Employment Standards TRIBUNAL

An appeal

- by -

Graestone Ready Mix Inc.
("Graestone")

- 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: April Katz

FILE No.: 2002/102

DATE OF DECISION: May 24, 2002

DECISION

APPEARANCES:

John Wiens	on behalf Graestone Ready Mix Inc.
Lynne Egan	on behalf of the Director

OVERVIEW

Graestone Ready Mix Inc. ("Graestone"), has appealed a Determination of the Director of Employment Standards based on evidence that was not submitted to the Director's Delegate during the investigation of Tony Giesbrecht's ("Giesbrecht") complaint. Graestone operates a cement plant and Giesbrecht was a truck driver with Graestone for over 4 years ending on May 24, 2001. Giesbrecht filed a complaint with the Director claiming compensation for length of service and overtime. The overtime was paid during the investigation. Graestone took the position that no compensation was payable because Giesbrecht was terminated for cause. The Director's Delegate issued a Determination on February 8, 2002 concluding that Giesbrecht was owed compensation for length of service.

ISSUE

Two issues arise in this appeal.

1. Should the Tribunal consider evidence submitted with this appeal that was not made available to the Delegate during the investigation?

2. If the evidence is considered does it support the conclusion that Giesbrecht's employment was terminated for cause within the meaning of the *Employment Standards Act* ("*Act*")?

ARGUMENT

Graestone argues that Giesbrecht knew he was not allowed to transport muriatic acid on his truck under company policy and government regulations and that he did so on May 24, 2001. In support of this position Graestone has submitted a statement from the Plant Manager which contradicts the report of a conversation between him and Giesbrecht. The Plant Manager did not make this statement to the Director's Delegate.

The Director's Delegate argues that the new statement from Graestone should not be considered because it was not submitted to the Delegate during the investigation.

THE FACTS AND ANALYSIS

In an appeal to the Tribunal the onus is on the appellant to show on a balance of probabilities that the Determination ought to be varied or cancelled based on an error of fact or law. The appellant in this appeal is Graestone. Graestone's position is that the Delegate made an error of fact in finding that

Giesbrecht was not carrying muriatic acid on his truck. At the time of the Determination the Delegate did not have the Plant Manager's statement and has not tested the statements of the Plant Manager.

The Tribunal does not normally consider evidence on an appeal that could have been produced during an investigation. In *Cathay Traditional Chinese Medical Centre Ltd.* BC EST # D169/01 the Tribunal said through decisions, which stem from *Tri-West Tractor Ltd.* BC EST # D268/96) and *Kaiser Stables Ltd.* BC EST # D058/97, that it will not normally allow an appellant to raise issues or present evidence which could have been raised or presented at the investigative stage. In *Tri-West*, the principle is stated as follows:

> "This Tribunal will not allow appellants to 'sit in the weeds', failing or refusing to cooperate with delegate in providing reasons for the termination of an employee and later filing appeals of the Determination when they disagree with it. ... The Tribunal will not necessarily foreclose any party to an appeal from bringing forward evidence in support of their case, but we will not allow the appeal procedure to be used to make the case that should have and could have been given to the delegate in the investigative process."

In *Kaiser Stables*, the concerted efforts of a delegate to have an employer participate in the investigation of a Complaint were ignored by the employer. The employer then appealed the delegate's Determination and sought to introduce new evidence on appeal. That evidence was ruled inadmissible. The Adjudicator in that decision states, "*the Tribunal will not to allow an employer to completely ignore the Director's investigation and then appeal its conclusions*".

Decisions like *Tri-West* and *Kaiser Stables* preserve the fairness and integrity of the Act's decision-making process. If it were not for such decisions, the role of the Director would be seriously impaired and the appeal process would become unmanageable and eventually fall into disrepute.

In this instance, the Plant Manager's statement contradicts Giesbrecht's statement made to the Director's Delegate. The Delegate had forwarded Giesbrecht's version of events to Graestone during the investigation. Graestone was give two opportunities to refute Giesbrecht's statements in response to letters sent on January 2, 2002 and January 30, 2002. Graestone did not reply to either letter.

The Tribunal does not accept this type of evidence for the very reason that causes the problem in these circumstances. Graestone did not cooperate with the Delegate's investigation so that the Delegate could test the statement of the Plant Manager by ascertaining surrounding facts and then challenge Giesbrecht.

Normally when there are facts in dispute, the investigator, the Director's Delegate, is the best person to test the veracity of the witnesses and the facts in evidence. The Delegate can interview the individuals who have different recollections of the facts. The Delegate may then make a credibility finding. The Court of Appeal of British Columbia set out criteria for making a credibility finding in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) at 356-8 that has been used by the Tribunal on several occasions. The criteria are set out below.

> "The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of a 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 thus 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...."

When the Delegate knows there is a different recollection of the facts the Delegate can test the surrounding circumstances to assess if there is a reason to believe one version of events over the other.

When the statement was not produced the Delegate could not assess the credibility of the Plant Manager as compared to Giesbrecht. Graestone now wants to rely on evidence that could have been given to the Delegate and tested. I find that the introduction of this evidence at this time prejudices the fairness of this process.

I find that I cannot consider the evidence of the Plant Manager. If I had considered it I would not have found it determinative as it is contradicted by Giesbrecht. The evidentiary burden of proof is on the appellant and where the evidence is inconclusive, I must find against the appellant in any event. Having reached the conclusion that I cannot consider the new evidence I find no basis on which to vary or cancel the Determination.

CONCLUSION

Graestone has not discharged the onus on it to demonstrate an error in the Determination. I deny the appeal and confirm the Determination

ORDER

Pursuant to section 115 (1)(a) of the *Act* the Determination dated December 12, 2001 is confirmed.

April D. Katz
Adjudicator
Employment Standards Tribunal