Employment Standards TRIBUNAL

An appeal

- by -

9503 Investments Ltd. operating as Mountain View Service
("Mountain View")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2005A/101

DATE OF DECISION: August 17, 2005

DECISION

SUBMISSIONS

Dave Jagpal	for 9503 Investments Ltd.
Gladston Wallace	on his own behalf
Mary Walsh	for the Director of Employment Standards

INTRODUCTION

1. This is an appeal filed by 9503 Investments Ltd. doing business as "Mountain View Service" ("Mountain View") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*). Mountain View appeals a Determination that was issued by a delegate of the Director of Employment Standards (the "Director") on May 4th, 2005 (the "Determination"). The Director's delegate conducted an oral evidentiary hearing on January 19th, 2005 and subsequently issued both the Determination and her supporting "Reasons for the Determination" ("Reasons") on May 4th, 2005.

2. The Director's delegate determined that Mountain View owed its former employee, Gladston Wallace ("Wallace"), the sum of $1,371.48 on account of two weeks' wages as compensation for length of service (see section 63) and concomitant vacation pay (section 58) and interest (section 88). Further, by way of the Determination, the Director also levied an administrative penalty against Mountain View in the amount of $500 pursuant to section 98 of the *Act* and section 29 of the *Employment Standards* in light of its contravention of section 63 of the *Act*. Thus, the total amount payable under the Determination is $1,871.48.

3. Mountain View appeals the Determination on the ground that the Director's delegate failed to observe the principles of natural justice in making the Determination.

4. In its Appeal Form, Mountain View indicated that it believed an oral appeal hearing was required, presumably so it could call two witnesses who did not testify before the delegate. In my opinion, this is not a case where an oral appeal hearing is required. The issue on appeal is an alleged breach of natural justice. I am fully satisfied that I can adjudicate this latter issue based solely on the section 112(5) record and the parties' submissions; an appeal hearing in this case would be a waste of both time and money.

THE DETERMINATION

5. The relevant facts, as set out in the delegate's reasons, are as follows. Mountain View operates an automotive repair business as a "Petro Canada" franchisee. Mr. Wallace worked as an automotive repair technician from October 20th, 2001 until his employment formally ended sometime in August 2004. While he was employed, Mr. Wallace was paid $16 per hour and worked 40 hours per week.

6. On April 16th, 2003 Mr. Wallace completed his regular shift. The very next day he was involved in a motor vehicle accident leaving him unable to work; accordingly, he then went on medical leave. Mr. Wallace's anticipated return to work date was uncertain; the evidence before the delegate was that both

parties agreed that Wallace would return to work as and when his medical condition allowed. It would appear that Wallace's recovery was delayed because he required knee surgery and had to wait for an extended period before the necessary surgery was performed. Both parties also seemingly agreed that during the months following his accident, Wallace frequently attended the workplace (although not to work) and kept his employer apprised about his ongoing medical condition.

7. Mountain View's position before the delegate was that in August 2004 Wallace effectively quit his employment since he refused to return to work, did not provide medical evidence regarding his continuing inability to work, and made statements to Mountain View that he did not wish to return to work. Mr. Jagpal wrote Wallace on December 1st and again on December 16th, 2004. In his December 1st letter, Mr. Jagpal inquired about Mr. Wallace's intentions regarding his return to work; he also advised that if Mr. Wallace intended to return to work, Mr. Wallace would have to provide "a note from your Doctor stating that you are fit to do so". Mr. Jagpal's letter continued:

> Furthermore, if you do not intend to return to your current position, you need to contact myself in writing by no later than December 15, 2004 so I can make alternate arrangements if I am required to do so.
>
> In the event that I do not receive a written reply regarding your decision I will accept that as your resignation from Mountainview Service as of December 16, 2004.

8. In his December 16th letter, Mr. Jagpal noted that he had not yet heard from Mr. Wallace and then indicated: "…if you do not intend to return to work & inform me in writing by December 23rd 2004, I will accept that as your formal resignation from Mountainview Service".

9. On the other hand, Wallace testified that he attempted to negotiate a return to work on August 5th, 2004 only to be informed that he "no longer had a job at Mountain View". Mr. Wallace subsequently attended at the workplace on August 9th and again on August 11th only to be told on each occasion by Mountain View's principal, Mr. Dave Jagpal ("Jagpal"), that a replacement technician had been hired in his [Wallace's] stead and that Mountain View would not be paying him any "severance pay". On August 9th Mr. Jagpal did, however, pay Mr. Wallace his accrued vacation pay. Mr. Wallace denied ever being asked to produce a doctor's note and maintains that he never quit or otherwise abandoned his job. As recounted in the delegate's Reasons (at page 10): "…he [Wallace] saw no point in responding to Jagpal's two letters in December 2004 seeking verification of his employment status [since] he no longer had a job to return to as of August 5th, 2004 and thus, it was illogical for Mountain View to assert otherwise months later". While he was on medical leave, Mr. Wallace received employment insurance benefits and, later on, disability insurance benefits from ICBC.

10. The delegate noted in her Reasons that Mountain View never issued Wallace a "Record of Employment" ("ROE"). I would add that employers must issue an ROE when an employee's job ends (regardless of the reason) and further, must identify the reason for issuing the document (such as "quit", "dismissal", "shortage of work", etc.).

11. The only issue in dispute before the delegate was whether Wallace quit or was terminated. The delegate determined that Mr. Wallace did not quit; rather, he was terminated on August 5th, 2004 without just cause or written notice. In making this latter determination, the delegate specifically noted that she found Mr. Wallace's testimony to be more credible than Mr. Jagpal's testimony. The delegate outlined in some considerable detail at pages 12 to 14 of her Reason why she considered Mr. Wallace to be the more credible of the two parties.

12. Parenthetically, I might add that the delegate carefully considered the conflicting evidence before her and arrived at what appears to be the only reasonable conclusion, namely, that Mr. Wallace's version of events was more probably the accurate version. Mr. Jagpal's version was contradicted by his own documents and, in many respects, simply strained credulity.

THE APPELLANT'S POSITION ON APPEAL

13. As noted above, Mountain View appeals the Determination on the ground that the Director's delegate failed to observe the principles of natural justice in making the Determination. Mountain View appended a 1-page letter, dated June 10th, 2005 and signed by Mr. Jagpal, to its Appeal Form. In this letter, Mr. Jagpal states:

> I feel that The Director failed to observe the principles of natural justice because I was never told at any time that I may bring witnesses to the hearing that was attended by myself & Mr. Wallace. I strongly believe that if some of my staff members had been able to testify on that day, then my statement would have been more solid. I come to the conclusion that it is simply my word against his. Mr. Wallace has repeatedly testified that he was terminated from his position which is definitely not factual and or true.

14. Mr. Jagpal's letter continues and simply reiterates the position he advanced before the delegate at the Branch-level hearing.

MR. WALLACE'S AND THE DIRECTOR'S POSITIONS

15. In his July 8th, 2005 submission, Mr. Wallace states that Mr. Jagpal *was informed* that he could bring witnesses to the evidentiary hearing. This advice was apparently given to both Mr. Wallace and Mr. Jagpal at a mediation meeting that occurred on October 26th, 2004 at the Employment Standards Branch office in Surrey.

16. The Director's delegate, in her submission dated June 28th, 2005, referred to the record and noted that Mr. Jagpal was, in fact, made aware—in writing—that he could bring witnesses to the hearing if he wished.

FINDINGS AND ANALYSIS

17. I am fully satisfied about the accuracy of the Director's delegate's assertion that Mr. Jagpal should have known he could bring witnesses to the hearing. Mr. Jagpal was provided with a copy of the delegate's June 28th submission and was asked to reply to it; he never filed any reply whatsoever. I presume from his failure in this latter regard that he was not prepared to dispute the delegate's assertion in light of the overwhelming documentary evidence in support of it. Thus, I need not rely on Mr. Wallace's assertion that Mr. Jagpal was also orally advised about his right to bring witnesses to the hearing although, having said that, I have no reason to doubt Mr. Wallace's statement.

18. In any event, even if Mr. Jagpal did not actually know that he could have called witnesses at the hearing before the delegate—a proposition that I find extraordinarily difficult to accept—I do not believe that the rules of natural justice require the Director to specifically advise parties orally of their right to call witnesses. In my view, the information that the Director has made available in its publications and on its

website more than fully satisfy his obligation to ensure that parties understand the nature of the Branch-level hearing and adjudication process.

19. Further, even if these so-called "witnesses" had testified, there is no evidence before me that their evidence would have made the slightest difference to the ultimate outcome. At the hearing, Mr. Jagpal referred to the possibility of two other employees overhearing the August 5th dispute between Mr. Wallace and Mr. Jagpal. Mr. Jagpal testified before the delegate (see Reasons at page 14) that one of the employees was present at the workplace on August 5th but Mr. Jagpal "couldn't recall [the employee] being present" when the dispute occurred. As for the other employee, Mr. Jagpal only testified that this person "would have overheard the conversation"—this assertion is wholly speculative at this point. If these two employees truly had relevant and probative evidence, I would have expected Mountain View to have provided to the Tribunal, at the very least, signed statements from these employees attesting to what they saw and heard on August 5th. Finally, even if such statements were before the Tribunal, they would likely be inadmissible by reason of section 112(1)(c) of the *Act* since this latter evidence clearly would have been "available" (although not presented) at the Branch-level hearing.

20. In my view, this appeal is not only without merit; it is also frivolous and vexatious.

ORDER

21. Pursuant to sections 114(1)(a) and (c) and 115(1)(a) of the *Act*, I order that the appeal be dismissed and that the Determination be confirmed as issued in the amount of **$1,871.48** together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal