Employment Standards TRIBUNAL

An appeal

- by -

V-Tec Industrial Ltd.
(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: Yuki Matsuno

FILE No.: 2008A/39

DATE OF DECISION: June 26, 2008

DECISION

SUBMISSIONS

Anita Kowalski and Witold Kowalski	for the Employer, V-Tec Industrial Ltd.
Anthony Grant	for himself
Greg Brown	for the Director of Employment Standards

OVERVIEW

1. The Employer, V-Tec Industrial Ltd. appeals a Determination of the Director of Employment Standards (the "Director") issued March 5, 2008 (the "Determination"). In the Determination, a delegate of the Director (the "Delegate") determined that the Employer contravened the *Employment Standards Act* (the "*Act*") by not paying compensation for length of service to Andrew Grant, an employee. The Delegate ordered the Employer to pay the Mr. Grant a total amount of $5,656.45 inclusive of vacation pay and interest accrued under section 88 of the *Act*. The Delegate also imposed an administrative penalty of $500.00, pursuant to section 29(1), for contravention of section 63 of the *Act*. The total amount payable by the Employer was $6,156.45.

2. The Employer indicates in the appeal form that it believes an oral hearing is necessary. Upon reviewing the file and seeing that no viva voce evidence is required to decide the issues in the appeal, I have determined that I will decide this appeal on the basis of the written materials before me, pursuant to Section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings under section 103 of the *Act* and Rule 16 of the Tribunal's Rules of Practice and Procedure. Before me are the Determination; the Employer's appeal form and attached submission and documents; the Delegate's reply submission on behalf of the Director and attached documents; Mr. Grant's submission and attached documents; the Employer's final reply submission and additional documents; and the record provided by the Delegate under section 112(5) of the *Act*.

BACKGROUND

3. The Determination outlines the following background to this appeal. The Employer operates an industrial electrical company and employed Mr. Grant as an electrician from January 2003 to July 2007. Mr. Grant filed a complaint with the Employment Standards Branch after his employment ended, requesting compensation for length of service. Mr. Grant's position was that he was entitled to compensation because his employment was terminated by the Employer. The Employer's position was that Mr. Grant quit his employment.

4. The Delegate held a hearing of the complaint on December 17, 2007, during which witnesses on behalf of both the Employer and Mr. Grant provided testimony; as well, both the parties also had an opportunity to submit documents to the Delegate in support of their case. The Delegate writes in the Determination that the "employer and its witnesses provided a substantial amount of evidence on issues surrounding the complainant allegedly quitting his job. I have heard and reviewed all of the evidence but have reproduced only that information that is relevant to my determination."

5. The Delegate goes on to state that the only issue to be decided was "whether V-Tec terminated Grant's employment or if Grant quit his job with V-Tec." The Delegate cites the test for determining whether an employee quit or was fired as outlined by this Tribunal in *Burnaby Select Taxi Ltd. and Zolton Kiss*, BCEST #091/96. He notes that Mr. Kowalski, witness for the Employer, and Mr. Grant presented contradictory accounts of how the employment relationship ended, and that this presented the need to assess the credibility of the parties. The Delegate concludes that he prefers the evidence presented by Mr. Grant over that presented by the Employer and ultimately finds that the Employer, through Mr. Kowalski, terminated Mr. Grant's employment on July 23, 2007.

6. The Employer appeals the Determination on the basis that the Delegate failed to observe the principles of natural justice in making the Determination, and that new evidence has become available.

ISSUES

- Did the Delegate fail to observe the principles of natural justice in making the Determination?
- Should the appeal be allowed on the basis that evidence has become available that was not available at the time the Determination was being made?

ARGUMENT AND ANALYSIS

7. As the party bringing the appeal, the Employer has the burden of showing that the Determination is wrong and should be varied, cancelled, or referred back to the Director.

8. Before turning to the stated grounds of appeal, I would like to address the main thrust of the Employer's appeal: that the Determination is wrong because the Delegate's conclusions did not accord with the Employer's views. Many, if not most, of the Employer's submissions refer to the evidence that was presented at the hearing (through documents or testimony); assail the credibility of Mr. Grant and the witnesses who appeared on his behalf; and repeat the Employer's evidence and arguments that were presented to the Delegate during the hearing.

9. The Delegate argues in his submissions that the Employer is attempting to re-argue its case on the merits; is seeking a "second opinion" from the Tribunal; and is appealing findings of fact. I agree with the Delegate's characterization of the Employer's submissions. It is not open to the Employer to challenge findings of fact made after a proper assessment of the credibility of the witnesses, as was carried out by the Delegate. In the Determination, the Delegate cites two authorities, *Faryna v. Chorny* (1952) 2 D.L.R. 352 (B.C.C.A.) and *Werachai Laoha*, BCEST #370/01. The former case contains this direction on how a decision maker should assess the credibility of witnesses:

> 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.
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> 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 recognize as reasonable in that place and in those conditions. . .

10. In *Werachai Laoha*, the Tribunal has this to say on the same topic of assessing credibility:

> In this case, the Delegate was presented with two competing accounts of how the employment was terminated and, as such, she had to assess the credibility of witnesses and choose between the two. That is not an easy task as there are many factors to consider in assessing credibility. The manner of the witnesses is of some interest (Is the witness clear, forthright and convincing or evasive and uncertain?) but of greater importance are factors like the ability of the witness to recall details; the consistency of what is said; reasonableness of the story; the presence or absence of bias, interest or other motive; and capacity to know.

11. The Delegate took the principles from these authorities and applied them to the testimony of the witnesses at the hearing. He found that he preferred the testimony of Mr. Grant over the testimony of Mr. Kowalski and gave reasons for his preference based on the direction given by the authorities cited above. He found that Mr. Grant was able to recall more details; that his testimony was more consistent that that of Mr. Kowalski; and that his overall story was more reasonable version of the events that took place around the end of his employment. The Delegate was, of course, also able to observe directly the manner of the witnesses in the hearing. I find that the Delegate followed a proper process in assessing the credibility of the witnesses, and that the findings of fact that he made as a result are supported by the evidence.

12. The Employer also appeals on the ground that the Delegate failed to observe the principles of natural justice. In order to successfully appeal on this ground, the appellant must prove a procedural defect, amounting to unfairness, in how the Director carried out an investigation or made the Determination. Such procedural defects include failing to inform a person of the case against him or her and not allowing a person an opportunity to respond to a complaint.

13. The Employer's main suggestion in its pleadings regarding this ground of appeal is that the Delegate failed to mention various aspects of the Employer's evidence in the Determination and that by implication this evidence was ignored or overlooked by the Delegate. In response, the Delegate submits that he heard and recorded all of the testimony of the witnesses during the hearing. In the Determination, the Delegate specifically states that he heard and reviewed all of the evidence presented at the hearing but only reproduced what he considered to be relevant evidence in the Determination.

14. The Employer also submits that the Delegate told the Employer that a "witness can be called only one time". The Delegate submits that he did not make that statement. I find that I do not need to make a decision on whether this statement was made or not, because there is no evidence or argument that anything turns on this alleged statement.

15. From my review of the parties' submissions and the record, I find no indication that the Employer was deprived of any procedural rights. The investigation and hearing processes were carried out fairly, and the Employer had ample opportunity to put all of its evidence before the Delegate and respond to the case against it. I find that the Employer has not proven a failure to observe the principles of natural justice on the part of the Delegate.

16. The Employer also appeals the Determination on the basis that evidence has become available that was not available at the time the Determination. Where an appellant invokes this ground of appeal, all of the following four conditions must be met before the evidence will be considered by the Tribunal:

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 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.

(*Bruce Davies and others, Directors or Officers of Merilus Technologies Inc*., BC EST #D171/03).

17. In this case, what the Employer labels "new evidence" either repeats the evidence provided at the hearing, or is information that was otherwise available at the time the Determination was made. As such, the evidence does not pass the first factor of the test in *Bruce Davies.* As a result, I find it unnecessary to analyze the "new evidence" in light of the remaining three factors. I find that the Tribunal cannot consider any of the "new evidence" presented by the Employer.

18. The Employer's appeal does not succeed.

ORDER

19. Pursuant to Section 115 of the *Act*, I order that the Determination dated March 5, 2008 be confirmed.

Yuki Matsuno
Member
Employment Standards Tribunal