Employment Standards TRIBUNAL

An appeal

- by -

Applied Coatings & Restoration Inc.
("ACR")

- 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/101

DATE OF DECISION: September 18, 2017

DECISION

SUBMISSIONS

Shane Rondquist on behalf of Applied Coatings & Restoration Inc.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), Applied Coatings and Restoration Inc. ("ACR") has filed an appeal of a Determination issued by the Director of Employment Standards (the "Director") on June 29, 2017. In that Determination, the Director found that ACR had contravened sections 58 and 63 of the *Act* in failing to pay its former employee, Dave B. Stein, compensation for length of service, wages, annual vacation pay and interest in the total amount of $5,645.20. The Director also imposed three administrative penalties in the total amount of $1,500 for the contraventions, for a total amount owing of $7,145.20.

2. ACR appeals the Determination on the grounds that evidence has become available that was not available at the time the Determination was made.

3. This decision is based on the ACR's submissions, the section 112 (5) record, and the Reasons for the Determination.

FACTS AND ARGUMENT

4. ACR, a restoration company, was incorporated in August 2001. Mr. Rondquist and Eric Lauridsen are the officers and directors of ACR.

5. ACR hired Mr. Stein on November 7, 2016, as a sales manager for Applied Building Services Inc. ("ABS"). ACR's offer of employment, dated November 8, 2016, set out Mr. Stein's salary and other benefits. The last day for which Mr. Stein was paid was February 28, 2017. Mr. Rondquist terminated Mr. Stein's employment by way of an e-mail dated March 13, 2017. Mr. Stein claimed compensation for length of service, vacation pay, and pay for work performed from March 1 – 13, 2017.

6. The delegate conducted a hearing into Mr. Stein's complaint on May 25, 2017. The delegate noted that although Mr. Rondquist attended the hearing on ACR's behalf, he did so reluctantly. She wrote that Mr. Rondquist appeared angry with Mr. Stein, and expressed the view that the *Act* favoured employees. According to the Determination, the delegate informed Mr. Rondquist that she could not require him to participate but that she was required to issue a Determination based on the evidence she received.

7. ACR took the position that Mr. Stein did not perform any work during the period March 1 -13, 2017, and that his employment had been terminated for cause. The delegate informed Mr. Rondquist that the Employer had the burden of establishing just cause for termination and that his non-participation could negatively impact ACR's position. Although Mr. Rondquist ultimately participated in the hearing and gave evidence under oath, he left the hearing after the completion of his testimony and before he could be questioned on his evidence, making negative comments to Mr. Stein on his way out of the hearing.

8. At issue before the delegate was whether or not Mr. Stein was entitled to compensation for length of service, wages and vacation pay.

9. ACR took the position that Mr. Stein was terminated because he had misrepresented his work experience at the time he was hired, and because he was insubordinate – specifically because he refused to provide ACR with a customer contact list. ACR also took the position that Mr. Stein performed no work that warranted payment of wages from the period March 1 - 13, 2017.

10. There was evidence before the delegate that ACR planned to establish a new business, Applied Building Services Inc., ("ABS") which would sell corporate cleaning and building maintenance services. Mr. Rondquist's evidence was that ACR hired Mr. Stein because it believed he had been employed with Pinnacle, a company that was a direct competitor of ABS, from January 2009 onwards. Mr. Rondquist testified that, during the hiring process, Mr. Stein represented that he was still employed by Pinnacle. ACR did not check Mr. Stein's references with Pinnacle as it did not want to jeopardize Mr. Stein's employment status.

11. In early 2017, Mr. Stein told Mr. Rondquist that he was working to secure a service contract with a number of Rona stores in Vancouver. When Mr. Rondquist asked Mr. Stein to copy him on his correspondence with Rona and to provide him with a copy of the draft service contract, Mr. Stein allegedly responded in an angry and evasive manner. According to Mr. Rondquist, Mr. Stein informed him that the final contract had already been sent and that he would bring the documents to Mr. Stein in a few days. Mr. Stein's "evasiveness" led Mr. Rondquist to investigate his activities.

12. On February 24, 2017, Mr. Stein presented the contract to Mr. Rondquist for signature. After Mr. Rondquist signed it, Mr. Stein was to have Rona execute it. He never did so. Mr. Rondquist determined that the contract was in the name of a corporate entity that did not exist, and that the documents were sent to the attention of an individual who was not employed by Rona. Mr. Rondquist testified that Mr. Stein informed him that Rona had requested changes to the contract and that Mr. Stein would present Mr. Rondquist with a revised contract for signature. That did not happen. Mr. Rondquist's investigation also determined that the person Mr. Stein said he had been dealing with at Rona also did not exist.

13. At the end of February 2017, Mr. Rondquist asked ACR's technology staff to review Mr. Stein's computer communications. The staff reported that there were 14 unanswered voice mails on Mr. Stein's ACR's supplied telephone line and that, since November 7, 2016, Mr. Stein had sent only eight e-mails from ACR's server. The technology staff also reported that while Mr. Stein's administrative assistant had sent a total of 12 e-mails, none of those were to an outside customer, which formed the basis for ACR's termination of her employment.

14. Mr. Rondquist acknowledged that ACR had not supplied Mr. Stein with an office until late January 2017, as it expected Mr. Stein to work from home until ABS was established. He also confirmed that Mr. Stein did not have set office hours; rather, as a salesman he was expected to work outside the office.

15. On March 9, 2017, Mr. Rondquist spoke with Pinnacle's owner and learned that Mr. Stein had not been employed there since June 2011.

16. Mr. Rondquist also testified that, despite being requested to do so, Mr. Stein did not provide a list of all potential customers.

17. ACR questioned the work performed by Mr. Stein during the period March 1 – 13, 2017, contending that he performed no more than four hours of work. Mr. Rondquist informed the delegate that ACR would pay Mr. Stein for these days if Mr. Stein could demonstrate what work he had performed.

18. ACR did not provide the delegate with a daily record of hours in response to the Branch's Demand for Employer Records and the wage statements that were submitted did not contain the number of hours Mr. Stein worked in each pay period.

19. Mr. Stein's evidence was that, prior to being hired, he was interviewed by four ACR representatives including Mr. Rondquist. He testified that he informed those representatives that he left Pinnacle's employment in 2011 and that his resume needed updating. He said that he provided ACR with reference letters and recent T4 slips at ACR's request.

20. Mr. Stein testified that he accepted employment with ACR because Mr. Rondquist made representations that he would become a partner in ABS once it was established, and supplied the delegate with an e-mail from Mr. Rondquist in support of his assertion. Mr. Stein believed that his employment was terminated because of a March 8, 2017, conversation with Mr. Rondquist during which he expressed his desire to have the representation formalized.

21. Mr. Stein testified that he worked very hard to undertake all the steps required to establish ABS and that he was the only employee tasked to do so. He said that he spent a month developing a web site; creating contract templates; applying for a PST number and business licence; ordering telephone lines; and sourcing cleaning supplies. When the delegate asked Mr. Stein for the website address, Mr. Stein informed her that the site had been taken down.

22. Mr. Stein said that he worked full-time for ACR from November 7, 2016, until March 13, 2017. He acknowledged that much of the work was performed from his residence with his own cell phone and computer because ACR did not provide him with an office until January 23, 2017. He contended that his job required him to solicit customers and that the mileage he reported demonstrated that he was working hard at doing so. Mr. Stein said that ACR reviewed and approved his expense reports prior to being paid.

23. Mr. Stein explained that the Rona contract was a mock-up as he was in the process of developing an acceptable contract template when he was terminated, and that Mr. Rondquist was aware that was the case.

24. Mr. Stein testified that, prior to his termination on March 13, 2017, ACR had never raised any performance concerns with him. He believed that his work was satisfactory, particularly because of a text he received from Mr. Rondquist on March 7, 2017, suggesting that April was a great time of year to go to Las Vegas. In addition, on March 8, 2017, Mr. Rondquist sent Mr. Stein a text message inquiring about the time he would be in the office.

25. Mr. Stein said that ACR had not supplied him with a functioning computer until March 8, 2017, which could explain why ACR only had evidence of eight email communications.

26. Mr. Stein's evidence was that on March 13, 2017, he provided Mr. Lauridsen with a USB stick with a lengthy customer contact list on it. Mr. Stein denied he was insubordinate in any way.

27. The delegate set out the employer's obligations 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 terminated for just cause, and outlined the parameters of just cause.

28. The delegate found much of Mr. Rondquist's evidence to be hearsay and concluded that much of his assertions were "in question." The delegate noted that Mr. Rondquist provided no evidence of any

discussions with Mr. Stein regarding his job responsibilities, performance or compensation. Finally, the delegate noted that Mr. Rondquist did not fully participate in the hearing, leaving before Mr. Stein could question him on his evidence. The delegate determined that, for these reasons, she could give little weight to Mr. Rondquist's testimony and preferred that of Mr. Stein.

29. The delegate determined that ACR had not met the test for establishing just cause for terminating Mr. Stein's employment. She noted Mr. Lauridsen had not been called to give evidence regarding the customer list and concluded there was insufficient evidence to determine that Mr. Stein had been insubordinate. The delegate found no evidence that Mr. Stein misrepresented his employment history or that ACR raised any issues about Mr. Stein's performance prior to March 13, 2017.

30. The delegate noted an employer's obligation to maintain control of the workplace and did not find it credible that ACR would pay Mr. Stein's wages and expenses without any awareness of the work he was performing from November 7, 2016, onwards.

31. The delegate determined Mr. Stein was entitled to compensation for length of service.

32. The delegate considered section 28 of the *Act* which outlines an employer's obligation to maintain payroll records as well as a record of hours worked by an employee each day. She determined that ACR did not supply a daily record of hours in response to the Demand for Employer Records. In the absence of any evidence from ACR, the delegate preferred Mr. Stein's evidence regarding the work he performed. The delegate determined that Mr. Stein was entitled to regular wages for nine days in March, and vacation pay on those wages.

Argument

33. ACR asserts that Mr. Stein gave false evidence at the hearing. Specifically, ACR says that Mr. Stein's evidence that he spent time obtaining a PST registration number and applying for insurance for ABS was false, and that other staff members performed this work. Attached to the appeal submission are documents indicating that ABS was incorporated effective November 14, 2016. Also attached are applications for a variety of business services including business cards, telephone lines, internet domain name, and PST and WorkSafe BC registrations, none of which were completed by Mr. Stein.

ANALYSIS

34. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

- the director erred in law;
- the director failed to observe the principles of natural justice in making the determination;
- 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*, (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. I have concluded that there is not.

New Evidence

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

> (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;
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> (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.

38. ACR submitted documents relating to ABS on appeal that were not presented at the hearing. Mr. Rondquist chose not to fully participate in the hearing. However, it is clear that these documents were available to him and could have been presented had he done so.

39. However, even if the documents had been presented to the delegate, I am not persuaded that they would have led her to a different conclusion on the issue of whether Mr. Stein was entitled to either compensation for length of service or wages. The delegate determined, correctly in my view, that ACR had not discharged its burden of demonstrating that it had just cause for terminating Mr. Stein's employment. Even if Mr. Stein did not do the work he asserted at the hearing such as obtaining a PST number for ABS, that failure, in and of itself, does not establish just cause. Because Mr. Rondquist chose not to fully participate in the hearing, the delegate had no ability to assess the credibility of the parties and make findings of fact, including the veracity of Mr. Stein's evidence. It is not open to the Tribunal, on appeal, to make assessments of the veracity of evidence when they have not been presented in the first instance.

40. Furthermore, even if Mr. Stein's evidence that he obtained a PST number for ABS was false, that conclusion did not support Mr. Rondquist's assertion that Mr. Stein was insubordinate or that he had misrepresented his work experience.

41. The "new evidence" also does not relate to the issue of whether Mr. Stein was entitled to wages for the period March 1 – 13, 2017. Although ACR was obliged to maintain records of Mr. Stein's hours of work, it provided none of those records to the delegate. The delegate, again correctly in my view, based her Determination on Mr. Stein's evidence in the absence of any contrary evidence from ACR.

42. I dismiss the appeal on this ground.

Error of law

43. The Tribunal has 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] B.C.J. No. 2275 (B.C.C.A.):

> 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.

44. I find no basis for concluding that the delegate erred in law. She applied appropriate rules of evidence, based her findings on the evidence before her, and applied the correct sections of the *Act*.

45. The appeal is dismissed.

ORDER

46. Pursuant to section 115 of the *Act*, I Order that the Determination, dated June 29, 2017, be confirmed in the amount of $7,145.20 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