

An appeal

- by -

Rite Style Manufacturing Ltd
(“Rite Style”)

- 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: David B. Stevenson

FILE No.: 2011A/148

DATE OF DECISION: December 9, 2011

DECISION

SUBMISSIONS

Parminder Singh	on behalf of Rite Style Manufacturing Ltd.
Gurnavdeep Sagoo	on his own behalf
Gagan Dhaliwal	on behalf of the Director of Employment Standards

OVERVIEW

1. This decision addresses an appeal filed under Section 112 of the *Employment Standards Act* (the “Act”) by Rite Style Manufacturing Ltd. (“Rite Style”) of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on August 26, 2011.
2. The Determination was made in respect of a complaint filed by Gurnavdeep Sagoo (“Sagoo”), who alleged Rite Style had contravened the *Act* by failing to pay length of service compensation.
3. The Determination found that Rite Style had contravened Part 8, section 63 of the *Act* and ordered Rite Style to pay Sagoo an amount of \$1,027.62, an amount which included wages and interest.
4. The Director also imposed an administrative penalty on Rite Style under Section 29(1) of the *Regulation* in the amount of \$500.00.
5. The total amount of the Determination is \$1,527.62.
6. In this appeal, Rite Style says the Director failed to observe principles of natural justice in making the Determination and seeks to have the Determination cancelled.
7. The Tribunal has statutory authority to hold any combination of written, electronic and oral hearings on an appeal (see section 103 of the *Act* and section 36 of the *Administrative Tribunals Act*). Appeals to the Tribunal are not *de novo* hearings and the statutory grounds of appeal are narrow in scope. Typically, the Tribunal will decide an appeal with a written hearing – one based on the Determination, the written submissions of the parties, the material in the section 112(5) “record” and any additional evidence allowed by the Tribunal to be added to the “record”. The Tribunal has decided this appeal can be decided with a written hearing.

ISSUE

8. The sole issue is whether the Director failed to observe principles of natural justice in making the Determination.

THE FACTS

9. Rite Style operates a manufacturing business. Sagoo was employed by Rite Style as a production worker at a rate of \$13.00 an hour.

10. An incident occurred on January 13 and 14, 2011, that caused Sagoo to be sent home from work by Parminder Singh, the vice-president of the company, on January 14, 2011. Sagoo claimed he was terminated on that day. Rite Style claimed Sagoo quit his employment when he did not return to work after January 14, 2011.
11. The Determination refers to evidence of conversations between Sagoo and two witnesses provided by Rite Style at the complaint hearing: Ms. Anu Sodhi, an employee of the company, and Ms. Bijal Patel, the company's accountant.
12. The Determination notes that Ms. Patel testified to a number of telephone conversations she had with Sagoo on January 14, 2011. The Determination describes her evidence about the first call on that day as follows:

She states he first called her to ask her why he was sent home. She told him she did not know, and that he should speak to Mr. Singh.

She told him she thought he had quit.
13. There was other evidence of Ms. Patel referred to in the Determination, including evidence that Sagoo had asked for "all his dues", meaning his unpaid wages, and that Sagoo should talk with Mr. Singh if he had issues.
14. Sago was advised in a letter dated February 28, 2011, that Rite Style deemed him to have quit his employment.
15. The Director conducted a complaint hearing on August 10, 2011. In the Determination, the Director found, on the available evidence, that Sagoo had not formed the necessary intent to quit his employment and that the objective evidence subsequent to January 14, 2011, which included several unsuccessful attempts by Sagoo to contact Mr. Gill, the owner of the company, between January 14, 2011, and February 28, 2011, supported that conclusion. The Director also found Rite Style had made no attempt to contact Sagoo after January 14, 2011, prior to sending the February 28, 2011, letter.
16. The Director found the letter of February 28, 2011, to be formal notice of his termination and entitled Sagoo to compensation for length of service.

ARGUMENT

17. In this appeal, Rite Style argues the Director based the Determination on assumptions and ignored certain evidence provided by them. Rite Style refers to the evidence of Ms. Patel that Sagoo had asked for "all his dues", as proving "that he had quit his job". Rite Style also says the Director ignored evidence of a taped voice mail message that showed Sagoo lied when he said he never called or left messages for Mr. Singh during his employment tenure. Rite Style says Sagoo told other lies at the complaint hearing and these lies were not recorded in the Determination.
18. Rite Style submits the Determination does not accord with the facts and evidence and, as a result, is wrong.
19. The appeal submission makes no mention of Ms. Patel having given evidence that she told Sagoo he "should have come to work the following working day".
20. The Director and Sagoo have each filed a response to the appeal.

21. The Director submits the evidence Rite Style says was not referred to in the Determination was considered to be irrelevant to the question being considered, which was whether Sagoo had quit his employment on, or after, January 14, 2011, or was terminated by the letter of February 28, 2011.
22. The Director says there was no failure to observe principles of natural justice as Rite Style was given the opportunity to know the case against it, respond to it and have the complaint decided by an independent decision maker who had no previous knowledge of the case or the parties.
23. The reply provided by Sagoo primarily responds to assertions of fact made by Rite Style in their appeal submission.
24. In their final reply, Rite Style has provided a response to the submissions made by the Director and Sagoo. In that reply, and in response to Sagoo's submission, Rite Style asserts the accountant gave evidence at the complaint hearing that she told Sagoo "he should have come to work the following day".
25. The Director has submitted a letter, dated November 17, 2011, to this aspect of the final reply, saying that comment was never part of the accountant's evidence.
26. The Tribunal has requested any comments from the other parties on the Director's letter. Rite Style has filed a response, stating:

We have revisited our notes and we confirm our statement about what Ms Bijal Patel told Gurnavdeep about his employment status. I have since checked with Ms Patel again to verify this and she is certain that this is correct and is willing to testify this fact [sic] again.

27. Rite Style has provided neither the notes referred to nor any statement from Ms. Patel directly.

ANALYSIS

28. As a result of amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are statutorily limited to those found in Subsection 112(1) of the *Act*, which says:
 - 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.*
29. A review of decisions of the Tribunal reveals certain principles applicable to appeals have consistently been applied.
30. The Tribunal has established that the burden in an appeal is on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds. An appeal under the *Act* is intended to be an error correction process, with the grounds of review identified in section 112 and the burden of persuasion being on the appellant to identify the error on one of those grounds.
31. While the ground of appeal relied on by Rite Style is an alleged failure by the Director to observe principles of natural justice, there is little in the appeal that relates to this ground of appeal.

32. The single natural justice element to this appeal arose in the final reply of Rite Style, where they alleged Ms. Patel gave certain evidence that was not considered by the Director, but which the Director says was not part of Ms. Patel's evidence.
33. The Director says there has been no failure to observe principles of natural justice because Rite Style was given the opportunity to know the case against it, respond to it and have the complaint decided by an independent decision maker. I agree that, typically, the requirements of "natural justice" are encompassed by those elements and are satisfied when those requirements are met: see *Imperial Limousine Service Ltd.*, BC EST # D014/05.
34. I am also satisfied however that, if supported by proper evidence, the failure by the Director to refer to and consider relevant evidence raises a serious issue that would be capable of constituting a breach of natural justice.
35. The question before me is whether a case has been made out for a breach of natural justice by the failure of the Director to consider the evidence allegedly provided by Ms. Patel. I find that it has not. A finding that the Director has breached natural justice is a serious matter. While sworn evidence is not necessarily required, clear and reliable first party evidence is required: see *James Hubert D'Hondt operating as D'Hondt Farms*, BC EST # RD021/05.
36. The onus of demonstrating a breach of natural justice is on Rite Style; some evidence in support of that allegation must be provided: see *Dusty Investments Inc. dba Honda North*, BC EST #D043/99. In *J.C. Creations Ltd.*, BC EST # RD317/03, for example, the Tribunal was provided with a statutory declaration from the employer outlining the specifics of the breach of natural justice alleged. In contrast, the information before us here consists of unsupported assertions and second-hand information from Mr. Singh. While Rite Style says they have "revisited our notes", no such "notes" have been provided. No statement, sworn or otherwise, has been provided by Ms. Patel detailing at what point in her evidence she made the statement attributed to her or dealing with the timing and circumstances of the statement she is alleged to have made to Sagoo.
37. If the evidence showed that a Director ignored relevant evidence that matter would be a serious concern. But it is precisely because it is a serious matter, and because subtle changes in the facts can make a significant difference in the outcome of natural justice cases, that sufficient evidence supporting an alleged breach of natural justice are important. The Tribunal has not been given the evidence required even though Rite Style has had the at least two opportunities to do so, first in the appeal submission itself and later in response to the Director's November 17, 2011, letter.
38. Rite Style says Ms. Patel is prepared to testify to this fact and I have considered whether I should convene an oral hearing for that purpose. I have concluded I should not. An appeal to the Tribunal is not an inquisitorial process. The statutory appeal process places the obligation on the parties to advance their case before the Tribunal and, in the context of an allegation of a failure to observe principles of natural justice, a responsibility to provide direct and cogent evidence in support of such an allegation.
39. In result, I am not persuaded there has been any demonstrable breach of natural justice and this ground of appeal is dismissed.
40. The remainder of this appeal is not about principles of natural justice at all, but is about a disagreement by Rite Style with the conclusion that Sagoo did not quit, but was terminated. The appeal is predominantly grounded in a challenge to findings of fact made by the Director in the Determination. The *Act* does not

provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03. The error of law must be apparent on the face of the Determination and the material on file or arise out of evidence that is allowed under section 112(1)(c).

41. The Tribunal has accepted that acting without any evidence and acting on a view of the facts which could not reasonably be entertained are errors of law.
42. The finding by the Director that Sagoo did not quit, but was terminated from his employment, is a finding based on the facts. In addition to the natural justice allegation (which I have dismissed), Rite Style has raised two arguments against this finding: first, that it failed to recognize much of Sagoo's evidence was a lie; and second, that it took a wrong view of the evidence.
43. I can deal with these arguments summarily.
44. The view that Sagoo lied is not a finding made by the Director, but is one held by Rite Style. The evidence relied on by the Director in finding Sagoo had not quit his employment was not contested by Rite Style and in many respects agreed with evidence given by witnesses for them. This evidence includes the evidence attributed to Ms. Patel in the Determination and the evidence that the employer did not to make any contact with Sagoo between January 14, 2011, and February 28, 2011, despite repeated attempts by Sagoo to talk with Mr. Gill after he was sent home.
45. In respect of the second matter, there was clearly evidence that reasonably allowed the Director to reach the finding made.
46. Accordingly, these arguments are rejected.
47. In result, the appeal is denied.
48. There is one final matter to be addressed. In decision BC EST # D125/11, the Tribunal suspended the effect of the Determination pending the outcome of this appeal. As the appeal has been dismissed and I see no reason to vary the order made, the Director may release the funds held in trust to Sagoo.

ORDER

49. Pursuant to Section 115 of the *Act*, I order the Determination dated August 26, 2011, be confirmed in the amount of \$1,527.62, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal