Employment Standards TRIBUNAL

An appeal

- by -

James Hubert D'Hondt operating as D'Hondt Farms
("D'Hondt")

- 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

TRIBUNAL MEMBER: Carol L. Roberts

FILE No.: 2004A/77

DATE OF DECISION: August 17, 2004

DECISION

SUBMISSIONS

On behalf of D'Hondt Farms: James D'Hondt

On behalf of the Director of Employment Standards: Rod Bianchini

OVERVIEW

This is an appeal by James D'Hondt operating as D'Hondt Farms ("D'Hondt"), pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued March 19, 2004.

Christopher Mervyn filed a complaint with the Director alleging that D'Hondt had contravened the Act in failing to pay him wages and compensation for length of service. Following a hearing on November 13, 2003, the delegate concluded that Mr. Mervyn was entitled to wages, annual vacation pay, compensation for length of service and interest in the total amount of $3,275.93. The delegate also imposed two administrative penalties of $500.00 for each of the contraventions of the Act, for a total amount payable of $4,275.93.

D'Hondt contends that the delegate erred in law, and failed to observe the principles of natural justice in making the Determination, and seeks to have the Determination changed or varied.

The parties were advised by the Tribunal's Vice Chair that the appeal would be adjudicated based on their written submissions and that an oral hearing would not be held.

ISSUES TO BE DECIDED

1. Did the delegate err in law?

2. Did the delegate fail to observe the principles of natural justice in making the Determination?

FACTS

Mr. Mervyn was employed as a farm worker for D'Hondt, a hatchery and farm, from April 5, 2002 until July 5, 2003. He alleged that he had not been paid regular wages, and that he was fired without cause and not paid compensation for length of service.

The delegate held a hearing into Mr. Mervyn's complaint on November 13, 2002 and heard evidence from Mr. Mervyn and from Allana St. Remy, Mr. D'Hondt's wife, on D'Hondt's behalf.

Mr. Mervyn's evidence was that, on July 5, 2003, he encountered truck difficulties while delivering a load of chickens. Mr. D'Hondt came to assist Mr. Mervyn, and told him there was nothing wrong with the truck. Mr. Mervyn completed his delivery and returned to the farm at which time there was a dispute between Mr. Mervyn and Mr. D'Hondt.

Mr. Mervyn's evidence was that during this dispute, he was told to leave the farm. He also testified that the following day, July 6, 2003, he was told that he no longer had a job.

The employer's evidence was that Mr. Mervyn was constantly late for his shifts, and that, although Mr. D'Hondt was upset with Mr. Mervyn on July 5, 2003, he did not fire him. The employer claimed that Mr. Mervyn did not show up for work on July 6, 2003, and the employer had many deliveries, including one to Safeway that was cancelled because it could not be delivered on time. The employer said that it made an unsuccessful attempt to contact Mr. Mervyn again on July 7, 2003, and that the employer did not hear from Mr. Mervyn again until the complaint was filed. The employer asserted that Mr. Mervyn abandoned his job and that he was not entitled to compensation for length of service.

The employer also asserted that on June 2, 2003 Mr. Mervyn was given an advance on wages, and that the advance was to be paid back at an amount of $150.00 per paycheque. The employer said one $150.00 payment by Mr. Mervyn's mother had been made against the advance. The employer acknowledged that Mr. Mervyn's last wage cheque and vacation pay had not been paid because the advance was not paid back. The employer took the position that because the advance was in excess of the money owed in wages, Mr. Mervyn was not entitled to any further wages. The employer asserted that all other wages had been paid.

The delegate found that the evidence of the parties regarding the events of July 5, 2003 was identical up to the point where Mr. Mervyn left work for the day. He found that there had been an argument between Mr. Mervyn and Mr. D'Hondt, and that Mr. Mervyn was either told not to return to work or left with an intention not to return.

The delegate had regard to the fact that Mr. D'Hondt, the person best able to provide his version of the events of July 5, 2003 did not appear at the hearing. He found that Ms. St. Remy's evidence was hearsay, and because Ms. Remy was not present at the culminating event, that evidence could not be tested. Therefore, the delegate gave that evidence less weight. The delegate concluded that, on a balance of probabilities, Mr. Mervyn did not abandon his job, and that the employer had not met the burden of establishing that Mr. Mervyn was terminated for cause.

The delegate preferred the employer's records with respect to Mr. Mervyn's hours of work and found that, with the exception of the final paycheque, there were no unpaid wages.

The delegate also concluded that the money given to Mr. Mervyn on June 2, 2003 was a loan rather than an advance on wages. The delegate found that since no written assignment of wages had been entered into, Mr. Mervyn was entitled to wages equal to his final paycheque and vacation pay.

ARGUMENT

Mr. D'Hondt contends that the delegate erred in giving less weight to the employer's version of the circumstances under which Mr. Mervyn left work on July 5, 2003 because Mr. D'Hondt did not appear at the hearing.

Mr. D'Hondt also contends that the delegate erred in concluding that the $2,500.00 advance was a loan.

Mr. D'Hondt argues that "the Tribunal has to review the case and change it in favour of D'Hondt, when Mervyn quit his advance money paid him in full. I did not fire Mervyn, and he did not hold up to the oral agreement and handshake he failed to live up to his word."

Mr. D'Hondt also set out what he contended was the content of the oral agreement between he and Mr. Mervyn regarding the $2,500.00.

The delegate contended that the appeal was simply an attempt to reargue the case, and that the issues were fully addressed in the Determination.

ANALYSIS

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

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

The burden of establishing that a Determination is incorrect rests with an Appellant. (*Natalie Garbuzova* BC EST #D684/01) On the evidence presented, I am unable to find that burden has been met.

Errors of law

Mr. D'Hondt says that the delegate erred when he preferred Mr. Mervyn's evidence over that of Ms. St. Remy with respect to the circumstances under which Mr. Mervyn's employment ended. The delegate had two opposing versions of the same event, and had to prefer one over the other. He gave less weight to the evidence of Ms. St. Remy because Ms. St. Remy was not present during the discussions between the parties. In other words, the evidence given by Ms. St. Remy was based on what Mr. D'Hondt told her, not what she heard or observed.

Hearsay evidence is, in a simplified form, the repetition by a witness of something someone else said in order to establish the matter asserted in the statement was true. Hearsay is, generally speaking, not admissible in a judicial proceeding because of its unreliability and the inability to question the maker of the statement. While hearsay evidence is admissible in administrative proceedings, it will be given less weight than if had been made by the original speaker if it goes to the very issue in the hearing. In this case, that evidence was central to the issue of whether Mr. Mervyn was fired or not. I am unable to find that the delegate erred in placing less weight on the evidence of Ms. St. Remy in this respect. I find no error of law in this respect.

Section 21 of the Act provides except as permitted or required by the Act, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose. D'Hondt did not dispute that it withheld Mr. Mervyn's final paycheque for what Mr. D'Hondt characterized as repayment of a loan. Section 22(4) of the Act provides that an employer may honour an employee's written assignment of wages to meet a credit obligation. Mr. D'Hondt acknowledges that, whatever agreement he had with Mr. Mervyn, it was not in writing. I find no error of law in the delegate's conclusion that Mr. D'Hondt had contravened this provision of the Act in the absence of any written agreement.

Natural justice

Principles of natural justice are, in essence, procedural rights that ensure parties know the case against them, the right to respond, and the right to be heard by an independent decision maker.

D'Hondt advanced arguments about the nature of the $2,500 advance/loan at the hearing which the delegate considered, and rejected. I find no basis for this ground of appeal.

The appeal is denied.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination dated March 19, 2004 be confirmed in the amount of $4,275.93, together with whatever interest may have accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal