Employment Standards TRIBUNAL

An appeal

- by -

0947401 B.C. Ltd. carrying on business as Princeton Builders Mart 2012
(the "Appellant")

- 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: Rajiv K. Gandhi

FILE No.: 2015A/89

DATE OF DECISION: September 3, 2015

DECISION

SUBMISSIONS

Susan Robinson	on behalf of 0947401 B.C. Ltd. carrying on business as Princeton Builders Mart 2012

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), 0947401 B.C. Ltd. carrying on business as Princeton Builders Mart 2012 (the "Appellant") has filed an appeal of a determination (the "Determination") issued by a delegate of the Director of Employment Standards (the "Director") on May 15, 2015. The Appellant seeks to cancel the Determination requiring payment of compensation to the Complainant, Kevin Cebulski ("Mr. Cebulski"), for length of service, vacation pay, interest, and administrative penalties, in the aggregate amount of $6,969.65.

2. It challenges the Director's finding that it contravened section 63 of the *Act*, on the basis that:

   (a) the Director failed to observe the principles of natural justice; and

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

   two of the permitted grounds for appeal under section 112(1) of the *Act*.

3. At this stage, I must consider whether or not it is appropriate to summarily dismiss part or all of this appeal according to section 114(1) of the *Act*.

THE FACTS AND ANALYSIS

4. The Appellant is a British Columbia company, operating a building supply store in Princeton, British Columbia under the name and style "Princeton Builders Mart 2012".

5. Mr. Cebulski was employed at the building supply store, first as sales clerk and later as store manager, from June 2, 2008, to October 10, 2014, at which point his employment ended.

6. On December 18, 2014, Mr. Cebulski filed a complaint with the Employment Standards Branch, seeking compensation for length of service arising out of what Mr. Cebulski says was the involuntary termination of his employment. The Appellant maintains that Mr. Cebulski quit.

7. Central to the Appellant's argument is the assertion that, on October 10, 2014, after an unpleasant verbal altercation with a customer that was characterized as "abusive", Mr. Cebulski uttered the phrase "I am done. I quit. I am out of here." – something that Mr. Cebulski has denied.

8. Having considered evidence and submissions from both parties in a hearing conducted on April 7, 2015, the Director found that the Appellant had failed to produce evidence of what Mr. Cebulski said when he left the store. The Director accepted Mr. Cebulski's version of events and, in the absence of written notice, payment in lieu of notice, or cause, found that the Appellant's liability under section 63(3) of the *Act* had not been discharged.

9. The Appellant was ordered to pay:

(a) wages, according to section 63(4) of the *Act*, in the amount of $6,000.00;

(b) vacation pay, according to section 58 of the *Act*, in the amount of $360.00;

(c) accrued interest, according to section 88 of the *Act*, in the amount of $109.65; and

(d) administrative penalties, according to section 98 of the *Act*, in the amount of $500.00.

10. In considering this appeal, I have reviewed the original Determination, the Appeal Form filed on July 7, 2015, and written submissions from Ms. Robinson received by the Tribunal between June 23, 2015, and July 8, 2015.

11. I have also reviewed the Director's Record, submitted to the Tribunal on July 15, 2015.

Failure to Observe the Principles of Natural Justice

12. On behalf of the Appellant, Susan Robinson ("Ms. Robinson") submits that the Director had an obligation to require Mr. Cebulski to "present the information adequately and completely" and to "stand up and take responsibility for [his] actions", and by not doing so, the Director has failed to observe the principles of natural justice.

13. I understand Ms. Robinson to say either that the Director should not have imposed an onus on the Appellant to show that Mr. Cebulski had quit, or that the Director, in failing to accept the Appellant's assertion with respect to what it alleged Mr. Cebulski to have said at the time of his departure, failed to properly consider the evidence – both procedurally unfair to the Appellant and warranting cancellation of the Determination.

i. The Burden of Proof

14. Section 63(1) of the *Act* imposes liability on an employer to pay compensation for length of service. According to section 63(4) of the *Act*, compensation is payable on termination of employment.

15. Under section 63(3) of the *Act*, that liability is discharged only where an employer has provided the employee with adequate notice, pay *in lieu* of notice, or a combination of pay and pay *in lieu* of notice. The obligation is also satisfied where the employee is dismissed for cause, retires or voluntarily resigns.

16. Sections 63(1) and 63(4) are the rules. Section 63(3) is the exception.

17. It is common ground between the Appellant and Mr. Cebulski that employment was terminated on October 10, 2014. That is sufficient to trigger the rule by which the Appellant is to pay compensation for length of service.

18. To take advantage of the exception, the Appellant must show that Mr. Cebulski quit. In my view, the *Act* is clear, and the law trite - requiring the Appellant to meet this burden is not unfair, nor does it violate a principle of natural justice.

ii. Failure to Consider the Evidence

19. The second part of the Appellant's "natural justice" argument is what I interpret to be an allegation that the Director failed to properly consider the evidence. The Tribunal has previously held that failure to consider

relevant evidence can constitute a failure to observe the principles of natural justice. (See *Britco Structures Ltd.*, BC EST # D260/03, and *Flora Faqiri*, BC EST # D107/05)

20. The Director's finding (at Page R7 of the Determination) that the Appellant offered no evidence of Mr. Cebulski's departing declaration is, at worst, an imprecise summary of the proceedings. It is more accurate to say that the Appellant offered no corroborating evidence with respect to the alleged utterance.

21. In reading the Determination (at pages R3, R5, and R7), it is clear that the Director listened to evidence from both parties concerning Mr. Cebulski's final day. This includes, among other things, the evidence of Ms. Robinson who says she clearly heard Mr. Cebulski declare, on leaving the Appellant's store, "Keys are on the desk. I am done. I quit. I am out of here."

22. Ultimately, the Director found that the evidence from both parties, taken as a whole, did not prove that the statement was made, or that Mr. Cebulski had resigned.

23. That is not a failure to consider relevant evidence; rather, it is a failure to accept the Appellant's position in the absence of compelling evidence. The former might be seen as a departure from the principles of natural justice, but the latter is not.

24. Accordingly, I find that an appeal under section 112(1)(b) of the *Act* has no reasonable prospect of success.

Fresh Evidence

25. In *Davies et. al.*, BC EST # D171/03, the Tribunal held that the onus rests with an appellant to meet a strict, four part test before any exercise of discretion to accept and consider fresh evidence:

> (a) 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;
>
> (b) the evidence must be relevant to a material issue arising from the complaint;
>
> (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
>
> (d) 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.

26. In reviewing the Appellant' submissions, I have determined that there are, apparently, two "new" pieces of evidence:

> (a) an alleged admission, by Mr. Cebulski, in proceedings or investigations apparently conducted under the *Workers Compensation Act*, that he did utter the words 'I quit" on October 10, 2014;
>
> (b) a statement from the customer with whom Mr. Cebulski had the verbal altercation on October 10, 2014, confirming that he heard Mr. Cebulski utter the phrase "I am done. I quit. I am out of here."

27. From what I can surmise, based on information supplied by the Appellant and otherwise contained in the Director's Record, the Worker's Compensation matter was addressed prior to the Determination. Even assuming that statements made in another forum were admissible in this one, I find - at the very least – that

the first part of the test in *Davies* would not be satisfied. I am equally unconvinced that any such evidence would satisfy the third and fourth part of the test in *Davies*.

28. As it relates to what Mr. Cebulski may or may not have admitted to WorkSafeBC, I find that an appeal under section 112(1)(c) of the *Act* will not succeed.

29. That leaves, to be answered, the question of what the customer might contribute to these proceedings.

30. Based upon the Appellant's summary of what that customer will say, I am not prepared to summarily dismiss this aspect of the appeal under section 114(1) of the *Act*. The Tribunal should first hear further submissions from the parties with respect to that element of the appeal.

ORDER

31. Without making any ruling on the admissibility of the same, I order the appeal to proceed under section 112(1)(c) of the *Act*, but only as it relates to the "fresh evidence" to be tendered by the customer witnessing events occurring on October 10, 2014.

32. The balance of this appeal is otherwise dismissed pursuant to section 114(1)(f) of the *Act*.

Rajiv K. Gandhi
Member
Employment Standards Tribunal