Employment Standards TRIBUNAL

An appeal

- by -

Shirley Levy Wosk
("Wosk")

- 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.: 2011A/112

DATE OF DECISION: November 18, 2011

DECISION

SUBMISSIONS

Shirley Levy Wosk	on her own behalf
Kent J. Bruyneel	on behalf of A.M. Bruyneel Inc. carrying on business as Bruyneel & Co.
Robert D. Krell	on behalf of the Director of Employment Standards

INTRODUCTION

1. Shirley Levy Wosk ("Wosk") appeals a Determination that was issued by a delegate of the Director of Employment Standards (the "delegate") on July 8, 2011, pursuant to which her former employer, A.M. Bruyneel Inc. carrying on business as Bruyneel & Co. (the "employer"), was ordered to pay her $3,164.52 in unpaid wages (the "Determination"). Further, and also by way of the Determination, the delegate levied a $500 monetary penalty against the employer (see *Employment Standards Act*, section 98).

2. This appeal is filed pursuant to section 112(1)(c) of the *Employment Standards Act* (the "*Act*"): "evidence has become available that was not available at the time the determination was being made".

3. The Determination was issued following an oral hearing conducted on May 25, 2011, and the delegate issued "Reasons for the Determination" (the "delegate's reasons") together with the Determination on July 8, 2011. Although Ms. Wosk was generally successful, the delegate did not award her any compensation for length of service under section 66 of the *Act* (the so-called "constructive dismissal" provision) and her appeal is predicated on the assertion that the delegate should have found in her favour on this issue. Section 66 states: "If a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated."

4. The employer is a chartered accounting firm but I understand that Ms. Wosk was employed as a certified general accountant and thus she is not excluded from the *Act* by reason of section 31(b) of the *Employment Standards Regulation*.

5. In an October 14, 2010, letter accompanying her original complaint, Ms. Wosk asserted: "I feel I had very just reason for leaving this employment and that I am entitled to a fair compensation of at least 3 weeks pay" (*sic*). Ms. Wosk's position at the complaint hearing was that "she was directed to perform work that she found unethical and intolerable" and was otherwise required to compromise her professional ethics and personal integrity (delegate's reasons, page R3).

6. The delegate ultimately rejected Ms. Wosk's section 66 claim finding as follows (page R4):

> …I find no evidence to support a contention that she was placed in situations whereby she was asked to compromise her ethical standards. Furthermore, I note a significant disparity between her September 29, 2010 email stating "I was repeatedly asked to perform duties or have knowledge of duties that I felt were ethically wrong" and her testimony that "she was never asked to involve herself in any wrongdoing, but her professional integrity was compromised by knowledge of it". All evidence considered, I dismiss that aspect [*i.e.*, the section 66 claim] of Ms. Wosk's complaint under the Act.

THE APPEAL

7. Ms. Wosk, in an August 15, 2011, letter appended to her Appeal Form, says that in her opinion there was "a substantial and unilateral alteration in the conditions of [her] employment". Ms. Wosk's letter then states that she is "supplying what I feel is a clearer presentation of my reasons for consideration in this matter". Ms. Wosk also asserts that the delegate "misquoted" her testimony and says that she "can substantiate this claim with a written copy (and audio copy) of the transcript of that hearing".

8. Ms. Wosk appended a 22-page document to her Appeal Form that she says is a transcribed verbatim record of the complaint hearing. Although Mr. Alan Bruyneel represented the employer in person at the complaint hearing, Ms. Wosk attended by teleconference. Accordingly, neither Mr. Bruyneel nor the delegate would have known that the hearing was being recorded. I understand that Ms. Wosk surreptitiously recorded the proceedings and the delegate now submits that the transcript is not admissible in this appeal. The employer, for its part, does not say that the transcript is admissible and, in fact, relies on the transcript as support for its position that the appeal wholly lacks merit.

9. Although the employer does not oppose my consideration of the transcript as part of the appeal record, the delegate says that it is not properly before me. Therefore, and before proceeding to a consideration of the Ms. Wosk's arguments on appeal, I will first address whether the transcript is admissible in this appeal.

IS THE TRANSCRIPT OF THE COMPLAINT HEARING ADMISSIBLE?

10. As noted above, Ms. Wosk apparently surreptitiously recorded the complaint hearing and, presumably, prepared the transcript in question based on her review of the taped record. Although the actual voice record has been submitted to the Tribunal in the form of a CD, I have not reviewed the CD and thus cannot say whether the transcript is absolutely accurate. I might also add that I have not reviewed the transcript but for purposes of this aspect of my decision, I will assume that the transcript is an accurate record of the complaint hearing.

11. Although it was not unlawful for Ms. Wosk to record the hearing since she was not "intercepting" the telecommunication (at least under the federal *Criminal Code*; whether it was lawful for her to surreptitiously record the hearing under provincial privacy legislation may be another issue), as a matter of general practice, complaint hearings are not recorded. At the outset of the complaint hearing, Ms. Wosk should have informed both Mr. Bruyneel and the delegate that she proposed to record the proceedings so that submissions could be made and a ruling given regarding that matter. It was entirely inappropriate for Ms. Wosk to have recorded the complaint hearing without having given prior notice thereby affording the employer and the delegate an opportunity to consider the matter.

12. In *Galter Holdings Ltd.*, BC EST # D289/00, a decision rendered when the Tribunal's appeal jurisdiction was much wider than is presently the case and when oral appeal hearings were relatively common, the Tribunal adjudicator discovered that Galter's representative was tape recording the appeal hearing. After hearing from the parties, the adjudicator issued an order prohibiting the recording of the proceedings and directing "that the tape be turned over to the Tribunal pending such application as [Galter's representative] might make to have the tape released". Galter's representative refused to comply with the adjudicator's order and thus he "terminated the hearing". Galter applied for reconsideration of the adjudicator's order and a 3-person panel refused the application stating (at page 4):

> We agree with the opinion expressed in the original decision that the Tribunal should not allow its proceedings to be recorded unless special circumstances exist. Ultimately, however, where a party

> involved in an oral hearing before the Tribunal requests the proceedings be recorded, the question of whether the circumstances justify accommodating that request, including what conditions, if any, might be imposed if the request is granted, is a matter of discretion for the Adjudicator.

13. By proceeding unilaterally without prior notice, Ms. Wosk deprived the delegate of the opportunity to hear from the parties and make a reasoned decision regarding whether the hearing could be recorded and, if so, what protocol should be followed to ensure the integrity of the taped record (see also *Tennant*, BC EST # D302/97). I do not think it appropriate to, in effect, usurp the delegate's primary authority to determine this question by simply allowing the transcript to form part of the record in this appeal.

14. More recently, in *Bercasio* (BC EST # D088/09; reconsideration refused: BC EST # RD049/10), the Tribunal confirmed that it is generally improper for a party to record (and hence have control of the transcript) a complaint hearing. At page 4 of the *Bercasio* decision I observed:

> The delegate's refusal to allow the proceedings to be taped does not amount to a contravention of the principles of natural justice. Generally speaking, when administrative proceedings are recorded on an *ad hoc* basis, the recording is undertaken by a neutral person (not an interested party) and only after full disclosure and consent. Where proceedings are recorded, invariably the tribunal itself controls the recording process and maintains possession of the ensuing electronic record.

15. Accordingly, and in light of the above considerations, I am of the view that the transcript is not properly before me and I will not consider its contents when adjudicating this appeal. I now turn to Ms. Wosk's ground of appeal.

FINDINGS AND ANALYSIS

16. Ms. Wosk's sole ground of appeal is that she has new and relevant evidence that was not available at the time the Determination was being made. The Tribunal, in *Davies et al.*, BC EST # D171/03, set out a number of considerations that should be taken into account when assessing "new evidence" (at page 3):

> (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.

17. In the instant case, Ms. Wosk simply wishes to re-argue and expand on the evidence that she presented at the complaint hearing. She frankly concedes that she was "not able to provide enough information to satisfy [the delegate]" at the complaint hearing and now wishes to present evidence that she failed to put before the delegate and/or she now wishes to provide a more complete version of the evidence she provided at the complaint hearing. Ms. Wosk's submission sets out two scenarios (described as "Case A" and "Case B") that she says supports her position that she should have been awarded compensation for length of service under section 66 of the *Act*. Ms. Wosk concedes "these cases were discussed at the adjudication hearing". Clearly, this evidence does not satisfy the first component of the *Davies* test and accordingly the appeal must fail for that reason alone. The appeal process is not a forum for the presentation of evidence that could have – and, in this case, perhaps should have – been presented to the delegate at the complaint hearing. I might add, in

any event, that in my opinion neither "Case A" nor "Case B" unequivocally supports Ms. Wosk's assertion that she was "constructively dismissed" under section 66 of the *Act*.

ORDER

18. Pursuant to section 115(1)(a) of the *Act*, the Determination is confirmed as issued in the total amount of $3,664.52 together with whatever further section 88 interest that has accrued since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal