

An appeal

- by -

Wade Marshall
("Marshall")

- 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.: 2005A/171

DATE OF DECISION: November 15, 2005

DECISION

SUBMISSIONS

Wade Marshall	on his own behalf
Jim Knowles	on behalf of CPM Foods Ltd. operating as McDonalds
M. Elaine Phillips	on behalf of the Director

OVERVIEW

1. This is an appeal under Section 112 of the *Employment Standards Act* (the “Act”) by Wade Marshall (“Marshall”) of a Determination that was issued on August 10, 2005 by a delegate of the Director of Employment Standards (the “delegate”).
2. Marshall had filed a complaint with the Director of Employment Standards claiming entitlement to length of service compensation from CPM Foods Ltd. operating as McDonalds (“CPM”). The Determination found that CPM was not liable to Marshall for length of service compensation because Marshall had quit his employment.
3. Marshall says evidence has come available that contradicts information given by Mr. Knowles, who was representing CPM during the investigation of the complaint.
4. The Tribunal has reviewed the appeal and the materials submitted with it and the submissions of the parties and has decided an oral hearing is not necessary in order to decide this appeal.

ISSUE

5. The issue in this appeal is whether Marshall has shown an error in the Determination on any of the grounds listed in subsection 112(1) of the *Act*.

THE FACTS

6. CPM operates a restaurant. Marshall had been employed by CPM for more than 11 years when his employment was terminated. He claimed entitlement to length of service compensation.
7. There was a difference between Marshall and Mr. Knowles about whether Marshall had quit his employment.
8. That difference was resolved in favour of a finding that Marshall had quit his employment. That finding was made on evidence and information provided by both parties.

ARGUMENT AND ANALYSIS

9. An appeal is an error correction process with the burden of showing the error being on the appellant. In this appeal, Marshall has the burden of persuading the Tribunal there is a reviewable error in the Determination. The grounds upon which an appeal may be made are 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.*
10. As an opening comment to the analysis of this appeal, I point out that that 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).
11. In this appeal, Marshall says that evidence has come available that was not available at the time the Determination was made. The Tribunal has taken a relatively strict view of this ground of appeal. While the Tribunal retains a discretion to allow new or additional evidence on an appeal, we do not normally allow such evidence where that evidence could have been acquired and provided to the Director before the Determination was issued. In addition to considering whether the evidence was reasonably available and could have been provided during the complaint process, the Tribunal also considers whether the evidence is relevant to a material issue arising from the complaint and whether it is credible, in the sense that it has to be reasonably capable of belief.
12. If I read the appeal correctly, the evidence in question comprises a letter dated July 24th, 2005, addressed to the delegate, and a copy of one side of an MSN conversation which Marshall had with a former co-worker at CPM on June 30, 2005. Both pre-date the Determination. The delegate says she did not see either of the documents prior to the filing of this appeal and objects to Marshall's attempt to bring forward this evidence in the appeal on the basis that this information should have been provided during the complaint investigation process.
13. The evidence Marshall seeks to submit with the appeal does not satisfy the requirements for inclusion as "new evidence" in this appeal.
14. In any event, neither document adds significantly to the material that was before the delegate when the Determination was made. Marshall had provided his version of events in the complaint form, which was filed in October 2003, and had discussions with the delegate initially assigned to the file in March 2004 and with the delegate who wrote the Determination in June 2005. The first delegate had also received a response from CPM in March 2004 and had a discussion with Mr. Knowles concerning the complaint. A letter from the first delegate, which was spawned by the March 2004 discussions with Marshall and CPM, is included in the record although notes of the discussions are not.

15. The next activity on the file is at the end of June 2005, when there was a discussion between the second delegate assigned to the file and Marshall. Based on that discussion, the second delegate decided Marshall had provided contradictory information concerning the circumstances of his leaving CPM. As the Determination notes, it is understandable that memories would be fuzzy on some of the details, as the complaint process involved two delegates and took almost two years to complete. There is no indication the second delegate had any communication with CPM regarding the complaint.
16. In substance, this appeal is not about “new evidence” or how that evidence might impact on findings and conclusions of fact made by the delegate, but is about how the delegate investigated the complaint and dealt with the contradictory information provided by the parties. From that perspective, this case is about whether there is an error of law in the Determination arising from the fact gathering process and how the delegate made at findings and conclusions in the Determination.
17. While I have some concerns with the sufficiency of the investigation and with the analysis undertaken by the delegate in the Determination, the conclusion that Marshall quit his employment remains essentially a finding of fact. There is no “new evidence” that bears on the question of whether Marshall quit his employment. The merits of the appeal must be determined on whether there was evidence that reasonably supported the findings made by the delegate. From that perspective, I must conclude there was such evidence and the view taken of that evidence was not unreasonable. Those aspects of the investigation and the Determination that cause me concern do not reveal an error of law.
18. The appeal is dismissed.

ORDER

19. Pursuant to Section 115 of the *Act*, I order the Determination dated August 10, 2005 be confirmed.

David B. Stevenson
Member
Employment Standards Tribunal