Employment Standards TRIBUNAL

An appeal

- by -

Save Energy Walls Ltd.
("Save Energy")

- 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: Ian Lawson

FILE No.: 2004A/172

DATE OF DECISION: December 2, 2004

DECISION

SUBMISSIONS

Raymond Anderson	On behalf of Save Energy Walls Ltd.
Judy Reekie	On behalf of the Director of Employment Standards
Nancy Kane	On her own behalf

OVERVIEW

This is an appeal by Save Energy Walls Ltd. ("Save Energy") pursuant to section 112 of the *Employment Standards Act* ("*Act*"). The appeal is from Determination ER#120 094 issued by Judy Reekie, a delegate of the Director of Employment Standards, on August 23, 2004. The Determination found Save Energy liable to pay regular wages and vacation pay with interest to Nancy J. Kane ("Kane") in the amount of $4,239.55, together with an administrative penalty of $500.00. Save Energy filed an appeal on September 30, 2004. The appeal is now decided without an oral hearing, on the basis of written submissions and the record before the Tribunal.

FACTS

Save Energy operates a manufacturing business in Abbotsford, B.C. Kane was employed on March 20, 2003 at a wage of $10.00 per hour, and was to complete a probationary period of no more than three weeks. The delegate then makes the following rather extraordinary findings of fact:

> On March 28, 2003, Gord Johnson (Johnson), V.P. and CEO of Save Energy Walls informed her that she was to be the new plant manager. On April 16, 2003, Kane and Johnson agreed that, effective immediately, as plant manager she was to be paid a salary of $60,000.00 per year. Johnson informed her that she was no longer required to punch a time clock, and that as a salaried employee, she would receive her cheques from a different account than she previously had, as the company wished to keep management salaries and employee wages separate.
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> Johnson and Kane agreed to meet on Monday, April 21, 2003 to go over the details of her new position, i.e. payment dates, vacations, etc. On April 21st, Johnson was not available to meet with Kane. The meeting date was changed to April 22nd; Johnson did not show up. The meeting was rescheduled for April 28th; again Johnson was not available. On April 29th Johnson did not attend the workplace. On April 30th, Kane expected to be paid, but was not. She was told that Johnson wanted to meet with her on May 1st; Johnson did not show up for the meeting. On May 2nd Kane met with Johnson and with Ray Anderson (Anderson), president of Save Energy Walls. At the meeting Johnson informed Kane that he again did not have time at present to meet with her regarding her wages.
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> On May 3, 2003, Kane met with Anderson and spoke to him of her conversation with Johnson regarding her new salary. He agreed that $60,000.00 per year was a fair wage. Kane told Anderson that in order for her to complete a purchase of a new home she required, by May 5, 2003, a letter from her employer confirming her employment and a copy of a pay stub. Kane gave

> Anderson a "proof of employment letter" she had drafted and Anderson assured her that he would try to get her letter and cheque to her the following Monday, May 5, 2003.
>
> On May 5, 2003, Anderson presented Kane with a copy of a contract Johnson wanted her to sign prior to issuing her a cheque for outstanding wages and a proof of employment letter. On May 6, 2003, Johnson and Kane met to go over the contract. Johnson proceeded to tell Kane that 50% of her wages would be paid in cash and 50% would be paid in company shares. This was not the salary payment scheme she and Johnson had previously discussed. After some discussion Johnson told Kane not to sign the contract, as it was too employer based and agreed to rework the contract and get back to her with it. Kane asked Johnson when she would expect to be paid, and was told there was presently no money to pay her. Johnson asked Kane to hold off a week or two.
>
> At Kane's request, on May 6, 2003, Johnson signed the proof of employment letter, wherein he confirms that Kane's annual salary was $60,000.00 per year, and faxed it to the [*sic*] Kane's mortgage broker. This letter is included as part of Kane's evidence marked Exhibit #1. A pay statement did not accompany the letter, as Kane was yet to receive outstanding wages at her new rate of pay.
>
> Kane did not attend work after May 6, 2003. Discussions went back and forth between her and Johnson via the telephone, but at no time was she told that her paycheque was ready for her...

Kane filed a complaint with the Director that she had not been paid wages for the period April 14 to May 6, 2003. She reported that she had been paid $1,395.00 for the period March 20 to April 13, 2003. She had also complained she was owed compensation for length of service, but she later withdrew that claim.

The Director elected to conduct a complaint hearing, and Save Energy was sent notice of the hearing to be held on March 8, 2004. The delegate reports the following in the Determination:

> Kane attended the hearing on March 8, 2004. Save Energy Walls did not attend the hearing. Gord Anderson, of Save Energy Walls was contacted at 9:05 a.m. on March 8, 2004, at 604-723-0964 and a message was left for him advising that the hearing was scheduled for 9:00 a.m. but we would wait for him to arrive or call until 9:30 a.m. Our office also advised that the hearing would commence at 9:30 a.m. and that it would be possible for him to attend via telephone if he wished to participate. Mr. Anderson did return the call later in the day and advised that he did not wish to attend the hearing, and that he was aware that there were outstanding wages owed to Kane but the company was not in the position to pay wages at that time. The hearing commenced at 9:30 a.m.

I presume the "Gord Anderson" referred to by the delegate in the above paragraph is actually the "Ray Anderson" of Save Energy to whom the delegate referred elsewhere in the Determination. "Raymond Anderson" filed the appeal on behalf of Save Energy, and claimed as the only ground of appeal that evidence has become available that was not available at the time the Determination was being made. Save Energy seeks an order referring this matter back to the Director. Anderson states in the notice of appeal: "I was not aware of this matter or the various meetings required until this letter showed up at my house." Attached to the notice of appeal is a handwritten note from Anderson which reads in its entirety:

> Further to the reasons for an appeal on this matter, my understanding at the time of Ms. Kane's period with the company I was told that her wages would be entirely covered by a Mr. Dave Smalley and he or Gord Johnson were working it out. Unfortunately I need to locate my notes on this matter, thank you.

Anderson sent a further submission which enclosed two e-mail messages from David W. Smalley, a lawyer with Fraser and Company in Vancouver (which is also Save Energy's registered office). The e-mails refer to a meeting that Mr. Smalley believed was to take place on Saturday, May 17, 2003, and also to the possibility Mr. Smalley would advance $25,000.00 "when the paper work with Canaccord is complete." In their submissions, Kane and the delegate point out Anderson had a telephone discussion with another delegate who attempted mediation and Anderson's allegation he knew nothing of Kane's complaint is not credible.

ISSUE

Does Save Energy have any evidence that was not available at the time the Determination was being made, to justify referring the matter back to the Director?

ANALYSIS

In the absence of some extraordinary reason for failing to present important evidence to the delegate, an appellant may not "lie in the weeds" and present that evidence only after a Determination has been issued against their interest (see *Tri-West Tractor Ltd.* BCEST No. D268/96, and *Kaiser Stables Ltd.* BCEST No. D058/97). Save Energy does not specify what "new" evidence it wishes to present, and I presume this new evidence is new only because Save Energy failed to attend the complaint hearing. Save Energy advances no reason or explanation for failing to respond to the notice of complaint hearing, and Anderson makes no response to the Delegate's finding that he called the Director on the date of the hearing and said he was not going to participate.

The record discloses that Save Energy had a number of employees and at least four vice-presidents. Save Energy's failure to explain how the notice of complaint hearing was apparently not received is in my view fatal to its appeal. In any event, Save Energy has not identified any evidence as "not available" at the time the Determination was being made and its appeal must therefore be dismissed.

ORDER

Pursuant to section 115(1) of the *Act*, the appeal is dismissed and Determination ER#120 294 issued on August 23, 2004 is confirmed, with interest pursuant to section 88.

Ian Lawson
Member
Employment Standards Tribunal