Employment Standards TRIBUNAL

An appeal

- by -

0947401 B.C. Ltd. carrying on business as Princeton Builders Mart 2012
(the "Appellant")

- 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: Rajiv K. Gandhi

FILE No.: 2015A/89

DATE OF DECISION: November 20, 2015

DECISION

SUBMISSIONS

Susan Robinson	on behalf of 0947401 B.C. Ltd. carrying on business as Princeton Builders Mart 2012
Kevin Cebulski	on his own behalf
Tyler Siegmann	on behalf of the Director of Employment Standards

OVERVIEW

1. 0947401 B.C. Ltd. carrying on business as Princeton Builders Mart 2012 (the "Appellant") seeks to cancel the May 15, 2015, determination (the "Determination") of a delegate of the Director of Employment Standards (the "Director"), requiring payment of compensation to the Complainant, Kevin Cebulski ("Mr Cebulski"), for length of service, vacation pay, interest, and administrative penalties, in the aggregate amount of $6,969.65.

2. The Appellant originally challenged the Director's finding that it contravened section 63 of the *Employment Standards Act* (the "*Act*"), on the basis that:

    (a) the Director failed to observe the principles of natural justice; and

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

    two of the permitted grounds for appeal under section 112(1) of the *Act*.

3. On September 3, 2015, I dismissed the bulk of this appeal in BC EST # D091/15, as having no reasonable prospect of success under section 114(1)(f) of the *Act*. I declined to do so, however, with respect to what, in these reasons, I describe as the "Learie Statement".

THE FACTS AND ANALYSIS

4. The Appellant is a British Columbia company, operating a building supply store in Princeton, British Columbia, under the name and style "Princeton Builders Mart 2012".

5. The Complainant was employed at the store, first as sales clerk and later as store manager, from June 2, 2008, to October 10, 2014, at which point his employment ended.

6. On December 18, 2014, Mr. Cebulski filed a complaint with the Employment Standards Branch, seeking compensation for length of service under section 63 of the *Act*, arising out of what the Complainant says was the involuntary termination of his employment. The Appellant maintains that Mr. Cebulski quit his job and, by virtue of section 63(3)(c) of the *Act*, it is not liable to pay.

7. Central to the Appellant's argument is the assertion that, on October 10, 2014, after an unpleasant verbal altercation with a customer that has been characterized by all parties as "abusive", Mr. Cebulski uttered the phrase "I am done. I quit. I am out of here." – something that the Complainant has denied.

8. After considering evidence and submissions from both parties in a hearing conducted on April 7, 2015, the Director found that the Appellant had failed to produce evidence of what Mr. Cebulski said when he left the store. The Director accepted Mr. Cebulski's version of events and, in the absence of written notice, payment in lieu of notice, or cause, found that the Appellant's liability under section 63 of the *Act* had not been discharged.

9. The Appellant now says that evidence to show that Mr. Cebulski quit has become available. It seeks to cancel the Determination by reason of section 112(1)(b) of the Act.

10. In considering this appeal, I have reviewed:

(a) the original Determination;

(b) the Appeal Form filed on July 7, 2015;

(c) the Appellant's submissions, filed on June 30, September 22, September 23, October 2, and October 28, 2015;

(d) the Complainant's submissions, filed on October 16, 2015; and

(e) submissions on behalf of the Director, filed on October 20, 2015.

11. I have also reviewed the Director's Record, submitted to the Tribunal on July 15, 2015.

12. In the Determination, the Director made the following findings of fact which are relevant to this part of the appeal:

(a) On October 9, 2014, Mr. Cebulski was not feeling well. He communicated this fact to Susan Robinson ("Ms. Robinson") and, with her knowledge, left work very early on that day.

(b) Notwithstanding that he was not well, Mr. Cebulski reported for work, as usual, on October 10, 2014.

(c) At approximately 7:45 A.M. on October 10, 2014, a customer by the name of Mr. Wayne Learie entered the store, intending to return a bale of insulation. He did not have his receipt in hand. Mr. Cebulski started to process the return but told Mr. Learie that, owing to store policy, a receipt would be required the next time. Mr. Learie became upset and, according to Mr. Cebulski and one other customer, Mr. Hughes, was verbally abusive. (Mr. Hughes did not give evidence at the original hearing; rather, Ms. Robinson acknowledged having been told by Mr. Hughes that Mr. Learie was abusive.)

(d) When Ms. Robinson arrived at the store on October 10, 2014, she was accosted by an agitated Mr. Learie, who complained vociferously about his encounter with Mr. Cebulski.

(e) Ms. Robinson took Mr. Learie into the store to complete his return. At the same time, Mr. Cebulski came down from the office .

(f) Mr. Cebulski threw his keys on the counter, and left the store. (At this point, Ms. Robinson says that Mr. Cebulski shouted the words "I am done. I quit. I am out of here" before leaving. Mr. Cebulski denies having used the words "I quit.")

(g) Mr. Cebulski then re-entered the store, and went into the back office. A few minutes later, Mr. Cebulski's wife came into the store and asked Ms. Robinson what had happened. Ms. Robinson said she did not know. Mr. Cebulski and his wife then left the store.

(h) Mr. Cebulski was acting irrationally. He was not feeling well, and he was upset.

(i) Ms. Robinson received a call from Mr. Cebulski at 4:00 pm October 10, 2014. Mr. Cebulski told Ms. Robinson that he was not feeling well and would not be at work the following day. Neither discussed with the other the altercation with Mr. Learie, the subsequent events in the store, or the question of Mr. Cebulski's employment status.

(j) On October 11, 2014, Mr. Cebulski called the store to talk to staff with respect to an item ordered by another customer.

(k) Ms. Robinson and Mr. Cebulski met again on October 14, 2014, at a location outside the store. Again, Ms. Robinson did not discuss the altercation with Mr. Learie or events subsequent, but instead advised Mr. Cebulski that she had no choice but to accept his resignation.

13. There is nothing in the Determination or any of the submissions tendered in this appeal to suggest any previous conflict between the Appellant and Mr. Cebulski and, except with respect to the question of what Mr. Cebulski did or did not say when he left the store on October 10, 2014, there does not appear to be any dispute concerning these facts.

14. In the context of these facts, the Appellant now seeks to adduce, as fresh evidence, a sworn statement from Mr. Learie (the "Learie Statement") - the individual with whom Mr. Cebulski had the verbal altercation.

15. In his statement, Mr. Learie declares that he was present in the Appellant's store on October 10, 2014, and witnessed Mr. Cebulski move "purposely from inside the store" through the front entrance, waving his arms, and shouting "I am done, I quit, I am out of here."

16. Mr. Learie's statement, sworn some eleven months after the incident, sets out a version of events that matches almost exactly what Ms. Robinson says happened, although it is interesting to note that Mr. Learie makes no mention of the altercation that took place minutes before.

Fresh Evidence

17. The test adopted by the Tribunal when considering the admissibility of fresh evidence is set out in *Davies et. al.*, BC EST # D171/03:

(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.

18. To be admitted, the Learie Statement must satisfy all four parts of the *Davies* test.

19. I consider each, in turn.

(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.

20. On behalf of the Appellant, Ms. Robinson submits that she made efforts to locate the witness in advance of the original hearing, but was unsuccessful in doing so. Those efforts included attempting to contact Mr. Learie by telephone, and searching for him using several online resources. The evidence was clearly available, but not what I would call "presentable" to the Director. In the absence of evidence to the contrary, I am prepared to accept that the Appellant made reasonable effort to locate Mr. Learie before the Determination. I find that the first part of the *Davies* test has been satisfied.

(b) The evidence must be relevant to a material issue arising from the complaint.

21. Central to the Determination is a finding with respect to whether or not Mr. Cebulski quit his employment with the Appellant. Evidence suggesting an intention on the part of Mr. Cebulski to abandon his employment is relevant to answering that question. I find that the second part of the *Davies* test has also been satisfied.

(c) The evidence must be credible in the sense that it is reasonably capable of belief.

22. Under this part of the *Davies* test, my role is not to decide what evidence I prefer, or even, for that matter, whether or not I believe Mr. Learie. Instead, my objective is to consider whether the Learie Statement is so unreliable or flawed that it is not reasonably capable of belief (*Kobelt v. Sheedy* (1994) CanLII 1886 (BCCA) at paragraph 15; and *R. v. S.* 2005 BCSC 1915 at paragraph 61).

23. That is a relatively low threshold and, considering that the Learie Statement is clear, concise, and sworn, I am satisfied that it has been met.

(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.

24. The pivotal issue in this appeal is whether or not the Learie Statement is such that, "if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to affect the result." (*Smith v. Ross, et al*, 1996 CanLII 2435 (BCSC) at paragraph 17)

25. Having considered that "fresh evidence" in the context of the facts found by the Director in the original Determination, my answer to the question is no. Even if I were to accept the Learie Statement as true, when taken with the other evidence I do not believe that the Director would have come to a different conclusion.

26. Section 63 of the *Act* imposed liability on an employer for length of service except in those specific cases where liability is deemed by section 63(3) to be discharged. One such exception arises when an employee quits.

27. In *Burnaby Select Taxi Ltd. and Zoltan Kiss*, BC EST # D091/96 at page 10, the Tribunal held that:

> The right to quit is personal to the employee and there must be clear and unequivocal facts to support a conclusion that this right has been voluntarily exercised by the employee involved. There is both a subjective and an objective element to a quit: subjectively, the employee must form an intent to quit employment; objectively, the employee must carry out an act inconsistent with his or her further employment. The rationale for this approach has been stated as follows:

> . . . the uttering of the words "I quit" may be part of an emotional outburst, something stated in anger, because of job frustration or other reasons, and as such it is not to be taken as really manifesting an intent by the employee to sever his employment relationship. **Re University of Guelph**, (1973) 2 L.A.C. (2d) 348

28. A finding that one of the section 63 exceptions applies to relieve an employer from liability requires the Director not just to consider a single declaration, but the context in which that declaration is made. That is, the Director must consider the circumstances leading to and flowing from the alleged utterance.

29. Even if Mr. Cebulski did speak the words that are attributed to him in the Learie Statement, and I am not sure that he did, I find that:

(a) the altercation between an employee who was unwell and a verbally abusive customer; and

(b) Mr. Cebulski's subsequent actions

are inconsistent with a finding that the Complainant intended to sever his employment relationship. At best, the Learie Statement, if believed, creates a presumption that is rebutted by the altercation, by subsequent acts, and by Mr. Cebulski's emphatic denial that the words were uttered.

30. For these reasons, I do not accept that the evidence of Mr. Learie would change the outcome, and I find that the fourth part of the *Davies* test has not been satisfied.

31. In the original hearing, and in this appeal, the Appellant submitted that it had no alternative but to accept Mr. Cebulski's resignation. I do not agree. Rather than snapping up what the Appellant perceived as an abandonment of employment, it was obliged to clarify Mr. Cebulski's true intention. The failure to do so, even when done without malice, is what creates liability under section 63 of the *Act*.

32. Finally, in submissions made by the Director and Mr. Cebulski, questions were raised with respect to the timeliness of steps taken by the Appellant in this appeal. Both say the appeal is out of time, and an extension should not be granted. Given the remainder of these reasons, I do not intend to address that issue. If one was necessary and if I were to refuse an extension, this appeal would fail on the basis of a technicality. If an extension was necessary and I were to grant it, this appeal would still fail on its merits. In both cases, the outcome is the same.

ORDER

33. In accordance with section 115(1)(a) of the *Act*, the appeal is dismissed, and the Determination confirmed.

Rajiv K. Gandhi
Member
Employment Standards Tribunal