



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 21, 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	for the Director of 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 employer, 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”. I note here that while the first remedy she is seeking is within the jurisdiction of the Tribunal, the second is not.
5. Ms. Bates is also requesting a copy of the Bachelor of Commerce degree of Mr. Jason Jantz, a representative of Integrity Marketing, and made numerous submissions on the subject. The latter request is based on Ms. Bates’ contention that Mr. Jantz does not have the degree, but represented himself as having it in his correspondence with the Delegate. She claims that this is a misrepresentation or a lie on the part of Mr. Jantz and it goes to the question of his credibility. This Tribunal, in a separate decision, dealt with this preliminary issue of document production and dismissed Ms. Bates’ application.
6. Ms. Bates has not requested an oral hearing of her 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.

ISSUE

7. The issues in this appeal are threefold, namely:
 - Did the Director err in law in concluding that Integrity Marketing did not contravene the *Act* in failing to pay Ms. Bates compensation for length of service?
 - Did the Director breach the principles of natural justice in making the Determination?
 - 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

8. 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.
9. 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*.
10. 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;
11. 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.’

12. 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.
13. 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.
14. 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.
15. 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.
16. 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.
17. 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

18. I have reviewed Ms. Bates’ written appeal submissions and compared them to her written submissions in her Complaint, and find that the former largely reiterate the latter. I also note that the Delegate, in the Reasons, has succinctly summarized the gist of those submissions, which I have set out verbatim above and do not find it necessary to reiterate them here.
19. I have also carefully reviewed Ms. Bates’ several email submissions received by the Tribunal on September 26, 2011 and they are largely in the nature of more evidence to elaborate on the evidence she previously provided to the Delegate in the investigation of the Complaint. They also contain some more personal attacks against Mr. Jantz. They do not really address the grounds of appeal she has raised in her Appeal and I do not find it necessary to reiterate those submissions here.

SUBMISSIONS OF INTEGRITY MARKETING

20. Mr. Jantz, on behalf of Integrity Marketing, presented a three-page written submission dated August 30, 2011. In this submission, on the first page, he largely repeats the submissions he made in the Letter to the Delegate before the Determination was made. He then proceeds to elaborate on those submissions further, including his previous submission that Ms. Bates, in her employment with Integrity Marketing, never voiced any concern about her employment, position or job duties, or that she had any issue with her job or conflict with any coworkers. Mr. Jantz then goes on to address specific allegations Ms. Bates made in her Complaint and repeated in her appeal submissions. I do not find it necessary to reiterate Mr. Jantz’s submissions here because of my reasons and decision under the heading Analysis below.

SUBMISSIONS OF THE DIRECTOR

21. The Director submits that Ms. Bates has not provided any evidence of an error of law or breach of natural justice on the part of the Director in making the Determination. The Director also submits that Ms. Bates has not provided any new evidence in her appeal that was not previously provided during the course of the Delegate’s investigation. According to the Director, Ms. Bates is simply attempting to re-argue her case because she disagrees with the Determination. In the circumstances, the Director submits the appeal should be dismissed.

ANALYSIS

22. Section 112(1) of the *Act* sets out the grounds upon which an appeal may be made. It provides:
 - 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.

23. The burden lies on the appellant to demonstrate an error in the Determination. In this case, Ms. Bates has invoked all three (3) grounds of appeal in her Appeal Form, and I will deal with each under separate headings below, starting with the natural justice ground of appeal in section 112(1)(b) of the *Act*.

Natural Justice

24. The principles of natural justice are, essentially, procedural rights ensuring that parties have an opportunity to learn the case against them, the right to present their evidence and the right to be heard by an independent decision-maker (see *Re: 607730 B.C. Ltd. (c.o.b. English Inn & Resort*), BC EST # D055/05). In *Imperial Limousine Services Ltd.*, BC EST #D014/05, the Tribunal explained the principles of natural justice as follows:

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. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the Act, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party. See *BWI Business World Incorporated*, BC EST #D050/96.

25. Having carefully reviewed the submissions of Ms. Bates, including the section 112(5) “record”, I do not find that Ms. Bates has discharged her onus to show any breach of the principles of natural justice by the Director in making the Determination. I find that Ms. Bates simply checked off the “natural justice” ground of appeal in the Appeal Form, but she has not made any submissions in support of that ground. I also find, based on my review of the Reasons as well as the section 112(5) “record”, that there is no evidence of any breach of the principles of natural justice by the Delegate. I find that Ms. Bates, in the investigation of her Complaint, was afforded an opportunity to adduce her evidence and to respond to the evidence of Integrity Marketing. I also find that the Delegate performed his function in an unbiased and neutral fashion and, therefore, I dismiss Ms. Bates’ natural justice ground of appeal.

New Evidence

26. Ms. Bates, as previously indicated, has also invoked the new evidence ground of appeal in her Appeal Form. The oft-quoted decision of the Tribunal delineating the test governing the new evidence ground of appeal in section 112(1)(c) of the *Act* is *Re: Merilus Technologies Inc.*, [2003] BC EST # D171/03. In this decision, the Tribunal, confronted with the issue of whether to accept fresh evidence on appeal, decided that it should be guided by the test applied in civil courts for admitting fresh evidence on appeal and went out to craft the following four-fold test:

- (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.”

27. Having said this, it should be noted that the four (4) criteria delineated above are a conjunctive requirement and, therefore, any party requesting the Tribunal, on appeal, to admit new evidence must satisfy each of them before the Tribunal will accept the purported new evidence and consider it on appeal.
28. In this case, I do not find Ms. Bates is asking the Tribunal to consider any new evidence in her appeal or any evidence that would qualify as “new” evidence under the criteria delineated in *Re: Merilus Technologies Inc., supra*. She is simply reiterating and adding further explanations to the evidence she already gave in the investigation of the Complaint and, in some cases, making personal attacks on Mr. Jantz’s credibility.
29. Having compared Ms. Bates’ appeal submissions with her submissions in support of her Complaint, I am in agreement with the Director that Ms. Bates is simply re-arguing her case as she is, understandably, dissatisfied with the result in the Determination. She is, therefore, attempting to get the proverbial “second kick at the can” in her Appeal. The purpose of an appeal is not to afford a re-hearing to a party dissatisfied with the conclusion in the Determination. The party must bring her appeal within the limited appeal grounds delineated in section 112(1) of the *Act*.
30. I also note that one of the very important purposes of the *Act*, set out in section 2(b), is to provide “fair and efficient procedures for resolving disputes over the application and interpretation of [the] Act”. In my view, to allow a re-argument by Ms. Bates on appeal would defeat this very important purpose of the *Act*. In the circumstances, I find that there is no basis for Ms. Bates’ new evidence ground of appeal, and I dismiss this ground of appeal as well.

Error of Law

31. Ms. Bates also appeals on the ground that the Director erred in law in making the Determination. The Tribunal has consistently adopted the following definition of “error of law” set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):
1. A misinterpretation or misapplication of a section of the Act;
 2. A miscalculation of an applicable principle of general law;
 3. Acting without any evidence;
 4. Acting on a view of the facts which could not reasonably be entertained; and,
 5. Adopting a method of assessment which is wrong in principle.
32. Based on my review of the section 112(5) “record” and the submissions of the parties, I do not find the Delegate misinterpreted or misapplied the *Act* or any applicable principles of general law. I find that the Delegate’s determination that Ms. Bates quit her employment pursuant to section 63(3)(c) was rationally supported in the law and the evidence.
33. I also note that the Delegate turned his mind to the possibility of the application of section 66 of the *Act* in the circumstances. Section 66, as previously mentioned, incorporates into the *Act*, the concept of constructive dismissal. Section 66 provides:

Director may determine employment has been terminated

66 If a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated.

34. Common law principles governing constructive dismissal are relevant in determining if, under section 66, the employer has substantially altered a condition of employment. In this particular case, the Director considered the evidence adduced by Ms. Bates in context of whether an alteration of a condition of her employment had taken place, and concluded that it had not. I note, however, that in the Questionnaire Ms. Bates submitted in the investigation of her Complaint, in response to the question asking her why she quit, she states that “(b)ecause there were illegal activities going on at work”. She also further explained in the Questionnaire that she could not lie any further “for the reps” or “the bosses” and her conscience was getting to her. I note that Integrity Marketing disputes the assertion regarding “illegal activities”, and there is not sufficient evidence in the “record” to support that Integrity Marketing was carrying on “illegal activities” or asking Ms. Bates to carry on illegal activities which, if established, could have given a basis for the application of section 66 of the *Act*. In the result, I find that it was open for the Director to conclude that section 66 of the *Act* did not apply in Ms. Bates’ case. I also add that Ms. Bates has not shown either that there was no evidence to support the findings of fact made by the Delegate or that the latter took a view of the facts that could not reasonably be entertained based on the evidence before him in the investigation.
35. Accordingly, I reject Ms. Bates’ error of law ground of appeal.
36. In summary, I am not persuaded with the merits of Ms. Bates’ appeal and I dismiss it.

ORDER

37. Pursuant to section 115 of the *Act*, I order that the Determination, dated July 12, 2011, be confirmed.

Shafik Bhalloo
Member
Employment Standards Tribunal