Employment Standards TRIBUNAL

An appeal

- by -

ARA Development Ltd.
("ARA")

- 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.: 2008A/118

DATE OF DECISION: December 18, 2008

DECISION

SUBMISSIONS

Mark C. Stacey	on behalf of ARA Development Ltd.
M. Elaine Phillips	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by ARA Development Ltd., ("ARA"), pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued September 5, 2008.

2. Erich Jaeger was employed as a project manager for ARA, the owner/developer of a condominium project, from November 15, 2005 until November 15, 2006. Mr. Jaeger filed a complaint alleging that ARA had contravened the Act in failing to pay him overtime wages, annual vacation pay, compensation for length of service and bonus wages. The vacation pay issue was resolved prior to the hearing.

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 in which ARA was to pay Mr. Jaeger a bonus. The delegate heard oral evidence from ARA's director, Esmaeil Marzara, and Mr. Jaeger and on October 18, 2007, issued a Determination in which she found that ARA had contravened the *Act* in failing to pay Mr. Jaeger his bonus. In her Determination, the delegate stated that she preferred the evidence of Mr. Jaeger over that of Mr. Marzara. ARA appealed the Determination on the grounds that the delegate erred in law. In a decision issued January 29, 2008, 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 second hearing was held into Mr. Jaeger's complaint by a new delegate on April 23, 2008. On September 5, 2008, the delegate issued a Determination finding that Mr. Jaeger was entitled to wages, vacation pay and interest in the total amount of $8,619.96.

5. ARA submits that the second delegate also erred in law and seeks to have the Determination cancelled. ARA also sought a suspension of the Determination, which was granted by the Tribunal.

6. 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

7. Did the delegate err in law in failing to consider the evidence of the parties before the delegate at the first hearing in arriving at her conclusion about his credibility?

FACTS

8. The evidence set out by the delegate is as follows.

9. Mr. Marzara hired Mr. Jaeger as the project manager for a condominium project when it was less than one half completed. He had paid the previous project manager $2,500 per month and wanted to pay Mr. Jaeger $4,000 per month. Ultimately, Mr. Marzara agreed to pay Mr. Jaeger a wage of $5,000 per month, inclusive of gas and cellular telephone costs. Mr. Jaeger also alleged that the parties had a contract in which Mr. Marzara agreed to pay him a bonus of $7,500 upon completion of the project.

10. Mr. Jaeger's evidence was that the usual rate for a project manager was $9,000 to $12,000 per month but he asked for $6,500 per month. When Mr. Marzara refused and asked how he could be assured Mr. Jaeger would not leave the project early, Mr. Jaeger said that Mr. Marzara proposed that he be paid a bonus at the end of the project. Mr. Jaeger then conceded that it was he who proposed the bonus. His evidence was that the bonus was calculated at a rate of $1,500 per month for the anticipated balance of the project, or five months.

11. The project took several months longer than anticipated to complete. Mr. Marzara refused to pay Mr. Jaeger a bonus because, Mr. Jaeger alleged, the project was not completed on time. Mr. Jaeger identified a number of reasons the project was behind schedule, none of which were disputed by Mr. Marzara. Those included:

- Mr. Marzara fired the project architect and left Canada without paying him. Mr. Jaeger had difficulty hiring another architect to take the project on because of the unpaid account.
- Mr. Marzara failed to pay some of the sub contractors, and
- the project was subject to a "stop work" order for nearly three months.

12. The delegate heard evidence from Mr. Marzara and Mr. Jaeger on the contract.

13. Mr. Marzara's evidence was that he asked Mr. Jaeger if he wanted a contract and that he showed him a template he used. He said Mr. Jaeger told him they did not need a contract because "they were adults". Mr. Marzara's evidence was that he prepared the contract anyway and asked Mr. Jaeger to review it, but Mr. Jaeger never agreed to sign it.

14. Mr. Jaeger disputed Mr. Marzara's evidence. He testified that he wanted an employment contract and that although Mr. Marzara told him he had his own template for one, Mr. Marzara never produced one. Therefore, Mr. Jaeger testified, he had a contract made up through an accountant, Jim Phillips. Mr. Jaeger submitted a contract dated November 23, 2005, which specified that Mr. Jaeger would be the project manager at a rate of $5,000 per month, and that upon the "issuance of an occupancy permit for the Windgrove Apartment Project… ARA Development agree(d) to pay Erich Jaeger a bonus of $7,500." The

contract bore what purported to be the signatures of Erich Jaeger (in blue ink) and Essy Marzara (in red ink)

15. Mr. Jaeger testified that Mr. Phillips faxed him a copy of the contract. He said that he had "trimmed off the fax information from the original faxed version and made two copies" and that both he and Mr. Marzara were in ARA's boardroom where they each signed the document. Mr. Jaeger testified that if Mr. Marzara had not signed a contract, he would not have continued working for him. Mr. Phillips did not attend the hearing to give evidence and his absence was not explained to the delegate.

16. Mr. Marzara's evidence was that he had a casual discussion over coffee with Mr. Jaeger about a bonus, telling him that if the project was finished in five months he would buy him tickets to Mexico or Cuba. He denied that he agreed to pay Mr. Jaeger a $7,500 bonus.

17. When asked whether the signature on the contract was his, Mr. Marzara testified that it was "similar" and "very close" but that he normally signed documents in blue or black ink, not red. Mr. Marzara also testified that he did not use letters for his degree after his name or his title when he signed documents, although both his degree letters and the designation "President and CEO" appeared under his name on the contract. Mr. Marzara also testified he did not usually spell the ARA part of the company name in all capital letters since it suggests a partnership when it is actually the last three letters of his name.

18. Mr. Marzara also testified that all the computers in his office have scanned versions of his signature that can be pasted into documents, but that it is not as clear as when he personally signs a document. He agreed that the signature on the contract did not look like it was added by the computer.

19. Mr. Marzara further testified that his letters are typed on company letterhead and that if Mr. Jaeger had produced a contract in the form it was presented, he would have had it redone on his letterhead, the company name would have been spelled correctly, and he would not have used the letters and words which appear after his name.

20. Mr. Stacey cross-examined Mr. Jaeger on a number of issues, including the circumstances surrounding the preparation of the contract and its signing. He also put questions to him relating to his evidence at the first hearing on a number of areas where this evidence differed from his evidence at the second hearing.

21. The delegate assessed the parties' credibility with references to the factors set out in *Faryna v. Chorny* [1952] 2 D.L.R. 354 (B.C.C.A.). She determined that she did not have to assess the alleged contradictions between Mr. Jaeger's evidence at the first hearing and the hearing she conducted for the following reasons:

> … complaint hearings at the Branch are not recorded and no transcript is available of what anyone said. The only record of what may have been said and which is available to me, is the decision of the Adjudicator from the Tribunal. The Tribunal's Adjudicator was not present at the complaint hearing and was quoting the first delegate. Therefore, evidence from the Tribunal's adjudicator is two steps removed from what was said at the first complaint hearing.
>
> Without having heard the original evidence for myself and without being able to hear a tape of it or to read a certified transcript of what was said, I am reluctant to base my decision on alleged contradictions of testimony between the two hearings. However, I will comment on any inconsistencies which may have occurred at the hearing on April 23, 2008.

22. The delegate found Mr. Jaeger's version of what had occurred more probable than Mr. Marzara's and concluded that Mr. Jaeger was entitled to the bonus of $7,500.

ARGUMENT

23. Mr. Stacey contends that the delegate erred when she failed to consider the discrepancies between Mr. Jaeger's testimony at the first hearing and his testimony before her in assessing his credibility. He argues that Mr. Jaeger's testimony at the first complaint hearing was an official record of the Director of Employment Standards which should have been reviewed by the second delegate. Additionally, he contends that his impeachment of Jaeger with respect to his prior inconsistent statements should have been taken into account when assessing his credibility.

24. Mr. Stacey also argues that the delegate erred in concluding that she did not need to consider the application of *Gordon v. McDonald* ([2005], B.C.J. No 2721, 2005 BCCA 621) because she did not base her decision on alleged contradictions in the evidence given at the previous hearing and the evidence presented at hers.

25. The delegate says that she was given three things in preparation for the second complaint hearing: a document purporting to be an original copy of the alleged contract, a faxed copy of an agreed statement of facts signed by both parties, and the Tribunal's decision in respect of the first hearing (BC EST #012/08). She says she was not given a copy of the previous delegate's decision under the terms of the agreed statement of facts. Not having the first Determination before her, the delegate submits she was bound to consider only the evidence presented at her hearing.

26. In reply, Mr. Stacey submits that at the time the Agreed Statement of Facts was finalized, neither party could predict whether the other party would testify in a manner that would necessitate cross-examination on previous statements inconsistent with that testimony. He contends that the lack of a recorded transcript from the first hearing should not have prevented the second delegate from considering his cross examination of Mr. Jaeger or Mr. Jaeger's "sharply contradictory" responses to testimony he previously made. Further, he submits, at the very least the second delegate ought to have considered Mr. Jaeger's demeanour and responses to statements put to him in assessing his credibility.

27. Mr. Stacey argues that the second delegate's refusal to even consider the reasons of the first delegate seriously prejudices ARA. He says this could lead to the perverse outcome that Mr. Jaeger could "flagrantly offer false testimony" before the second delegate and have her base her decision solely on that evidence and leave ARA with no recourse to impeach Mr. Jaeger. He submits that such an outcome, given the clear factual findings of the first delegate, is contrary to procedural fairness, natural justice and to the public policy principles to be followed by the Director of Employment Standards.

ANALYSIS

28. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

(a) the director erred in law
(b) the director failed to observe the principles of natural justice in making the determination; or

(c) evidence has become available that was not available at the time the determination was being made

29. 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)

30. Section 76 of the *Act* provides that the Director must accept and review complaints, may conduct investigations to ensure compliance with the Act, and sets out grounds on which the Director may refuse to accept or stop reviewing, mediating, investigating or *adjudicating* a complaint. (my emphasis) Prior to 2002, the Director investigated all complaints. In May 2002, the *Act* was amended to allow the Director to "adjudicate" complaints as well as investigate them. Since then, many complaints are resolved by an adjudication process in which a Branch Delegate schedules and convenes a hearing with both parties present, and adopts practices and a posture more akin to that of a judge or adjudicator. (see *Kyle Freney* BC EST#D 130/04).

31. Although provisions of the *ATA* apply to the Tribunal by virtue of section 103 of the *Act*, it does not apply to hearings conducted by the Director. Nevertheless, the Director held a hearing which must, in light of the statutory grounds of appeal, be correct at law and in compliance with principles of natural justice. A misapplication of an applicable principle of general law is a reviewable error of law (*Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)* (1998] B.C.J. (C.A.))

32. In *F.H. v. McDougall*, (2008) SCC 53, a case where the reliability and credibility of the parties was a central issue, the Supreme Court of Canada stated that:

> evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases… judges may be faced with… events…where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.

33. At 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. In light of the statement on the Branch's website that evidence at adjudication hearings is given under oath, I infer that the parties gave sworn testimony.

34. One of the purposes of the *Act* is to "provide fair and efficient procedures for resolving disputes over the application and interpretation of this *Act* (s. 2(d)). In meeting that express purpose, the delegate had a duty to assess the impact of any inconsistencies on questions of credibility and reliability of the evidence of the two parties relating to the core issue before her.

35. In my view, the delegate erred in law in failing to consider the evidence of the parties as recited by the first delegate in assessing their credibility.

36. Sections 13 and 14 of the *Evidence Act* (R.S.B.C. 1996, c. 124) provide as follows:

> 13 (1) Subject to subsection (2) a witness may be cross examined as to previous statements made by that witness in writing, or reduced to writing, relative to the subject matter of the proceedings, without the writing being shown to that witness.
>
> (2) If it is intended to contradict the witness by the writing referred to in subsection (1), the attention of the witness must, before the contradictory proof can be given, be called to those parts of the writing that are to be used for contradicting the witness.
>
> …
>
> 14 (1) Subject to subsection (2), if a witness, in cross examination as to a former statement made by the witness relative to the subject matter of the proceedings and inconsistent with the present testimony of the witness, does not distinctly admit to making the statement, proof may be given that the witness did in fact make that statement.
>
> (2) Before giving the proof referred to in subsection (1),
>
> (b) the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and
>
> (c) the witness must be asked whether or not the witness made the statement.

37. Furthermore, as noted in Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths Canada Ltd., 1999:

> The most common method of impeaching the credit of an opponent's witness is that of self-contradiction by means of a prior inconsistent statement written or uttered by the witness. The prior statement may take one of many forms. It may be a statement given by a party under oath, in examination for discovery, in an earlier trial, or in an affidavit; it may have been unsworn, as for example, a statement given by a witness to an investigator, it may be a statement made orally, or written in correspondence by the witness to another or recorded on audio tape or video tape. (at s. 16.126)

38. Although Mr. Jaeger's sworn evidence was not officially recorded, it was recorded by a delegate of the Director and set out in a Determination as evidence. Determinations have weight and authority and, unless successfully appealed, can form the basis for enforcement proceedings. Although the Determination was cancelled, the delegate's record of the evidence, while hearsay, may still be used for the purpose of cross examination as well as assessing the credibility of parties in subsequent hearings.

39. In my view, the delegate was obliged to consider the evidence of both parties at the first hearing in assessing their credibility and the reliability of their evidence. While the delegate correctly notes that hearings are not recorded and therefore no official transcript is produced, that in itself does not prevent her from referring the witnesses to sworn statements attributed to them by the first delegate, as set out either in the Determination or as repeated in the Tribunal's decision. This is particularly the case where, as here, credibility is the central issue before her.

40. Therefore, I conclude that the delegate erred in refusing to consider all of the evidence available to her, and particularly when Mr. Stacey put allegedly prior inconsistent statements to Mr. Jaeger in the course of the hearing.

41. Mr. Stacey argues the inconsistencies are "significant and dramatic", such that Mr. Jaeger's evidence was "entirely undermined" and ought to have led the delegate to a decision in favour of ARA. While I am not prepared to agree that the delegate ought to have decided in favour of ARA, I agree that the delegate's failure to consider prior evidence was sufficiently serious to conclude that a new hearing ought to be ordered.

42. I recognize that remitting this matter back to the Director for a third hearing is costly and frustrating to the parties. It also does not meet one of the stated objectives of the *Act*, that of providing for efficient hearings. Nevertheless, where there is a manifest error in the conduct of a hearing, the Tribunal is obliged to correct that error to ensure that other purposes are met.

ORDER

43. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated September 5, 2008, be cancelled. The matter is referred back to the Director of Employment Standards for a new hearing before a different delegate.

Carol L. Roberts
Member
Employment Standards Tribunal