Employment Standards TRIBUNAL

An appeal

- by -

Hartwood Holdings Ltd.
("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.: 2017A/69

DATE OF DECISION: September 5, 2017

DECISION

SUBMISSIONS

Shane Garner	on behalf of Hartwood Holdings Ltd.
Tamara Henderson	on behalf of the Director of Employment Standards

OVERVIEW

1. On April 3, 2017, a delegate of the Director of Employment Standards (the "Director") issued a determination (the Determination") pursuant to section 79 of the *Employment Standards Act* (the "*Act*") in which Hartwood Holdings Ltd. (the "Appellant") was ordered to pay to Cory Titanich (the "Complainant") the aggregate amount of $6,449.68, representing compensation for length of service, vacation pay, and accrued interest.

2. In addition, the Appellant was ordered to pay $1,000.00 in administrative penalties, arising out of the Appellant's failures, firstly, to pay compensation for length of service when due under section 63 of the *Act*, and secondly, to respond to the Director's demand for employment records as required by section 46 of the *Employment Standards Regulation* (the "*Regulation*").

3. The Determination addresses two primary questions, and answers both in the affirmative:

   (a) Was the Complainant an employee entitled to the benefits conferred by the *Act*?

   (b) Was the Complainant entitled to compensation for length of service under section 63 of the *Act*?

4. The Appellant does not challenge the Director's finding that the Complainant was an employee. Nor does it contest the administrative penalty levied with respect to the Appellant's breach of the *Regulation*. However, I think it is fair to say that the Appellant rejects the Director's findings with respect to the entitlement to, and calculation of, the amount payable as compensation for length of service. Implicit in this, I believe that the Appellant also challenges the administrative penalty arising out of the breach of section 63 of the *Act*.

5. Under sections 112(1)(b) and 112(1)(c) of the *Act*, the Appellant submits that:

   (a) the Director failed to observe the principles of natural justice in making the Determination,

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

   and asks for an order from this Tribunal cancelling the Determination (at least with respect to those matters now appealed).

6. Having had an opportunity to review:

   (a) the Determination;

   (b) the Director's Record, submitted by the Director on May 18, 2017;

   (c) submissions from the Appellant, received on May 9, 2017; and

(d) submissions from the Director, received on July 25, 2017,

I conclude that this Appeal should be dismissed.

FACTS AND ANALYSIS

7. By way of background:

(a) The Complainant was employed in the Appellant's logging business, as a truck driver, between August 17, 2015, and September 19, 2016. (The Appellant appears to dispute the termination date, although it was sometime in September.)

(b) According to materials submitted by the Appellant before the original Complaint hearing, termination was based on the Complainant's:

(i) demonstrably poor workplace attitude, about which the Appellant's president, Mr. Garner, has spoken to the Complainant on August 17, 2016, and September 1, 2016 (something which the Complaint denies); and

(ii) failure to report to work on September 16, 2016 (a fact which appears to be accepted by all parties).

(c) The Director found that the verbal warnings (to the extent that the warnings were given) and the Complainant's unauthorized absence from work on September 16, 2016, did not amount to "just cause" and did not otherwise relieve the Appellant of the obligation to pay compensation or length of service.

8. The Appellant does not argue an error of law in the Determination.

Did the Director violate the principles of natural justice?

9. Instead, the Appellant calls for cancellation of the Determination on the basis that the Director failed to observe the principles of natural justice.

10. Those principles require the Director, always, to act fairly, in good faith, and with a view to the public interest (*Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48 at paragraph 2). Fairness, in turn, means that all parties involved have the right to notice, the right to know the case to be met and the right to answer it, the right to cross-examine witnesses, the right to a decision on the evidence, and the right to counsel (*Tyler Wilbur operating Mainline Irrigation and Landscaping*, BC EST # D196/05, at paragraph 15).

11. The Appellant's submissions on this point are brief but, somewhat generously, I interpret the Appellant to say that the Director was wrong to hear the Complaint on February 15, 2017, having been advised on January 25, 2017, that Mr. Garner, the Appellant's representative and principal witness, would be out of country.

12. Indeed, Mr. Garner did not appear at the Complaint hearing, and I agree that Mr. Garner's absence adversely affected the Appellant's ability to fully and properly answer the Complaint.

13. However, it does not automatically follow that the absence amounts to a breach, by the Director, of the principles of natural justice and, in light of the facts of this matter, the argument falls flat:

(a) The complaint was filed on October 31, 2016, and the Complaint hearing scheduled for February 15, 2017. According to the Record, the hearing date was verbally confirmed in a telephone discussion between Mr. Garner and a representative of the Employment Standards Branch at approximately 1:43 P.M. on December 22, 2016, confirmed by electronic mail sent to Mr. Garner at 4:50 P.M. on December 22, 2016, and subsequently by registered mail (the "Hearing Notice"), delivered to the Appellant. The latter was received at the Appellant's registered office on December 28, 2016, and at the Appellant's business office on January 4, 2017.

(b) The following instructions are included at page 3 of the Hearing Notice (emphasis added):

> ***Adjournments***
>
> *A request for an adjournment must be made in writing and be delivered to the Brach at least seven days before the scheduled hearing date. It must advise whether the other party consents and include reasons, alternate available dates and supporting documentation if applicable.*
>
> *Parties should remain prepared to attend the hearing on the originally scheduled date until advised in writing that the adjournment has been granted. If a party does not appear, the hearing may proceed in their absence*

(c) On January 25, 2017, Mr. Garner notified the Employment Standards Branch by electronic mail that he would be out of the country on February 15, 2017, and requested rescheduling hearing of the Complaint to a date after March 5, 2017. Although this adjournment request was made in writing, it included little of the information required according to the procedure established in the Hearing Notice.

(d) The Employment Standards Branch responded to Mr. Garner's message, by electronic mail, less than one hour after receipt. In that response, the Branch representative repeated the same paragraphs set out above, and included an adjournment request form.

(e) Mr. Garner appears to have made no further effort with respect to formalizing his application for adjournment, despite having spoken to a Branch representative by telephone on February 6, 2017 concerning the submission of employment records, and despite having sent submissions to the Branch on February 7, 2017 concerning the substance of the Complaint.

14. The power to adjourn a hearing is discretionary, and must be exercised in accordance with the principles of fairness and natural justice. In the absence of a clear and unequivocal breach of those principles, this Tribunal should not interfere. (See *Wicklow Properties Ltd.*, BC EST # D518/99, at page 5, and *Prassad v. Canada (Minister of Employment & Immigration* [1989] 1 S.C.R. 560, at pages 568 – 570).

15. The Director's decision to proceed with the Complaint hearing is detailed in the Determination, and it is reasonably made. The date of the Complaint hearing was set with the Appellant's knowledge and consent. The Hearing Notice included information concerning adjournment applications, and the Employment Standards Branch communicated that information to the Appellant again, on receipt of the January 25, 2017, message from Mr. Garner.

16. Despite this, the Appellant did not submit a request for adjournment with supporting information, or otherwise comply with the Director's requirements for rescheduling the Complaint Hearing.

17. The Director points to the plethora of information available in Employment Standards Branch publications and on the Branch website regarding complaint hearings, and the way one party can request an adjournment.

18. The Director says that any responsibility it had to guide the Appellant with respect to process of applying for an adjournment has been satisfied. I agree. The procedure for seeking an adjournment is clear, and the Appellant had opportunity to do so. Unfairness is not the result where, in the absence of appropriate reason, the Director declines to abbreviate that procedure or otherwise relax the requirements inherent in a process intended to accommodate all parties efficiently, inexpensively, and expeditiously.

19. An adjournment application, properly made and supported by fact, might well have succeeded. I think there is merit in the Director's suggestion that the Appellant made a calculated decision to forgo that application in favour of a written submission on the substantive complaint. Intentional or not, that was the Appellant's decision (or negligence).

20. While I agree that Mr. Garner's absence from the Complaint hearing put the Appellant at a considerable disadvantage, the fault for this does not lie with the Director or the Employment Standards Branch.

21. The Appellant has not established a breach of the principles of natural justice, let alone one that is "clear and unequivocal".

22. I dismiss this ground of appeal.

Should the Tribunal accept fresh evidence?

23. The Appellant also says that evidence is now available that was not available at the time the Determination was made. It implies that this evidence would change the result of the Determination and, as a result, the Determination should be cancelled.

24. 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 exercising any 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.

25. If any one part of the four-part test is not satisfied, an appeal based on "fresh evidence" must fail.

26. In this appeal, the Appellant's "fresh evidence" consists of:

> (a) a written summary of the Complainant's average earnings, which differs considerably from the evidence supplied by the Complainant; and
>
> (b) a series of statements contradicting the Complainant's *viva voce* evidence supplied at the Complaint hearing.

27. None of it, in my estimation, satisfies the first part of the *Davies* test:

(a) While I have no reason to doubt the correctness of the document, it is abundantly clear to me that the earnings summary could have, and should have, been presented to the Director before the Complaint hearing. While Director made several requests for records – on December 22, 2016, January 26, 2017, and February 6, 2017 – the Appellant offers no explanation as to why that information was not disclosed.

(b) It is equally clear that, had Mr. Garner or some other representative of the Appellant appeared at the Complaint hearing, the Complainant's *viva voce* evidence could have been tested by cross-examination and contradicted by sworn evidence from the Appellant's witnesses. To the extent that I have decided that the Director's choice to proceed with the Complaint hearing did not, in the circumstances, amount to a breach of the principles of natural justice, there is no basis for me to now find that the Appellant's efforts to adduce "fresh evidence" should pass the first part of the *Davies* test just because Mr. Garner says he was unavailable to attend the hearing.

28. Having failed to satisfy the first part of the *Davies* test, I conclude that the entirety of the Appellant's appeal, on this ground, must fail.

Conclusion

29. I agree with the Director's finding that the Complainant was both an employee under the *Act* and entitled to compensation for length of service. Even if I did not, the Appellant has not established a basis upon which I could upset those findings.

30. I am also satisfied that the Director's calculation of compensation due was made based on the best evidence available at the time. If the Appellant's alternate numbers are correct, the result may well be a windfall to the Complainant that is, from the perspective of the Appellant, unfair. However, I conclude that it is the Appellant, not the Director, who is responsible.

31. I have sympathy for the position in which the Appellant finds itself, but my sympathy is tempered by the Appellant's failure to provide employment records when demanded, and to appear at the Complaint hearing or otherwise to properly apply for an adjournment when presented with an opportunity to do so.

ORDER

32. I dismiss the appeal, and confirm the Determination, pursuant to section 115(1)(a) of the *Act*.

Rajiv K. Gandhi
Member
Employment Standards Tribunal