

An appeal

- by -

587035 B.C. Ltd. carrying on business as West Coast Door Service
(“West Coast”)

- 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.: 2014A/112

DATE OF DECISION: November 27, 2014

DECISION

SUBMISSIONS

K S Borisuk	on behalf of 587035 B.C. Ltd. carrying on business as West Coast Door Service
Sukh Kaila	on behalf of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), 587035 B.C. Ltd. carrying on business as West Coast Door Service (“West Coast”) has filed an appeal of a Determination issued by the Director of Employment Standards (the “Director”) on July 21, 2014. In that Determination, the Director found that West Coast had contravened sections 63 and 58 of the *Act* in failing to pay its former employee, Steven Robertshaw, \$8,567.50 representing compensation for length of service, annual vacation pay and interest. The Director also imposed an administrative penalty in the amount of \$500 for the contravention for a total amount owing of \$9,067.50.
2. West Coast appeals the Determination contending that the delegate failed to observe principles of natural justice in making the Determination. West Coast also says that evidence has become available that was not available at the time the Determination was being made.
3. This decision is based on the written submissions of West Coast and the Director of Employment Standards, the section 112(5) “record” that was before the delegate at the time the decision was made and the Reasons for the Determination.

FACTS AND ARGUMENT

4. Mr. Robertshaw was employed as a sales manager by West Coast, a door repair service, from June 30, 2006, until December 14, 2011. On April 25, 2012, Mr. Robertshaw filed a complaint with the Director alleging that West Coast had failed to pay compensation for length of service.
5. The Delegate held a hearing into Mr. Robertshaw’s complaint on January 4, 2013. Mr. Borisuk represented West Coast and called two witnesses, Carson Connelly, a West Coast employee, and Barry Promislow. Mr. Robertshaw was self-represented.
6. West Coast’s position was that Mr. Robertshaw’s employment was terminated for cause, alleging that Mr. Robertshaw stole money from West Coast. Mr. Borisuk’s evidence was that in September 2011, a client paid Mr. Robertshaw \$300 cash for a job which Mr. Robertshaw pocketed. Carson Connelly’s evidence was that he observed Mr. Robertshaw take the cash. Mr. Connelly also testified that Mr. Robertshaw offered him \$100 for Mr. Connelly’s work on the job, which he refused, and that he reported the transaction to Mr. Borisuk.
7. There was no dispute that Mr. Borisuk did not discuss this incident with Mr. Robertshaw or warn him in any way. Rather, Mr. Borisuk decided to monitor Mr. Robertshaw’s behavior for a period of time. Although Mr. Borisuk did not discover any other incidents of alleged theft, he decided to terminate Mr. Robertshaw’s employment on December 14, 2011.

8. Mr. Robertshaw's evidence was that he accepted \$300 cash from a customer for work he and Mr. Connelly performed and that he gave Mr. Connelly \$150 for overtime work at Mr. Connelly's request and put the balance of the funds into petty cash.
9. Mr. Borisuk denied that Mr. Robertshaw put the money in petty cash or used the money to offset business costs in any way.
10. West Coast asserted that Mr. Robertshaw's employment was terminated for cause.
11. The delegate concluded that West Coast had not met the burden of substantiating just cause. The delegate determined that West Coast had presented no evidence that Mr. Robertshaw had stolen any money. The delegate noted that West Coast did not call the witness who had given Mr. Robertshaw the money or present any documentary evidence such as invoices, financial statements or an accounting ledger.
12. The delegate also found that West Coast had failed to conduct any investigation into the allegation and had not spoken to Mr. Robertshaw about his side of the story. The delegate noted that, instead, West Coast "engaged in shadowing" Mr. Robertshaw, terminating him only after it found no evidence of theft. The delegate concluded that West Coast's decision to wait two months to terminate Mr. Robertshaw's employment to be unreasonable and to constitute condonation of Mr. Robertshaw's behaviour.

Argument

13. Mr. Borisuk alleges that the Determination was "flawed" for the following reasons:
 - there was an excessive delay in making the decision;
 - the delegate issued the Determination 18 months following the hearing. In his appeal submission, Mr. Borisuk states that there were "questionable note's [sic] taken at Hearing with decision taking 18 months." I infer Mr. Borisuk is suggesting that the delegate failed to take accurate notes at the hearing, resulting in an incorrect or delayed decision.
 - Mr. Robertshaw was fired for stealing funds from the company "and admitted doing so to myself and fellow employees." Mr. Borisuk provides the name, address and telephone number of an individual whom I infer was a West Coast Employee.
 - Mr. Borisuk also submitted, as "new evidence," a September 3, 2014, letter from Edmond Pingrenon, a former employee of West Coast. In the letter, Mr. Pingrenon states that he was asked by Mr. Borisuk to provide his "version of what happened on Dec 13 ...concerning the firing of then Manager Liard Robertshaw a few months later." Mr. Pingrenon states that he overheard a conversation between Mr. Borisuk and Mr. Robertshaw in which Mr. Robertshaw admitted to stealing from West Coast.
14. After reviewing the appeal submissions, I sought a response from the Director's delegate, and specifically asked him to explain the eighteen month delay in issuing the Determination. The delegate's submission is as follows:

...the delegate of the Director of Employment Standards respectfully contends that the delay had no effect on the outcome and there is no prejudice resulting from the delay. As well, no evidence was presented by the Appellant which would indicate undue delay caused prejudice. In addition, it must be noted that the hearing was held and conducted in full and within an acceptable time frame and the delay

occurred after the hearing was held, which didn't affect the natural justice elements of the actual fact-gathering process used in order to issue the Determination.

15. The delegate also submits that West Coast has not demonstrated an error of law, and contends that the evidence presented was available at the time the Determination was being made and thus does not constitute new evidence. The delegate also submits that the new evidence is “a strong deviation” from the Employer’s original argument.

ANALYSIS

16. 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;
- evidence has become available that was not available at the time the determination was being made.

17. The Tribunal has consistently said that the burden is on an appellant to persuade the Tribunal that there is an error in the Determination on one of the statutory grounds set out in section 112. This burden requires the appellant to provide, demonstrate or establish a cogent evidentiary basis for the appeal.

18. While I conclude that West Coast has not met that burden, I have serious concerns about the delay in issuing what appeared to be a relatively straightforward decision. Furthermore, the Director’s delegate has provided no explanation for the eighteen month delay between the date of the hearing and the issuance of his Determination despite my request that he do so. Rather, he simply asserts that the Employer has demonstrated no prejudice arising from what he appears to concede was “undue delay” in the issuance of the Determination.

19. The purposes of the *Act* are set out in section 2 and include “to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act” (s. 2 (d)). In keeping with that purpose, time limits are expressly provided for in the *Act*, including deadlines for filing complaints and appeals. While there are no statutory deadlines within which the Director’s delegates must issue decisions, in my view, the unexplained delay in this matter is not in keeping with one of the statutory purposes of the *Act*.

20. However, while remedies are available in administrative contexts to deal with state-caused delays, those remedies are available only where a party can demonstrate significant prejudice from the delay. In *Tung* (BC EST # D511/01), the Tribunal found that mere delay does not warrant a stay, or cancellation of a Determination; there must be proof of substantial prejudice:

“To constitute a breach of the duty of fairness, the delay must have been unreasonable or inordinate. There is no abuse of process by delay *per se*. [It] must [be] demonstrate[d] that the delay was unacceptable to the point of being so oppressive as to taint the proceedings” (*Blencoe* at para. 121). While I am of the view that the delay in this case was inordinate (this was not a complicated matter and it ought to have been dealt with considerably more expeditiously), I cannot conclude that this delay “tainted” the proceedings. (*Tung* BC EST # D511/01)

21. West Coast has provided no evidence of any prejudice, let alone significant prejudice. If there is any prejudice in this matter, it is that of the complainant, who has been deprived of a not insignificant award for almost two years.

22. Furthermore, I am not persuaded that the result is incorrect.
23. I find no error in the delegate's conclusion that West Coast failed to demonstrate just cause for Mr. Robertshaw's conduct. There was no evidence presented to support that allegation.
24. Furthermore, West Coast waited three months after the alleged theft to terminate Mr. Robertshaw's employment, a delay which, as the delegate noted, can be considered as condoning any alleged misconduct.

New Evidence

25. In *Re Merilus Technologies* (BC EST # D171/03) the Tribunal established the following four-part test for admitting new 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.
26. The "new evidence" consists of a letter from a former West Coast employee. I infer that this employee was available at the time of the hearing and could have given oral evidence at the hearing and been subjected to cross-examination on that evidence. It is unsworn and contains information that conflicts with the evidence at the hearing. For example, it refers to an incident on December 13 which led to Mr. Robertshaw's termination "a few months later." The record shows that West Coast issued at least three Records of Employment, all of which indicate Mr. Robertshaw's employment ended in December 2011. This discrepancy brings into question the reliability of the witness statement. Furthermore, as the delegate notes, the statement is also at odds with the evidence advanced at the hearing. I conclude that the new evidence does not meet the test of new evidence, and deny the appeal on this ground.
27. The appeal is denied.

ORDER

28. Pursuant to section 115 of the *Act*, I order that the Determination, dated July 21, 2014, be confirmed in the amount of \$9,067.50, together with whatever interest has accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal