

An appeal

- by -

Kim U. Bates
("Ms. Bates")

- 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/113

DATE OF DECISION: October 20, 2011

DECISION

SUBMISSIONS

Kim U. Bates	on her own behalf
Jason Jantz	on behalf of Integrity Marketing Group Inc.
Nicholas Ellegood	counsel for Integrity Marketing Group Inc.
Hans Suhr	on behalf of the Director of the Employment Standards

OVERVIEW

1. This is an appeal pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) brought by Kim U. Bates (“Ms. Bates”) of a Determination that was issued on July 12, 2011, by a Delegate of the Director of Employment Standards (the “Director”).
2. Ms. Bates filed a complaint with the Director under the *Act* alleging that her former employee, Integrity Marketing Group Inc. (“Integrity Marketing”), contravened the *Act* by failing to pay her compensation for length of service, pursuant to section 63 of the *Act* (the “Complaint”). The Determination concluded that the *Act* had not been contravened and no wages were due to Ms. Bates. In the circumstances, the Director decided to take no further action in the matter.
3. Ms. Bates appeals the Determination on all three (3) available grounds of appeal in section 112 of the *Act*, namely, the Director erred in law and breached the principles of natural justice in making the Determination and new evidence has become available that was not available at the time the Determination was made.
4. Ms. Bates, in the Appeal Form, is asking the Tribunal to change or vary the Determination and award her “severance” or termination pay. She is also asking the Tribunal to make an order against Integrity Marketing to “stop their criminal activity”.
5. However, as a preliminary issue in her Appeal, I note that Ms. Bates is requesting production of a copy of the Bachelor of Commerce degree of Mr. Jason Jantz, a representative of Integrity Marketing. She has made numerous submissions on the subject including most recently in her late submission dated October 18, 2011. The gist of her contention is that Mr. Jantz has misrepresented, in his correspondence dated June 30, 2011 (the “Letter”) to the Delegate, that he holds the said degree. Therefore, Mr. Jantz’s credibility is thrown into question and this should impact the Determination in some way. She also states she is “going to charge [Mr. Jantz] with fraud + misrepresentation”.
6. In this decision the Tribunal will only deal with the preliminary issue of whether or not an order for production of Mr. Jantz’s degree should be made.
7. 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 “*Rules*”), the Tribunal may hold any combination of written, electronic and oral hearings. In my view, the preliminary issue in the 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.

PRELIMINARY ISSUE

8. Should the Tribunal order production of Mr. Jantz's "B.Comm" degree?

FACTS

9. By way of background, Integrity Marketing operates a telemarketing sales business in British Columbia and employed Ms. Bates as a Customer Service Representative / Administrative Person from October 29, 2007, to March 24, 2011.
10. On April 8, 2011, Ms. Bates filed a Complaint under section 74 of the *Act* alleging that Integrity Marketing contravened the *Act* by failing to pay her compensation for length of service contrary to section 63 of the *Act*.
11. In the Reasons for the Determination (the "Reasons"), the Delegate notes that Ms. Bates provided several pages of submissions delineating numerous concerns she had with Integrity Marketing's business practices, which she did not find acceptable. As a result, she quit her employment. While the Delegate found that there were numerous issues Ms. Bates raised in her written submissions, the only one that appeared to be within the jurisdiction of the *Act* was her allegation that she was entitled to compensation for length of service. In this regard, the Delegate, in the Reasons, sought to succinctly summarize all of Ms. Bates' relevant submissions in the Complaint as follows:
- She had raised issues of concern with the representatives of the Employer, Jason Jantz and Mike Smith, about certain business practices;
 - She was told to either stop complaining and do her job, or keep complaining and get fired, or quit;
 - She decided to quit as she had never been fired from any job and wasn't about to have her reputation damaged in that way;
 - On her last day of work, she sent a text to Mike Smith, one of the Employer representatives, and said she would be late;
 - When she got to work on her last day, she implied she had a better job. It was then that she quit;
 - She believes that she is entitled to 8 weeks severance pay but because she did not provide any notice, the two weeks would be deducted leaving a balance owing of 6 weeks;
12. The Delegate also noted in the Reasons that Ms. Bates provided her Record of Employment and a questionnaire entitled "Quit" (the "Questionnaire") which she used to establish her entitlement to Employment Insurance, after her employment terminated. The Record of Employment document indicates that she quit her employment and the Questionnaire contains some very interesting questions, including the following three (3) that appear to have influenced the Delegate in his decision-making:
1. Which reason best describes why you quit?
'I quit because there were illegal activities going on at work.'
 6. Describe the illegal or immoral practises that caused you to quit your job.
'...I cannot lie any longer, not for the reps and not for the bosses. It is giving me pains in my heart, and I can't sleep. My conscience is getting to me.'
 10. Did you refuse to perform these activities?
'No.'

13. The Delegate further notes in the Reasons that Integrity Marketing responded to Ms. Bates' Complaint by way of a letter dated June 30, 2011 (the "Letter"). In the Letter, Integrity Marketing asserted that Ms. Bates "withdrew her employment" by way of an SMS text message on March 25, 2011, indicating that she had "an opportunity to earn significantly more salary that she could not turn down". Integrity Marketing also submits that, while it would have been preferable to receive two (2) weeks' written notice of termination of her employment from Ms. Bates, the employer accommodated Ms. Bates' wishes and wished her well.
14. Integrity Marketing also points out that Ms. Bates, at some point, requested a loan against her final paycheque, which it granted. Ms. Bates subsequently repaid the loan from her final paycheque.
15. Integrity Marketing argues that Ms. Bates never raised "any issues she was having with her position or conflicts with her colleagues". Integrity Marketing also contends that it could have accommodated Ms. Bates by moving her to another position within the organization, if she had informed them of any issues she was having with her job.
16. Integrity Marketing submits a screen shot of the text message Ms. Bates sent on March 28, 2011, to Integrity Marketing's Mr. Smith advising she would be coming in "at 930 or so to give u my resignation" [sic] and apologized for such short notice.
17. The Delegate, in concluding that Integrity Marketing did not contravene the *Act*, examined the evidence of the parties in context of two (2) provisions of the *Act*, namely, sections 63 and 66. With respect to section 63, the Delegate noted that the liability of the employer to pay compensation is discharged if the circumstances set out in subsection (3)(c) existed, namely, if the employee terminated the employment or quit. In the case at hand, the Delegate noted that while there were differences in the evidence of Integrity Marketing and Ms. Bates in relation to "the circumstances and sequence of events surrounding the termination of the Complainant, there is no dispute that the Complainant quit her employment". In the circumstances, the Delegate concluded that Ms. Bates was not entitled to compensation for length of service under section 63, as she quit her employment.
18. The Delegate also considered the applicability of section 66 of the *Act*, which incorporates the concept of constructive dismissal and provides that if a condition of an employee's employment is substantially altered, the Director has the discretion to determine the employee's employment has been terminated. The Delegate noted that while Ms. Bates, in her submissions, indicates that she reached a point in her employment with Integrity Marketing where she was unable to continue to "lie any longer" and that her conscience was getting to her, she does not provide any evidence that "there was any substantial alteration of a condition of [her] employment". According to the Delegate, Ms. Bates "merely...decided for her own reasons she was not prepared to continue in her capacity with the Employer" and quit her employment. Therefore, section 66, in this case, did not apply, according to the Delegate.

SUBMISSIONS OF MS. BATES ON THE PRELIMINARY ISSUE

19. As indicated in the Overview section, Ms. Bates contends that Mr. Jantz does not have a "B.Comm" degree but represented himself as having one in his Letter to the Delegate where the notation "B.Comm" appears next to his signature. I note that Ms. Bates first raised the matter in advance of the Determination, in her email to the Delegate. She contended then, as she does in her appeal now, that Mr. Jantz does not hold a "B.Comm" degree and demands that he produce a copy of the degree as it goes to the issue of his credibility. She has repeated these submissions again and again, including most recently in her late submission of October 18, 2011.

SUBMISSIONS OF INTEGRITY MARKETING ON THE PRELIMINARY ISSUE

20. Mr. Jantz, on behalf of Integrity Marketing, presented a three-page written submission dated August 30, 2011. In this submission, with respect to the allegation of Ms. Bates that he misrepresented his educational qualifications in the Letter to the Delegate, Mr. Jantz explains that this was an oversight on the part of his assistant who was preparing a response to the Complaint on a letterhead template that was old containing a colleague's information. He submits that he never intentionally attempted to misrepresent his own education.
21. I also note that counsel for Integrity Marketing in his letter of October 13, 2011, in response to Ms. Bates' submissions on this issue, argues that the demand of Ms. Bates for Mr. Jantz to produce a copy of the "B.Comm" degree is irrelevant to the issues in her appeal and does not relate in any way to the grounds of appeal she has advanced.

SUBMISSIONS OF THE DIRECTOR ON THE PRELIMINARY ISSUE

22. The Director submits, "the educational qualifications or lack thereof by the employer are not relevant to the issue in dispute between the parties". According to the Director, "There was no dispute with respect to the material facts" leading to the Determination. More particularly, the Director states that Ms. Bates "quit her employment" and the "credibility of the parties' evidence and argument was not a consideration in the Determination".

ANALYSIS

23. Rule 32(2) of the *Rules* provides:

Tribunal may compel participation and order disclosure

- (1) At any time before or during a hearing, the tribunal may make an order requiring a person:

...

- (b) to produce for the tribunal, or a party, a document or other thing in the person's possession or control, as specified by the tribunal, that is admissible and relevant to an issue in the appeal or reconsideration application.

24. Section 103 of the *Act* incorporates, *inter alia*, the application of section 34(3) of the *ATA* in the Tribunal proceedings:

103 Sections ... 34 (3) and (4) ... of the *Administrative Tribunals Act* apply to the tribunal.

25. Section 34(3) of the *ATA* states:

Power to compel witnesses and order disclosure

34(3) Subject to section 29, at any time before or during a hearing, but before its decision, the tribunal may make an order requiring a person

...

- (b) to produce for the tribunal or a party a document or other thing in the person's possession or control, as specified by the tribunal, that is admissible and relevant to an issue in an application.

26. Pursuant to both the *Rules* and the *ATA*, the Tribunal has the discretion to order a party to produce a document in their possession or control that is “admissible and relevant to an issue in the appeal”. In exercising its discretion, the Tribunal should be mindful of and guided by the dual requirements of the *Rules* and the *ATA*, namely, that the document requested must be both admissible and relevant. These are conjunctive requirements and the onus is on the applicant requesting the Tribunal to exercise its discretion to order production to satisfy that both requirements are met before the Tribunal moves to order production.
27. In the case at hand, as indicated, Ms. Bates has been very persistent in demanding production of a business degree from Mr. Jantz because he represented, next to his signature in the Letter to the Delegate, that he had a “B.Comm” degree. As indicated, Ms. Bates contends that Mr. Jantz does not have this degree and his misrepresentation in the Letter to the Delegate goes directly to his credibility. She has repeatedly argued this point and called Mr. Jantz a liar in her several submissions including her most recent late submission of October 18, 2011, which also contains some very crass comments about Mr. Jantz and personal attacks against him which I do not find necessary nor relevant to reiterate here.
28. I note that in his earlier response to Ms. Bates, Mr. Jantz states that he did not mean to intentionally misrepresent his education. He states that the representation in the Letter that he had a “B.Comm” was an oversight on the part of his assistant who was preparing a response to the Complaint on a letterhead template that was old, containing a colleague’s information. I agree with both the Director and counsel for Integrity Marketing that whether or not Mr. Jantz has a degree or whether or not he erred in representing in the Letter that he had a degree is irrelevant to the issues raised in the appeal of the Determination. The Determination itself dealt with the sole issue of whether or not Ms. Bates was entitled to termination pay under section 63 of the *Act*. The Delegate made the Determination that Ms. Bates was not entitled to termination pay on the basis of Ms. Bates’ own evidence that she quit her employment and on the further basis that she failed to establish in evidence that the employer substantially altered a condition of her employment pursuant to section 66 of the *Act*. In the circumstances, I fail to see how the disclosure of Mr. Jantz’s educational record or any finding pertaining to whether or not he erred in representing his education in the Letter would be relevant to the issues Ms. Bates raises in the appeal, namely, the Director erred in law and breached the principles of natural justice in making the Determination or that new evidence has become available that was not available at the time the Determination was made. Therefore, I am not persuaded with the merits of Ms. Bates’ request for an order for production of Mr. Jantz’s degree and I dismiss her application.

ORDER

29. The Appellant’s application for production of Mr. Jantz’s degree is dismissed.

Shafik Bhalloo
Member
Employment Standards Tribunal