Employment Standards TRIBUNAL

An appeal

- by -

Rennie Equipment Inc.
("Rennie")

- 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: Carol L. Roberts

FILE No.: 2017A/27

DATE OF DECISION: July 5, 2017

DECISION

SUBMISSIONS

Karen Hislop	on behalf of Rennie Equipment Inc.
Alana DeGrave	on behalf of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), Rennie Equipment Inc. ("Rennie") has filed an appeal of a Determination issued by the Director of Employment Standards (the "Director") on January 24, 2017. In the Determination, the Director found that Rennie had contravened sections 58 and 63 of the *Act* in failing to pay its former employee, Grae Shannon, $2,293.71, representing compensation for length of service, annual vacation pay and interest. The Director also imposed an administrative penalty in the total amount of $500 for the contraventions, for a total amount owing of $2,793.71.

2. In its appeal, Rennie alleges the Director erred in law, 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. Rennie also contends that the Determination does not indicate why two potential witnesses were not called.

3. Following the filing of the appeal, the Tribunal disclosed the section 112(5) "record" that was before the delegate at the time the decision was made. Rennie objected to the completeness of that record, contending that the delegate's hand-written notes indicating that two witnesses were "in the field not called" was not part of the record. The delegate agreed that the notation "in the field not called" were made contemporaneously at the hearing and were not on the original document submitted by the Employer.

4. I accept that the delegate altered the Employer's 'List of Witnesses' document to indicate she did not call two witnesses at the hearing. I find nothing turns on this point as it relates to the completeness of the record.

5. This decision is based on the submissions of the parties, the section 112 (5) record and the Reasons for the Determination.

FACTS AND ARGUMENT

6. Much of the evidence at the hearing was undisputed except for the evidence on the issue before the delegate, which was whether Mr. Shannon was temporarily laid off.

7. Mr. Shannon was employed primarily as a welder/fabricator by Rennie, a fabricating shop, from April 28, 2015, until July 5, 2016.

8. Rennie contended that temporary layoffs were common in the fabricating industry and that Mr. Shannon was aware, at the time he was hired, that he might be expected to perform jobs other than welding or fabricating when business became slow. Ms. Hislop, who represented Rennie at the hearing, testified that on July 5, 2016, she told Mr. Shannon that business had slowed down, that he would be laid off, and that she did not know when he would be recalled.

9. According to Ms. Hislop, Mr. Shannon replied that he already had another job and a second offer.

10. In his complaint form, Mr. Shannon alleged that Ms. Hislop told him that he should not wait around for a call back. Ms. Hislop disputed Mr. Shannon's allegation and asserted that two days after being laid off, Mr. Shannon asked her about being paid severance. She told him that Rennie did not pay severance during a temporary layoff. Ms. Hislop testified that, although she did not inform Mr. Shannon when he would be recalled, she did inform him that Rennie intended to call him back to work.

11. Ms. Hislop believed that she received an e-mail from someone she assumed was Mr. Shannon expressing confusion about the temporary layoff. She said that Mr. Shannon used an e-mail address different from the one she had on file, and she was not comfortable responding to him at that e-mail address. She attempted to telephone Mr. Shannon, but was unsuccessful because he did not have a voice mailbox on his mobile telephone. Ms. Hislop also said that on July 13, 2016, she sent Mr. Shannon a registered letter explaining the temporary layoff and asked him to provide a telephone number at which he could be reached. Mr. Shannon responded by e-mail, indicating that he did not always check his Canada Post mail and that he preferred to be contacted by e-mail so there would be a record of the conversation.

12. Ms. Hislop provided the delegate with a list of individuals who Rennie had laid off and brought back over the last two years.

13. Linda Fawcett, the owner's daughter and a Rennie employee, also testified on Rennie's behalf. She said that she assisted Ms. Hislop in human resource issues, and that she reviewed the contract of employment with Mr. Shannon at the time he was hired. She said that she emphasized the importance of employees' accessibility by mobile telephone because of the nature of Rennie's work when they occasionally had to get a crew together in 48 hours or less. She said that she called employees on the recall list twice and gave them one hour to respond. Ms. Fawcett testified that this is the process she followed when she attempted to recall Mr. Shannon. Ms. Fawcett's evidence was that she attempted to call Mr. Shannon on two occasions, and although she was not certain of the dates of those calls, she believed it was July 8, 2016. She was unable to reach him on his telephone and was not able to leave a voice message. Ms. Fawcett made no further attempts to contact Mr. Shannon.

14. Rennie called two additional witnesses both of whom were Rennie employees; William Bryant, a welder with 22 years in the fabricating industry and Stephen Przybille, an employee who had worked in the steel industry for 20 years. Both Mr. Bryant and Mr. Przybille testified that the welding industry work fluctuates with typical slow periods when employees are laid off and then called back to work. Mr. Bryant's evidence was that when he is laid off, he is told that there is "no expected date of rehire." Mr. Bryant testified that he had been laid off in August, and that the work had picked up at the time of the hearing.

15. Rennie argued that it discharged its liability to pay compensation for length of service through its unsuccessful attempt to call Mr. Shannon back to work.

16. Mr. Shannon's position was that he had been laid off without any notice and that he was not notified that the layoff was temporary until after he requested "severance."

17. Mr. Shannon said that Ms. Hislop informed him that he had been laid off and that they did not expect him to return. He said that he was surprised at the layoff given that he had been asked to work overtime the day before, and had refused after being told he would not be paid overtime wages. Mr. Shannon denied that he had accepted another job or told Ms. Hislop that he had.

18. Mr. Shannon testified that he went to pick up his cheque on July 6, 2016. When he did not receive severance pay, he e-mailed Ms. Fawcett asking about it. He said that Ms. Fawcett told him his cheque would be ready but that when he returned to pick up his severance pay, Ms. Hislop told him that Rennie did not pay severance and that there would be work for him but she could not say when. When asked to respond to this allegation, Ms. Fawcett was unable to recall whether she communicated that to Mr. Shannon and would have to check her emails.

19. Mr. Shannon denied that Rennie called him to return to work. He said that he provided Rennie with two telephone numbers, neither of which was the number Ms. Fawcett said she called and that he had not changed his contact number until after he had been laid off and had moved to another community for a new job.

20. Mr. Shannon received Rennie's July 13, 2016, registered letter stating that Rennie would contact him when it had work for him. Mr. Shannon replied to that letter by e-mail, requesting that Rennie contact him at that e-mail address. He said that he did not receive a call or e-mail from Rennie offering him work.

21. The delegate set out the obligations of the employer under section 63 of the *Act* to provide notice or pay compensation for length of service if an employee was terminated. The delegate noted that the employer was relieved of this obligation in circumstances where an employee was temporarily laid off, and that the burden was on the employer to demonstrate that the employment relationship provided for temporary layoff.

22. The delegate determined that the employment agreement between Rennie and Mr. Shannon did not specify that temporary layoffs were a term of employment. She also found that Rennie did not argue, nor did it provide evidence, that Mr. Shannon agreed to a temporary layoff. Rennie does not dispute these conclusions.

23. The delegate was unable to conclude that temporary layoffs were an implied term of employment despite Rennie's contention that temporary layoffs were both standard, and well-known, in the industry: "The Employer's broad statement that temporary layoffs occur is insufficient to be a term of the contract."

24. The delegate also found that even if Rennie had the right to temporarily layoff Mr. Shannon, it did not, by its own evidence, recall him within 13 weeks of his last day of work. She found that Rennie had an incorrect telephone number for Mr. Shannon and did not attempt to contact him after receiving the correct contact information.

25. Finally, the delegate found that there was no evidence Mr. Shannon quit his employment. Rennie also does not dispute this conclusion.

Argument

Error of Law

26. Rennie argued that all its employees understand that short-term temporary layoffs were possible, that Mr. Shannon was aware that he was being temporarily laid off, and that it did its best to contact Mr. Shannon to recall him to work. Rennie argues that Mr. Shannon:

> …consciously made it impossible to contact him for recall as he had accepted new employment and did voice that he wasn't interested in working for Rennie Equipment so we stopped our attempts to call him back interpreting his new employment as his resignation therefore nullifying his temporary layoff to his choice of termination. [reproduced as written]

27. The delegate contends that Rennie's appeal is simply an attempt to re-argue its case. The delegate says that she found that Rennie did not have the right to lay off Mr. Shannon. Therefore, she argues, Rennie's submissions about its attempts to recall Mr. Shannon, or its argument that Mr. Shannon quit after being laid off, are not relevant because Mr. Shannon had been laid off before either of these events occurred. Further, the delegate says, even if she had concluded Rennie had the right to temporarily lay off Mr. Shannon, Mr. Shannon had responded to Rennie's request for new contact information and Rennie did not contact him at the new contact information. The delegate further submits that Rennie had failed to provide clear and convincing evidence that Mr. Shannon quit his employment.

28. The delegate also argues that she made an alternative finding, which is that even if Rennie had temporarily laid off Mr. Shannon, it had not recalled him within the time required under the *Act,* as it had failed to demonstrate that Mr. Shannon either refused to return to work or avoided being contacted to be recalled.

Failure to observe the principles of natural justice

29. Rennie argues that the delegate did not allow it to call witnesses to demonstrate that it had a right of layoff. As noted above, Rennie submitted a List of Witnesses prior to the hearing. The delegate did not call two of the witnesses identified on that list, noting that they were "in the field." The Determination makes no reference to the Employer's desire to call two additional witnesses or explain why they were not. Rennie argues that the two employees were indeed available, and waiting to be called as witnesses to speak to the Employer's procedures and the possibility of temporary layoffs. As I understand the argument, Rennie says they were denied natural justice when the delegate failed to call additional witnesses to establish that all employees were aware of the possibility of temporary layoffs.

30. The delegate says that after calling four witnesses, one witness name remained on its List of Witnesses, that of Jarod Kelly. She says that there was a discussion at the hearing about whether Rennie would call Mr. Kelly. During that discussion, the delegate indicated that if the sole purpose of Mr. Kelly's evidence was to provide the same information as the two previous witnesses regarding temporary layoffs, his evidence was not necessary. Following that discussion, the delegate says that Rennie decided not to call Mr. Kelly, indicating his evidence would be redundant. The delegate denies that she refused to call any of Rennie's requested witnesses. The delegate notes that Rennie acknowledged, both at the hearing and in subsequent correspondence, that further witnesses would have provided the same evidence as the witnesses who were called. The delegate notes, in any event, that she accepted the evidence of Rennie's witnesses regarding temporary layoffs as credible, and the evidence of additional witnesses would not have changed the Determination, which was that a temporary layoff was not permissible under the *Act* in the factual circumstances.

31. In its reply, Rennie expressed confusion about the delegate's finding that the testimony of its employees regarding temporary layoffs was credible, yet concluded that Rennie did not have the right to temporarily lay off Mr. Shannon.

New Evidence

32. Rennie says that the new evidence demonstrates that Mr. Shannon provided false information at the hearing regarding his new employment. Attached to the appeal submissions is a copy of the July 13, 2016, registered letter Rennie sent to Mr. Shannon, a July 28, 2015, listing on Kijiji by Rennie for a Welder/Fabricator; and a February 2, 2017, letter from Milestone Fabrication to Rennie confirming that Mr. Shannon was employed at Milestone from July 18, 2016, until November 30, 2016. Rennie argues that Mr. Shannon accepted

employment with Milestone and had no intention of returning to work. Rennie says that it was under no obligation to pay compensation for length of service because Mr. Shannon quit.

33. The delegate submits that the new evidence does not meet three of the four criteria for new evidence. She argues that the evidence was, with the exercise of due diligence, available at the time of the hearing, that the evidence is not relevant to a material issue, which is whether Mr. Shannon was temporarily laid off, and that it is of no probative value.

ANALYSIS

34. 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;
>
> (c) evidence has become available that was not available at the time the determination was being made.

35. Acknowledging that most appellants do not have any formal legal training and, in essence, act as their own counsel, the Tribunal has taken a liberal view of the grounds of appeal. As the Tribunal held in *Triple S Transmission Inc.*, (BC EST # D141/03), while

> …most lawyers generally understand the fundamental principles underlying the "rules of natural justice" or what sort of error amounts to an "error of law", these latter terms are often an opaque mystery to someone who is untrained in the law. In my view, the Tribunal must not mechanically adjudicate an appeal based solely on the particular "box" that an appellant has--often without a full, or even any, understanding--simply checked off.
>
> The purposes of the *Act* remain untouched, including the establishment of fair and efficient dispute resolution procedures and, more generally, to ensure that all parties receive "fair treatment" [see subsections 2(b) and (d)]. When adjudicating an appeal, I believe it is appropriate for the adjudicator to first inquire into the nature of the challenge to the determination (or the process that led to it being issued) and then determine whether that challenge, *prima facie,* invokes one of the statutory grounds. In making that assessment, I also believe that adjudicators should take a large and liberal view of the appellant's explanation as to why the determination ought to be varied or cancelled or why the matter should be returned to the Director.

