

An appeal

- by -

CCD Corporate and Career Development Inc. and
Proactive Management Development 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

TRIBUNAL MEMBER: Alison H. Narod

FILE No.: 2004A/16

DATE OF DECISION: May 12, 2004

DECISION

The Appellant, CCD Corporate and Career Development Inc. (“CCD” or the “Employer”) appeals a determination made by the Director’s delegate, dated January 15, 2004 (the “Determination”). In that Determination, the Delegate ordered CCD and an associated company, Proactive Management Development Inc. (“Proactive”), to pay to Cecilia Lam (“Lam” or the “Employee”) \$14,815.65 in connection with its contraventions of the *Employment Standards Act* (the “Act”), pursuant to sections 17(1), 58, 44 and 63(2)(b) of the Act.

CCD submits that:

1. the Delegate erred in law and breached the principles of natural justice in the conduct of its hearing of the matter;
2. the Delegate committed a breach of natural justice in its determination of wages owing and its assessment of the evidence; and
3. the Delegate committed a breach of natural justice in finding that the Employer terminated Lam’s employment by making a substantial alteration in her terms and conditions of employment.

The Determination

The Director’s Delegate conducted a hearing of Lam’s complaint. According to the Employee, she was employed by the Employer as a part-time accountant from at least January 1992 to November 17, 2002. She held a full time job with an unrelated employer. During her employment with the Employer, she worked flexible hours both on and off the Employer’s premises. The Employer had never disputed her hours or criticized her work performance.

The Employee submitted her hours of work semi-monthly to the Employer and they were routinely paid although, on occasion, the Employee delayed cashing her paycheques, at the Employer’s request, because of the latter’s lack of funds. In and after September 2002, the Employer told the Employee to delay cashing her paycheques and she complied until November.

In November 2002, the Employee unsuccessfully tried to negotiate to be paid for at least one paycheque and to establish a payment plan for the balance of outstanding wages and other payments. Relations became hostile and negotiations broke down. When she refused to continue working without pay, the Employer disputed payment of the paycheques. The Employee’s last day of work was November 17, 2002. At the end of November, the Employer stopped payment on all outstanding cheques. When the Employee tried to enter the Employer’s premises in December 2002, she discovered the Employer had changed the locks on its doors and she could not enter the premises. The Employee claimed that her wage claims were justified. She gave evidence explaining her timesheets and wage claims.

The Employer argued that in the Fall of 2002, after the Employee left her employment, it discovered discrepancies in the number of hours the Employee recorded on her timesheets, going back at least the prior six months. Between November 26 and December 11, 2002, the Employer wrote the Employee setting out its concerns and asking to meet with her. It contended that she refused to meet. The Employer alleged that the Employee falsified her hours on her timesheets and did not in fact work those hours. In its view, the Employee was not entitled to wages from September to November 17, 2002.

The Employer contended that the work performed was not proportional to the number of hours the Employee claimed she worked and that the quality of her work was substandard. In this regard, it relied on the evidence of witnesses who were unable to fully confirm the hours the Employee actually worked, as well as witnesses who assessed the quality of her work after she left the Employer's employ.

The Employer did not dispute the Employee's statutory holiday pay claim, if she had worked on those statutory holidays. The Employer had no records other than the Employee's to show or prove that the Employee was not owed vacation pay.

The Employer argued that it did not terminate the Employee or force her to quit and therefore she was not entitled to compensation for length of service. Moreover, the Employer would not have terminated her, as it still required her services for two of its clients. The Employer said that it often asked Employees not to deposit their paycheques until it had funds in its bank account and that the Employee always agreed. Accordingly, it was not unusual to request that she not deposit her paycheques for and after September 2002.

The Employer claimed it changed its door locks because of a theft at the workplace and not because of an intention to lock the Employee out of the office.

The parties took issue over evidence such as the Employee's timesheets, building access reports which recorded the Employee's use of an access card to enter its premises and a co-worker's record of the Employee's hours of work. It was acknowledged that the access reports captured only her entrance and exit times at certain, but not all entrances, within specific timeframes and that there were some discrepancies in these records.

The Employee cross-examined the Employer's witnesses and obtained acknowledgements and concessions which demonstrated weaknesses in the Employer's case. For example, the co-worker conceded that his records of the Employee's hours of work were not recorded contemporaneously. He failed to provide any answer to her allegation that her signature on her October timesheet had been forged. He acknowledged that he may have made errors in copying the hours she recorded on her timesheets. He also conceded that he would not know if the Employee arrived earlier or left later than he did.

The Delegate found that the Employee had been allowed to work on and off the Employer's premises. She had been paid in accordance with the timesheets she had submitted throughout her employment. She had never been questioned on her timesheets or her work performance until approximately November 2002, at a time when she had not been paid for and after September 2002.

The Delegate considered and rejected the Employer's justification for not paying the Employee for and after September 2002. She said:

The employer's argument is essentially based on the premise that since the complainant did not work the hours claimed in the last six months, she fraudulently charged the employer, therefore she did not earn the last two months wages. I reject the evidence put forward by the employer.

Based on the evidence and the requirements of the *Act*, I find that the employee had worked and should have been paid.

The Delegate set out her reasons for rejecting the documentary and *viva voce* evidence relied on by the Employer, concluding that it was fraught with discrepancies. On the other hand, the Employee adequately explained the discrepancies in the evidence on which she relied. The Delegate found that the Employer's witnesses failed to show that the Employee could not have worked the hours she claimed. Moreover, the Employee's wage claims were consistent with the number of hours she worked in the last year of her employment. The Delegate concluded that there was insufficient evidence to discredit the Employee's claim of hours worked.

In the result, the Delegate found that the Employer contravened the *Act* and required it to pay the amounts at issue pursuant to ss. 17(1), 44, 58(1)(b) and 63(2)(b) of the *Act*.

Section 112(1) of the *Act* states:

Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:

- (a) the director erred in law;
- (b) the director failed to observe the principles of natural justice in making the determination;
- (c) evidence has become available that was not available at the time the determination was being made.

I have reviewed the record before the Delegate and the parties and the Delegate's submissions on appeal. I dismiss the appeal and confirm the Determination for the reasons set out below.

1. Conduct of hearing

CCD alleges that the Delegate erred in conducting a hearing of the Employee's complaint by failing to administer an oath to the Employee until after she had given the majority of her evidence. In contrast, the Delegate administered oaths to the Employer's witnesses at the outset of their testimony.

The Employee disputes CCD's submissions respecting the timing of the administration of the oath to her. She says that she was only one or two sentences into her testimony when the Delegate stopped her, administered an oath, and instructed her to commence again. Accordingly, any potential error was rectified.

The Delegate submits that the failure to administer an oath at the outset of a hearing is not a valid basis for cancelling a Determination or granting another hearing. Although the Delegate is unable to say when she administered the oath, it is her normal practice to do so prior to parties giving evidence. In any event, she says, the admission of unsworn evidence is not fatal to the decision, as it is an administrative proceeding and the Delegate is not bound by the same rules of evidence as in a criminal proceeding and because the Employer was present, had the opportunity to challenge the evidence and chose not to do so.

The law takes a flexible approach to what constitutes a form of hearing sufficient to meet the requirements of natural justice. The question as to what is required depends on the facts and circumstances of each case and the subject matter under consideration (*Knight v. Indianhead School Division (No. 19)*, [1990] 1 S.C.R. 653). For instance, the rules of natural justice do not require that there always be an oral or in-person hearing. An exchange of written materials may suffice (*Mobil Oil Canada Ltd. v. Canada Newfoundland Offshore Petroleum Board* (1994), 21 Admin. L.R. (2d) 248 (S.C.C.)).

What is required is that the parties must know the case being made against them and be given an opportunity to reply. They must be given a fair opportunity to correct or controvert any relevant and prejudicial statement (*Emery v. Alberta (Workers Compensation Board, Appeals Commission)*, 2000 ABQB 704).

In the instant case, the Director or its delegate, has the discretion as to whether or not to conduct an investigation of a complaint made under the *Employment Standards Act* (s. 76(2)). If an investigation is conducted, the Director, or its delegate, must make reasonable efforts to give a person under investigation an opportunity to respond (s. 77). In the instant case, the Director's delegate conducted an investigation by way of holding a hearing.

The Employer says that it was deprived of natural justice because the Delegate was inconsistent in the manner in which oaths were administered to witnesses and, in particular, says that an oath was not administered to the Employee until after she had commenced her testimony. As noted, the Employee says that the oath was administered early into her testimony and she was required to recommence her evidence thereafter.

In my view, there is no requirement that a delegate administer an oath in the course of conducting an investigation under the *Act*. The fact that an oath may be administered may enhance the delegate's belief in the reliability and credibility of the evidence. In the instant case, however, the Employer fails to point to any of the Employee's testimony that was not given under oath, but that was relied on by the Delegate and was material to the Delegate's decision. Accordingly, the Employer has failed to establish that any error in this regard was material to the determination. Moreover, the Employer does not suggest that it was deprived of the opportunity to correct or controvert any relevant or prejudicial testimony that was not given under oath. Accordingly, I am unable to conclude that the alleged error deprived the Employer of a fair hearing.

2. Determinations re: Wages and Evidence

As noted, CCD appeals the Delegate's findings with respect to the amount of wages awarded (and seeks a consequential reduction in the amount of vacation pay awarded), and submits that the Delegate committed a breach of natural justice in its assessment of the evidence. In particular, it disputes the Delegate's conclusion that the Employee worked flexible hours both on and off her work premises. It says off-site work was never authorized, sanctioned or expected. Nor did the Employee perform on-site all of the work she claimed. Moreover, it argues that the Delegate erred in finding that the Employee provided support for her claim for hours worked and says that the Employee brought no witnesses to dispute any of CCD's evidence.

In response, the Employee says it is a fact and she gave testimony under oath that she worked flexible hours both on and off CCD's premises. She says that CCD did not take issue with this during the hearing before the Delegate, nor did it dispute this until this appeal. Moreover, she says she worked on this basis throughout her years of employment and the Employer acknowledged and approved this because it paid her for this work, throughout, without any questions. Further, she says she made herself available to be contacted outside CCD's premises and had worked on their projects during normal business hours when that was necessary.

Additionally, the Employee says that the wages the Delegate ordered to be paid were supported by documentary evidence, that the documentary evidence contradicted CCD's witnesses and that CCD's

witnesses failed to successfully controvert her claims. She also says the Employer's calculations were in error, were internally contradictory and were contradicted by other documentary evidence.

The Delegate says that the Employee gave evidence that she was allowed to work flexible hours on and off CCD premises. The Employer did not challenge her working off-site, although it could have done so, nor did it submit any evidence to dispute her statement.

Moreover, the Delegate says that she considered the Employer's arguments respecting the evidence of the witnesses and the documentary evidence.

The burden is on the appellant to show an error in the Determination which justifies the Tribunal's interference. On appeal, the Tribunal does not conduct a re-investigation. Nor does it re-hear the case afresh. The grounds for appeal are set out in s.112 of the *Employment Standards Act* and do not permit a Tribunal to set aside findings of fact made by the Director unless, in reaching its conclusions, the Director erred in law or failed to observe the principles of natural justice or unless the Tribunal finds that the determination ought to be set aside because new evidence has become available that was not available at the time it was made.

In the instant case, the Employer does not argue that the Director erred in law or in fact. Nor does it argue that new evidence has become available that was not available at the time the determination was made. Rather, it argues that the Director breached the principles of natural justice in making the findings on which it based the Determination. As noted above, what is required is that the parties know the case to be made against them and have an opportunity to answer it. Here, there has been no breach of natural justice. No new evidence has been supplied and no new argument has been made. The Employer knew the case against it and had its opportunity to respond. It simply failed to persuade the Delegate. The Employer now quarrels with the manner in which the Delegate assessed and weighed the evidence and drew inferences from that evidence to reach the conclusions of fact on which she based the Determination.

In my view, in the course of reaching her conclusion, the Delegate conducted a thorough review of the evidence, carefully considered and weighed that evidence, and thoughtfully heard and considered the parties' arguments. She had before her the testimony of the Employee, as well as documentary evidence on which the Employee relied. The fact that the Employee did not bring other witnesses to bolster her case is of no moment. The Delegate was entitled to and did determine whether or not the evidence of the Employee was reliable and credible.

The Delegate also had before her the evidence supplied by the Employer, as well as the Employer's witnesses. The Employee challenged the Employer's evidence and witnesses through cross-examination and, in so doing, successfully controverted aspects of the Employer's case. The Delegate was entitled to and did weigh the evidence adduced by the Employer against the evidence adduced by the Employee and reached conclusions about the strength of the parties' respective positions. Ultimately, the Delegate decided to prefer the case made by the Employee over the case made by the Employer. This, she was entitled to do.

It is not appropriate for the Tribunal to interfere with the findings of fact made by the Delegate if they do not amount to the kind of errors contemplated by s.112, even if the Tribunal might not have reached the same findings of fact. The Delegate had the parties before her, in person, and heard and weighed their evidence, and assessed their demeanour and credibility. The Delegate had a signal advantage in that

regard over the Tribunal. The Tribunal is being asked by the Employer, in effect, to rehear the Employer's evidence and arguments afresh and make a new decision. This, the Tribunal is not entitled to do.

In short, the Employer appeals findings of fact. The Tribunal lacks jurisdiction to set aside a determination solely because of an error of fact.

3. Substantial alteration of conditions of employment

As noted, CCD submits that the Delegate committed a breach of natural justice in finding that it terminated the Employee by making a substantial alteration to her conditions of employment. CCD says it had no intention of terminating the Employee by altering conditions of her employment. It says that it discovered what it believed to be unsubstantiated over-billing of time by the Employee which prompted it to stop payment on paycheques it had advanced her until it could determine the authenticity of her wage claims. Notwithstanding this, the Employer expected to continue to rely on the Employee to assist it in servicing its clients. To its surprise, the Employee refused to work and would not co-operate with CCD's attempts to investigate the matter. CCD says its conduct was not an alteration to her conditions of employment, it was not unusual for her to experience such delays, her invoices had always been paid, and there were legitimate questions about the authenticity of her wage claims. These delays were a *de facto* condition of her employment at CCD. In any event, CCD says its concerns were justified because it subsequently discovered the Employee had not been adequately performing her work.

In response, the Employee says the Delegate's finding is justified by the Employer's non-payment of her wages and by the fact that the Employer prevented her from continuing to work by changing its locks. She says payment of wages is a fundamental condition of employment. CCD failed to honour its paycheques, to agree to a schedule of payment, or to provide her with any reasonable expectation that she would be paid for any additional hours worked. Moreover, CCD threatened to dispute payments made for the prior thirteen months if she did not agree to its demands, ie. that she continue to work without a guarantee of payment and that she cease an action in Small Claims Court for collection of a business loan she made to CCD. Further, she claims that CCD only began questioning her wage claims once it found it could not honour its payroll or its loan repayment obligations to her.

Finally, the Employee contends that CCD was not denied natural justice; it was accorded full opportunity to know and respond to the case against it and the Determination was supported by the evidence. Moreover, its submissions do not support its grounds for appeal.

The Delegate says she considered the Employer's arguments respecting the issue of termination.

Section 66 of the *Act* says that if a condition of employment is substantially altered, the Director may determine that the employment of an employee has been terminated.

As noted, the Employer argues that it had no intention of terminating the Employee. It says it had a practice of delayed wage payment which became a condition of the Employee's employment and that it stopped payment on paycheques it had given the Employee because of its legitimate concerns about the Employee's wage claims.

Although the Employer may be correct that conduct consistent with a past practice is not a substantial alteration in an employee's terms and conditions of employment, here, however, the Employer does not

dispute the Employee's allegation that it provided her with paycheques which it asked her not to cash because of lack of funds, consistent with its past practice, but it also went significantly further in a manner that was not consistent with its past practice. Once the Employee indicated she wanted to cash one of the paycheques, it stopped payment on all of the paycheques payable. Moreover, it would not commit to pay her for any additional hours worked and it changed its locks, thereby preventing her from performing further work.

It is well established in the Tribunal's jurisprudence respecting ss. 17(1) and 66 of the *Act* that an Employer's failure to pay wages in a timely manner amounts to a constructive dismissal: *Re H.L.N.T. Network (Canada) Inc.*, BC EST #D274/02; *Re Star Touch Enterprise Inc.*, BC EST #D032/03; *Re 582195 B.C. Ltd.*, BC EST #D049/03 and *Re Queenship Marine Construction Ltd.*, BC EST #D320/03. In any event, in the circumstances, the Employer's conduct in stopping payment on the delayed paycheques and changing the locks is, in my view, a constructive dismissal.

Accordingly, the Delegate did not err in reaching the conclusion that the Employee had been terminated as a result of the Employer's substantial alterations to her terms and conditions of employment and the Employee, therefore, was owed compensation for length of service.

Summary

I dismiss CCD's appeal and confirm the Delegate's Determination.

Alison H. Narod
Member
Employment Standards Tribunal