Employment Standards TRIBUNAL

An appeal

- by -

GM Marble & Granite Works Ltd.

- 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 Ann Hart

FILE No.: 2005A/111

DATE OF DECISION: September 8, 2005

DECISION

SUBMISSIONS

Max Kirton	on behalf of GM Marble & Granite Ltd.
Curtis Marcynuik	on his own behalf
Alan Phillips	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by GM Marble & Granite Ltd. pursuant to section 112 of the *Employment Standards Act* (the "*Act*") of a Determination issued on May 25, 2005 (the "Determination") by a delegate of the Director of Employment Standards (the "Director").

2. In the Determination, the delegate for the Director ordered that GM Marble & Granite Ltd. pay to its former employee Curtis Marcynuik $640.00 for compensation for length of service; $25.60 for vacation pay, and $7.67 for interest pursuant to sections 58, 63, and 88 of the *Act*.

3. The appeal was brought by GM Marble & Granite Ltd. on the grounds that the Director failed to observe the principles of natural justice in making the Determination.

4. On the Appeal Form, GM Marble & Granite Ltd. requested an oral hearing. I have concluded that this appeal may properly be determined by way of written submissions.

ISSUES TO BE DETERMINED

5. Section 112(1) of the *Act* sets out the grounds upon which an appeal may be made to the Tribunal from a Determination of the Director as follows:

> 112(1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:
> (a) the director erred in law;
> (b) the director failed to observe the principles of natural justice in making the determination;
> (c) evidence has become available that was not available at the time the determination was made.

6. Of the three boxes identifying grounds of appeal on their Appeal Form, GM Marble & Granite Ltd. checked the box stating that the Director failed to observe the principles of natural justice in making the Determination. In his letter dated 27 June 2005 which was attached to the Appeal Form, Mr. Kirton wrote: "*…With regard to [the] Determination, regarding Curtis Marcyniuk and our company being charged severance pay and an administration fine I can only appeal the whole process."*

7. Although on the Appeal Form GM Marble and Granite Ltd. indicated that the basis for its appeal was a denial of natural justice, it is apparent that its concern was with the manner in which the delegate for the Director dealt with the evidence. On that basis, the grounds for appeal are more appropriately

characterized as an allegation that the Director erred in law [section 112(1)(a)]; or possibly that there is "new evidence" [section 112(1)(c)]. In essence, GM Marble and Granite Ltd. takes the position that the delegate for the Director issued the Determination based on an incorrect finding that Mr. Marcyniuk had not been warned that his employment was in jeopardy.

8. As noted by the Tribunal in *Triple S Transmission Inc.* (BC EST #D141/03), although most lawyers generally understand the fundamental principles underlying the "rules of natural justice" and the other grounds identified under the *Act*, the grounds for an appeal "are often an opaque mystery to someone who is untrained in the law." The Tribunal member expressed the view that the Tribunal should not "mechanically adjudicate an appeal based solely on the particular "box" that an appellant has – often without a full, or even any, understanding – simply checked off."

9. The Tribunal member further wrote as follows:

> When adjudicating an appeal, I believe it is appropriate for the adjudicator to first inquire into the nature of the challenge to the determination (or the process that led to it being issued) and then determine whether that challenge, *prima facie*, invokes one of the statutory grounds. In making that assessment, I also believe that adjudicators should take a large and liberal view of the appellant's explanation as to why the determination ought to be varied or cancelled or why the matter should be returned to the Director.

10. I agree that "a large and liberal view" should be taken, and will therefore address each of the statutory grounds of appeal in light of submissions made on behalf of GM Marble and Granite Ltd. to decide the following three issues:

(a) Did the director err in law in making the Determination?

(b) Did the director fail to observe the principles of natural justice in making the Determination?

(c) Is there new evidence which has become available that was not available at the time the Determination was made?

BACKGROUND

11. The employer, GM Marble and Granite Works Ltd. operates a stonework business. Curtis Marcynuik was employed as a fabricator / polisher from June 30, 2004 to February 15, 2005. He was paid $12.00 per hour, and this was later increased to $16.00 per hour.

12. The employer terminated Curtis Marcynuik's employment, and maintained that there was just cause for the termination. Mr. Marcynuik subsequently filed a complaint under section 74 of the *Employment Standards Act* alleging that GM Marble & Granite Works Ltd. had contravened the *Act* by failing to pay compensation for length of service.

13. The delegate for the Director held a hearing by telephone conference on May 2, 2005, and the Determination was issued on May 25, 2005.

ARGUMENT

Appellant's Submissions

14. Mr. Kirton wrote that the matter of poor workmanship had been addressed with Curtis Marcynuik on more than five occasions, and he and Ed Anderson, the Foreman, had testified about that in the hearing before the delegate for the Director. Other concerns about Mr. Marcynuik were chronic lateness in attending for work and in returning to work from lunch; parking in front of the shop; and working in an unsafe manner. In addition, Mr. Kirton asserted that Mr. Marcynuik had "drastically overestimated" his working ability and resume. Mr. Kirton indicated that he had tried to help Mr. Marcynuik, and had overlooked some of his shortcomings because he had a young family. He further wrote:

> *"I personally warned Curtis that he had to get along with the other employees, improve his workmanship, not be late for work, not to park his car in front of the shop or he would not be working in our company. He was well aware of this."*

15. Mr. Kirton noted that Mr. Marcynuik had admitted that he had a bad attitude, and emphasized how important it was, in a small shop of four employees, to get along with others. He added the following comment: *"With regard to theft, there is a police report #05-9881 already in place regarding theft of rubber boots from our premises"*.

16. A letter dated April 30, 2005 from Patricia Jealouse, who indicated that she was "in partnership with Max Kirton of GM Marble", was submitted with the appeal.

Director's Submissions

17. The Director's delegate submitted that the employer had the burden to prove that there was just cause for the termination of Curtis Marcynuik's employment. There was no evidence to show that Mr. Marcynuik had been warned that his employment could be terminated if he did not change his attitude and behaviour.

18. GM Marble & Granite Ltd. had raised the issue of a police report concerning an alleged theft of rubber boots from the workplace. The delegate for the Director noted that the existence of a police report did not necessarily demonstrate that there had been a theft, or that Curtis Marcynuik was responsible for the theft. There was no evidence to show that the complainant had been charged with, or convicted of theft. In any event, GM Marble & Granite Ltd. had taken the position at the hearing before the delegate that Mr. Marcynuik's employment had been terminated because of his "bad attitude", and not because of theft.

19. The delegate for the Director wrote that although the letter from Patricia Jealouse (which was submitted by the employer) was dated 30 April 2005, and the Determination was issued on May 25, 2005, the first time he had seen that letter was when it was provided together with the appeal documents.

Respondent's Submissions

20. Curtis Marcynuik's evidence was that it was "entirely untrue" that he had been warned that his workmanship was jeopardizing his employment, and it was also not true that he had frequently been late for work. He indicated that he had not worked in an unsafe manner or caused equipment not to be safely operated. Mr. Marcynuik submitted that his employment had been terminated "for looking at someone [the foreman] the wrong way".

ANALYSIS

Natural Justice

21. The basis on which GM Marble and Granite Ltd. has brought this appeal is that the delegate for the Director failed to observe the principles of natural justice. Principles of natural justice are essentially procedural rights that ensure that parties have a right to be heard by an independent decision maker. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party (see *BWI Business World Incorporated* BC EST #D 050/96).

22. The burden rests with the party alleging an error of natural justice, to demonstrate that error. There is nothing apparent on the record in this case which persuades me that there was an infringement of the principles of natural justice. GM Marble and Granite Ltd. participated in an oral hearing conducted by telephone conference on May 2, 2005. Nothing in Mr. Kirton's submission suggests that the employer was not given a fair opportunity to be heard.

23. Clearly, Mr. Kirton takes issue with the findings which were made by the delegate for the Director in the Determination. However, there was no evidence adduced, and no submissions were made to support the assertion that the delegate had failed to observe the rules of natural justice. The appeal cannot succeed on this ground.

Error in Law

24. Error in law is not specifically identified as a ground of appeal on the Appeal Form delivered by the appellants. However, as set out above, because a liberal view of the appellant's grounds for the appeal must be taken, I will address the issue of whether the delegate for the Director erred in law in making the Determination.

25. In the Determination, the Director's delegate correctly identified that the onus is on the employer to show that there was just cause for termination. The delegate referred to the elements of the four-part test that this Tribunal has applied in cases of unsatisfactory performance. That test was outlined by the Tribunal in *Silverline Security Locksmith Ltd*., BC EST #D207/96. In the absence of serious misconduct or a fundamental breach of the employment relationship, the employer must be able to demonstrate that:

1. Reasonable standards of performance have been set and communicated to the employee;
2. The employee was warned clearly that his continued employment was in jeopardy if such standards were not met;
3. A reasonable period of time was given to the employee to meet such standards; and
4. The employee did not meet those standards.

26. Mr. Kirton provided no clear and compelling evidence that the delegate erred in his conclusion that Mr. Marcyniuk had not been discharged for just cause. Rather he seeks to re-assert the facts as he sees them, rather than as the Director found them, and requests that the Tribunal reach a different conclusion on those facts. The Tribunal decided in *Britco Structures Ltd.* BC EST #D260/03, that this kind of circumstance does not support a determination that there has been an error of law, but instead alleges an error in findings of fact. An error in findings of fact is not one of the ground on which an appeal may be based pursuant to section 112 of the *Act*.

27. This is not a situation where the Director made findings of fact in the absence of any evidence. The only basis for attacking the findings made by the delegate for the Director is to show that the delegate took a view of the facts that could not reasonably be entertained based on the evidence. Clearly there was evidence, which is identified in the Determination, that reasonably supported the Director's conclusion.

28. I am unable to find the delegate for the Director erred in finding that Mr. Marcyniuk was entitled to compensation for length of service. In my view, the delegate applied the law correctly in arriving at his conclusion.

New Evidence

29. This ground was also not checked on the Appeal Form. However, it appears that Mr. Kirton included evidence which was not before the delegate for the Director in his submission for the appeal, and also provided the letter from Patricia Jealouse, which was not before the delegate for the Director.

30. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D 171/03 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.

31. The evidence presented by Mr. Kirton in his letter dated June 27, 2005 was available at the time the hearing was conducted. The delegate for the Director provided the employer with the opportunity to present its evidence during the hearing. From the Determination, it appears that Mr. Kirton and Mr. Anderson provided oral testimony during the hearing.

32. Although the delegate recorded in the Determination that Mr. Anderson had testified about warning Mr. Marcynuik, he wrote that there was no indication that Mr. Anderson, or any other person had advised Mr. Marcynuik that his employment could be terminated if his behaviour did not improve. The delegate accepted that the employer viewed the complainant as a 'problem employee' but found that there was no evidence to show that the employer undertook disciplinary measures to 'fix' the problems.

33. Mr. Kirton wrote in his submission that he had personally warned Mr. Marcynuik that if his behaviour did not improve, he would no longer be working for the company. There is no indication, however, that Mr. Kirton provided this testimony during the oral hearing before the delegate for the Director.

34. Similarly, the evidence provided by Mr. Kirton, which appears to be an allegation of theft of a pair of rubber boots, was not put forward at the original hearing as a reason for the termination of Mr. Kirton's employment, and that evidence was not raised with the delegate for the Director.

35. The evidence Max Kirton now seeks to present does not meet the test for new evidence, as it could have been presented to the delegate for the Director during the hearing. An appeal is not intended to be a second opportunity for the appellant to present its case. Rather, the purpose of the appeal process is to ascertain whether there was an error in the Determination based on the grounds set out in section 112 of the *Act*.

36. The document written by Ms. Jealouse is dated April 30, 2005, which was prior to the date of the hearing. At the end of the letter, Ms. Jealouse wrote: *"Ps. This letter was sent with the original documents but it seems not to have been regarded."* I cannot be sure what Ms. Jealouse meant by this statement. Perhaps Ms. Jealouse added that statement after the letter was originally written, and was indicating that the letter (in its original form) had been sent to the delegate for the Director prior to the Determination being issued.

37. Ms. Jealouse indicated in her letter that she didn't spend a lot of time in the shop, and was aware of what occurred there because of her discussions with Mr. Kirton. As a result, most of the evidence provided by Ms. Jealouse in her letter is hearsay evidence, meaning that it was based on what she had been told by Mr. Kirton, and was not a first-hand account based on her own personal knowledge. Such evidence is generally given limited weight because the individual providing the evidence did not personally witness the events in question.

38. The delegate for the Director wrote in his submission that the first time he had seen the letter written by Ms. Jealouse was when it was submitted as part of the appeal documents.

39. The letter from Ms. Jealouse does not meet the test for new evidence, as set out in the *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.* case, Supra. The letter does not form part of the record which was before the delegate for the Director, and given that Ms. Jealouse works closely with Mr. Kirton, it should have been easily available. In addition, I have not been persuaded that the evidence contained in that letter has high potential probative value, and could have resulted in a different conclusion on a material issue in this case.

40. The appeal is also dismissed on the ground that there is new evidence which has become available that was not available at the time the Determination was made.

ORDER

41. Pursuant to Section 115 of the *Act*, the Determination dated May 25, 2005 is confirmed together with any interest that has accrued under Section 88 of the *Act*.

Carol Ann Hart
Member
Employment Standards Tribunal