36. Where there is any doubt about the grounds of an appeal, the doubt should be resolved in favour of the appellant. I have therefore considered whether there is any basis for the Tribunal to interfere with the decision.

Failure to observe the principles of natural justice

37. The Tribunal recognizes that parties without legal training often do not appreciate what natural justice means. Principles of natural justice are, in essence, procedural rights that ensure that parties know the case being made against them, the opportunity to reply, and the right to have their case heard by an impartial decision maker. Natural justice does not mean that the delegate accepts one party's notion of "fairness".

38. The delegate says that Rennie initially intended to call three witnesses but, during the course of the hearing, stated they would not be calling two of them because they were in the field (thus her handwritten notes on the List of Witnesses). Rennie has not challenged this explanation.

39. While Rennie argues that there was one additional witness who was prepared to give evidence about the possibility of temporary layoffs, it also does not dispute the delegate's recitation of the discussion at the hearing, and its agreement not to call Mr. Kelly on the basis that his evidence would not have been materially different than that given by Mr. Bryant and Mr. Przybille. I find that Rennie was not denied natural justice. The delegate considered Rennie's evidence and I am not persuaded that the third witness would have changed the delegate's conclusion in any event.

40. I find that Rennie had a full opportunity to respond to Mr. Shannon's complaint and the Delegate considered Rennie's evidence. I conclude that the delegate did not fail to observe the principles of natural justice.

Error of law

41. The Tribunal as adopted the following definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam),* [1998] BCJ No. 2275 (BCCA):

> 1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
> 2. a misapplication of an applicable principle of general law;
> 3. acting without any evidence;
> 4. acting on a view of the facts which could not reasonably be entertained; and
> 5. adopting a method of assessment which is wrong in principle.

42. Section 63 of the *Act* provides that, after 3 consecutive months of service, an employer is liable to pay an employee compensation for length of service upon termination of employment. That liability is discharged if the employee is given written notice in accordance with the *Act*, or if the employee terminated the employment, retires from employment or is dismissed for cause. Section 63 does not apply to (a) an employee employed under an arrangement by which the employer may request the employee to come to work at any time for a temporary period, and (c) to an employee who is laid off and does not return to work within a reasonable time after being requested to do so by the employer. (see section 65)

43. Section 1 of the *Act* defines "temporary layoff" as a layoff of up to 13 weeks in any period of 20 consecutive weeks, and "termination of employment" to include a layoff other than a temporary layoff.

44. Although Tribunal decisions have held that, as a matter of statutory construction, employees who are laid off for less than 13 of 20 consecutive weeks are on temporary layoff and not considered terminated (see *Microb Resources* (BC EST # D142/00) and *ATV Audio Visual* (BC EST # D187/02), the Supreme Court of British Columbia (the "Court") has taken a different view. In *Collins v. Jim Pattison Industries Ltd. (c.o.b. Jim Pattison Automotive Group),* [1995] B.C.C.J. No. 1201 (S.C.) the Court held that the *Act* did not grant all employers the statutory right to temporarily lay off employees; rather, the right to layoff had to be found within the employment relationship.

45. In *Besse v. Dr. A.S. Machner Inc*, ([2009] BCSC 1316) the Court applied *Collins* in concluding that the *Act* did not give employers a general right to temporarily lay off employees and determined that, in the absence of an express or implied provision allowing temporary layoff, a layoff constituted termination of employment.

46. The Branch has issued a factsheet on termination of employment designed to clarify the concept of temporary layoff. It states:

> Temporary layoff
>
> A fundamental term of an employment contract is that an employee works and is paid for his or her services. Therefore, **any** layoff, including a temporary layoff, constitutes termination of employment **unless** the possibility of temporary layoff:
>
> - is expressly provided for in the contract of employment;
> - is implied by well-known industry-wide practice (e.g. logging, where work cannot be performed during "break-up"); or
> - is agreed to by the employee.
>
> In the absence of an express or implied provision allowing temporary layoff, the Act alone does **not** give employers a general right to temporarily lay off employees. [emphasis in original]

47. While not an employment standards claim, the Court in *Hooge v. Gillwood Remanufacturing Inc.*, ((2014) BCSC 11), also held that an indefinite "lay-off," unless accepted by an employee or provided for as a term of the employment contract, amounts to a fundamental breach of the employment relationship and constitutes constructive dismissal.

48. In my view, notwithstanding the fact that temporary layoff is statutorily defined, as stated in *Collins* and *Besse*; the imposition of a layoff of any length where there is no express or implied term in the contract of employment permitting one, constitutes a breach of a fundamental term of the employment relationship.

49. Employers must therefore demonstrate that temporary layoffs are either an express or implied term of the contract of employment, or agreed to by the employee.

50. There is no dispute that Mr. Shannon's employment contract did not expressly provide for temporary layoff. There is also no dispute that Mr. Shannon did not agree to a temporary layoff.

51. The issue facing the delegate was whether the possibility of a layoff was an implied term of Mr. Shannon's employment. Rennie called two witnesses in support of its argument that it was. While the delegate found both of those witnesses were credible, she concluded that their evidence did not support a conclusion that a possibility of a layoff was an implied term of the contract of employment between Rennie and Mr. Shannon.

52. The delegate determined that:

> One of the purposes of the Act is to ensure that employees are provided with at least the basic level of compensation. Furthermore, the Act is remedial and benefits-conferring legislation. Therefore, a circumstance that creates an exception to a basic level of compensation…must be narrowly construed. An employer must provide compelling evidence clearly demonstrating that an employee should be excluded from receiving the benefits of the Act. A layoff, even if temporary, cannot be considered a well-known industry-wide practice merely because of fluctuations in industry or business demands. Finally, the evidence provided by the Employer that its business has slow periods is not sufficient to prove that temporary layoffs are an implied term of its employment contracts.

53. The delegate found that a temporary layoff was not an implied term of Mr. Shannon's employment contract. I find she considered the evidence and applied the correct test.

54. Finally, the delegate concluded that even if it could be considered that a temporary layoff was an implied term of Mr. Shannon's employment, Rennie did not call him back to work within 13 weeks of his last day of work. Rennie's evidence was that it made two attempts to call Mr. Shannon at a telephone number that was incorrect. After receiving the July 13, 2016, registered letter, Mr. Shannon provided Rennie with his e-mail address. Rennie made no attempts to contact him at that address. I find no error in the delegate's conclusion on this point.

New Evidence

55. In *Re Merilus Technologies* (BC EST # D171/03) the Tribunal established the following four-part test for admitting new evidence on appeal:

> 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.

56. Rennie's "new evidence" does not meet the test for new evidence. The July 13, 2016, letter to Mr. Shannon was presented at the hearing and considered by the delegate in arriving at her conclusion. The July 2015 Kijiiji listing is not relevant to the question of whether or not Mr. Shannon was temporarily laid off.

57. The February 2, 2017, letter from Milestone could, with the exercise of due diligence, have been discovered and presented to the delegate at the hearing. Although the letter was written after the hearing concluded, the letter indicates that Mr. Shannon was employed by Milestone between July 18, 2016, and November 30, 2016, prior to the date of the hearing. Furthermore, while I find that the letter is credible, it is only relevant on appeal if the delegate determined that Mr. Shannon had been temporarily laid off. Given that she found that he was not temporarily laid off, the evidence would not have led her to a different conclusion on that point, as Mr. Shannon did not begin working for a new employer until at least 12 days after his termination.

58. Furthermore, given that Mr. Shannon began new employment five days after Rennie sent its registered letter to him, I conclude that the new evidence would also not have altered the delegate's alternative finding; that Mr. Rennie was not recalled within the thirteen weeks after he was temporarily laid off.

59. The appeal is dismissed.

ORDER

60. Pursuant to section 115 of the *Act*, I Order that the Determination, dated January 24, 2017, be confirmed in the amount of $2,793.71, together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal