

An appeal

- by -

Gary Tam

- 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.: 2011A/120

DATE OF DECISION: November 23, 2011

DECISION

SUBMISSIONS

Derek C. Creighton, Access Law Group	counsel for Gary Tam
Gradin Tyler, Harris & Company	counsel for Western Forest Products Ltd.
Joe LeBlanc	on behalf of the Director of Employment Standards

OVERVIEW

1. Gary Tam filed a complaint with the Director of Employment Standards (the “Director”) alleging that Western Forest Products Ltd. (“WFP”) failed to pay overtime wages and compensation for length of service. A delegate of the Director held a hearing into the complaint on February 18, 2011. Both parties were represented by counsel at the hearing. On July 27, 2011, the delegate issued a Determination finding that the *Employment Standards Act* (“*Act*”) had not been contravened and that no wages were owed.
2. Mr. Tam appeals that Determination pursuant to section 112 of the *Act*, contending that the Director erred in law and failed to observe the principles of natural justice in making the determination. Mr. Tam also argues that new evidence has become available that was not available at the time the Determination was issued.
3. 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). I have determined that this appeal can be decided on the section 112(5) “record”, the submissions of the parties, and the Reasons for the Determination.

ISSUES

4. 1. Whether or not the Director erred in law in concluding:
 - a) that Mr. Tam had not substantiated a claim for overtime pay and
 - b) that Mr. Tam’s employment was terminated for cause and that he was therefore not entitled to compensation for length of service;
5. 2. Whether or not the Director failed to comply with the principles of natural justice by failing to consider the issue of constructive dismissal when analyzing whether or not Mr. Tam’s employment had been wrongfully terminated; and
6. 3. Whether or not there is new and relevant evidence that would cause the Director to come to a different conclusion on a material issue.

FACTS AND ARGUMENT

7. Mr. Tam was hired as an “Export Logistics Specialist” for WFP in November 2005 with responsibility for markets in China, Hong Kong, and Taiwan. As a result of operational restructuring in May 2010, Mr. Tam was assigned additional duties that included markets in Europe, the Middle East, Africa, and Asia not including Japan. Mr. Tam expressed his concerns about the additional workload on several occasions and

suggested that he should receive a wage increase. Between July 22, 2010, and July 26, 2010, Mr. Tam sent WFP a number of emails regarding their failure to reach a mutual agreement on a fair salary. Mr. Tam then refused to be responsible for shipments other than those to China, Hong Kong, and Taiwan. At no time did Mr. Tam request overtime pay or communicate to WFP that he had been working overtime.

8. On July 26, 2010, Mr. Tam met with senior executives of WFP to discuss his refusal to do the work assigned to him. When Mr. Tam was told he had to perform the work assigned to him, he stated that he would rather leave than continue to do what he was presently doing. Mr. Tam's employment was then terminated for insubordination.

Overtime wages

9. WFP's policies required staff working overtime to seek authorization for those overtime hours as well as to identify the hours and dates the overtime hours were worked. There was no dispute that Mr. Tam had not been asked to work overtime and did not seek authorization for the overtime hours he claimed in his complaint. Mr. Tam acknowledged that, although he had read the company overtime policy, he had paid no attention to it. He also acknowledged that he had never raised the issue of working additional hours or overtime pay with WFP at any time prior to making his complaint.
10. Mr. Tam's evidence was that he began recording his overtime hours during coffee and lunch breaks as well as after office hours and on weekends. He entered into evidence a chart of the overtime hours he claimed to have worked between January 27, 2010, and July 26, 2010. There was no daily breakdown of the hours worked per day or what customer files were worked on. Mr. Tam testified that he had discussed overtime with his immediate supervisor, Cathy Briton, and that she informed him that WFP did not pay overtime to salaried employees. WFP's general manager, Tony Marra, testified that Ms. Briton told him that Mr. Tam had not discussed overtime with her.
11. The delegate dismissed Mr. Tam's claim for overtime pay. He found Mr. Tam's evidence regarding overtime to lack credibility. The delegate noted that although Mr. Tam knew about WFP's overtime policy, he had not complied with it. The delegate further noted that although Mr. Tam had requested a salary increase, he had never raised the issue of overtime pay at any time before he filed his complaint with WFP, even when confronted with termination of his employment for his refusal to be responsible for shipments to new areas.
12. The delegate also noted that Mr. Tam claimed to have worked an extra 92.5 hours between January 27, 2010, and April 30, 2010, before he was assigned additional duties:

Mr. Tam provided no details of the overtime he claims to have worked for verification purposes. He has not provided information on what accounts were worked on, when the work took place, only aggregate amounts on a monthly basis. Doubt has been raised on the credibility of the monthly records as well. He claimed to have worked 3 hours overtime between January 27 and 31, 2010 but during cross examination he acknowledged that he was on vacation during that time period so could not have earned overtime as he had not worked at all on those days much less over 8 in a day or 40 for the week. Following his termination Mr. Tam made a request through a self-help kit for compensation for length of service but again there was no mention of overtime hours being worked. In his complaint to the Employment Standards Branch there is no claim for overtime wages.

13. The delegate considered the conflicting evidence of Mr. Marra and Mr. Tam regarding their conversations with Ms. Briton about the issue of Mr. Tam's overtime. The delegate preferred Mr. Marra's evidence given that Ms. Briton had not been called by either party, noting that Mr. Marra's evidence was consistent with Mr. Tam's actions.

14. The delegate concluded

It simply defies credibility to not say a word to anyone with regard to getting approval to work extra time, not seeking payment for the time, then months later raise the issue and not provide any of the details. I find on a balance of probabilities Mr. Tam has not established his claim he worked overtime hours. The claim for overtime pay is dismissed.

Compensation for length of service

15. Noting that the facts surrounding the termination of Mr. Tam's employment were undisputed, the delegate concluded that WFP had discharged its burden of showing just cause to terminate Mr. Tam's employment for wilful misconduct.

16. The delegate found that, with few exceptions, employees are not in a position to simply refuse their employers' reasonable and lawful instructions and that Mr. Tam did not fall within any of those exceptions:

... If such instructions involve a violation of the law or present a health/safety hazard for the employee or others there may be reasonable grounds for refusal. Also, if the assignment is clearly outside the employees' area of expertise refusal may be justified. However, in the present case none of the above exceptions were raised. Mr. Tam was given new markets to ship product to in addition to his existing markets. He was, according to his own testimony, an "international Marine Logistics Specialist". The type of work required for the additional markets was fundamentally the same as the work required for his previous markets. He was to arrange for marine transportation of WFP's products for overseas customers so the additional duties were well within his area of expertise. What seemed to be at the root of his refusal was his demand for an increase in salary.

...

In assessing the conduct of Mr. Tam and the sanction of dismissal imposed for it, I concur with WFP's position that it was for just cause. Mr. Tam's actions were wilful and deliberate misconduct that were intended to apply pressure on WFP to agree to pay him a larger salary in recognition of his additional markets. Mr. Tam agreed that his employer had authority to direct the workforce, however through his actions he was openly challenging that very authority and left his employer little in the way of options on how it would be addressed. If they acceded to his demands they would be sending a message to the other staff that this how to get an increase in salary. If they did not take disciplinary action the message would be that it is acceptable to simply refuse to carry out the employer's instructions. Mr. Tam's refusal struck at a key element of the employment relationship, the employer's authority to direct its workforce and have that workforce carry out its instructions.

For the above reasons I find that Mr. Tam was terminated for just cause and as such WFP is discharged from the obligation to pay compensation to him.

ARGUMENT AND ANALYSIS

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

- the director erred in law
- the director failed to observe the principles of natural justice in making the determination; or
- evidence has become available that was not available at the time the determination was being made

18. I will address each of the grounds of appeal separately.

Error of Law

19. The Tribunal has adopted the factors set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)* (1998] B.C.J. (C.A.) as reviewable errors of law:
 1. A misinterpretation or misapplication of a section of the Act;
 2. A misapplication of an applicable principle of general law;
 3. Acting without any evidence;
 4. Acting on a view of the facts which could not be reasonably entertained; and
 5. Exercising discretion in a fashion that is wrong in principle
20. Questions of fact alone are not reviewable by the Tribunal under section 112. In *Britco Structures Ltd.*, BC EST # D260/03, the Tribunal held that findings of fact were reviewable as errors of law if they were based on no evidence, or on a view of the facts which could not reasonably be entertained.
21. The Tribunal must defer to the factual findings of a delegate unless the appellant can demonstrate that the delegate made a palpable or overriding error.
22. Counsel argues that the delegate erred in the following conclusions: that Mr. Tam was not constructively dismissed or otherwise wrongfully terminated, that Mr. Tam was insubordinate and that Mr. Tam is not entitled to overtime pay.
23. The delegate submits that there is no “overriding error” in the Determination. He says that Mr. Tam advanced a claim for compensation for length of service before him, not a claim that he had been constructively dismissed. The delegate states that Mr. Tam contended that his refusal to ship to additional markets did not constitute insubordination, not that the additional responsibilities were a substantial alteration of a condition of his employment. The delegate also submits that neither party submitted a contract of employment setting out the terms and conditions of Mr. Tam’s employment. In any event, the delegate says, he concluded that the extra work assigned to Mr. Tam was fundamentally the same as the work he had already been doing and that merely adding more markets to his existing portfolio did not change the nature of the work.
24. The delegate also submits that Mr. Tam was attempting to renegotiate his rate of pay at the time he refused to carry out his assigned duties, a tactic that, while common in a unionized workplace, does not lend itself to a non-unionized sector. The delegate submits that Mr. Tam’s actions were both deliberate and intentional, actions that have been found by the Tribunal to constitute an act of misconduct constituting just cause. The delegate further submits that nowhere in Mr. Tam’s emails does he complain of the “crushing workload” he now presents as a justification for refusing to carry out his assigned duties.
25. Counsel for WFP submits that because the issues of wrongful and constructive dismissal were not before the delegate, these arguments are not proper subject matter on appeal. In the alternative, WFP contends that the Determination provides a reasoned analysis as to why the assignment of additional markets to Mr. Tam did not constitute a substantial alteration of a condition of his employment or that the assignments resulted in a “constructive dismissal”.
26. WFP argues that the delegate properly determined that Mr. Tam was not entitled to overtime pay and was terminated for just cause.

27. In a reply submission, counsel for Mr. Tam submits that the issues of constructive dismissal and wrongful dismissal were repeatedly raised and emphasized by Mr. Tam in his submissions and oral arguments. Counsel argues that these issues were part of the mediation and hearing brief which were provided to the delegate. Mr. Tam contends that, although the delegate briefly considered the issue of constructive dismissal, he erroneously focused on the nature of Mr. Tam's work rather than the cumulative effect of WFP's conduct.

Constructive dismissal

28. In his August 9, 2010, complaint, Mr. Tam's sole allegation was that he had been wrongfully dismissed and was therefore entitled to compensation for length of service:

I was dismissed by the Employer WITHOUT just cause, WITHOUT being given any prescribed written notice by the Employer, and WITHOUT receiving any Termination Pay from the Employer. This situation has forced me to seek for justice and the Termination Pay which I am entitled to under section 63 of the *Employment Standards Act*. [reproduced as written]

29. In the self-help kit sent to WFP as part of the process leading to the complaint, Mr. Tam sought only compensation for length of service in the amount of \$4,559.90, representing five week's wages.
30. For Mr. Tam to now assert that he was constructively dismissed is an attempt to re-argue the complaint on a different basis than the one asserted at the hearing. The limited nature of a review under the *Act* requires that the parties, together with the Delegate, define the issues in contest. The parties will adduce evidence related to those issues. The decision should address the issues so defined as raised by the parties. A Delegate cannot have erred in law if his Determination fails to address an issue raised for the first time on appeal.
31. There is nothing in the record to support Mr. Tam's assertion that he argued that he had been constructively dismissed at any time prior to the hearing. There is also nothing in the record to suggest that he alleged a contravention of section 66, the statutory provision which is, in essence, a codification of the notion of constructive dismissal. That section provides that, if a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated.
32. Even though Mr. Tam did not allege that he was wrongfully dismissed prior to the hearing, it appears that the delegate did turn his mind to the question whether or not WFP had altered a significant matter and circumstance that in any way affects the employment relationship and whether or not the alteration was substantial. Such an analysis is required under section 66 and is essentially a question of fact, to be assessed objectively (see *Helliker*, BC EST # D347/97). The evidence before the delegate was that the only aspect of Mr. Tam's job that had changed was the amount of work he was asked to perform. The employer estimated that Mr. Tam's workload had increased by 10%, based on the number of containers that were shipped to the countries Mr. Tam was responsible for. Mr. Tam disputed WFP's estimate, and although he asserted that his workload had increased by 40%, he acknowledged that this figure was only an estimate since he did not have any figures to support it. Furthermore, Mr. Tam acknowledged that his market responsibilities had increased every year of his employment. There was no evidence that Mr. Tam's employment changed in any way other than the addition of additional markets. Given that the evidence of Mr. Tam's workload increase due to those additional responsibilities was unreliable, I am unable to conclude that the delegate erred in law in finding that Mr. Tam had not demonstrated that a condition of his employment had been substantially altered.

Just cause

33. In assessing whether or not WFP had met the burden of showing that it had just cause to terminate Mr. Tam's employment, the delegate considered whether or not Mr. Tam's refusal to perform work assigned to him constituted insubordination.
34. The Tribunal has held that insubordination as exhibited by a wilful disobedience of an order will justify summary dismissal since it shows disregard of a condition essential to the contract of service (*Grouse Mountain*, BC EST # D143/96). In *Hoare* (BC EST # D226/03), the Tribunal held as follows:

It is an employer's right to determine how business will be conducted. Where an employee disobeys an order to perform work, the employer may terminate the employee for insubordination, so long as the work which the employee is directed to perform is not contrary to the law, dishonest, dangerous to the health of employees and within the ambit of the job for which the employee was hired [*Stein v. British Columbia (Housing Management Commission)*, BCCA (1992), 65 BCLR (2d) 181].

35. I find no error in the delegate's conclusion that WFP had just cause to terminate Mr. Tam's employment.

Overtime claim

36. The delegate found Mr. Tam's overtime claim to lack both credibility and reliability. Counsel presents no evidence that the delegate's conclusion was in error; rather, his submissions appear to be nothing more than an attempt to re-argue the case presented to the delegate. I find that no error in the delegate's conclusion on Mr. Tam's overtime claim.

Natural Justice

37. Principles of natural justice are, in essence, procedural rights that ensure that parties know the case being made against them, the opportunity to reply, and the right to have their case heard by an impartial decision maker. A party alleging a denial of natural justice must provide some evidence in support of that allegation.
38. Mr. Tam argues that the delegate breached the principles of natural justice "including but not limited to, abuse of discretion, taking into account irrelevant factors, and failure to take into account relevant factors" as well as failing to take into account material evidence that has become available "which indicates that the Respondent, intentionally or otherwise, spun the truth, provided false testimony, and deceived the decision-maker". In a reply submission, counsel for Mr. Tam submits that the delegate failed to properly address the issues of constructive and wrongful dismissal.
39. I am unable to find that Mr. Tam has demonstrated a denial of natural justice. He was represented at the hearing by his counsel. There is no evidence that Mr. Tam was denied the opportunity to fully present his case. Mr. Tam was also aware what WFP's position would be on appeal given its response to his self-help form. There is no evidence, or suggestion, that he was denied any opportunity to respond to WFP's evidence or that the delegate was biased.
40. Counsel for Mr. Tam has made very serious allegations against both the delegate and the Respondent's witnesses. Those include an assertion that the delegate abused his discretion and that the Respondent gave "false testimony". Not only does counsel provide no particulars about how the delegate "abused his discretion" or what evidence was "false", he provided no evidence in support of these assertions. Given the seriousness of these allegations, they ought not be made unless supported by sufficient evidence. In the absence of any evidence, I find these allegations entirely without foundation.

41. I find no basis for this ground of appeal.

New Evidence

42. Counsel contends that Mr. Marra “misrepresented himself” by alleging that Mr. Tam never raised the issue of overtime with Ms. Briton and that as a result of the unavailability of Ms. Briton’s evidence during the hearing and Mr. Marra’s “false testimony”, the delegate wrongly concluded that Mr. Tam had not raised the issue of overtime with anyone at WFP. Counsel submits that the delegate’s conclusion would have been different had Ms. Briton’s evidence been available at the time of the hearing.

43. Counsel for Mr. Tam also argues that the evidence of Bill Moulds, the owner of South Fraser Container Services Ltd., would show that Mr. Tam worked overtime.

44. Both the delegate and counsel for WFP contend that this evidence does not meet the Tribunal’s test for new evidence.

45. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST # D171/03, the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:

- 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;
- the evidence must be relevant to a material issue arising from the complaint;
- the evidence must be credible in the sense that it is reasonably capable of belief; and
- 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.

46. The new evidence advanced by counsel for Mr. Tam does not meet the Tribunal’s test for new evidence. The evidence of both Ms. Briton and Mr. Mould was available at the time of Mr. Tam’s complaint hearing and ought to have been presented at that time. Counsel provides no explanation as to why it was not.

47. Counsel has submitted what purports to be a transcript of a telephone message left by Ms. Briton on Mr. Tam’s answering machine. This “evidence” is not sworn nor is there any way to assess its authenticity. This “evidence” does not meet condition three set out above.

48. Counsel for Mr. Tam asserts that Mr. Mould would be able to say that he communicated with Mr. Tam outside regular work hours at nights and on weekends. I am unable to find that the evidence of this witnesses, if believed, would have led the delegate to a different conclusion on the issue of whether or not Mr. Tam was entitled to overtime wages. There is no evidence Mr. Moulds was aware of Mr. Tam’s hours of work or whether he was working overtime when he communicated with him.

49. I find no basis for this ground of appeal.

50. The appeal is dismissed.

ORDER

51. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated July 27, 2011, be confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal