

An appeal

- by -

Design Plastics Inc.
("DPI")

- 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.: 2005A/98

DATE OF DECISION: July 19, 2005

DECISION

SUBMISSIONS

Murray Bernard

on behalf of Design Plastics Inc.

Christie Macdonald

on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Design Plastics Inc. (“DPI”), pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination of the Director of Employment Standards (“the Director”) issued April 29, 2005.
2. Geoff Wilson was employed as a production supervisor for DPI from 2002 until December 2004. Mr. Wilson filed a complaint alleging that he was owed regular wages and compensation for length of service.
3. The Director’s delegate held a hearing into Mr. Healey’s complaint on April 14, 2005. Mr. Wilson’s wife appeared on her husband’s behalf by telephone, and Mr. Bernard appeared for DPI.
4. Following the hearing, the delegate determined that Mr. Wilson had received payment for all wages owed, and that aspect of his complaint had been resolved. The delegate determined that Mr. Wilson’s employment had been terminated without just cause, and that he was entitled to compensation for length of service. The delegate found that DPI had contravened section 63 of the *Employment Standards Act*, and concluded Mr. Wilson was entitled to compensation in the amount of \$3,213.70, including vacation pay and interest. The delegate also imposed a \$500 penalty on DPI under section 29(1) of the *Act*.
5. Although DPI sought an oral hearing, I am satisfied that this matter can be decided based on the written submissions of the parties.
6. DPI contends that evidence has become available that was not available at the time the Determination was being made.

ISSUE

7. Whether new and relevant evidence is available that was not available at the time the Determination was being made, and that evidence, if believable, would have led the Director to arrive at a different conclusion on the material issue.

THE FACTS AND ARGUMENT

8. As found by the delegate, the facts relevant to the appeal are as follows.
9. In late 2004, Mr. Bernard and his partners in DPI became involved in a partnership dispute, which, according to Mr. Bernard, led the partners to turn the business over to him. The partnership dispute had a negative affect on the workplace atmosphere. On December 7, 2004, Mr. Bernard went to the worksite,

ostensibly at the invitation of one of the partners. Mr. Bernard's evidence was that he said good morning to a group of employees, including Mr. Wilson. His evidence was that Mr. Wilson responded in a hostile manner and called him a "stupid idiot". At that point, Mr. Bernard told Mr. Wilson that he was fired. Mr. Bernard testified that Mr. Wilson walked towards him and brushed him into a wall. Mr. Bernard told Mr. Wilson that if he touched him again, he would call the police. According to Mr. Bernard, Mr. Wilson then became agitated and threatened to beat him up. Then, Mr. Bernard said, Mr. Wilson swung his fists at him, but was restrained by another worker before he could make contact with him.

10. Mr. Bernard contended that Mr. Wilson's hostile manner, coupled with his swearing at him, constituted just cause for dismissal.
11. Ms. Wilson asked Mr. Bernard a number of questions at the hearing, but Mr. Wilson's version of the events leading to the termination of his employment were never given under oath.
12. The delegate assessed Mr. Bernard's evidence in light of the tests for establishing just cause, noting that the employer had the burden of substantiating grounds for termination. She also considered, but gave less weight, to Mr. Wilson's written submissions to the Branch. She indicated that, where the evidence of the parties differed, she accepted Mr. Bernard's version of events.
13. The delegate also noted that, in his written submissions, Mr. Wilson acknowledged using inappropriate language towards Mr. Bernard in front of other employees.
14. The delegate concluded that DPI had not established just cause. She found that Mr. Wilson's conduct on December 7th, was, in isolation, not sufficient to justify termination. She noted that the use of coarse language was common in the "male testosterone" charged workplace, and that Mr. Bernard acknowledged it was a form of communication. The delegate found that Mr. Wilson's decision to call Mr. Bernard a "stupid idiot" had not irreparably damaged their working relationship. The delegate also found that, given the nature of the workplace, the use of such language in front of other employees did not undermine the employer's authority. The delegate further noted that Mr. Wilson had never been told that there were any performance or conduct standards with respect to the use of such language in the workplace, nor had Mr. Wilson ever been warned or disciplined for the use of inappropriate language in the four years he worked at DPI.
15. The delegate also found that Mr. Bernard could not rely on Mr. Wilson's conduct after he was told he had been fired to relieve him of the obligation of paying compensation for length of service under section 63.
16. In his appeal, Mr. Bernard states that he "never fully described Mr. Wilson's involvement in the partnership dispute that was going on." He says that he would like "the events leading up to the termination to be considered by the Tribunal".
17. The delegate submits that DPI has failed to show why the evidence Mr. Bernard says he now wishes to tell was not provided as evidence at the hearing of Mr. Wilson's complaint. She submits that, having failing to submit this evidence at first instance, the appeal should be dismissed.

ANALYSIS AND DECISION

18. 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;
or
 - (c) evidence has become available that was not available at the time the determination was being made
19. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D171/03 the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:
- 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;
 - the evidence must be relevant to a material issue arising from the complaint;
 - the evidence must be credible in the sense that it is reasonably capable of belief; and
 - 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.
20. I am unable to find that DPI has satisfied the test set out in *Bruce Davies* for new evidence.
21. Mr. Bernard says that the “new evidence” relates to “the events leading up to the termination.” Clearly, this evidence is not new, in the sense that it was available at the time the hearing was held. Mr. Bernard does not say why he failed to provide this evidence at the hearing when he apparently had full opportunity to do so.
22. The Tribunal will not allow the appeal procedure to be used to make the case that should have and could have been given to the delegate in the investigative or hearing process. In *Tri-West Tractor Ltd.* (BC EST #D268/96), the Tribunal held that it would not allow appellants to “sit in the weeds”, failing or refusing to cooperate with the delegate during an investigation and then later file appeal of the Determination when they disagreed with it.
23. Furthermore, Mr. Bernard does not say what the “new evidence” is, or how that evidence would have led the delegate to arrive at a different conclusion on the material issue.
24. Therefore, I dismiss the appeal.

ORDER

25. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated April 29, 2005, be confirmed in the amount of \$3,713.70, plus whatever interest might have accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal