Employment Standards TRIBUNAL

An appeal

- by -

Tropical Pool & Spa Ltd.
("Appellant")

- 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: Rajiv K. Gandhi

FILE No.: 2016A/086

DATE OF DECISION: November 3, 2016

DECISION

SUBMISSIONS

Deanna Devlin	on behalf of Tropical Pool & Spa Ltd.
Michael Thompson	on behalf of the Director of Employment Standards

OVERVIEW

1. On May 25, 2016, a delegate of the Director of Employment Standards (the "Director") issued a determination (the "Determination") in which Tropical Pool & Spa Ltd. (the "Appellant") was found to have contravened section 18 of the *Employment Standards Act* (the "*Act*") and section 46 of the *Employment Standards Regulation* (the "*Regulation*").

2. The Director ordered the Appellant to pay the aggregate sum of $816.75 to Jason Hovde, the Complainant, representing outstanding wages, vacation pay, and interest. The Appellant was also required to pay administrative penalties in the amount of $1,000.00.

3. The Appellant now seeks to vary or cancel the Determination on the basis that evidence has become available that was not available at the time the Determination was made, one of the permitted grounds for appeal under section 112(1)(c) of the *Act*.

4. In considering this appeal, I have reviewed the Determination, the Appellant's submissions received on July 11, 2016, and the Director's Record (the "Record"), some seventy-eight pages in length, received on August 25, 2016.

THE FACTS AND ANALYSIS

5. The Appellant is engaged in the retail sale, installation, and service of swimming pools and hot tubs, and employed the Complainant as a commissioned salesperson until he quit on September 21, 2014.

6. In his complaint to the Employment Standards Branch, the Complainant alleged entitlement to outstanding wages (unpaid commissions), and compensation for length of service. The Complainant abandoned his claim for the latter, at the hearing conducted on April 14, 2015.

7. With respect to outstanding wages, the Complainant sought payment of commissions for sales to fifteen different customers. The Director ultimately agreed commissions should have been paid with respect to six of the fifteen, in an aggregate amount totalling $750.00, together with vacation pay in the amount of $30.00 calculated at the rate of four percent.

8. Section 18(2) of the *Act* provides that an employer must "… pay all wages owing to an employee within 6 days after the employee terminates the employment." The Director assessed an administrative penalty on the basis that outstanding wages and vacation pay were not paid to the Complainant before September 27, 2014.

9. Section 46 of the *Regulation* requires an employer to produce documents to the Director "as and when required." According to the Record, a demand for the Appellant's materials was made on February 24, 2015.

The Director assessed an administrative penalty because the Appellant's response failed to include time sheets and wage statements.

10. The Appellant's challenge to these findings and the administrative penalties relies on the production of new evidence.

New Evidence

11. In *Davies et. al.*, BC EST # D171/03, the Tribunal held that the onus rests with an appellant to meet a strict, four-part test before the exercise of any discretion to accept and consider fresh evidence:

> (a) the evidence must not, with the exercise of due diligence, have been discoverable or presentable to the Director before the Determination;
>
> (b) the evidence must be relevant to a material issue arising from the complaint;
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> (c) the evidence must be reasonably capable of belief; and
>
> (d) the evidence must have high potential probative value, in the sense that it could, if believed, have led the Director to a different conclusion on the material issue.

12. A failure to satisfy any one of the four parts will render that evidence inadmissible.

13. In this case, the "fresh" evidence is a brief exchange of text messages (the "Text Conversation") allegedly passing between the Complainant and Deanna Devlin, the Appellant's now former owner. Mr. Devlin was a witness at the original hearing.

14. I consider this evidence in the context of each part of the Davies test and in relation to each part of the Determination that the Appellant now contests.

(a) The evidence must not, with the exercise of due diligence, have been discoverable or presentable to the Director before the Determination.

15. The Text Conversation appears to have taken place between September 22, 2014, and October 6, 2014.

16. According to the Record, notice of the hearing was issued on February 24, 2015, and documents were to be produced on March 18, 2015.

17. The Appellant does not explain why this evidence could not have been tendered at or in advance of the hearing. As the Appellant's witness, Ms. Devlin could have raised the Text Conversation with the Director. Certainly, the Director was aware that the Complainant made demands of Ms. Devlin in that same time period.

18. Absent that explanation, the Appellant's burden under this part of the *Davies* test remains unsatisfied, and the Appellant's request to admit new evidence falls flat at the first hurdle.

(b) The evidence must be relevant to a material issue arising from the complaint.

19. The Text Conversation itself is brief. I summarize it as a request by Ms. Devlin for contact, a demand by the Complainant for payment, and, ultimately, a direction from Ms. Devlin for the Complainant to pick up his cheque. The Text Conversation contains no specifics regarding what amount was demanded, negotiated, or paid. The final two messages in the Text Conversation, sent by the Complainant, are partial images of what appear to me to be invoices or order forms. Both are virtually illegible and, in my view, unhelpful.

20. Even if I were to accept that the Text Conversation pushes the Complainant's termination date back by several weeks, as the Appellant now argues, outstanding wages would still not have been paid within the time required under section 18 of the *Act*.

21. Similarly, there is nothing in the Text Conversation suggesting that the Complainant removed records from his employment file, as the Appellant alleges, and nothing supporting the idea that the Appellant should be relieved of its responsibility to produce accurate time sheets and wage statements.

22. As far as I can see, the Text Conversation is not relevant to the Director's finding with respect to what commissions the Appellant owed or did not owe, or otherwise material to the assessment of penalties under section 18 of the *Act* or section 46 of the *Regulation*.

23. The Text Conversation, in my opinion, fails to pass the bar set by the second part of the *Davies* test.

(c) The evidence must be reasonably capable of belief.

24. The Appellant has not provided any basis upon which the Text Conversation can be authenticated or by which I can properly say that the exchange of messages between the Complainant and Ms. Devlin is complete or otherwise accurately represented.

25. As it relates to the third part of the *Davies* test, the "fresh" evidence does not pass muster.

(d) The evidence must have high potential probative value, in the sense that it could, if believed, have led the Director to a different conclusion on the material issue.

26. For the reasons I gave previously, I find the probative value of the Text Conversation to be low – there is nothing in that exchange that would lead the Director to a different conclusion.

27. It does not address commission entitlements, alter the fact that outstanding wages were not paid when due, or otherwise give credence to the Appellant's claim that the Complainant misappropriated parts of his employment records.

28. Pitted against the standard of the fourth part of the *Davies* test, the Appellant's argument sinks, rather than swims.

29. For these reasons, I decline to admit the Text Conversation as fresh evidence, and I find that this appeal has no reasonable prospect of success.

ORDER

30. This Appeal is dismissed under section 114(1)(f) of the *Act*. The Determination is confirmed according to section 115(1)(a) of the *Act*.

Rajiv K. Gandhi
Member
Employment Standards Tribunal