

An appeal

- by -

Trevor Greveling
("Mr. Greveling")

- 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: Shafik Bhalloo

FILE No.: 2011A/108

DATE OF DECISION: October 7, 2011

DECISION

SUBMISSIONS

Kristine Booth

on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) brought by Trevor Greveling (“Mr. Greveling”) of a Determination that was issued on July 8, 2011, by a Delegate of the Director of Employment Standards (the “Director”).
2. Mr. Greveling filed a complaint with the Director under the *Act* alleging that his former employer, Western Forest Products Inc. (the “Employer” or “Western Forest Products”), contravened the *Act* by failing to pay him compensation for length of service, pursuant to section 63 of the *Act* (the “Complaint”). The Determination concluded that the *Act* did not apply in the case of the Complaint as Mr. Greveling was employed under a collective agreement between Western Forest Products and the United Steelworkers of America (the “U.S.W.”). As a result, pursuant to section 76(3)(h) of the *Act*, the Delegate exercised her discretion and stopped investigating Mr. Greveling’s Complaint.
3. Mr. Greveling appeals the Determination on two (2) grounds, namely, the Director erred in law in making the Determination and new evidence has become available that was not available at the time the Determination was made.
4. Mr. Greveling is asking the Tribunal to refer the matter back to the Director. Although Mr. Greveling does not explain why he wants the matter referred back to the Director, it would appear that he wants the Director to assume jurisdiction over the Complaint under the *Act* and make a Determination.
5. Mr. Greveling has not requested an oral hearing of the appeal. Pursuant to section 36 of the *Administrative Tribunals Act* (the “*ATA*”), which is incorporated in section 103 of the *Act* and Rule 17 of the Tribunal’s *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. In my view, this appeal can be adjudicated on the basis of the section 112(5) “record”, the written submissions of the parties and the Reasons for the Determination.

ISSUES

6. The issues in this appeal are twofold, namely:
 - (a) Did the Director err in law in concluding that the Complaint did not fall within the jurisdiction of the *Act*?
 - (b) Is there new evidence that has become available that was not available at the time the Determination was being made and, if so, does that evidence justify referring the matter back to the Director?

FACTS

7. Western Forest Products operates a mill on Vancouver Island, British Columbia, and employed Mr. Greveling as a production worker at its mill from May 31, 1995, to December 31, 2010.

8. On June 1, 2011, Mr. Greveling filed a Complaint under section 74 of the *Act* alleging that Western Forest Products contravened the *Act* by failing to pay him compensation for length of service, pursuant to section 63 of the *Act*.
9. In the Reasons for the Determination (the “Reasons”), the Delegate noted Mr. Greveling’s argument that the collective agreement between his former employer, Western Forest Products, and U.S.W. (the “Collective Agreement”) failed to meet or exceed the *Act* as it did not contain any rights pertaining to “the termination of employment not due to a permanent plant or logging camp closure and the liability resulting from length of service”. The Delegate also noted that Mr. Greveling, in reliance on section 3(3) of the *Act*, contended that in such case section 63 of the *Act* (which dealt with termination of employment or liability of employer resulting therefrom) was deemed incorporated into the Collective Agreement.
10. The Delegate then went on to succinctly summarize, in the Reasons, the issue before her as follows:

It is agreed that a collective agreement between the Employer and the U.S.W. covered the Complainant’s employment. The Complainant believes the provisions of the Act related to compensation for length of service flowing from a temporary lay-off ought to apply to him; his former employer disagrees. In effect, there is a dispute about whether a provision within the Act ought to be amalgamated into the collective agreement between the Employer and U.S.W., and if so how. The Complainant wishes me to render a decision deeming inclusion of the Act into the collective agreement, however, the preliminary matter which I must decide is whether the Act applies to the Complainant or not.
11. The Delegate then considered the application of section 3(7) of the *Act* in the case of the Complaint and concluded that this section dictates that in the event of a dispute regarding whether and how the provisions in the *Act* ought to be integrated into a collective agreement, the grievance procedure within the collective agreement applies. The Delegate also confirmed that the wording in the said section is not permissive but a directive to the Director; it did not contemplate the Director’s involvement in resolving disputes such as the one between Mr. Greveling and Western Forest Products in the Complaint but rather required the grievance procedure within the Collective Agreement to be used. In the result, the Delegate, pursuant to section 76(3)(h) of the *Act*, decided to exercise her discretion and stop investigating the Complaint.

SUBMISSIONS OF MR. GREVELING

12. Mr. Greveling, in his appeal submissions, does not explain how the Delegate erred in law in making the Determination, but he submits that it is not possible for him to now resolve his dispute through the grievance procedure in the Collective Agreement because his “seniority retention expired [at] the same date that [his] membership with the U.S.W. union expired” and he is “no longer a dues-paying member of the union”. He further contends that the union “does not hold any responsibility to handle the matter” and the matter “falls outside of the jurisdiction of the union”, and should be referred back to the Director.

SUBMISSIONS OF THE DIRECTOR

13. With respect to the new evidence ground of appeal, the Director argues that Mr. Greveling has not demonstrated why the purported new evidence could not have been presented during the investigation and prior to the Determination being made. In particular, the Director submits that Mr. Greveling was provided with the Delegate’s preliminary findings in advance of the Determination and was afforded the opportunity to submit additional argument and evidence, but failed to provide the purported new evidence he now seeks to adduce on appeal, namely, that the U.S.W. ceased to have jurisdiction over the terms and conditions of his employment with Western Forest Products when his seniority expired and he stopped paying dues to the union.

14. Furthermore, the Director submits that Mr. Greveling has also failed to establish “the relevancy or probative value of this evidence” in relation to the issue in this appeal.
15. With respect to the error of law ground of appeal, the Director submits that Mr. Greveling has not presented clear or compelling argument as to how the Delegate erred in law. The Director states that while Mr. Greveling claims that his dispute falls outside of the Collective Agreement, the Delegate accurately interpreted sections 3(7) and 76(3)(h) of the *Act* and did not make an error of law. In the circumstances, the Director argues that the appeal of Mr. Greveling should be dismissed and the Determination confirmed.

ANALYSIS

16. The gist of this appeal concerns statutory interpretation and, more particularly, the jurisdictional scope of the *Act* and, the related scope of the Director’s jurisdiction under the *Act*. This effectively is a question of law. It is also noteworthy that where the question of statutory interpretation results in a relevant determination about the scope of the *Act* and the jurisdiction of the Director, the standard of review applicable in such case is one of correctness. As indicated by the Tribunal in *Vancouver Firefighters Union, Local 18*, BC EST # D273/03, “the Director cannot refuse a jurisdiction that she otherwise has by a reasonable but incorrect decision on the scope of the *Act* or her own jurisdiction”.
17. In this case, while Mr. Greveling argues section 3(3) of the *Act* operates to incorporate into the Collective Agreement section 63 of the *Act* governing termination of employment, Western Forest Products disputes or challenges Mr. Greveling’s claim. In such case, the Delegate states that section 3(7) of the *Act* provides direction on how a dispute such as the one between Mr. Greveling and Western Forest Products ought to be dealt with. Section 3(7) provides:
 - 3(7) If a dispute arises respecting the application, interpretation or operation of
 - (a) a Part or provision of this Act deemed by subsection (3) or (5) to be incorporated in a collective agreement, or
 - (b) a provision specified in subsection (6),
the grievance procedure contained in the collective agreement or, if applicable, deemed to be contained in the collective agreement under section 84(3) of the *Labour Relations Code*, applies for the purposes of resolving the dispute.
18. I find myself in agreement with the Delegate’s interpretation of section 3(7). I find that there exists here a dispute between the parties respecting “the application, interpretation or operation” of section 63 of the *Act* (which arguably is deemed to be incorporated in the Collective Agreement pursuant to section 3(3)), and section 3(7), in my plain reading of it, expressly directs that the grievance procedure contained in the Collective Agreement applies to resolve that dispute.
19. I also agree with the Delegate that the language of section 3(7) of the *Act* is in mandatory terms and a clear directive from which there is no discretion in the Director to disregard the process delineated for resolving the type of disputes set out in that section.
20. I also find that, in this case, section 76(3)(h) of the *Act* clothes the Director with the power to refuse to investigate the Complaint because the dispute that caused the Complaint may be dealt with under section 3(7). In the circumstances, I agree with the Director that the Delegate properly exercised her authority under the said section to stop investigating the Complaint.

21. With respect to the new evidence ground of appeal, the governing test as to whether the Tribunal should accept fresh evidence on appeal of a Determination is set out in *Re: Merilus Technologies Inc.*, BC EST # D171/03. In this case, the Tribunal delineated the following four-fold test for determining whether to admit fresh evidence on appeal:
- (a) The evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
 - (b) The evidence must be relevant to a material issue arising from the complaint;
 - (c) The evidence must be credible in the sense that it is reasonably capable of belief; and
 - (d) The evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.
22. The above criteria are a conjunctive requirement and, therefore, any party requesting the Tribunal to admit new evidence must satisfy each of the criteria before the Tribunal will admit the purported new evidence.
23. In this case, I agree with the Director that Mr. Greveling's purported new evidence does not satisfy the test in *Re: Merilus, supra*, for admitting new evidence on appeal. More specifically, Mr. Greveling has not shown that the purported new 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.
24. I also agree with the Director that Mr. Greveling has failed to show that the purported new evidence is of high potential probative value in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Delegate to a different conclusion on the material issue in this case, namely the application of the *Act* to his dispute with Western Forest Products.
25. In summary, I find that the Delegate correctly decided that the *Act* did not apply to the Complaint and I find that there is no basis for Mr. Greveling's appeal.
26. With respect to Mr. Greveling's contention that he is unable to now resolve his dispute through the grievance procedure of the Collective Agreement because he is no longer "a dues-paying member of the union" or that union "does not hold any responsibility to handle the matter", I find that this is a matter that falls within the jurisdiction of the Labour Relations Board, and both the Tribunal and the Director do not have any authority to direct the Labour Relations Board on that matter.

ORDER

27. Pursuant to section 115 of the *Act*, I order that the Determination, dated July 8, 2011, be confirmed.

Shafik Bhalloo
Member
Employment Standards Tribunal