Employment Standards TRIBUNAL

An appeal

- by -

Manuel D. Gutierrez
("Employee")

- 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: Alison H. Narod

FILE No.: 2005A/51

DATE OF DECISION: July 19, 2005

DECISION

1. This Decision relates to an appeal by Manuel D. Gutierrez (the "Employee") who was formerly employed by Rainmaker Call Centres Inc. (the "Employer") of a Determination dated February 24, 2005 (the "Determination") issued by a Delegate of the Director of Employment Standards (the "Delegate"). In that Determination, the Delegate dismissed the Employee's complaint alleging that the Employer contravened the *Employment Standards Act* (the "*Act*") by failing to pay him compensation for length of service and profit-sharing wages on the termination of his employment.

2. The Employee brings his appeal under Section 112(1) of the *Act* on the grounds that the Delegate erred in law, that the Delegate failed to observe the principles of natural justice in making the Determination, and that evidence has become available that was not available at the time the Determination was being made.

THE DETERMINATION

3. Following mediation sessions held with an officer of the Employment Standards Branch, the Employee's complaint was set down for hearing before the Delegate. The Delegate conducted the hearing on January 18 2005. The Employee and, Ms. Bolton, a Manager employed by the Employer attended, gave evidence and made submissions.

4. In the Determination, the Delegate noted that the Employer operated a marketing business. It employed the Employee as a telemarketer from September 20, 2002 to July 30, 2004. The Employee was paid an hourly rate, plus a production bonus.

5. The Delegate identified the issues as being:

    1. Did [the Employee] resign his employment or was he terminated?

    2. Are any profit-sharing wages owed to [the Employee]?

6. The Delegate's recitation of the facts and evidence indicates that there were disputes between the parties, particularly with regard to issues relating to the Employee's work performance, as well as events that occurred on and after July 30, 2004, the last day of his attendance at work. However, the parties agreed that during a meeting held on July 30, 2004, the Manager gave the Employee a letter containing notice of termination in the following terms:

> We are hereby advising you that your employment with us will be terminated for the following reason(s)
> failure to meet requirements of under 10 hr/tour for the past 4 pp (2 months). Note if you can turn this around in the next 2 weeks this notice will be cancelled. Your last day of work will be Aug 15th/04. Please be advised that this is the only Notice of Termination you will receive.

7. The Employee was asked to sign the letter and refused. The words "refused to sign" were written in a space reserved for employee signature.

8. The parties agreed that during this meeting, the Employee and the Manager discussed the notice of termination. The Manager told the Employee that if he improved his production numbers during the notice period, the notice of termination may be cancelled. The Employee asked whether, if he signed the

letter and returned to work, he would be paid two weeks' wages instead. The Manager called the Acting Supervisor into the meeting to witness the Employee being given his termination notice. After the meeting, the Employee went to his work station, found his computer was logged off, and was unable to re-start it. The Employee left his work station, dropped his headset onto the Manager's desk, rather than leaving it in his desk drawer, and left the premises, in anger. The Employee was scheduled for work the following day, Saturday, July 31, 2004. However, he did not attend. The Manager called him on his cell phone on July 31, 2004, but the phone call disconnected. They did not speak with each other further that day. The Employee did not subsequently return to work.

9. As noted, the parties disputed certain of the facts. Moreover, each party had a different view of the events and their significance. With respect to the July 30, 2004 meeting, the Employee said the Manager demanded that he sign the termination notice and told him he would not be permitted to return to work unless he did so. The Manager said she expected the Employee to sign the notice and return to work. Although the Manager agreed that the Employee asked if he would be paid two weeks if he did not sign the notice and return to work, she denied saying that he would be paid in those circumstances.

10. With respect to the logged-off computer, the Employee said he assumed that the Employer deliberately shut off his computer to prevent him from working because he had refused to sign the termination notice. The Manager denied this, saying that the system had experienced glitches which caused disconnects and that the Employee did not report his inability to log on, nor did he ask to be logged on, as per normal practice.

11. With respect to the circumstances in which the Employee left work on July 30, 2004, the Employee said he left his work station, dropped his headset on the Manager's desk and then left the premises an hour before the end of his shift. The Employee said the reason for this was that he considered himself terminated when he found he had been logged off his computer. The Manager said that she assumed the Employee had returned to work after the meeting. She said he left shortly before his shift ended, so she thought he was leaving for the day. However, she also considered the fact he returned his headset to her desk as an act of resignation, because normally headsets were placed in the Employee's desk drawer.

12. With respect to the events of July 31, 2004, the Manager's evidence was that she phoned the Employee to persuade him to work out his notice period, but was disconnected. She thought he had hung up on her. The Employee claimed that the phone simply disconnected. He said he called the Manager back several times that day and left messages for her, to which she did not respond.

13. As noted, there was disputed as well as undisputed evidence before the Delegate. In assessing the conflicting evidence before her, the Delegate applied the test for considering the credibility of interested witnesses set out in the leading B.C. Court of Appeal judgment of *Faryna v. Chorny*, [1952] 2 D.L.R. 354, at pages 356-357. In so doing, she reproduced the following excerpt from that case:

> The credibility of interested witnesses, particularly in cases of (*sic*) conflict on evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

14. The Delegate concluded that, from the Employee's perspective, the "last straw" in the events of July 30, 2004 was his inability to log onto his computer after the meeting in which he was given the termination notice. He assumed the Employer had deliberately prevented him from logging in, but he did not ascertain whether this was the case. The Delegate found that the Manager's explanation that the Employer's system was experiencing glitches at the time was uncontradicted and reasonable. Therefore, she concluded that the Employer did not deliberately shut down the Employee's computer. The Delegate found that the evidence was consistent with the conclusion that the Employee was upset at having been given termination notice, that he reacted to his inability to log onto his computer by assuming the Employer had deliberately caused the situation, and that he left the Employer's premises in anger.

15. With respect to the telephone conversations of July 31, 2004, the Delegate noted that the parties agreed that the Manager called the Employee when he failed to report to work the day after being given termination notice. The Delegate found that the purpose of this call was to encourage the Employee to work out his notice period. The Delegate found that there was no evidence to support the Employee's that he left messages for the Manager that he had called back. Moreover, given the Employee's state of mind, the Delegate found it more probable than not that he deliberately disconnected the telephone call and that he did not attempt to return the Manager's call afterwards.

16. The Delegate then went on to consider whether or not there was a basis for the Employee's claim for profit-sharing. She described the Employee's evidence which indicated that he had not been provided with specific details of a profit-sharing practice or bonus system, nor had he been specifically promised any commissions or extra wages. She noted that the Manager denied there had ever been any profit-sharing or commission payment to any employees during her five years of employment with the Employer.

17. In her analysis of the first issue of whether the Employee resigned or was terminated, the Delegate considered the Employee's assertion that the termination notice was not properly given, because he was not permitted to work out the notice period and because the notice contained a provision that the termination may be rescinded if his performance improved.

18. The Delegate found that Section 63 of the *Act* imposes a statutory liability on an employer to pay compensation for length of service in an amount equal to two weeks wages to an employee with the Employee's length of consecutive employment. She said that an employer's liability under this section is discharged if the employee is given two weeks written notice of termination or if the employee quits, retires, or is dismissed for just cause.

19. The Delegate found that the letter given to the Employee met the requirements of the *Act* for providing written notice of termination. It clearly stated the employment was to be terminated, it specified the date of termination, and it provided two days in excess of the requisite two weeks written notice. She found that the suggestion that the termination would be rescinded if the Employee's production improved, although perhaps confusing to an employee, did not invalidate the termination notice.

20. The Delegate did not address the Employee's concerns that his termination was unjust because, she noted, the *Act* does not require an Employer to have just cause to terminate an employee's employment, provided that compensation for length of service is paid or written notice of termination is provided.

21. The Delegate then considered whether or not the Employee quit his employment. In so doing, she focused on the events that occurred after he received his termination notice. She observed that the

Tribunal's decision in *Zoltan Kiss* (BC EST #D091/96) set out the following test for determining whether an employee quit or was fired for the purposes of the *Act*:

> The right to quit is personal to the employee and there must be clear and unequivocal fact (*sic*) to support a conclusion that this right has been voluntarily exercised by the employee involved. There is both a subjective and objective element to a quit; subjectively, the employee must form an intent to quit employment; objectively, the employee must carry out an act inconsistent with his or her employment.

22. The Delegate reviewed her findings respecting the events that occurred after the Employee received his termination notice. She found that the Employee's conduct in leaving the premises without explanation was based on his erroneous assumption that the Manager had deliberately shut down his computer, which he reacted to in anger. She noted that the Employee's actions might have been forgivable under the circumstances had he reported the next day for his scheduled shift, but he did not. She accepted that the Manager attempted to contact the Employee to try to persuade him to return to work out his notice. On the basis of this fact, she concluded that the Employer did not terminate the Employee's employment the previous day. The Delegate went on to say, "it was [the Employee's] failure to report to work on July 31 or any subsequent day that crystalized his resignation".

23. The Delegate concluded that the Employer provided proper notice of termination under the *Act*, as well as an opportunity for the Employee to work during the notice period. She wrote that, subjectively, the Employee left the Employer's premises in anger on July 30, 2004. Objectively, he chose not to report to work as scheduled on July 31 or on any other day during the period of notice. The Delegate found the Employee quit and was therefore not entitled to compensation for length of service.

24. With respect to the second issue of entitlement to profit-sharing wages, the Delegate found that the Employee's wage package did not include a commission or profit-sharing system. His claim for such payment was without merit.

25. Accordingly, the Delegate dismissed the Employee's complaint.

ARGUMENTS

26. The Employee makes detailed submissions which I will not reproduce in full, but will summarize, below.

27. The Employee makes a number of submissions that the Delegate failed to properly consider all of the evidence relating to his performance. For instance, the Employee alleges the Delegate failed to consider performance assessments and performance improvement plans, as well as favourable evidence respecting his performance, such as year-to-date results that exceeded those of co-workers. He alleges that the Delegate failed to consider the difficulty of his work, and the poor quality of leads he was given which prevented him from improving his performance. Additionally, the Employee says the Delegate failed to mention discrepancies respecting the timing of the Acting Supervisor's signature on the Notice of Termination.

28. The Employee claims that he was the victim of constructive dismissal and that the Employer failed to justify the termination. He says he was victimized, threatened, harassed, and treated arbitrarily.

29. The Employee also asserts that the Delegate erred in relying on *Faryna v. Chorny*, which he says is an old and therefore irrelevant case. The Employee alleges that the Delegate based her decision to prefer the Employer's evidence over his on findings that were not supported by the evidence, because her conclusion that the Manager tried to contact the Employee by cell phone on July 31 was not supported by the Employee's cell phone records.

30. The Employee alleges that the Delegate erred in conducting the hearing by selectively and arbitrarily choosing what evidence to enter, instead of considering all of it, and by refusing his request to tape the hearing.

31. The Employee contests the validity of the Notice of Termination, saying that it was the Employer's regular practice to give such notices to employees and that a notice containing an offer to rescind if performance improved was not proper notice.

32. The Employee challenges the Delegate's finding that he quit, asserting that there is an onus on the Employer to obtain a letter of resignation before concluding that an employee has quit. Additionally, he contests the Delegate's findings of facts which led to her conclusion that he quit. For instance, he alleges that he told the Acting Supervisor and the Manager that he was encountering problems with his computer and that they tried, but were unable to log him on. As a result, he alleges that they must have directed the computer company not to allow him to log on. Further, he says he made several calls during the week of August 2, 2004 to the Employer to inquire about his status. Moreover, he says he was prepared to serve out his two weeks notice when he picked up his Record of Employment.

33. The Employer does not agree that the Delegate erred as alleged. The Employer says that many of the allegations made on appeal deal with performance issues which are not properly before the Tribunal, as the Employee was not terminated for just cause. Rather, he was given in excess of two weeks notice of termination, but left the office in anger and did not return to work during the notice period, thereby discharging the Employer's liability for compensation under the *Act*.

34. With respect to the cell phone calls, the Employer says that the Manager tried to call the Employee twice on July 31, 2004, once on his cell phone, which was answered with a "hello" and then quickly disconnected, and once on his land line, which was answered, and then hung up. The Employer says that the Employee does not dispute that he got the call and testified that the call got dropped. The Employer suggests that the answer to why the call was not recorded in the Employee's cell phone bill is in the details of his cell phone plan and that since no connection lasted longer than five seconds, he was not charged for it.

35. The Employer submits that there is no evidence that has become available that was not available at the time the Determination was being made and the Employee fails to provide an explanation why any new information was not supplied. For instance, the Employer says that the Employee was aware of his cell phone bill, as it was discussed in mediation, and that he was aware that he was to bring copies of any documentation to the hearing to present to the Delegate if he wanted it considered.

36. With respect to the Employee's allegations regarding his inability to log onto the computer system, the Employer says that the Employee agreed during the hearing that there had been glitches in the computer system which logged agents out from time to time. It says that, at that time, the Employee perceived that someone in higher authority, such as the computer company, had made it impossible to log back on.

However, it says, he did not ask to be logged back on. Nor did he bring it to the Manager's attention. Rather, he dropped his headset on the Manager's desk, and left without saying anything to the Manager.

37. With respect to subsequent telephone calls, the Employer reiterates its version of events on July 31, 2004 and says that the next time the Manager spoke with the Employee was when he requested a copy of the termination notice, performance report and exit interview to be faxed to him. There were no discussions about the Employee returning to work or signing anything.

38. The Delegate provided copies of the record to the Tribunal, which was comprised of the exhibits filed at the hearing. Additionally, she says there was no denial of natural justice. The Employee had an opportunity to attend and fully participate in the hearing. The Delegate says she considered all of the evidence before her. During the hearing, both parties had an opportunity to submit further evidence but did not do so.

ANALYSIS

39. This appeal is brought under Section 112 of the *Act*. Section 112(1) states:

> **112** (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:
>
> (a) the director erred in law;
>
> (b) the director failed to observe the principles of natural justice in making the determination;
>
> (c) evidence has become available that was not available at the time the determination was being made.

40. As noted, the Employee relies on each of the above-noted grounds. I will first address the "new evidence" issue. I will next address the "error of law" issue. Finally, I will address the "natural justice" issue.

(a) new evidence

41. The Employee makes various assertions which appear to be based on evidence that may not have been brought to the attention of the Delegate. For instance, he now supplies a copy of his cell phone bill for the period of July 25 to August 25, 2004. He relies on this document to say that the Delegate erred in concluding there was no evidence in support of her finding that the Manager telephoned him on July 31, 2004 and in relying on that finding to prefer the Employer's evidence over his.

42. Additionally, he says that, contrary to the Delegate's finding that he did not mention to the Employer that his computer was not working, he did in fact mention this to both the Acting Supervisor and the Manager and that they tried to log him on, but could not do so. This, he says, supports his view that he was being terminated, because the computer company that handled the system could have logged him off under the Employer's direction.

43. Further, he says that he was prepared to serve out his two weeks notice when he picked up his Record of Employment.

44. According to Section 112(1)(c), an appeal may be made on the ground that evidence has become available that was not available at the time the Determination was being made. The Tribunal has held that this ground is not intended to allow a person dissatisfied with the result of a Determination to simply seek out more evidence to supplement what was already provided to, or acquired by, the Director during the complaint process if, in the circumstances, that evidence could have been provided to the Director before the Determination was made. The key aspect of this ground is that the fresh evidence being provided on appeal was not available at the time the Determination was made. The Tribunal retains a discretion about accepting fresh evidence. However, in deciding how to exercise this discretion, it will be guided by the test applied in civil courts for admitting fresh evidence on appeal. That test is described as a relatively strict one and must meet the following four conditions (*Merilus Technologies Inc.*, BC EST #D171/03):

> (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 probitive 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.

45. In my view, all of the evidence described above could, with the exercise of due diligence, have been discovered and presented to the Delegate prior to the Determination being made. Moreover, none of it had such high potential probitive value that, if believed, it alone or together with other evidence would have led the Delegate to a different conclusion on the material issues.

46. With respect to the Employee's cell phone bill, I note that it existed at the time of the hearing. The Employee says it was discussed during mediation. However, unless the parties agree otherwise, mediation is a confidential process and evidence discussed in that setting for the first time will not necessarily be raised in a subsequent hearing, unless the parties bring it forward. It is up to the parties to present to the Delegate the evidence on which they intend to rely in a hearing. It is not an error for a Delegate to fail to consider evidence not presented to her.

47. Additionally, I note that the Employee seeks to rely on the cell phone bill to support his assertion that the Delegate erred in finding the Manager telephoned him on July 31, 2004 to try to persuade him to work out his notice period and in then relying on that finding to prefer the Employer's evidence over his. This, however, is not an accurate description of the Delegate's reasoning. According to the Determination, the parties agreed that the Manager called the Employee on July 31, 2004 when he failed to report to work. As noted below under the heading "(b) error of law", there was evidence before the Delegate to support this conclusion. Therefore, since this fact was "agreed", the Delegate was not required to make a determination of the parties' credibility in making this finding of fact. She had to choose between them in deciding what transpired during and after the call. The Delegate decided to prefer the Employer's evidence that the Employee deliberately disconnected the call and did not call back. In so finding, she relied on her conclusions about the Employee's angry state of mind and the lack of evidence to support his claim that he called back. I note that the cell phone bill does not support the Employee's claim that he called the Manager back. It does not record any telephone calls on July 31, 2004. Accordingly, I am unable to conclude that the evidence of the cell phone bill would have altered the outcome of the case.

48. With respect to the Employee's allegation that he mentioned the problem with his computer to the Acting Supervisor and the Manager, this evidence existed at the time of hearing and could have been raised then. The Employee provides no explanation for why he did not do so. Nor does it appear that, at the hearing, the Employee denied the Manager's evidence that he failed to report his inability to log onto his computer and did not request assistance to log on, as was the normal procedure, before he left work on July 30, 2004. In the face of the Manager's evidence and the Employee's failure to refute it, I find there was evidence on which the Delegate could reasonably conclude, as she did, that the Employee failed to raise his inability to log onto his computer with the Employer. Accordingly, I am unable to conclude that this "new" evidence, if believed, would alone or when considered with other evidence have led the Delegate to a different conclusion on the material issue.

49. With respect to the Employee's allegation that he was prepared to work out his two weeks notice when he picked up his Record of Employment, I note that this evidence existed prior to the Determination being made and there is no explanation for why it was not raised at the hearing of the complaint. Moreover, there is no suggestion that the Employee communicated his preparedness to work out the notice period to the Employer. In the absence of any evidence that he communicated his preparedness to the Employer, and the circumstances in which it was communicated, it cannot be said that this evidence would alone, or when considered with other evidence, have led the Delegate to a different conclusion on the material issue.

50. Accordingly, this ground of appeal fails.

(b) error of law

51. 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.), described an error of law as including:

> (a) a misinterpretation or misapplication of a section of the applicable enactment;
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> (b) a misapplication of an applicable principle of general law;
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> (c) acting without any evidence;
>
> (d) acting on a view of the facts which could not reasonably be entertained; and
>
> (e) exercising discretion in a fashion that is wrong in principle.

52. Although the Employee has alleged that the Delegate committed an error of law, he has not explained how the Delegate erred in this regard. He has, however, made a number of allegations that the Delegate erred in assessing the evidence and making findings of fact, as well as in failing to apply principles that the Employee assumes ought to have been applicable.

53. Although the legislation does not provide for appeals based on findings of fact, alone, there may be circumstances in which an error of fact gives rise to an error of law, such as where a finding of fact is made without any evidence or where a determination is reached on a view of the facts which could not reasonably be entertained. However, to sustain an appeal, the findings of fact in question must be relevant to an issue to be decided in the appeal.

54. In my view, the Delegate correctly identified the issues she was to decide. Accordingly, she was required to consider the relevant and admissible evidence relating to those issues in making the findings of fact that will determine the case.

55. In the instant case, the Employee asserts that the Delegate failed to properly consider all of the evidence, that she selectively and arbitrarily chose what evidence to enter and that there was an absence of evidence to support certain of her findings. However, the record does not support the allegation that the Delegate failed to admit and consider all the evidence that was before her. The Delegate says she considered all of the evidence that was before her. The Delegate listed the Exhibits she admitted and considered. She also heard the testimony provided by the parties' witnesses. The Employee does not point to any evidence the Delegate refused to admit and consider.

56. I note that the fact that the Delegate may have failed to reference all of the evidence that the Employee considered relevant does not, by that fact alone, constitute a reviewable error. She is not required to recite all of the evidence in her reasons (*International Longshore & Warehouse Union (Marine Section), Local 400 v. Oster*, 2001 FCT 1115 (FC TD), at paragraph 46).

57. For instance, it is not an error of law to fail to reference evidence which is not relevant to the issues to be decided. In this case, many of the Employee's allegations of error relate to issues regarding his work performance. However, the Employer did not rely on an allegation of just cause to justify its termination of the Employee's employment. Nor did the *Act* require it to prove it had just cause to terminate where it provided proper notice of termination under s. 63. As noted, the Employer maintained that it sought to terminate the Employee without cause, and that it was entitled to do so, as it provided the Employee with the minimum statutory notice period. It also maintained that it discharged its obligation to provide notice when the Employee quit. Accordingly, the Employee did not have to establish that the termination was without cause in order to support his claim for length of service compensation. Rather, he had to counter the Employer's assertion that he quit. In short, the issues did not include whether the Employer had cause to terminate. Therefore, evidence relating to the Employee's work performance was not relevant to the issues before the Delegate and she did not err by omitting to refer to that evidence.

58. As noted above, the Employee says that the Delegate was wrongly persuaded that the Manager tried to contact him by cell phone to persuade him to work out his notice period. He said this is not supported by his cell phone itemized billing records which he submitted to "the Board" but which were not in the Delegate's possession during the hearing. He says the Delegate's conclusion in this regard served to persuade her to believe the Manager's version of events over his.

59. In deciding whether there was an error of law in reaching this finding, I must determine whether there was no evidence to support it.

60. The Employee submits his telephone bill for the period July 25 to August 25, 2004. As noted above, I have ruled that this bill, as "new" evidence, cannot be considered in aid of the Employee's appeal. However, if I am wrong in that regard, I find that it does not aid the Employee in making his "error of law" argument. That is because the cell phone bill does not assist the Employee in challenging the particular finding with which he now quarrels, which he says is the finding that there was no evidence the Manager called him on July 31, 2004, since there was other evidence to support the Delegate's findings about the telephone calls at issue.

61. More particularly, the Employee says his cell phone plan has "itemized billing features" and that if the Manager had heard him respond to a July 31, 2004 call, a record of the call would exist. No such record exists on this bill. In response, the Manager says that during the hearing, she testified that she tried to call the Employee twice on July 31, 2004, once on his cell phone, which he answered with a "hello" and then disconnected, and once on his land line, which was answered, without response, and then was hung up. The Manager says that the Employee's position in the hearing before the Delegate was that he tried returning the call. She says he does not dispute that he did get the call. She suggests that the reason the phone call is not on his cell phone bill is that because of his billing plan, since the connection did not last longer than five seconds, he was not charged for it. She said that, at the hearing, the Employee testified that the call got dropped.

62. I note that the cell phone bill, itself, does not provide an explanation of the Employee's billing plan and so I cannot determine from the face of the bill whether the document supports the Employee's or the Employer's version of the events.

63. However, I find that the cell phone bill is not determinative of the question of whether the Delegate committed an error of law under s. 112(1) of the Act. That is because there was evidence before the Delegate which supported her finding that the Manager called the Employee on July 31, 2004. I note that the Delegate specifically addressed both the Manager's and the Employee's evidence respecting the July 31, 2004 phone call. The Delegate said the parties agreed that the Manager called the Employee on July 31, 2004 when he did not report for work. Additionally, she wrote:

> [The Employee] was scheduled for work the following day, Saturday, July 31 but did not show up. [The Manager] called him on his cell phone but was disconnected shortly into the conversation. [The Manager] believed [the Employee] had hung up on her and **[the Employee] claims the phone simply disconnected and he called back several times that day and could not connect with [the Manager]. He claims to have left messages that he had called back although there is no evidence to support this claim.** [The Manager] states she was calling [the Employee] to persuade him to return to work out his notice. [The Manager] denies receiving any messages that [the Employee] returned her call. (emphasis added)

64. Accordingly, the Employee testified that he received a phone call from the Manager which "simply disconnected", that he "called back several times" and that he left messages that "he had called back". His evidence that he called the Manager back several times is inconsistent with his current position that the Manager never called him in the first place. If she had not called him, and if he had not known she had called, there would be no reason for him to call her back several times. Therefore, there was some evidence, given by the Employee, to support the Delegate's conclusion that the Manager called the Employee which supported the Manager's evidence that she called him to persuade him to work out his notice period. Therefore, the Delegate did not err as alleged.

65. In any event, I note that the Delegate's comment that "there is no evidence to support this claim" related to the Employee's claim to have left messages that he called back. It did not relate to the question of whether the Manager called the Employee in the first place. Accordingly, the cell phone bill does not assist the Employee on the particular factual finding to which the Delegate's "no evidence" comments related. Moreover, the cell phone bill does not support the claim he made during the hearing that he called back several times and left messages for the Manager that he called, because it simply does not list any calls at all on July 31, 2004. Therefore, the cell phone bill does not support a conclusion that the Delegate erred in finding there was no evidence to support the Employee's claim that he called the Manager back several times.

66. With respect to the question of whether or not the Delegate erred in her application of an applicable principle of law, such an error might arise if the Delegate misapprehended and/or misapplied the law respecting the validity of notices of termination, the law respecting resignations or "quits" or the law respecting the assessment of conflicting evidence, where issues of credibility are raised.

67. In connection with the issue of the validity of the notice of termination, I note that Section 63 of the *Act* requires an employer to give written notice of termination setting out a stipulated notice period based on an employee's length of service, pay in lieu of that notice period, or a combination of the two. Additionally, the written notice is to specify the date on which the termination is to be effective. Where written notice is provided, that notice is "working notice". In other words, the employment relationship continues during the notice period. In practical terms, this means that the employee must continue to report to work, in accordance with the employment contract, and the employer must continue to pay wages and benefits during the notice period (*Delphi International Academy*, BC EST #D166/02).

68. In the instant case, the Employer provided the Employee with written notice of termination in which it provided a notice period slightly in excess of the statutory minimum, and it set out the date on which the termination would be effective. Additionally, the notice indicated that the notice of termination might be waived by the Employer, should the Employee's performance improve during the notice period. The Employee relied on this potential waiver and the fact that the Employer had a practice of issuing such notices of termination in the past as a basis for saying the notice of termination was not valid. The Delegate disagreed, finding that the notice of termination met the requirements of the *Act* and was not invalidated in the circumstances by the suggestion it would be rescinded if the Employee's performance improved.

69. In my view, the Delegate did not err in reaching this conclusion. The notice of termination met the requirements of the *Act* insofar as it provided the Employee with in excess of the appropriate statutory minimum working notice period, and set out the date on which the termination would be effective. The fact that the Employer reserved its right to waive the notice period if the Employee's performance improved did not invalidate the notice in the circumstances.

70. With respect to the applicable legal principles, the inclusion in a notice of termination of a proviso raising the possibility that the notice of termination may be waived or withdrawn if circumstances change during the notice period will not automatically invalidate the notice (see, for example, *Gregg v. Freightliner Ltd.*, 2005 BCCA 349, affirming 2004 BCSC 1574). Accordingly, the Delegate did not misapprehend or misapply the applicable law.

71. In the instant circumstances, the notice of termination given to the Employee was certain. Unless and until the Employer subsequent sought to waive the notice, it was valid. The fact that the Employer had issued such notices in the past would not alter this conclusion, unless it could be shown that there was evidence on which the Employee could reasonably rely to justify a conclusion that such notices were not to be taken seriously, such as where they were routinely ignored or waived for arbitrary reasons unrelated to their terms. The Employee does not point to such evidence.

72. Rather, the evidence suggests that when the Employee was given such notices in the past, he was provided a period in which to improve, he did improve and the notices were waived in compliance with their terms. The evidence did not suggest that such notices were treated as summarily severing the employment relationship without a working notice period or that such notices were shams or arbitrarily ignored. Accordingly, this practice does not support a conclusion that the Employer intended to terminate

the Employer's employment during the July 30, 2004 meeting, but that it intended to provide him with a working notice period that his employment would be terminated on the stipulated termination date, subject to the possibility it would be waived if his performance improved in the interim.

73. With respect to whether the Delegate erred in relying on the leading B.C. Court of Appeal judgment of *Faryna v. Chorny*, quoted earlier, when deciding to prefer the Manager's evidence over the Employee's, I note that that case remains good law in this Province and is routinely applied when determining conflicts in evidence arising from the credibility of interested witnesses. The fact that it is an older case does not make it irrelevant. In this case, the Delegate carefully considered the conflicting evidence and chose which she preferred, as she was obliged to do. In doing so, however, she elected to prefer a version of the facts that was not favourable to the Employee's case. That election, however, was determinative of the case, because it led her to conclude that the facts and evidence supported a finding that the Employee quit during the notice period and therefore the Employer discharged its obligation to pay him length of service compensation. The Delegate did not commit a reviewable error in relying on this case.

74. As noted, the Employee submits that there is an onus on the Employer to obtain a letter of resignation before concluding that an employee has resigned. Although it may have assisted the Employer to obtain a letter of resignation, there is no legal requirement under the *Act* that an employer obtain one before concluding that an employee has resigned.

75. With respect to whether the Delegate erred in law respecting what are resignations or "quits", the Delegate cited a passage from one of the Tribunal's leading cases, *Zoltan Kiss, supra*. Similar statements have been made in cases such as *RTO (Rentown) Inc.*, BC EST #D409/97, where the Tribunal stated:

> To be a valid and subsisting resignation, the employee must clearly have communicated, by word or deed, an intention to terminate their employment relationship and, further, that intention must have been confirmed by some subsequent conduct. In short, an "outside" observer must be satisfied that the resignation was freely and voluntarily given and represented the employee's true intention at the time it was given.

76. The facts in the instant case indicate that the Employer gave the Employee a notice of termination setting out a working notice period that satisfied the requirements of the *Act*. The Employee did not agree to the notice and refused to sign it. That, however, did not invalidate the notice.

77. Although the Employee did not expressly tell the Employer that he resigned or quit, the Delegate found on the balance of probabilities, taking into consideration the credibility of the witnesses and their conflicting evidence, that the objective and subjective tests of a resignation or "quit" were satisfied. The Delegate relied on the evidence concerning the events that occurred after the Employee received his termination notice. She concluded that the Employee returned to his station to find his computer shut down, made certain assumptions about those circumstances, reacted in anger, and took the significant steps of dropping his headset onto the Manager's desk, instead of returning them to his desk drawer, and leaving the premises without providing an explanation to his superiors.

78. However, it was not simply this conduct that led to the Delegate's conclusion. Rather, the Delegate said that it was the Employee's failure to report to work the next day or any subsequent day that crystalized his resignation. In reaching this conclusion, the Delegate took into account the fact that the Employer provided the Employee with working notice and that the Manager attempted to contact the Employee on July 31, 2004 to try to persuade him to return to work to work out his notice. Accordingly, she found the Employer did not terminate the Employee on July 30, 2004.

79. The Delegate went on to find there was objective evidence that the Employee quit, in the form of his failure to report to work as scheduled on July 31, 2004 or on any subsequent day during his notice period. Moreover, there was subjective evidence of an intention to quit insofar as the Employee left the premises in anger and did not return for the balance of the working notice period. In short, the Delegate did not believe the Employee's reasons for leaving and not returning and instead believed the Employer's version of events as being more consistent with the whole of the evidence. Accordingly, the Employee communicated by deed a subjective intention to terminate the employment relationship during the working notice period. That intention was confirmed by his conduct in leaving the workplace in anger on July 30, 2004, not reporting to work on July 31, 2004 and in not subsequently contacting the Employer to alter any impression that he had quit. The Delegate had a difficult choice to make, but she was obliged to and did make it. She did not misapprehend or misapply the law respecting resignation or "quits" in so doing.

80. In view of the foregoing, I conclude that the Delegate did not err in law by making findings unsupported by any evidence, acting on a view of the facts that could not be reasonably entertained, misinterpreting or misapplying applicable statutory provisions or principles of law, or exercising a discretion that was wrong in principle.

(c) natural justice

81. The principles of natural justice require that each party has an opportunity to present its case, to know and respond to the case against it, and to have its case heard and decided by an impartial decision maker.

82. The Employee has not explained how the Delegate erred in this regard. In the instant case, each party had the opportunity present its evidence and submissions and to respond to the evidence and submissions of its opponent. The Delegate, having conducted such a hearing, was entitled to base her conclusions on the relevant evidence and submissions made at the hearing. Those conclusions may differ from a party's preferred view of the events. A party's disagreement with the Delegate's view of the case, by itself, does not mean that the Delegate committed a reviewable error.

83. As noted above, the Employee alleges that the Delegate selectively and arbitrarily chose what evidence to admit and failed to consider all of the evidence. The Employee does not point to any instance in which the Delegate refused to admit any evidence. Nor does he point to any example where the Delegate failed to consider specific evidence that was presented to her and that was relevant to the issues that were determinative of the case.

84. As noted earlier, the Delegate did not need to admit or consider irrelevant evidence, such as evidence relating to the issue of whether there was cause for termination of the Employee's employment. The fact that the Delegate did not specifically mention all of the evidence in her Determination does not necessarily mean that it was not considered. Additionally, her failure to mention it does not mean that the Employee was deprived of a fair hearing. Nor does it mean she was biased or partial.

85. With respect to the Employee's allegation that the Delegate erred in declining to tape the hearing, I note there is no requirement that she do so. The Delegate is entitled to determine procedural matters such as whether or not proceedings will be taped. The Delegate's determination not to tape a hearing is not evidence of bias or partiality, nor is it evidence of a denial of natural justice. In short, the Employee has failed to establish that the Delegate engaged in any conduct which deprived him of the right to be heard

on the relevant issues that were decided by the Delegate or that the Delegate was biased or partial in hearing and deciding the case.

86. Accordingly, I find the Delegate did not breach the principles of natural justice.

OUTCOME

87. For the reasons set out above, the Employee's appeal is dismissed.

Alison H. Narod
Member
Employment Standards Tribunal