

An appeal

- by -

Rite Style Manufacturing Ltd. and M.D.F. Doors Ltd.
("Rite Style")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2005A/77

DATE OF DECISION: July 19, 2005

DECISION

SUBMISSIONS

Formiza Nisha

for Rite Style Manufacturing Ltd.

Sebastien Andeson

for Geoff Costanzo

INTRODUCTION

1. This is an appeal filed by Rite Style Manufacturing Ltd. (“Rite Style”) pursuant to section 112 of the *Employment Standards Act* (the “Act”). Rite Style appeals a Determination that was issued by a delegate of the Director of Employment Standards (the “Director”) on April 22nd, 2005 (the “Determination”). Rite Style says that the Determination should be varied on the ground that the Director’s delegate erred in law [see section 112(1)(a) of the Act].
2. The Director’s delegate determined, following an investigation, that Rite Style owed its former employee, Geoff Costanzo (“Costanzo”), the sum of \$8,664.94 on account of unpaid wages and section 88 interest. In addition, by way of the Determination the Director also levied five separate \$500 administrative penalties against Rite Style based on that company’s contraventions of sections 18 (payment of wages upon termination), 21 (unlawfully withholding wages), 40 (overtime pay), 46 (statutory holiday pay) and 83 (“retaliatory discharge”) of the Act. Accordingly, the total amount payable under the Determination is \$11,164.94.
3. I should noted that the Determination was issued against two firms, Rite Style and M.D.F. Doors Ltd., on the basis that the two firms were “associated corporations” as defined by section 95 of the Act and, therefore, jointly and severally liable for Costanzo’s unpaid wages. Apparently, during the course of the delegate’s investigation neither firm contested the delegate’s preliminary finding that they were associated corporations and the correctness of that latter declaration is not in issue in these proceedings.
4. Section 103 of the Act incorporates several provisions of the *Administrative Tribunals Act* including section 36 which states: “...the tribunal may hold any combination of written, electronic and oral hearings” (see also *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). In a letter dated June 16th, 2005, the Tribunal’s Vice-Chair advised the parties that this appeal would be adjudicated based solely on their written submissions. In its Appeal Form (Paragraph 6), Rite Style stated that it believed an oral appeal hearing was required because: “...we have witnesses on outside [sic] that we would like to present.” However, I share the Vice-Chair’s view that this is not a case where an oral appeal hearing should be held since I am able to determine, based on the material before me and without having to hear any oral testimony, whether the delegate erred in law.
5. In addition to the section 112(5) record and Rite Style’s Appeal Form, I have before me a submission dated May 26th, 2005 filed by legal counsel for Mr. Costanzo. As noted, the *only* material before me filed by Rite Style is its Appeal Form and some attached documents including letters dated December 21st, 2004 and March 14th, 2005 each of which is addressed to the Employment Standards Branch. In essence, Rite Style, despite being specifically invited to do so, did not file any submission with the Tribunal concerning its allegation that the delegate erred in law.

6. By letter dated May 31st, 2005, the Tribunal's Vice-Chair specifically invited Rite Style to file a further submission (by June 15th, 2005) regarding the contents of the record and/or Mr. Costanzo's counsel's submission, however, Rite Style did not file any further material. I might add that Rite Style was advised as early as May 5th, 2005 (by letter) that this appeal could be adjudicated based solely on the parties' written submissions and thus its failure to provide at least some particulars regarding its allegation that the delegate erred in law is rather hard to fathom.

REASONS FOR THE DETERMINATION

7. According to the information set out in the delegate's "Reasons for the Determination" ("Reasons"), also issued on April 22nd, 2005, Costanzo commenced his employment with Rite Style on August 25th, 2004 as a machine operator at a wage rate of \$15 per hour. Mr. Costanzo filed a "confidential" complaint under section 75 of the *Act* on October 26th, 2004 seeking \$468.75 on account of unpaid overtime and statutory holiday pay.
8. Mr. Costanzo alleged that his last regular working day was November 5th, 2004; he reported for work on November 8th and again on November 9th but did not work either day as he was sent home and told not to return until contacted by his employer's principal, Mr. Ajit Gill ("Gill"). Mr. Costanzo says that Mr. Gill never contacted him requesting that he return to work. Mr. Costanzo wrote to his employer on November 10th, 2004 (this letter was confirmed to have been delivered on November 12th by "Xpresspost") stating that he was "ready to return to my duties...[and to] please let me know if I am still employed at Rite Style Manufacturing/MDF Doors". Since he was never requested to return to work, Mr. Costanzo subsequently amended his complaint seeking additional compensation for, *inter alia*, compensation for length of service and further compensation for "retaliatory discharge".
9. Rite Style's position was that Mr. Costanzo was terminated for cause. Rite Style acknowledged having held back certain of Costanzo's wages because he allegedly damaged company equipment. Rite Style denied Costanzo's assertion that he was terminated because he filed a complaint under the *Act* and maintained that the termination was strictly related to his poor performance.
10. The Director's delegate determined, based on a review of Rite Style's payroll records and additional admissions made by Mr. Gill, that Mr. Costanzo was owed regular wages and concomitant vacation pay on those wages in the total amount of \$222.30 and unpaid overtime pay in the amount of \$345.14. Rite Style's payroll records did not indicate that Mr. Costanzo was paid annual vacation pay and, indeed, Rite Style asserted that Costanzo's accrued vacation pay was withheld on account of some property damage allegedly caused by Costanzo. The delegate awarded Mr. Costanzo \$260.10 on account of unpaid annual vacation pay and also concluded that Rite Style wrongfully withheld Mr. Costanzo's wages and thereby contravened section 21 of the *Act*. The delegate further concluded, again based on Rite Style's own payroll records, that Mr. Costanzo was entitled to \$189.15 on account of unpaid statutory holiday pay and concomitant vacation pay. Since Mr. Costanzo was employed for less than 3 consecutive months, the delegate did not award him any compensation for length of service [see section 63(1) of the *Act*].
11. The delegate awarded Mr. Costanzo the sum of \$7,488 as compensation for "retaliatory discharge" (see section 83(1)(a) of the *Act*). This latter sum was calculated based on 12 weeks' wages plus vacation pay—12 weeks being the time period that Mr. Costanzo was unemployed before he secured comparable alternative employment [see section 79(2)(c) of the *Act*].

REASON FOR APPEAL

12. As noted above, Rite Style says that the delegate erred in law, however, in the absence of any submission from Rite Style providing further particulars, precisely how the delegate is supposed to have erred in law is rather difficult to discern. In its December 21st, 2004 and March 14th, 2005 letters to the Employment Standards Branch, Rite Style argues that it terminated Mr. Costanzo's employment due to his poor performance and that it intentionally withheld a portion of his wages to compensate the company for property damage Costanzo alleged caused through incompetent work performance. Rite Style further alleges that the termination was not connected in any way to the fact that Mr. Costanzo filed an unpaid wage complaint while employed and that it paid him all of his "regular wages".

FINDINGS AND ANALYSIS

13. In the absence of any justification from Rite Style to support its contention that the delegate erred in law, I must dismiss this appeal. There is nothing in the material before to indicate that the delegate erred in law.
14. For the most part, the appeal appears to be founded on the simple assertion that the delegate's findings of fact should not be allowed to stand. If a finding of fact is made without any evidentiary foundation, that finding of fact could be characterized as an error of law. However, I note that the delegate's findings with respect to unpaid regular wages, overtime pay, vacation pay and statutory holiday pay were based on Rite Style's *own payroll records*. Further, during the course of the delegate's investigation, a Rite Style principal conceded that the firm had intentionally withheld a portion of Mr. Costanzo's wages—a clear contravention of section 21(1) of the *Act*. Clearly, there was ample evidence before the delegate to support all of his factual and legal findings with respect to unpaid wages.
15. The bulk of Mr. Costanzo's award (about 88%) represents compensation awarded under section 79(2)(c) for "retaliatory discharge" [as that latter term is defined in section 83(1)(a) of the *Act*]. Clearly, the delegate was faced with conflicting evidence regarding this latter matter. This is hardly surprising. I would expect that most employers would not frankly concede they fired an individual because they learned the individual had filed a complaint under the *Act*. The truth in these sorts of situations is often obscured by denials and post-termination rationalizations.
16. The delegate set out in his Reasons, in some detail, the various factual circumstances that lead him to conclude Mr. Costanzo was terminated because he filed an unpaid wage complaint. Rite Style has not denied any of the salient facts from which the delegate inferred that there was a retaliatory discharge. Further, the delegate's inference about what triggered Mr. Costanzo's termination is a reasonable and, indeed, the most reasonable inference to be drawn from the facts as found by the delegate.
17. The documentary evidence conclusively proves that on November 8th, 2004 Rite Style received a notice advising it that Mr. Costanzo had filed an unpaid wage complaint (thereby undermining the confidentiality that Mr. Costanzo had requested in his initial complaint) and that the complaint would be discussed at a "mediation" session scheduled for December 2nd, 2004. Mr. Gill conceded that he was unaware that Mr. Costanzo had filed a complaint prior to receiving the notice to attend the mediation session. Mr. Gill told Costanzo to go home and Gill was "waving" the mediation notice as he directed Costanzo to leave the premises.

18. I note, from having reviewed the record that was before the delegate, that much of the damage Costanzo was alleged to have caused to company property was caused, if at all, several days—even weeks—prior to November 8th, 2004. If Rite Style truly intended to terminate Costanzo’s employment why did it wait for days or weeks to do so? Rite Style’s explanation that it was merely a “coincidence” that Costanzo’s employment was effectively terminated on the very same morning that it learned he had filed an unpaid wage complaint is not, in my view, credible. I might add that the delegate had the advantage of speaking with the parties and their witnesses directly and having done so he rejected the employer’s position as lacking credibility and I cannot say he erred in law in so finding.
19. As for the matter of the appropriate remedy in the case of a retaliatory discharge, it should be noted that Costanzo could have been “made whole” by way of a reinstatement order coupled with an order to recover the wages he lost in the period from termination to reinstatement (i.e., a “backpay” award) under section 79(2)(b). Compensation in lieu of reinstatement [section 79(2)(c)] should reflect an equivalent level of compensation—see e.g., *Tricom Services Inc.*, B.C.E.S.T. Decision No. D484/98; *W.G. McMahon Canada Ltd.*, B.C.E.S.T. Decision No. D386/99. As recounted in the delegate’s Reasons, Mr. Costanzo apparently made a diligent search to find new comparable employment but did not find such new employment until he had been unemployed for about 12 weeks. I find the delegate’s award of 12 weeks’ wages based on a 40-hour work week and a \$15 per hour wage rate (plus 4% vacation pay) to be entirely reasonable in the circumstances. Certainly, I cannot conclude that the delegate erred in law in making that award.
20. Finally, I note that counsel for Mr. Costanzo, in his submission, asked the Tribunal to make an order reinstating Mr. Costanzo to his former employment with Rite Style; counsel also asked for an order for “costs” against Rite Style. The Tribunal has no statutory authority to order one party to pay the other’s costs. As for the reinstatement request, I do not think this is an appropriate case for such an order and, in any event, if Costanzo felt the Director’s delegate should have ordered reinstatement, rather than compensation in lieu of reinstatement, Costanzo should have independently appealed the Determination.

ORDER

21. Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of **\$11,164.94** together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal