the 26th is of crucial importance. But Jensen is not certain of what was said. He claims that Jensen did tell

him that he was fired as of the 26th, yet he indicates in a written submission that he may have misunderstood the employer. He states "if I had initially misunderstood what (Jensen) said when he and his partners confronted me on Monday, January 29, it had to have been obvious to them that I had perceived that I was fired …".

It is unlikely that Taylor was told that he had been fired, or that was no longer an employee as of Friday, the 26th of January, or that Jensen said anything like that. I have had the chance to observe Jensen and I find that he is an articulate person. I have had no difficulty in understanding him at all. I do not believe that if Jensen had meant to fire Taylor on the 29th that Taylor would be at all uncertain as to what was said. Being fired is just not the sort of thing that one forgets. And it strikes me as most unlikely that the employer would fire Taylor, then leave the employee free to roam its offices and manufacturing facility. The fact that it did so leads me to believe the employer, that Taylor was given an ultimatum, arrange for a sitter or a nanny by Friday the 2nd of February, and start working normal hours, or face being served with notice of termination at that point.

It is unlikely the employer would decide to fire an employee, then meet with the employee for two hours. The likely explanation for the fact that the partners met with Taylor for two hours is that they did want to retain Taylor's services. That is consistent with knowing that it was unlikely that the employer would find a replacement, there being a shortage of people with Taylor's level of training and experience.

It is unlikely the employer would decide to fire its most capable employee given that it was so far behind with a major project.

The Tribunal has long held that it is an employee's right to resign and that there must be clear, unequivocal facts to show that the employee voluntarily exercised the right to quit [*Burnaby Select Taxi Ltd. and Zoltan Kiss*, (1996), BC EST #D091/96]. Panel after panel has held that quitting has both a subjective and an objective element. Subjectively, the employee must form the intention to quit. Objectively, he or she must act in a way, or demonstrate conduct, which is inconsistent with continuing the employment.

As matters have been presented to me in this case, I am led to believe that the facts of this case are that the employer told Taylor that he had to start working normal hours and that he had until February 2, 2001 to arrange his life so that he could do that, the employee decided that he would not do that and that he would stop working for APT. He then carried out the plan to quit in that he did not thereafter report for work. That is inconsistent with continuing the employment. It is to quit.

The Determination is confirmed in respect to the decision that the employee quit.

FACTS (APT's Appeal)

The Determination is based on the employer's records, time cards and payroll records.

According to the Determination, Taylor is owed $3,297.10, $3,038.11 in overtime wages for the period January 29, 1999 to January 29, 2001 plus 4 percent vacation pay and interest. Those figures appear out of the blue. The delegate does not say what is the total amount paid in the last two years of the employment or what is the total amount earned in that period. All that is shown is that $3,297.10 is $3,038.11 plus 4 percent vacation pay and interest.

I am shown a detailed calculation summary but it covers the period January 26, 1999 to January 26, 2001, not January 29, 1999 to January 29, 2001. Adding greatly to the difficulty in understanding how the $3,038.11 in overtime is calculated is the fact that the detailed calculation summary also fails to say what was earned in the last two years of the employment or what was paid to the employee in the last two years of the employment. And compounding my difficulty in understanding the Determination is the fact that the detailed calculation summary includes the calculation of minimum daily pay and statutory holiday pay in addition to overtime pay.

APT is convinced that it may have failed to copy, and therefore turn over to the delegate, its payroll record for week 19 in the year 2000 (in fact, a record which is for the two week period ending May 6, 2000). It shows me that the record is in fact absent from all of the material before me. The delegate has had nothing to say on this point even though she could easily confirm whether the document was or was not submitted. Nothing to the contrary, I find that there is reason to believe that the delegate has understated the amount that the employer paid Taylor by $2,211.29, that being the amount which Taylor was paid in week 19 of the year 2000.

The employer shows me that the delegate has Taylor working 7.75 hours on Saturday, June 24, 2000 and no hours on Monday, June 26, 2000. It also shows me that there is no time card for June 24, only one for June 26, and that the time card for the 26th has Taylor working 7.75 hours on that day. That considered, I find that Taylor worked 7.75 hours on Monday, June 26, 2000 and that he performed no work on Saturday, June 24, 2000.

The employer shows me that Taylor was paid for 6 hours of overtime in the weeks of March 12, 2000 and March 19, 2000. That is not to show that the Determination is in error and that the amount owed should be reduced. The payment is money paid in the last two years of the employment. The employee is entitled to be paid the difference between the amount to which he is entitled under the *Act* (the amount earned in the last two years of the employment) and the total amount paid for work in the last two years of the employment. If the employer paid for overtime in the last two years of the employment then that will have been taken into account in the calculations.

The employer shows me that some of the employee's time cards are marked "no lunch", some have him deducting for lunch, and that there are a number of time cards which are marked "no lunch" yet there is no deduction for lunch.

ARGUMENT & ANALYSIS (APT's Appeal)

The employer complains that the Determination is difficult to understand in that the delegate does not explain how it is decided that the employer owed $3,038.11 in overtime wages. I agree. The delegate does not say what is the total amount earned in the last two years of the employment, nor does she say what was paid for work in that period. Both figures are a necessary part of providing the reasons for a decision and showing how it is that an employer must pay further wages. The delegate's decision does not meet the requirements of section 81 of the *Act*.

> **81** (l) On making a determination under this Act, **the director must serve** any person named in the determination with **a copy of the determination that includes the following**:
> (a) **the reasons for the determination**;
> (b) **if an employer** or other person **is required** by the determination **to pay wages**, compensation, interest, a penalty or another amount, the amount to be paid and **how it was calculated**;
> (c) if a penalty is imposed, the nature of the contravention and the date by which the penalty must be paid;
> (d) the time limit and process for appealing the determination to the tribunal.
> (my emphasis)

The delegate in this case has failed to provide the employer with a determination which includes the reason or reasons why it is said to owe $3,038.11 in overtime wages, nor does she show how the amount is calculated.

The employer is seeking to introduce new evidence, the record for week 19 of the year 2000. The Tribunal has said, through decisions which include *Tri-West Tractor Ltd.* (BCEST No. D268/96) and *Kaiser Stables Ltd.* (BCEST No. D058/97), that it will not normally allow an employer to raise issues or present evidence which could have been raised or presented at the investigative stage and the delegate objects to my accepting the new evidence on that basis.

In *Tri-West*, the Tribunal had this to say:

> "This Tribunal will not allow appellants to 'sit in the weeds', failing or refusing to cooperate with delegate in providing reasons for the termination of an employee and later filing appeals of the Determination when they disagree with it. … The Tribunal will not necessarily foreclose any party to an appeal from bringing forward evidence in support of their case, but we will not allow the appeal procedure to be used to make the case that should have and could have been given to the delegate in the investigative process."

In *Kaiser Stables*, the concerted efforts of a delegate to have an employer participate in the investigation of a Complaint were ignored by the employer. The employer then appealed the delegate's Determination and sought to introduce new evidence on appeal. That evidence was

ruled inadmissible. The Adjudicator in that decision states, "the Tribunal will not to allow an employer to completely ignore the Director's investigation and then appeal its conclusions".

Decisions like *Tri-West* and *Kaiser Stables* preserve the fairness and integrity of the *Act*'s decision-making process. If it were not for such decisions, the role of the Director would be seriously impaired and the appeal process would become unmanageable and eventually fall into disrepute. Yet the Tribunal has not set an absolute bar to the production of new evidence on appeal. "There are many decisions of this Tribunal which follow the reasoning of *Tri-West Tractor Ltd.* but almost all qualify the rule to some degree using such words as 'generally' or 'normally' new evidence will not be allowed at the appeal stage" (*Re Poretsis*, BCEST No. D370/98). That is because there will in some cases be good reason to allow a party to raise a new issue or introduce new evidence on appeal. As another Adjudicator has said in *Speciality Motor Cars (1970) Ltd. and Russell David Reid* (BCEST No. D570/98),

> "… it should also be recognized that the Kaiser Stables principle relates only to the admissibility of evidence and must be balanced against the right of parties to have their rights determined in an administratively fair manner. Accordingly, I would reject any suggestion that evidence is inadmissible merely because it was not provided to the investigating officer. There may be legitimate reasons why particular evidence may not have been provided to the investigating officer … ."

In this case it cannot really be said that there was a failure to cooperate with the delegate or that the employer deliberately withheld information. As matters are presented to me, I am led to believe that the employer may have made an inadvertent error in copying its payroll records, an error which was missed by the delegate. If so, the delegate will have overstated the amount to which Taylor is entitled by $2,211.29.

I have decided to accept evidence of a payment in week 19 of the year 2000. Doing so is consistent with administrative fairness and the remedial nature of the *Act*. Not accepting the payroll record would force the employer to pay twice for the same work.

A second error has been identified, also inadvertent, and that is that the delegate has Taylor working 7.75 hours on Saturday, June 24, 2000 instead of Monday, June 26, 2000. The amount of work in the week of June 18, 2000 is overstated and the amount of work in the week of June 25, 2000 is understated.

Concerned as I am with the delegate's failure to provide reasons and show how it is that she decides that APT owes $3,038.11 in overtime wages, I have decided that this case should be referred back to the Director. I am ordering recalculation of the amount earned so that the payroll record for week 19 of the year 2000 can be considered should it not have been considered so far and the Director can also correct for the error that has been made in respect to the work on Monday, June 26, 2000. Above all else, I am ordering that the Director show how the new amount which APT must pay Taylor is calculated. In that regard I suggest that a delegate not just state the total amount paid for work in the last two years but that he or she develop a list of payments by pay period, or part pay period if that is appropriate.

The employer, on appeal, claims that it should not be forced to pay minimum daily hours of work when Taylor worked less than 4 hours on day because Taylor set his own hours. I disagree. It matters only whether the employee starts work.

34 (2) An employee is entitled to be paid for a minimum of

(a) 4 hours at the regular wage, if the employee **starts work** unless the work is suspended for a reason completely beyond the employer's control, including unsuitable weather conditions, or

(b) 2 hours at the regular wage, in any other case unless the employee is unfit to work or fails to comply with the Industrial Health and Safety Regulation of the Workers' Compensation Board.

The employer allowed Taylor to set his own hours but the employer could have set a 4 hour daily minimum from what I can see.

I see no reason to alter the delegate's conclusion with respect to lunch periods. The Determination reflects a decision that the employee may have simply forgot to mark "no lunch" on some of his time cards. I am not shown that her decision is clearly wrong and it is not for me to second guess her decision.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated September 12, 2001 be confirmed insofar as it decides the matter of whether Taylor is or is not entitled to compensation for length of service.

I order, pursuant to section 115 of the *Act*, that the matter of quantum be referred back to the Director so that the amount of the Determination can be recalculated as set out above and the Director can provide reasons for the Determination and show how the amended award is calculated.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal