Employment Standards TRIBUNAL

An appeal

- by -

Island Scallops Ltd.
("ISL" or "Employer")

- 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

ADJUDICATOR: Paul E. Love

FILE No.: 2001/862

DATE OF HEARING: April 10 and 16, 2002

DATE OF DECISION: May 15, 2002

DECISION

APPEARANCES:

Robert Payne, for Island Scallops Ltd.

Dr. Gidon Minkoff

Ian McNeill, for the Director of Employment Standards

OVERVIEW

This is an appeal by an employer, Island Scallops Ltd.("ISL" or "Employer "), from a Determination dated November 16, 2001 (the "Determination") issued by a Delegate of the Director of Employment Standards ("*Delegate*") pursuant to the *Employment Standards Act, R.S.B.C. 1996, c. 113* (the "*Act*"). The Delegate determined that Dr. Minkoff was entitled to the sum of $5,159.35. The principle issues in this case are whether the Delegate erred in applying s. 65(2) of the *Act*, without assessing the defence advanced by the Employer that the parties had reached an oral agreement for a one year renewal of a written three year contract, and the credibility of the parties on the issue of contract renewal. The Employer urged that if I found an error, that I ought to determine the issue of credibility and issue of contract renewal. The Employer further urged that there was bias in the investigation, and also a breach of natural justice in failing to disclose evidence to the employer, failing to interview the employer, and by issuing an email to the Employee of the merits of the case, before issuing a Determination. In this case the Delegate made a number of mistakes in the investigation of this complaint, but such conduct, while mistaken did not amount to bias.

The Delegate erred in the application of s. 65(2) of the *Act*, without first considering whether there was an oral renewal of the fixed term contract. In my view, this case turns solely on an issue of fact, whether the parties agreed to a one year term, continuing or renewing a contract for the period January 1, 2000 to December 31, 2000. The issue of an "oral renewal"involved an assessment of credibility of the principal of ISL and Dr. Minkoff. For the reasons expressed in the Decision, I have concluded that the evidence of Dr. Minkoff is to be preferred, and that there was no oral renewal of the fixed term contract. Dr. Minkoff worked for more than three months after the term of the written contract expired. He was dismissed without just cause and without notice. It was proper to apply s. 65(2) of the *Act*, and assess compensation for length of service. The Delegate also erred in assessing compensation for length of service at three weeks, rather than four weeks. I therefore corrected the amount of compensation for length of service and varied the Determination.

ISSUE:

Did the Delegate err in applying s. 65(2) of the *Act*, without considering the Employer's defence that there was an oral renewal of the contract?

Did the parties meet and agree in March or April of 2000 that Dr. Minkoff would be renewed for a further 12 months of employment, at the prevailing salary, and with a bonus of $5,000 to be paid in the event of production and sale of 10,000 juvenile black cod?

ARGUMENTS OF THE PARTIES:

Employer's Argument:

The Employer argues that there was an oral contract reached by the parties in March or April of 2000. The Employer says that Dr. Minkoff worked until the end of the term of the oral renewal. The Employer says that by virtue of s. 65(1)(b) of the Act, Dr. Minkoff is not entitled to compensation for length of service, because this was a definite term contract.

The Employer alleges errors in the Determination that all relate to the failure to find an oral agreement. The Employer points out that there is no discussion in the Determination concerning an oral contract, and that the Delegate erred by characterizing the issue as the proper interpretation of s. 65(2) of the Act, rather than finding the facts and considering the issue of credibility between the parties. The Employer further argues that the failure to interview the employer's principal, Robert Saunders, was a breach of procedural fairness or natural justice, or a breach of s. 77 of the *Act*. The Employer argues that the failure to interview Mr. Saunders, and the failure to refer to the oral contract issue, in the Determination, together with a review of documents received, pursuant to a Freedom of Information request, amounts to bias on the part of the Delegate.

Employee's Argument:

The Employee argues that he worked under a three year written contract, and that the Employer ignored his attempts to renegotiate a further written contract. The Employee denies any oral agreement was reached for a one year term. The Employee argues that the allegation of oral contract, is one that was recently fabricated by the Employer or its counsel. Dr. Minkoff says that he was dismissed without notice. He seeks compensation for length of service.

Delegate's Argument:

The Delegate argues that evidence relating to an oral contract is new evidence which ought not to be considered by me because of *Triwest Tractors*. The Delegate further argues that there was no oral agreement reached for a renewal term. The Delegate argues that the "oral contract" was a recent fabrication by the Employer or its counsel. The Delegate asks me to correct the Determination to provide for 4 weeks compensation for length of service rather than the three weeks set out in the Determination.

FACTS

I decided this case after an oral hearing. In the hearing I heard testimony from Robert Saunders, on behalf of Island Scallops Ltd. ("ISL"), and Dr. Gidon Minkoff. The cross-examination of Dr. Minkoff, in particular, was vigorous.

Dr. Minkoff was employed as a researcher with ISL with regard to a project to develop black cod for commercial sale in an aquaculture facility commencing in 1997. Dr. Minkoff is an expert in the field of artificial propagation of marine fishes in hatcheries. He is an Israeli national, and at the time he was recruited, he was resident in Newfoundland, where he was working on another aquaculture project. In

1997 he was in Canada on a work permit, and he wished to become a landed immigrant in Canada. Dr. Warren Nigata of the National Research Council of Canada ("NRC") gave Dr. Minkoff's name to ISL.

While there was an attempt by ISL to minimize Dr. Minkoff's role with the black cod project, I am satisfied that he is a leading expert in this area, and one of the few experts that had the track record required for commercial production. I am also satisfied, from Dr. Minkoff's testimony, that a report that he made to the NRC in 1999, was key to continued funding of the Black Cod project, for the period after December 31, 2000.

After the exchange of correspondence between the parties, Dr. Minkoff was brought out to Qualicum, British Columbia to view ISL's operation. Prior to the viewing of the operation Dr. Minkoff was required to sign and he did sign a non-disclosure agreement. The parties reached an agreement in writing for a three year term of employment, and Dr. Minkoff was to be paid an annual salary of $75,000 per year, for a term from January 1, 1997 to December 30, 1999. The written contract provided that the contract could be renewed.

Dr. Minkoff testified, and I accept his evidence, that this was a risky project. I accept the evidence of ISL that the project was funded by the National Research Council of Canada for a three year period on a grant basis. Thereafter it was funded on a loan repayable by ISL.

Dr. Minkoff was free to pursue private consulting work, during the course of the employment relationship as long as it did not conflict with the work he was doing at ISL. He did do work in Chile. He also, in conjunction with 6 other persons, formed a referral arrangement, and prepared a web-site, "teleostei.com", for the purpose of pursuing consulting work on a world wide basis for the artificial propagation of marine fishes in hatcheries. Dr. Minkoff explained that much of the work in this field can be done at home, as long as one is provided with images of larvae, data sheets and histology preparations. He also testified, and I accept his testimony, that all the other scientists were employed by other employers either in universities, research institutes, or hatcheries. While Dr. Minkoff was cross-examined vigorously with regard to the website, I am satisfied that he did not create the website because he anticipated his job with ISL was at an end. He created it because it was a logical method to continue, or to expand private consulting referral work. In short, it was created for advertising purposes, at a time, when the Employer did not have an exclusive right to Dr. Minkoff's services.

Dr. Minkoff indicated that it was important to him in 1999 to obtain a written renewal of his contract because he was on an annual work permit from Immigration Canada. He said that it was important to him to get a written contract from ISL until he was granted landed immigrant status.

Dr. Minkoff made a number of written proposals to ISL for a written contract. The first proposal from Dr. Minkoff, made in about February of 1999 (Exhibit 3) contained a proposal to continue as a salaried employee or as an independent contractor. Dr. Minkoff also sought shares in the company and production bonuses. Dr. Minkoff sought a 5 year term. The next proposal made by Dr. Minkoff (Exhibit 4) was for a one year term, commencing January 1, 2000 and continuing to December 31, 2000. The next proposal made by Dr. Minkoff (Exhibit 5) for a consulting contract was for the amount of $6,250 per month, plus production bonuses.

Dr. Minkoff received a draft employment contract from ISL (Exhibit 6), for a one year term, which could be renewed. This draft proposed to continue Dr. Minkoff's salary at $75,000. It contained rather extensive clauses dealing with protection of company income, and a very wide restrictive covenant clause

purporting to restrict Dr. Minkoff from working for a company directly or indirectly in competition with ISL in B.C, Alaska, Washington or Oregon.

Dr. Minkoff found the terms of the restrictive covenant and confidentiality agreement offensive. He expressed this in writing to ISL in a covering letter (Exhibit 7). He had never signed one of these agreements during a term of employment. While he did sign a confidentiality agreement (Exhibit 1) prior to viewing ISL's facility, that agreement did not contain a restrictive covenant. On February 13, 2000, Dr. Minkoff, proposed a further form of contract (Exhibit 8). This was again for a one year term, containing a two month termination notice clause. Dr. Minkoff proposed a contract rate of $85,000, and also production bonus of $10,000 based on the production of 10,000 juveniles of 10 grams.

I note that ISL did not accept any written proposal made by Dr. Minkoff. Dr. Minkoff did not accept the only written proposal made by ISL. A central argument in this case, made by ISL is that ISL and Dr. Minkoff agreed to a one year renewal term by way of an oral contract. The evidence of the parties is diametrically opposed on the issue of whether an oral contract was reached. The parties agree that the project continued on after the departure of Dr. Minkoff. Dr. Minkoff takes the view, and has taken the view from the date he ceased work, that he was terminated without advance notice. Mr. Saunders of ISL takes the view, that he has taken since the date Dr. Minkoff ceased work, that Dr. Minkoff's term of employment had expired. It is clear that there is no written renewal of the contract of January 6, 1997. The only question is whether there was an oral renewal of that contract for a one year term.

The Delegate found that Dr. Minkoff was entitled to the sum of $5,159.35, which consists of compensation for length of service for three weeks at $1,562.50 per week ($4,687.50), plus vacation pay at 4 % ($187.50), plus interest ($284.35). Dr. Minkoff worked for a period of 4 years with ISL, and ceased working in early 2001.

ANALYSIS

In an appeal under the *Act*, the burden rests with the appellant, in this case the Employer, to show that there was an error in the Determination such that I should vary or cancel the Determination.

The Scheme of the Act:

Before analyzing the Employer's allegation of errors alleged to have been made by the Delegate, it is appropriate to consider the statutory context for the Employer's argument. Employees who are subject to the *Act*, and who are discharged, without notice and without cause, are entitled to compensation for length of service as set out in s. 63 of the *Act*. If section 63 applies to Dr. Minkoff, he would be entitled to 4 weeks pay as compensation for length of service, rather than the three years found by the Delegate.

The Employer seeks to bring itself within the exemption set out in s. 65(1)(b) of the *Act* which reads as follows:

> 65(1) Sections 63 and 64 do not apply to an employee
>
> (b) employed for a definite term

The *Act* provides for the situation where an Employee on a definite term works beyond the definite term of the contract in s. 65(2), which reads as follows:

> 65(2) If an employee who is employed for a definite term or specific work continues to be employed for at least 3 months after completing the definite term or specific work, the employment is
>
> (a) deemed not to have been for a definite term or specific work, and
>
> (b) deemed to have started at the beginning of the definite term or specific work

In my view s. 65 (1) contains exceptions to the general rule, that employees covered by the *Act*, are entitled to compensation for length of service in accordance with s 63 of the *Act*. It is apparent that Dr. Minkoff worked for 3 years with the benefit of a written contract, and one year without the benefit of a written contract. Section 65(2) speaks to a "definite term". It is trite that a definite term may be contained within a written or an oral contract. The employer argues that Dr. Minkoff was employed on a definite term, because after the expiration of a written contract, the parties reached an oral contract for a definite term of one year.

The major issue in this case is whether the parties made an oral agreement in March of 2000 to renew Dr. Minkoff's contract for a one year term, expiring December 31, 2000. Once the issue of fact is resolved, related to the existence or non existence of the contract, and a definite term of employment, the rights of Dr. Minkoff would be determined either under s. 65(1)(b) or s. 65(2). Central to this issue is credibility. Mr. Saunders on behalf of ISL asserts that an oral agreement was reached in March of 2000. Dr. Minkoff disputes that the parties reached an oral contract.

The testimony given by Mr. Saunders at this hearing was as follows:

Mr. Saunders says that on the drive back from a meeting in Campbell River, he cannot recall what topic was being discussed, but that Dr. Minkoff raised the issue of his remuneration and said that "we should solve this and get it solved without legal input, it could be a simple agreement". Mr. Saunders said that he asked Dr. Minkoff what was on his mind, and Dr. Minkoff said that if he paid him a bonus of $5,000 based on hatchery production of 10000 juvenile black cod that he would be happy with that. Mr. Saunders said that we would have to sell the black cod to pay his bonus, and he says Dr. Minkoff agreed to it. Mr. Saunders said that he could not pay $80,000 but could continue salary at $75,000. He says that Dr. Minkoff said - "what is one more year". The conversation was alleged to have taken place in March or April of 2000. The employer paid a bonus of $5,000 in October of 2000.

Errors Alleged:

Failing to Consider the Issue of Oral Renewal of the Contract:

I note that the Employer argued that the Delegate erred by failing to rule on whether there was an oral contract, and by failing to assess the credibility of the parties. The Delegate did not give evidence. The issue of oral contract is entirely absent from the Determination. Indeed rather than considering the issue of "oral contract", the Delegate characterized the issue for decision as:

> "At issue here is the interpretation of s. 65(2) of the Act."

In setting out the Employer's position in the Determination, the Delegate does not set out the oral contract argument. From a reading of the Determination, it is apparent that the Delegate did not consider the issue of "oral contract". The existence or non-existence of the oral renewal was a defence raised by the Employer, which should have been addressed by the Delegate in the Determination. It is not apparent to me why the Delegate failed to address the issue of the alleged oral agreement in the Determination. The failure to do so is a fundamental error.

Failing to Interview the Employer:

The Employer submitted that the failure by the Delegate to interview the Employer was a breach of s. 77 of the *Act*. It is apparent that s. 77 does not mandate an oral interview of the parties: *Medallion Developments Inc. BCEST D# 235/00*. It is unclear to me in this case, why the Delegate interviewed the complainant, and chose not to interview the Employer. Apparently by agreement of the parties, the whole communication between counsel for the Employer and the Delegate was not filed with me by either party. Perhaps such an explanation would be apparent in the exchange of information between the Delegate and counsel for the Employer. In my view, the nature of the duty of the Delegate under s. 77 of the *Act* must depend on the matter which is in issue between the parties. At minimum, the Delegate must provide an opportunity to the parties to provide information, and to consider and respond to important allegations, on a critical matter in issue, before the Delegate issues a Determination. Each case will turn on its own facts. While a Delegate has considerable discretion over the investigation process, in this case given that one of the issues was the existence or non-existence of an oral contract for a fixed term, I would have thought it essential, in order to assess credibility of the parties, to interview both parties. In my view, in the circumstances of this case, the failure to interview Mr. Saunders was a breach of s. 77 of the *Act*.

Non-Disclosure of Documents:

I note that documents marked B, and C for identification were submitted by Dr. Minkoff to the Delegate. These documents were not disclosed to counsel for the Employer during the investigation. Before making a finding of fact, basic fairness dictates that the Delegate ought to disclose the nature of the evidence, and preferably a copy of any written document, that the Delegate intends to rely upon, in making the Determination, and invite a response from the opposing party. It is of course open to the Delegate to investigate the case, and rely upon materials that the Delegate believes are helpful. It is obvious that the Delegate found these documents useful because there are cited in the Determination.

It is my view that these documents are of limited value to an Adjudicator, in an oral hearing where the major issue as to the existence, or not of an oral contract, and this issue depends on credibility of the parties. If Dr. Minkoff intended to prove the facts contained within the letters, which go to the issues of continuation of the project, he ought to have called the witnesses, so that the witnesses could have been cross-examined on their evidence. In this case, there was oral evidence indicating continuance of the project, without the need to adduce the further written "proof".

Bias:

In this appeal, the Employer raised an issue of bias on the part of the Delegate. The Employer did not call any oral evidence on the investigation. The Delegate did not give evidence in this case. The Employer relies on part for the allegation of bias on file notes produced as part of a Freedom of Information

complaint, and filed with the Tribunal on March 26. 2002. The particular note that I was referred to, was an undated email from the Delegate to Dr. Minkoff which reads as follows:

> ...I received your message regarding the [deleted] offer of settlement. I do not believe ISL has any defence to this termination and your claim to compensation.
>
> I also do not believe this will be settled without some legal pressure on ISL so I plan to issue my formal Determination as soon as possible. IF you have any questions, please get back to me as soon as possible as this Determination will come out in early November.
>
> Do you know if they are still receiving funding from NRC?
>
> Do you know of anyone or any company that may owe them money for the purchase of black cod or sable fish? ...

It appears that the Delegate did not copy this email to the Employer's counsel. This email was written shortly before the issuance of the Determination, in answer to an inquiry from Dr. Minkoff. In my view, this is not evidence from which one could conclude that the Delegate approached this matter with bias, within the definition supplied by the Employer: *Baker v. Canada (Minister of Citzenship and Immigration), [1999], S.C.J. No 39*. In my view the timing of this email is critical to whether or not there was bias. Certainly, if the email was issued before the Delegate obtained information from the Employer, this would be strong evidence of bias. It is apparent, however, that the Delegate had some dealings with counsel for the Employer. It appears that there was some acrimony in those dealings. I have not been provided with the full correspondence between the Delegate and the Employer's counsel. Given the timing of the email, it appears that the email was issued shortly prior to the issuance of the Determination.

There is nothing here that shows that from the outset of the investigation, or even midstream in the investigation, that the Delegate approached this investigation in a manner which pre-determined the outcome. It is also clear that the Delegate erred in not disclosing information to the Employer, and in determining this matter, without considering the Employer's version of the facts. An oral interview of Mr. Saunders may have avoided this error. There is a difference between making an error, and approaching an investigation with bias. I appreciate the legal test for assessing bias, particularly as set out in *Baker v. Canada (Minister of Citzenship and Immigration), [1999], S.C.J. No 39*. and the detailed arguments made in the Employer's brief concerning bias. An allegation of bias is a serious matter. I dismiss the allegation of bias because the full facts concerning the transaction between counsel for the Employer and the Delegate have not been placed before me, and I have not heard evidence from Employer's Counsel or the Delegate regarding the investigation. There is no sufficient evidentiary basis to conclude bias.

The Delegate wears a "number of hats" during the course of dealings with the parties up until the issuance of a Determination. The Delegate acts as an investigator to investigate complaints made under the *Act*. The Delegate functions as a settlement officer to attempt to settle complaints without issuing a Determination. The Delegate also may issue a Determination, which is then subject to appeal to the Tribunal. In order to efficiently, and fairly handle complaints made, the Delegate may "roll" between the various roles. The Tribunal has generally been reluctant in the past to require the Delegate to investigate all witnesses suggested by a party, as in the first instance the Director has to determine the appropriate level of administrative resources to allocate to an investigation. In certain situations it may well be appropriate to obtain the complainant's side of the story, and determine with the Employer whether there

is any basis for settlement. This may well be an effective use of scarce resources, contributing to the statutory purpose set out in section 2 of the *Act*, to resolve disputes in a fair and expeditious manner.

In performing the roles that are open to a Delegate to perform, it appears that the Delegate reached a decision about the case, before issuing the Determination, and communicated his intended decision to the complainant, without communicating this information to the Employer, and without interviewing the Employer. I see nothing wrong in the practice of communicating, preliminary views to both parties for the purpose of attempting to settle a complaint, without the issuing a Determination. In this case, a substantial portion of the written submission of the Employer alleged bias against the Delegate. It is apparent that, at least by the stage of issuing the email, the Delegate had determined the case against the Employer. This conclusion appears to have been reached shortly before the issuance of the Determination. When a Delegate believes that it is necessary to issue a Determination in order to resolve a matter, he should do so without communicating what he intends to do to one side, without communicating this to the opposing party.

The Employer also suggested bias because of the questions asked by the Delegate during the course of the hearing. The questions asked were designed to support a position of "no error" in the Determination. The Delegate is a party in the process, and is entitled to highlight that evidence which supports a finding of "no error" in the Determination. The questioning by the Delegate did not go beyond the bounds of cross-examination. There is no basis to infer bias from the questions asked by the Delegate. For the above reasons, I find that the Employer has not established bias on the part of the Delegate. I note, however, that apart from the issue of bias, the Delegate erred in failing to address the "oral contract" issue.

Recent Fabrication:

During the submissions, both Dr. Minkoff and the Delegate submitted that the issue of oral contract was in essence a "recent fabrication by counsel". The problem with this submission, is that it is entirely without evidentiary foundation. ISL was not cross-examined on this point, and Dr. Minkoff did not give any evidence on this point. Counsel took strong objection to this point at the hearing, and indicated that if this was to be advanced, it should have been advanced during evidence. While there is some basis in the Delegate's submission to the Tribunal for concluded this is a recently advanced issue, I am advised by the Employer's counsel, and also by the Delegate that the Employer was represented by counsel throughout this process, and that all the correspondence between counsel and the Delegate has not been placed before me. Counsel indicated that by agreement, particularly because some of the documents contained settlement proposals and some of the documents contained personal invective, that these documents by agreement were not put into evidence. Counsel indicates that had the "recent fabrication argument" been advanced, he would have insisted on all documents between himself and the Delegate be put into evidence. Some very strong language was used by counsel in reply to the submission made by both the Delegate and Dr. Minkoff, with the Employer's Counsel suggesting an intent by the Delegate to mislead the Tribunal.

I note that it is difficult to deal with the issue of "recent fabrication by counsel" or "misleading submissions made by the Delegate", without examining the evidence, and as I indicated I do not have the complete course of the paperwork dealings between counsel and the Delegate. Apparently the Employer was represented from the outset of the investigation by counsel. Neither Counsel, nor the Delegate, were witnesses in this case, and there is therefore a complete absence of oral testimony concerning the investigation process. I cannot make any findings without evidence. As I indicated to the parties, at the hearing, there are other forums to pursue this issue, and it is not my task to discipline either counsel or the

Delegate, nor is there any basis to do so on the material before me. I note further that it is difficult to put any weight on the "recent fabrication argument" where the Delegate failed to interview the Employer.

During submissions, I asked counsel for the Employer how I should address the issue of remedy if I were to find an error in the Determination. I noted that it was open to me to find an error and refer this back to the Delegate for a consideration. The Employer's view was that this issue had been fully canvassed in this hearing, and that it was unnecessary to refer the matter back. The Employer also indicated because the issue of bias raised the Employer was not confident that a new investigation would yield any different result.

In summary, I agree with counsel for the Employer that the Delegate erred in this case by failing to consider whether or not the parties had reached an oral agreement for a one year term. On a reading of the Determination, there is no mention of the Employer's position in any part of the Determination. I would have been inclined to remit this matter back to the Delegate for a reconsideration, however, counsel for the Employer urged me to consider the evidence and make the decision the Delegate should have made.

> The employer submits that the Determination should be set aside. Further more, the circumstances of this case require that the Tribunal assess the competing oral evidence of the complainant and the employer with respect to the formation of a new contract for a definite term ending December 31, 2000. It is likely only through such oral evidence that the Tribunal will be able to resolve the question that ought properly to have been addressed and resolved by the delegate but which was not.
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> (Appeal Submission of the Employer dated December 10, 2001, Page 10)

I accept this submission. In this case, the issue of oral contract was canvassed thoroughly with evidence under oath or affirmation at this hearing. I see no utility in referring the issue of oral contract back to the Delegate or the Director, for further investigation.

While I have concluded that it was an error for the Delegate not to have addressed the issue of oral contract in the Determination, and it is not apparent to me why this was not done, having heard the respective evidence of the parties, I am not satisfied that there was an oral contract or an oral renewal of the contract. I am satisfied that the parties, particularly the Employer permitted the Employee to continue on an indefinite term, after the expiration of the written contract made on January 6, 1997. My reasons for this conclusion are set out below.

Findings Relating to the Oral Contract:

This case turns on the existence or non-existence of an oral contract. There is a significant issue of credibility since the Employer advances the issue, and the Employee denies the issue. The leading case in assessing the credibility of witnesses is *Faryna v. Chorny, [1952] 2 D.L.R. 354 (C.A.)*:

> The credibility of interested witnesses, particularly in cases on conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of truth. The test must reasonably subject his story to the examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only this can a Court satisfactorily appraise

> the testimony of quick minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skillful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be truth, but he may be quite honestly mistaken. For a trial Judge to say " I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self direction of a dangerous kind.
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> The trial judge ought to go further and say that the evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reason for that conclusion. The law does not clothe the trial Judge with a divine insight into the hearts and minds of witnesses. And a Court of Appeal must be satisfied that the trial Judge's finding of credibility is based no on one element only to the exclusion of others, but is based upon all the elements by which it can be tested in the particular case.

Given the nature of the *Faryna* test, I must give reasons why I prefer the evidence of one party over another where that evidence is in direct contradiction.

I was asked by the employer to place weight on the fact that the documents, negotiating drafts of contracts, deal with a one year term, and this is the context in which the parties were negotiating for a renewal of the written agreement. The initial proposal made by Dr. Minkoff (Exhibit 3) contains a one year term. I note that the forms of written contract prepared by Dr. Minkoff, and tendered by ISL (Exhibits 5, 6, and 8) all mention one year terms. The Employer's draft (Exhibit 6) contains a one year term. The Employer argues that this is evidence that the parties had agreed to a one year term. This is not quite an accurate assessment of the drafts. The Employer's draft (Ex 6) contains the following clause;

> 7.2 ISL shall be entitled to terminate Minkoff's employment, without notice, in the event that the National Research Council funding for the Blackcod project is reduced, suspended, cancelled or terminated for any reason whatsoever.

indicating that the term it proposed was "one year or less depending on funding". It cannot be said that the parties agreed for a term certain, as on a strict reading, the proposal by the Employee was for one year, and the proposal by the Employer was for one year or less depending on funding.

In my view it is not open to me to "cherry pick", and find a contract for the parties based on the exchange of drafts. It was likely the "understanding" of each party that they were negotiating for a one year renewal term. Dr. Minkoff was looking at an arrangement which lasted for at least the term of the project, and one year was "a start". Negotiating history can sometimes be helpful in resolving an ambiguity or uncertainty in contractual language. Negotiating history, however, can not be translated into an agreement in the absence of the formality of contract formation

It was of course open to ISL to confirm, in writing the matters that Dr. Minkoff proposed which were agreed to and the matters which were in dispute. It was also open to the employer to write to Dr. Minkoff indicating that it was continuing Dr. Minkoff's salary for a year at the present rate. It chose not to do so. I cannot find on the basis of the exchange of drafts that there was an agreement for a one year continuation of the contract. The negotiating history, in my view, is of little assistance in resolving the issue of agreement on a term or definite period of employment. The fact that the parties did exchange drafts is part of the "currently existing conditions" which I must consider in applying the *Faryna* test. What I find more significant, however, is that the Employer basically ignored the drafts that Dr. Minkoff put forward. The fact is that Dr. Minkoff worked for at least the first two and a half months of 2000, without a contract, on the facts which are not in dispute. The Employer did not put out a draft for Dr.

Minkoff's consideration until February of 2000. This leads to the conclusion that the Employer was prepared to continue the employment relationship without reaching an agreement for a definite term.

Dr. Minkoff says that after making a number of attempts to secure a written contract with ISL, he gave up attempting to secure a contract in writing. He could not force Mr. Saunders to talk to him, and it was like "banging his head against the wall". Dr. Minkoff says that his salary continued on.

This description is consistent with what in fact happened, and what Mr. Saunders admitted to happening, he would not discuss the various contract drafts presented by Dr. Minkoff. On Saunders story, he gave no reason to Minkoff for his failure to discuss the contract drafts. Dr. Minkoff was surprised at being terminated, as the Black Cod project was continuing, and he was given no advance notice of the termination. Dr. Minkoff testified in cross-examination that he had no problem with a one year term, if "we were to sign a contract and those were the dates". His use of "one year" in his drafts was a device to "work towards" employment for the entire project time period. He said that there never was a meeting in a car, and he was never presented with anything for signature.

Mr. Saunders says that the parties reached an oral arrangement in a car on the way back from a meeting in Campbell River. He says that Dr. Minkoff raised the issue, and that he agreed to continue Dr. Minkoff's salary and pay a bonus of $5,000 if the fish could be produced and sold. He says that Dr. Minkoff said "what is one more year", and both parties appeared to be "relieved" to have put this issue behind them. I note that in considering Mr. Saunders evidence, I find it somewhat surprising that after having ignored Dr. Minkoff's earlier written proposals, including a written response to the employer's only written offer, Saunders would conclude an oral contract in a vehicle. He cannot relate when in March this occurred. No surrounding corroborative proof is offered. If this was a business trip, as advanced by Mr. Saunders, there must have been records related to fuel expenses or other expenses, diary notes scheduling a meeting, or other documents relating to a meeting. No documents were produced which would confirm a March meeting. Further, Mr. Saunders was uncertain who he met, and the purpose for such a meeting. I note that the meeting as described by Mr. Saunders, was bereft of the detail surrounding this meeting. If the meeting took place, as alleged, I would have thought there would have been more detail, or a better recollection of the events surrounding the meeting.

Dr. Minkoff denies that such a meeting took place, and indicates that this was a time when he would have been very busy with attempting to reproduce fish. This evidence was not challenged on cross-examination. Dr. Minkoff viewed his diary and noted that he had nothing in his diary concerning any meeting in Campbell River or reaching an agreement with Mr. Roberts. Dr. Minkoff appeared to have his diary with him, however, counsel did not challenge him on this evidence. Given Dr. Minkoff's concern with his work permit status, if an agreement was reached, it would be surprising if he did not insist on written documentation. He testified to a procedure where he had to send documents to HRDC and then on to immigration. Again, counsel did not challenge Dr. Minkoff with regard to Dr. Minkoff's interest in having a written contract for immigration purposes.

Further, I think it unlikely that Mr. Saunders would have left the renewal of the contract to an oral contract. I believe this to be the case because, from the outset of the relationship, Mr. Saunders sought to protect the position of ISL. He protected the technology of ISL by having Dr. Minkoff sign a confidentiality and non-disclosure agreement during Dr. Minkoff's first pre-employment site visit. He also had the initial term of employment confirmed in writing, securing Dr. Minkoff's services for the anticipated term of the project. He also attempted to deal with the possibility of funding cuts to the project, by agreeing to pay for the relocation costs of Dr. Minkoff to Israel or comparable costs of moving

to another country. When ISL did prepare a draft contract for Dr. Minkoff's consideration, ISL sought further to protect this project by tendering a contract draft containing protection of the intellectual property, and a restrictive covenant on Dr. Minkoff's ability to work, as well as a termination without notice clause, in the event of funding change by the NRC.

It is my view, the reason why the Employer did not commit to a written renewal term was that there was uncertainty regarding the project funding. In cross-examination of Dr. Minkoff, counsel for the employer put to Dr. Minkoff that under the terms of the arrangement between ISL and NRC, during 2000, the contract was cancellable on 60 days notice. Dr. Minkoff accepted this assertion of counsel. I therefore find as a fact that the funding for this project on which Dr. Minkoff was working, during 2000 could be cancelled on 60 days notice. Further, I note that in the draft contract presented by the Employer to Dr. Minkoff (Ex 6 or 13), the contract provided for termination of Dr. Minkoff, without notice, in the event of funding cuts by NRC. It seems more likely than not, that when faced with an uncertain and risky project, which had achieved limited commercial success as of the spring of 2000, and was now being financed by a repayable loan, terminable on 60 days notice, ISL was reluctant to commit to a fixed term of employment for Dr. Minkoff, which would exceed the notice period for the termination of funding. This underlying reality or "currently existing condition" is one that permeates or forms the background in which Dr. Minkoff submitted a number of proposals, to which the employer did not respond during 1999 and 2000. This is also a reality, which makes the "oral contract" improbable. There was nothing in the evidence to suggest that in March of 2000, there was any further certainty regarding the project.

If the parties had truly reached an agreement on the term I believe that both parties would have insisted upon documentation; Dr. Minkoff because he needed it for immigration purposes, and ISL because it would want to have Dr. Minkoff's services available for the project term.

From Mr. Saunders oral testimony, it was obvious that ISL was dissatisfied with Dr. Minkoff. The following evidence was given by Mr. Saunders. The Employer indicated that there were personality difficulties between Dr. Minkoff and staff. The Employer testified that little notice was given by Dr. Minkoff before going for a Christmas break to England. It was evident in Mr. Saunders evidence that he was irritated by the fact that Dr. Minkoff was seeking shares and "everything except the condo in Hawaii" when Dr. Minkoff first raised the renewal of the contract in 1999. The Employer spoke to a deteriorating relationship by the late autumn of 2000. The Employer stated that he made a series of notes in his files that Dr. Minkoff was "refusing to follow my instructions and making unilateral decisions on expenses without signing purchase orders". I also heard evidence about risk and uncertainty with regard to the project. Mr. Saunders indicated that he would have terminated Dr. Minkoff in November, but Dr. Minkoff went to Chile for a consulting project, returning briefly, and then onto England for Christmas. If Dr. Minkoff had been in Canada, the Employer could have discharged its liability by giving advance notice. Given what appears to have been the Employer's desire to terminate Dr. Minkoff because of a deteriorating relationship, it could do so, without financial consequences, by alleging cause for dismissal, or a definite term contract.

As pointed out by Dr. Minkoff, and the Delegate, it is perhaps too convenient that the oral renewal was alleged to have been made in March, and that Mr. Saunders is not able to corroborate the March meeting to pin down the conversation. Under s. 65 of the *Act* if one works for more than three months after the expiration of a fixed term contract, the employment arrangement has the effect of considered an "indefinite" arrangement for the purpose of assessing compensation for length of service. If in fact, Mr. Saunders was aware of the *Act* and intended to rely on a fixed term contract, it would have been reasonably prudent to confirm the extension in writing. It seems anomalous that Saunders would

document the original contract in writing, and fail to confirm an oral renewal agreement, particularly where there were numerous written proposals from Dr. Minkoff, and where the Employer had prepared a written draft. This is not a case which involved numerous oral discussions relating to the renewal term. It is peculiar that Mr. Saunders did not respond in writing to Dr. Minkoff's written proposals. The only explanation for this, apparent in the evidence is "uncertainty and risk" with the project.

The Bonus:

I note that it was suggested that the bonus paid by the Employer corroborates the Employer's version of events. Mr. Saunders said that during the conversation in the car they also discussed the bonus. Dr. Minkoff says that he received a bonus in 2000, based on an agreement that he made with ISL during the fall of 1999. This bonus was related to a discussion he says that he had with the Employer regarding production of black cod juveniles, and a new theory he was working on. He said that the employer was excited about this and promised a bonus of $5,000 if the fish could be produced and sold. The Employer says that the payment of the bonus (Exhibit 9) confirms the Employer's evidence of the contract in March. The problem for the Employer, however, is that the bonus cheque (Exhibit 9) was not paid on a date which can be connected to the car conversation. The amount of the bonus was not referred to by the Employer in its draft contract (Exhibit 6). The amount of the bonus was not referred to in any of the drafts prepared by Dr. Minkoff. Further, it was paid as a consultant fee. It could have been paid as a result of a conversation with Dr. Minkoff in the fall of 1999, or as a result of a conversation in March of 2000. I think it more probable that these discussions occurred in the fall of 1999 then 2000, as an incentive to Dr. Minkoff to use his new theory to attempt to make a success of the project which had not succeed to date.

On the whole of the evidence, I think it likely that Mr. Saunders was content to maintain the work relationship on an indefinite basis, without a specified term, given the riskiness of the project and uncertainty with funding. This would certainly afford a reason why he chose not to respond to the proposals initiated by Dr. Minkoff, as an attempt to nail down the renewal terms, in advance of expiration of the written contract on December 31, 1999.

While I have rejected Mr. Saunders evidence, I do wish to comment on Dr. Minkoff's evidence. The Employer took issue with Dr. Minkoff's evidence in this case. The Employer raised "credibility issues" with regard to the preparation of a web site, the bonus, and the signing of a confidentiality agreement. I take as genuine Dr. Minkoff's evidence that he was surprised about his termination, particularly where the project was continuing on without him. This evidence rings true because of two points of fact. Dr. Minkoff had written a report to the NRC which allowed for continued funding of the project by NRC. The payment of a bonus in addition to the salary, confirms that Dr. Minkoff had made some accomplishment in the project. Because of these points, termination would come as a surprise.

With regard to the website, as indicated earlier, given that the Employer did not have exclusive rights to Dr. Minkoff's services, and given that Dr. Minkoff continued to engage in consulting work during the term of the contract, I do not find it surprising that he attempted to market the consulting portion of his work by making a website. His evidence that the website involved his efforts, the efforts of his co-consultants, and a website programmer, is not inconsistent with the web-site being available on the internet in November or December of 2000. Nor is it inconsistent with his evidence that he operated his consulting business as a proprietor, and then incorporated a company with carrying on the consulting business after he was terminated with the employer.

On the whole, I believe that Dr. Minkoff answered questions put to him in a candid and straightforward manner. A particular point was Dr. Minkoff's evidence that he had not ever signed a confidentiality agreement during an employment term. Some attempt was made to contradict this evidence, with Exhibit 2, however, it is clear that Exhibit 2 was signed on a pre-employment basis. Dr. Minkoff appears to have considered Exhibit 2 to apply to information obtained during the pre-employment visit. Dr. Minkoff's understanding of the document (whether or not he is mistaken), is not an issue of credibility. Further Dr. Minkoff referred to Exhibit 2 as a forgery. While it is clear that the document was altered to insert Dr. Minkoff's address, this does not make the document a forgery. Nevertheless, Dr. Minkoff was correct that the document was altered. I draw no "credibility inferences" from either the alteration of the document by ISL or Dr. Minkoff's characterization of the document as a forgery.

In summary, in assessing the allegation of oral contract, I have considered the negotiating history, particularly the lack of response of the Employer to numerous contract proposals put forward by Dr. Minkoff, the riskiness and uncertainty associated with the project results and financing, the interests of both parties in documenting their past arrangements, and the risks in writing, and the change in the NRC funding arrangements for the project. I find that Mr. Saunders evidence is not in accordance with the probabilities, and therefore I reject his evidence related to the allegation of an oral contract. On the whole of the evidence, I find that there was no oral agreement amounting to a new contract or a renewal contract for a one year term in March of 2002, as alleged by ISL. Having made this finding of fact, based on credibility of the parties at the hearing, it is clear that Dr. Minkoff worked on a fixed term contract to December 31, 2000. It is clear that he worked for a further 12 months after the term of that contract expired. It is clear that the Employer did not give any advance notice to Dr. Minkoff of the termination of the contract.

This is a case for the proper application of s. 65(2) of the *Act*. There is, however, a further error in the Determination, as the Delegate found an entitlement to compensation for length of service in the amount of three weeks. The Delegate should have found an entitlement to four weeks compensation ($6,250), plus vacation pay of $250. This amounts to $6,500, plus interest calculated in accordance with the *Act*.

Miscellaneous Procedural Issues:

There were a number of procedural issues which arose during this hearing, which I wish to address in this Decision.

(a) Documentary Issues

I note that during the course of this case the Employer objected to three documents which I marked as Exhibits "A", "B" and "C" for identification, which were letters from Gus Angus, Craig Clarke, and Dr. Warren Nigata. These documents were filed in Dr. Minkoff's written submission to the Tribunal. I reviewed all the written submissions of the parties, prior to the first day of hearing. I indicated that I would make a ruling in writing in my reasons. These documents are written by persons with no personal knowledge of the contractual relations between ISL and Dr. Minkoff. Further, these persons were not tendered to give oral evidence, or cross-examined. It is apparent that the Delegate did consider Exhibits "B" and "C" , and did not disclose the contents of the documents to the Employer.

The practice of the Tribunal is to accept for filing purposes documents which are filed by the parties. Adjudicators usually read the file in preparation for oral hearings. It is not uncommon for persons

unrepresented by counsel to submit evidence of trifling probative value, from persons who are not called as witnesses. In my view these documents are of no assistance to me in determining the issue of whether there was a definite term contract. I note that I advised the parties at the hearing, that I read the documents marked as Exhibit "A", "B" and "C", I, have not relied on this documents in making my decision.

(b) Witness Issues:

Dr. Minkoff sought to tender Mr. Austin as a witness, on April 16, 2002. At 9:50 a.m., I was advised that Mr. Austin was not available to give evidence until 12:00 or 12:30. Mr. Austin was present for a portion of the day on the first day of hearing on April 8, 2002. While I permitted the hearing to be re-opened to permit cross-examination of Dr. Minkoff by the Employer on an issue related to the website, I was not prepared to stand down this case to wait for Mr. Austin to attend. Mr. Austin was being tendered to give evidence relating to his "understanding of the term of Dr. Minkoff's employment". Mr. Austin was not Dr. Minkoff's employer, while he was involved somehow in the "partnership" related to the development of the black cod technology. On the basis of the submissions, it is apparent that he had no personal knowledge of the contractual relationship, and particular could not shed any light on the existence or non-existence of an oral contract.

(c) Quantum

I note that the Employer, in its written submission of December 11, 2001 sought to reserve its position on the issue of quantum, as its principal was recently returned from abroad. No subsequent written submission was filed with the Tribunal on the issue of quantum. No evidence was lead at the Tribunal hearings by the Employer with regard to any error in the calculation of wages. The Tribunal has not developed a practice of bifurcated hearings where one hears the merits of an argument, and then a hearing related to quantum. Given that no evidence or argument was lead at this hearing on the issue of quantum, and given that there is no dispute that Dr. Minkoff worked for a total of four years, it is appropriate to vary the Determination, to correct it for the proper amount of compensation for length of service and vacation pay. Dr. Minkoff is of course entitled to interest on the amount pursuant to s. 88 of the *Act*.

ORDER

Pursuant to s. 115 of the *Act,* I order that the Determination dated November 16 , 2001 is varied to provide for 4 weeks compensation for length of service, plus vacation pay in the amount of $6,500, and interest calculated in accordance with s. 88 of the *Act*.

Paul E. Love
Adjudicator
Employment Standards Tribunal