

An appeal

- by -

Eric Jaeger

- 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.: 2009A/106

DATE OF DECISION: October 28, 2009

DECISION

SUBMISSIONS

Bahar Mashreghi	Counsel for Eric Jaeger
Mark Stacy and Veronica Rossos	Counsel for ARA Developments
Megan Roberts	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Eric Jaeger, pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued July 14, 2009.
2. This appeal has a long history before the Tribunal. Mr. Jaeger, who was employed as a project manager for ARA Development Ltd. ("ARA") from November 15, 2005, until November 15, 2006, initially filed a complaint alleging that ARA owed him overtime wages, annual vacation pay, compensation for length of service and bonus wages.
3. A delegate of the Director held a hearing into Mr. Jaeger's complaint on July 23, 2007. The central issue before the delegate was the authenticity of a written contract between the parties which provided that ARA was to pay Mr. Jaeger a bonus. The delegate heard oral evidence from ARA's director, Esmail Marzara, and Mr. Jaeger, preferred the evidence of Mr. Jaeger over that of Mr. Marzara and concluded that Mr. Jaeger was entitled to a bonus. Following an appeal by ARA, I concluded that the delegate had erred in law in drawing unreasonable conclusions and failing to properly analyze the evidence. I referred the matter back to the Director for a new hearing before another delegate. (BC EST # D012/08)
4. A new delegate held a second hearing on April 23, 2008. In a Determination issued September 5, 2008, the second delegate also concluded that Mr. Jaeger was entitled to wages and vacation pay. Following a second appeal by ARA, I concluded that the delegate erred in law in refusing to consider all of the evidence available to her, cancelled the Determination and referred the matter back yet again to the Director of Employment Standards for a new hearing before a different delegate. (BC EST # D0123/08)
5. On June 9, 2009, a new delegate conducted a fresh hearing. Mr. Jaeger appeared on his own behalf, ARA was represented by counsel. In a Determination dated July 14, 2009, the delegate concluded that the *Act* had not been contravened and that no wages were outstanding.
6. Mr. Jaeger appeals this Determination on the grounds 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.
7. Section 36 of the *Administrative Tribunals Act* ("ATA"), which is incorporated into the *Employment Standards Act* (s. 103), and Rule 17 of the Tribunal's *Rules of Practice and Procedure* provide that 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). This appeal is decided on the section 112(5) "record", the submissions of the parties, and the Reasons for the Determination.

ISSUE

8. Did the delegate fail to observe the principles of natural justice?
9. Has new evidence become available that was not available at the time the Determination was being made?

FACTS

10. The full background facts have been set out in my previous decisions. Only relevant facts will be briefly repeated.
11. Mr. Marzara, ARA's director, terminated the employment of a project manager on a condominium project when it was behind schedule and hired Mr. Jaeger. After some negotiation, Mr. Jaeger and Mr. Marzara agreed that Mr. Jaeger would be paid \$5,000 per month. Although Mr. Jaeger sought a salary of \$6,500, he alleged that Mr. Marzara offered him, instead, a \$7,500 bonus if he continued to work to the end of the project. According to Mr. Jaeger, the bonus represented six months' wages at a rate of \$1,500 per month. Mr. Marzara denied that he agreed to pay Mr. Jaeger a bonus.
12. Mr. Jaeger provided a document, purportedly signed by Mr. Marzara, as proof of ARA's agreement to pay him a bonus. Mr. Marzara denied the authenticity of his signature on the document.
13. At the June 9, 2009 hearing, both parties appeared before the delegate, submitted documentary evidence and gave sworn testimony which was subject to cross examination. Prior to the hearing, the parties agreed that the only issue in dispute was whether Mr. Jaeger was entitled to a \$7,500 bonus payment.
14. It is relevant to note that at this hearing, Mr. Jaeger's evidence as to the formation of the contract differed from earlier hearings. He testified that, despite repeated requests, Mr. Marzara did not provide him with a written contract, and as a result, Mr. Jaeger decided to prepare his own. He stated that his friend, Jim Phillips, an accountant, prepared one on his behalf and faxed it to him on November 23, 2005. Mr. Jaeger testified that he cut the fax header information from the contract and made two copies, one for himself and one for ARA.
15. It was Mr. Jaeger's evidence that on November 24, 2005, he took this contract to ARA's offices and presented it to Mr. Marzara. He testified that Mr. Marzara signed it, albeit after some protest, and that they each took a signed copy.
16. Mr. Jaeger testified that when he asked Mr. Marzara for his bonus, Mr. Marzara refused. According to Mr. Jaeger, he and Mr. Marzara nevertheless continued to have an amicable relationship. When questioned by ARA's counsel about inconsistencies in his evidence over the course of three hearings, Mr. Jaeger conceded that he was "mistaken" when he earlier testified that first his lawyer, then his accountant had prepared the contract, and that the contract had then been "reprocessed" by an ARA employee. He stated that he had "done some checking" and that he was mistaken when he said an ARA employee had assisted in the preparation and presentation of the contract. Mr. Jaeger also conceded in cross-examination that he was mistaken in his previous testimony of the wage negotiations that resulted in his \$5,000.00 salary. He stated that he did not recall who proposed the bonus or how it was to be calculated, even though the previous Determinations set out his testimony to the contrary.
17. Although offered the opportunity to ask questions of Mr. Marzara, Mr. Jaeger declined to do so.

18. The credibility of the parties on the issue of the employment contract and the payment of the bonus was the central issue before the delegate. The delegate considered the evidence of the parties as set out in earlier Determinations as well as the evidence before her according to the test of credibility set out in *Faryna v. Chorny* ((1952) 2 D.L.R. 354, B.C.C.A). She noted that ARA attempted to impeach Mr. Jaeger's credibility on the basis of previous inconsistent testimony given in previous Employment Standards hearings. The delegate noted that Mr. Jaeger's evidence at the first hearing about how the contract was produced was "unalterably opposed" to that which he provided at the second and third hearings. She also noted that but for one misstatement, neither party contested the evidence or testimony as recorded in the previous Determinations.
19. The delegate found that ARA had provided no direct evidence to refute Mr. Jaeger's version of events. She noted that the signature on the contract submitted in evidence bore an almost exact likeness to Mr. Marzara's actual signature. However, she noted she was not able to make a finding on the authenticity of that signature. She also noted that ARA had not provided a copy of the employment contract Mr. Marzara alleged he presented to Mr. Jaeger. The delegate considered the fact that although ARA had alleged that Mr. Marzara's signature on the first document had been computer generated, it had provided no further plausible explanation beyond an allegation of forgery as to the origin of Mr. Marzara's apparent signature. The delegate however, noted that Mr. Marzara's evidence over three hearings was consistent, while Mr. Jaeger's was not. The delegate noted that although there were plausible explanations for some of the inconsistencies such as the passage of time, "concern arises as the nature and degree of the difference in the testimony provided by him." She considered Mr. Jaeger's explanation for the discrepancies was that he was "unprepared" for the first two hearings but had "done his research" for the final hearing and found it implausible that Mr. Jaeger's recollection would improve over the three year period. She also found his changed evidence that an unidentified ARA employee retyping a contract could not be reasonably defended as a simple mistake or lack of preparations in the proceeding.
20. The delegate concluded as follows:
- The parties strongly disagreed with and disputed each other on all aspects relevant to whether or not a bonus was promised and the contract signed. Under the circumstances of such dispute between parties, neither of which presents definitively persuasive direct evidence, I must determine that which on balance of probabilities is likely to be the truth given the circumstances. Mr. Jaeger's testimony was inconsistent and marked with stark contrasts through the hearings and despite understanding the significance of the Tribunal's findings, provided little if any corroborative evidence to support the validity of the contract or version of events leading up to and including Mr. Marzara signing it. In contrast, Mr. Marzara, who Mr. Jaeger declined to cross examine, appeared forthright and consistent in his testimony.
21. The delegate was also troubled by Mr. Jaeger's account of how and when the contract was signed as well as his changed testimony as to the calculation of the bonus and was not satisfied that these inconsistencies could be excused as a simple mistake or attributed to the passage of time.
22. The delegate was not persuaded that there was an agreement between the parties for the payment of a bonus to Mr. Jaeger and found no contravention of the *Act*.

ARGUMENT

Failure to observe the principles of natural justice

23. Counsel for Mr. Jaeger submits that the "Evidence Rule", a component of natural justice, requires administrative decisions be "based on logical proof or evidence material". He submits that decision makers cannot base their decisions on mere speculation or suspicion but should be able to clearly point to the

evidence on which the inference or determination is based. Counsel says that the delegate failed to observe the principles of natural justice in failing to clearly point to the evidence on which the Determination was based.

24. Counsel further submits that although the delegate noted the inconsistencies in Mr. Jaeger's evidence, she failed to consider or ignored the inconsistencies in Mr. Marzara's. He submits that the delegate denied Mr. Jaeger the right to a fair hearing "in her unequal analysis of the parties' inconsistencies". Counsel further submits that the delegate was wrong to arrive at her conclusion that the document was not genuine in the absence of any evidence from ARA that it was.
25. Counsel for Mr. Jaeger further submits, under the ground of new evidence as well as a failure to observe the principles of natural justice, that the delegate denied Mr. Jaeger the opportunity to fully present personal calendars for the years 2005 and 2006 as evidence at the hearing. He asserts that the delegate denied him the opportunity to review all of his calendar to "refresh his memories and provide insight in the circumstances surrounding the signing of the employment agreement", allowing him only to refer to one specific date, that being the date he allegedly attended Mr. Marzara's office to sign the contract.
26. In his final reply, Mr. Jaeger also asserted, for the first time, that he did not understand the proceedings as he did not have legal representation. He submits that at previous hearings, the delegate "guided him through the process, clarified his uncertainties and tried to explain issues to him". He further asserted that the delegate "criticized" him for not having a lawyer.
27. The delegate (who, it should be noted, is unrelated to the Tribunal member) submits that Mr. Jaeger was given a fair hearing. She says that Mr. Jaeger did present his calendar/journal entries at the hearing and that they formed the basis of his testimony on times and dates of events. She contends that all evidence presented by the parties was considered and analyzed. The delegate also says that the hearing process was explained to Mr. Jaeger at the start of the hearing and that, at no time during the hearing did Mr. Jaeger indicate he did not understand the process, submissions or any instructions provided to him. Had he done so, she asserts, she would have clarified any matters he was unclear about or assisted him in understanding.
28. The delegate seeks to have the Determination upheld.
29. While ARA does not dispute the assertion that decision makers must not base their assessment of credibility on mere speculation or suspicion, it contends that the grounds of appeal are more accurately framed as an appeal of the delegate's findings of fact and assessment and findings of credibility. ARA's counsel contends that the Determination is clear on its face that the delegate considered all of the evidence before her and thoughtfully completed the task with which she was charged – that of assessing the credibility of the parties in order to determine, on a balance of probabilities, what version of events was more likely in the given circumstances. Counsel argues that Mr. Jaeger identifies no instance of either speculation or suspicion exercised by the delegate.
30. Counsel for ARA submits that the delegate identified reasons on which her credibility findings were based and argues that these findings are reasonable and should not be interfered with. Counsel submits that where no failure to consider relevant evidence is established, no breach of natural justice has occurred.

New evidence

31. Counsel for Mr. Jaeger contends there is new evidence that was not available at the time the Determination was made. That new and relevant evidence is said to be the testimony of Jim Phillips, the accountant who allegedly prepared the employment contract as well as Mr. Jaeger's personal calendars for 2005 and 2006.
32. Counsel says that Mr. Phillips was away from Vancouver on a lengthy business trip and was unable to attend any of the three hearings. He says that Mr. Phillips is now in Vancouver and wishes to provide evidence as to the preparation of the employment contract.
33. The delegate submits that the "new evidence" does not meet the Tribunal's test for new evidence. She says that the journal entries were not only available at the time of the hearing but relevant portions were relied on by Mr. Jaeger. She submits that the balance of his journals had minimal, if any, probative value in determining the issue in dispute.
34. The delegate says that while Mr. Jaeger now suggests he has email correspondence between himself and Mr. Philip, his evidence at the hearing was that he was unable to operate a computer to engage in such a form of communication. She says that although Mr. Jaeger now attempts to offer Mr. Philip as a witness as he was away on a lengthy business trip at the time of the hearing, he offers no explanation why he did not call Mr. Philip at any of the prior hearings. She notes there is no indication of what evidence Mr. Philip would give or why Mr. Philip's evidence could not have been given at the hearing. Further, the delegate says that Mr. Jaeger has not demonstrated how the new evidence would have led her to a different conclusion.
35. Counsel for ARA submits that neither Mr. Phillips' evidence nor Mr. Jaeger's calendars and journals meet the test for new evidence.

ANALYSIS

36. 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; or
 - evidence has become available that was not available at the time the determination was being made

37. I will address the grounds of appeal as follows.

New evidence

38. 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.

39. Section 112(1)(c) is intended to support the finality of the Director's Determinations by not allowing a party to not present its whole case before the Director and then, as a ground of appeal, raise evidence, which could and should have been put before the Director at first instance.

40. I am unable to find that Mr. Jaeger has satisfied this test, either with respect to the personal calendars or Mr. Phillips' evidence.

Calendars

41. There is no evidence to support the allegation that the delegate denied Mr. Jaeger the opportunity to rely on his 2005 and 2006 personal calendars at the hearing. The delegate says that Mr. Jaeger relied on relevant portions during the hearing. Counsel for ARA also said that the delegate allowed the admission of the documents despite its objections and that Mr. Jaeger referenced the notes and calendars during the hearing for the purpose of clarifying dates and timelines. I accept that Mr. Jaeger did rely on his calendars at the hearing. Therefore, I find that Mr. Jaeger's calendars do not meet the test for new evidence.

Mr. Phillips

42. The sole issue before the delegate was the veracity of a written document under which Mr. Jaeger claimed he was entitled to a bonus payment. Although there were apparently others involved in the making of that document, the delegate heard evidence only from Mr. Marzara and Mr. Jaeger. That Mr. Philip's evidence might have been relevant ought to have been apparent to Mr. Jaeger well before the hearing. In my second decision (BC EST #D123/08) I noted:

Mr. Jaeger testified that Mr. Phillips faxed him a copy of the contract. ... Mr. Phillips did not attend the hearing to give evidence and his absence was not explained to the delegate.

43. In light of these comments it seems to me that Mr. Jaeger would have thought it helpful to have Mr. Phillips give evidence at the hearing in these circumstances where the veracity of the contract was the central issue in dispute.

44. Although Mr. Phillips may have been out of the country at the date of the hearing, there is no indication that Mr. Jaeger sought a hearing date that might have accommodated Mr. Phillips' schedule. Furthermore, although Mr. Jaeger's first hearing was in 2005, there is no evidence that Mr. Phillips was unavailable to provide his evidence during those four years. Further, there is no explanation as to why Mr. Philip could not have given evidence by way of telephone or in affidavit form if it was impossible for him to appear in person.

45. There is nothing in Mr. Jaeger's submissions that sets out what Mr. Phillips' evidence might be other than that it would "provide significant insight into events surrounding the negotiation, creation and signing of the employment contract." Even if Mr. Phillips could offer evidence about his involvement in drafting a letter on Mr. Jaeger's behalf, there has been no evidence to suggest that Mr. Phillips was involved in "negotiating or signing" any employment contract. It seems to me that the time for Mr. Phillips to offer whatever insight he had has long passed.

46. Mr. Jaeger's failure to call Mr. Philip cannot now be used as a basis for an appeal.

Failure to observe principles of natural justice

47. Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them, the right to present their evidence and the right to be heard by an independent decision maker. Parties alleging a denial of natural justice must provide some evidence in support of that allegation (see *Dusty Investments Inc. dba Honda North*, BC EST #D043/99).

48. There is nothing in the record that suggests Mr. Jaeger was denied the right to be heard. Apart from the assertion that he was denied the right to refer to and rely on his journals, an assertion that I have found to be without foundation, Mr. Jaeger presents no evidence that he was denied natural justice. However, in his final reply submission, Mr. Jaeger alleges, for the first time that the delegate, in essence, failed to assist him at the hearing. Not only did Mr. Jaeger have access to information sheets published by the Branch on how to prepare for a hearing, he had in fact been a participant in two previous hearings. He acknowledged that both times, the delegate had "assisted him" at the hearing. He had been cross examined by counsel at both of those hearings. Mr. Jaeger was well aware of the hearing process and I find no basis for his argument that he was put into a "disadvantaged" position by the delegate.

49. Mr. Jaeger's counsel relies on an "Evidence Rule" that is not cited, and is unknown to the Tribunal, to support his proposition that Mr. Jaeger was denied natural justice. Counsel explains this rule as the delegate's failure to clearly point to the evidence on which the Determination was based.

50. I find no basis for this argument.

51. The delegate correctly noted that the issue was one of the credibility of the parties, each of whom had different views about the written contract. She correctly noted that the reliability and credibility of the parties was a central issue and that there was no other evidence than that of Mr. Jaeger and Mr. Marzara.

52. Mr. Jaeger's appeal is, in reality, an attempt to have the Tribunal "re-weigh" the evidence before the delegate. As I noted in the first appeal, the Tribunal is limited in its review of Determinations. Those limitations are of particular significance in cases that turn on issues of credibility because credibility is a matter particularly within the purview of the delegate, who has heard the evidence first hand and observed the parties and any witnesses. (see *Volzhenin v. Haile* ([2007] B.C.J. No. 1209, 2007 BCCA 317)

53. The delegate assessed the credibility of the parties at some length and gave extensive reasons for her findings. I find no basis to interfere with her conclusions.

54. The appeal is dismissed.

ORDER

55. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated July 14, 2009, be confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal