Employment Standards TRIBUNAL

An appeal

- by -

Penny Kang
("Kang")

- 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: Margaret Ostrowski, Q.C.

FILE No.: 2009A/130

DATE OF DECISION: December 21, 2009

DECISION

SUBMISSIONS

Penny (Ping) Kang	on her own behalf
Stephanie Bogaert	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Kang pursuant to section 112 of the *Employment Standards Act (*the *"Act")* from a Determination issued by the Director of Employment Standards on September 22, 2009. In that decision, the Director found that Classic Caregivers Ltd. ("Classic") had not contravened the *Act* and that no further action would be taken. Kang had alleged that Classic lied to her in the course of her employment and she was given a letter of reprimand which was to be placed in her personnel file - those facts caused her to quit her job. She asked for $2,000 in compensation for the loss of the job and for emotional strain.

2. The Tribunal has reviewed the Determination, the submissions of the parties and the section 112(5) record and has determined that a decision can be made without an oral hearing as there are written submissions from the parties setting out their respective positions.

3. Kang has appealed the Determination on the grounds that the Director failed to observe the principles of natural justice in making the Determination. She stated that the loss of her job was a wrongful dismissal in that she received a poor employment performance letter in her file and Classic was dishonest with her; because of these factors, she could not stay in the job. In her submission of November 13, 2009, she described her "quit" as a constructive dismissal, that she had no other reasonable choice but to quit, and that the "determination did not make a correct decision". This submission by Kang is in effect alleging an error of law by the Director in the analysis of the facts in regards to section 66 of the *Act*. I adopt a liberal view of the grounds of appeal and include an error in law by the Director as a further ground for appeal.[1] In Kang's submission of November 13, 2009, she additionally requested that new evidence be allowed to be considered in the appeal. She said that she was only asked for the warning letter as evidence from the Employment Standards Branch and therefore she did not supply further evidence to the Branch.

ISSUES

4. The issues to be determined by the Tribunal are as follows:

   a. Did the Director fail to observe the principles of natural justice in making the Determination?

   b. Did the Director err in law?

   c. Is the evidence that Kang tendered, evidence that was not available at the time the Determination was made and if so, is that new evidence sufficient to justify the Tribunal to vary or cancel the Determination under appeal or to refer the matter back to the Director?

[1] Regarding the adoption of a liberal view of grounds of appeal, I refer to the analysis in *Triple S. Transmission Inc.*, BC EST # D141/03

BACKGROUND

5. Kang was hired by Classic in January 2005 as a caregiver for elderly persons and others needing care in their homes. She said that she worked hard at the job and received certificates and rewards from Classic. This is not disputed by the Director or Classic. However she said that during her time working for Classic, in some matters the office did not treat her fairly; for instance, she described that when she left a note (the note said "You do your job, I do my job, behave yourself") to another caregiver who she alternated work shifts with, that caregiver gave the note to the office, and this resulted in the office cancelling Kang's shift. In another example, on May 7, 2008, one of the co-ordinators at Classic phoned Kang to tell her that her client went to another company because of payment issues and the client no longer needed Kang to work for her. Kang said that this was a lie as the client had told Kang that Blue Cross paid Classic. On May 21, 2008, Classic sent Kang a warning letter because she had sent e-mails to the office with work concerns and because she had phoned that client, both of which were allegedly contrary to Classic's work policy. She said that she was hurt deeply by this warning letter and was so stressed by it, that she left the job at Classic on May 28th, 2008. In a note telling her employer that she was leaving, she stated that working for Classic was a "wonderful experience".

6. Kang reapplied for employment with Classic around October 18 and 20, 2008, after seeing an ad in an employment paper, but was told by Classic that there were no jobs. Kang said that this was another lie. Classic's position was that Kang was best placed with Chinese speaking clients and that there were no openings at that time with such clients.

7. Kang states in her submissions that she was wrongfully dismissed. However she admits that she, in fact, quit the job and said that it was constructive dismissal as her former employer kept cutting her work hours, took her work without consent and just before she left the job, she only had a few hours of work per week. She said the office directive prohibiting e-mails was only initiated in August 2008, that is, after she had left the job. Classic said that this was a policy that Kang had been told about.

8. Kang submits that she was told by the Employment Standards Branch only to send a copy of the warning letter to them though she would have liked to have sent more evidence. In her submission in this appeal dated November 13, 2009, Kang also alleged that Classic kept cutting her work hours such that she only had a few hours of work per week. Attached to the appeal, Kang included a copy of an email from a Classic staff member, a card of good wishes from Classic and Certificates of Appreciation from Classic dated July 2007, and an Award for Employee of the Month dated January 16, 2007. In her submission of October 8, 2009, she included a letter to herself from Classic dated December 1, 2005, telling her of an increase in wage, and two letters of reference from former employers of Kang. In her submission of October 16, 2009, she included a copy of a letter to the Employment Standards Branch dated January 16, 2009, and a copy of a card of thanks from the family of a client. I conclude that these documents as well as further details in her submissions comprise the new evidence that Kang would like considered in this appeal.

ANALYSIS

9. Pursuant to amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are limited to the following as set out in section 112(1):

> 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.

Kang has appealed on ground (b) on her Appeal Form 1. In her submissions she made arguments that are in the nature of an error of law (ground (a)) and has asked that new evidence be considered (ground (c)). I will look at ground (c) first, that is, is there evidence now available that was not available at the time the determination was made that should be considered in this appeal. If I find that to be the case then that evidence will be used in my analysis of the remaining grounds.

1. New Evidence

10. In *Davies et al (Merilus Technologies Inc.)* BC EST # D171/03, the Tribunal set out the following test regarding the ground for "new evidence":

> We take this opportunity to provide some comments and guidance on how the Tribunal will administer the ground of appeal identified in paragraph 112(1)(c). This ground is not intended to allow a person dissatisfied with the result of a Determination to simply seek our more evidence to supplement what was already provided to, or acquired by, the Director during the complaint process if, in the circumstances, that evidence could have been provided to the Director before the Determination was made. The key aspect of paragraph 112(1)(c) in this regard is that the fresh evidence being provided on appeal was not available at the time the Determination was made. In all cases, the Tribunal retains a discretion whether to accept fresh evidence. In deciding how its discretion will be exercised, the Tribunal will be guided by the test applied in civil Courts for admitting fresh evidence on appeal. That test is a relatively strict one and must meet four conditions: (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.

11. I adopt the test set out in the above decision as a reasonable statement of a standard to follow in the analysis of whether to accept the newly tendered evidence.

12. The evidence tendered by Kang as new evidence and outlined in paragraph 8 above was submitted after the date of the Determination. Most of this evidence was available before the date of the Determination. Kang explained that the reason she had not tendered the evidence earlier was because the Employment Standards Branch had misled her and had only asked for a copy of her warning letter. I find that difficult to accept as an explanation for not tendering evidence earlier as I see two instances in documents where that position is contradicted: (1) in the copy of the Complaint and Information Form received by the Employment Standards Branch on November 10, 2008, there is a directive to the complainant to attach all available information relating to the claim. Kang signed directly below the paragraph giving such a directive. (2) In one of the letters from the Employment Standards Branch dated January 7, 2009, to Kang that she submitted on October 8, 2009, the Branch representative stated that "I asked you to supply more information which you have now done." These are two instances where more information was requested from Kang and I therefore find her reason for not submitting the evidence earlier not to be persuasive. Accordingly, I find that all the new documentary evidence submitted fails to meet the condition that it was not available prior to the Determination being made.

13. Even if I did consider the substance of the new documentary evidence, I do not find most of it to have high potential probative value. The letter from Classic dated Dec. 1, 2005, telling Kang of an increase in wage, two letters of reference from former employers, the certificate and award, a card of well wishes from Classic and a copy of a card of thanks from the family of a client all support Kang's contention that she had been a good worker. The Director in the Determination does not dispute her work performance or the receipt of any previous merits Kang received. Those pieces of evidence are not particularly relevant to the issue whether there has been a contravention of section 66 of the *Act* which involves a determination of whether a condition of employment is substantially altered.

14. Kang further submitted that Classic opened a letter addressed to her and then sent it on to her. I do not find this fact pivotal as this was not the reason given by Kang for quitting the job.

2. Failure to Observe Principles of Natural Justice

15. Kang has appealed the Determination on the basis that she was denied natural justice. The principles of natural justice are concerned with the procedural fairness of an adjudicative process. Natural justice requires that a party has an opportunity to know the case against him or her, and it includes the right to be heard by an unbiased decision maker who has heard the evidence and has not prejudged one or more of the issues, and the right to receive adequate reasons for the decision. The onus in on the appellant who has alleged a breach of natural justice to persuade the Tribunal on a balance of probabilities that there was a denial of natural justice.

16. Kang does not specifically state how she was denied natural justice but she does submit that initially the Employment Standards Branch told her that they only dealt with situations where an employee is owed wages and her case was closed without a Determination. Upon the writing of a further letter on July 17, 2009, Kang's case was reopened and a Determination issued. I have read the correspondence in this regard and I detect a certain lack of interest in her case initially by the Employment Standards Branch because Kang was not able to specify the section of the *Act* which had been allegedly violated. But as a Determination was ultimately issued, I will not speculate further on what was the denial of natural justice and find that the appellant has not satisfied the onus on her to persuade me that there was such a denial.

3. Errors of Law

17. The *Act* does not provide for an appeal based on errors of fact and the Tribunal does not consider such appeals unless such findings raise an error of law (*Britco Structures Ltd.*, BC EST # D260/03). The Tribunal has adopted the following definition of "error of law" set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)* [1998] B.C.J. No. 2275 (B.C.C. A):

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 reasonable be entertained; and
5. adopting a method of assessment which is wrong in principle.

18. Kang did not set out the section or sections of the *Act* that was allegedly contravened by Classic. The Director in the Determination based her analysis of the evidence on Section 66 of the *Act* which reads as follows:

> **Director may determine employment has been terminated**
>
> **66** If a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated.

19. Kang alleges that the Director erred when she failed to consider that "not all quits are quits, and not all dismissals are dismissals." She further submitted that "my employer took wrong action, gave me wrong warning letter; my employer acted poor performance and dishonesty." She also alleged constructive dismissal.

20. The doctrine of constructive dismissal is grounded in the principles of the law of contract. It is not to be assumed however that those principles are identical to those factors to be considered when an issue arises for determination under section 66. An act is a statutory scheme that creates rights and obligations separate and district from those at common law (*Re Rizzo v. Rizzo Shoes* [1998] 1 SCR 27.). Several previous decisions of the Employment Standards Tribunal have reiterated that "substantially altered" referred to in section 66 of the *Act* is an alteration that "must be sufficiently material that it could be described as being a fundamental change in the employment relationship" (for example see *Big River Brewing Company Ltd.* BC EST # D324/02). Decisions on this issue have included an analysis of the nature of the employment relationship, the conditions of employment, the alterations that have been made, the legitimate expectations of the parties, and whether there are any implied or express agreements or understandings. I will rely on such factors to determine whether there has been a substantial alteration of the conditions of employment in this instance. The Director determined that there was no violation of section 66 of the *Act*. I am in agreement that section 66 is the section to consider here. The issue is whether the Director's conclusion regarding section 66 is correct.

21. It is also important to note that an appeal is not an opportunity by the appellant to re-argue and represent a case that was made before the Director. As long as there is an evidentiary basis for the Director to make the findings of fact that she did, the Tribunal will not substitute a finding of fact without a substantial basis. (*Kelly* BC EST # D065/04)

22. The case of *Jager*, BC EST # D244/99, sets out a short procedure for an analysis by the Director under section 66:

> Under Section 66, the Director should consider, first, whether there was an alteration in any matter or circumstance affecting the employment relationship. If there is no such alteration, that is an end of the matter. If the Director concludes there is an alternation, the next step is to consider whether the alteration is "substantial". If the alteration is not "substantial", there is no basis for exercising the discretion given the Director in Section 66.

23. I come to the same decision as the Director in the Determination. I accept from Kang that she was upset at the letter of reprimand from Classic and that a working relationship between her and some of the staff members at Classic had all but broken down. There was little trust and good feelings left between them because Kang alleged that Classic lied to her on this matter. But she has not proven that Classic was not telling the truth regarding what the client had said. Her evidence on this issue is opposite to that from Classic and the onus of proof is on Kang to show on a balance of probabilities that Classic had lied to her on this matter as she alleges so as to create an untenable working relationship. A letter from the client would have been some proof. A breakdown in the relationship between Classic and Kang because of the letter of

reprimand, without strong proof that the letter was malicious and without basis, may have caused an alteration in emotions for Kang such that she no longer wanted to work for Classic, but it does not meet the test that a condition of employment was substantially altered.

24. Furthermore, regarding Kang's later submission that she had very little work from Classic at the time she left the job, implying that this was a substantial alteration of employment conditions, I note that this allegation was not before the Director prior to the Determination being issued and there was no reason given for not raising this issue at the hearing. Even upon considering it now, evidence was not presented at any time regarding what the nature of the employment relationship was - was there an express or implied agreement between Kang and Classic regarding the amount of work that Kang would receive? Was she guaranteed full time work so that if she only had a few hours of work, then a case for a substantial alteration of a condition of employment could be made? This is not argued by Kang. Therefore I have no reason to believe that there was an agreement or understanding on this issue between her and Classic. Kang has not shown that the loss of a client which thereby reduced her work load was a substantial alteration in the arrangement she had with Classic.

ORDER

25. Pursuant to section 115 of the *Act,* I order that the Determination dated September 22, 2009, be confirmed.

Margaret Ostrowski, Q.C.
Member
Employment Standards Tribunal