EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act R.S.B.C. 1996, C.113

- by -

Samuel G. Craig
(“ Craig ”)

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: David B. Stevenson

FILE No.: 2000/306

DATE OF DECISION: June 14, 2000

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) by Samuel G. Craig ("Craig") of a Determination that was issued on April 6, 2000 by a delegate of the Director of Employment Standards (the "Director"). The Determination addressed a complaint that had been filed by Craig against his former employer, YVR Computer Surplus Warehouse Ltd. ("YVR"), for wages alleged to be owing to him, including overtime wages, annual vacation pay and length of service compensation. Following an investigation, Craig was paid an amount for overtime wages, vacation pay and statutory holiday pay by YVR. The claim for length of service compensation was denied as the Director concluded that Craig had worked a period of less than 2 months and, pursuant to subsection 63(1) of the *Act*, YVR was not entitled to length of service compensation.

Craig says that conclusion is wrong.

ISSUES TO BE DECIDED

The only issue in this appeal is whether Craig can show that the Determination was wrong and that, in fact, he was employed by YVR for more than three consecutive months.

FACTS

It is unnecessary to set out all of the facts considered by the Director. The Determination contains a comprehensive analysis of the respective positions of Craig and YVR. The investigating officer interviewed four persons whose names were provided by Craig and four persons tendered by YVR. The identity of each witness and a summary their statement is found in the Determination.

The investigating officer also examined material provided by YVR and by Craig, including payroll records, copies of Craig's time cards and copies of direct deposit transaction slips relating to Craig's wages provided by YVR and copies of bank records, some correspondence from federal government agencies and a calendar for the months of June, 1999 to November, 1999 provided by Craig. The object of examining the witnesses and the material provided by YVR and Craig was to determine whether Craig was employed by YVR for more than three consecutive months, as he claimed, or less than three consecutive months, as YVR claimed. The Determination also notes the following information:

1. Craig filed his complaint on January 25, 2000. On the complaint form he stated his start date as August 15, 1999.

2. On February 10, 2000, he requested that his start date be changed to July 2, 1999.

3. On February 14, 2000, he requested that his start date be changed to June 28, 2000.

The investigating officer concluded that no substantive evidence had been provided by Craig to support his allegation that he was employed with YVR from June 28, 1999 and, on balance, based on the records provided by YVR, found that Craig commenced his employment with YVR on September 25, 1999. The reasons for that conclusion are provided in the Determination.

The appeal was filed with the Tribunal on May 1, 2000 and in it Craig set out six reasons in support of his assertion that the above finding was wrong, which I shall only summarize:

(4) the investigating officer should not have concluded that the calendar showing "hours worked" was not credible;

(5) the investigating officer was rude and abusive to Craig's witnesses;

(6) one person, identified in the appeal only as "Rick", was not contacted by the investigating officer;

(7) YVR's witnesses were afraid of losing their jobs and, as a result, their statements were coerced;

(8) Matt Thompson's father is also an owner of YVR; and

(9) his start date was confirmed by "Labour Relations" to be July 2, 1999[1].

The Director filed a reply to the appeal on May 4, 2000. There are two salient points in that reply: first, that Craig had changed his start date twice from the date stated on the complaint and had changed it again in the appeal; and second, that Craig had never provided the investigating officer with the name of "Rick". The Director submitted that no new substantive evidence has been added to material upon which the Determination was based.

YVR filed a reply to the appeal on May 10, 2000. Included in the material attached to the submission was a letter from Canada Customs and Revenue Agency date stamped March 31, 2000. The letter concerned an appeal filed by YVR on whether CPP contributions and UI premiums were payable on Craig's earning from July 2, 2000 to November 19, 2000. The letter contains the following paragraph:

> It has been decided that contributions and premiums were only payable from September 25, 1999 to November 19, 1999 as he was employed under a contract of service. Sam Craig was not employed by you prior to September 25, 1999.

It is not clear that Craig received a copy of this letter, but at a minimum it would seem to contradict the assertion found in point (f) of his appeal.

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[1]This point refers to a letter to Craig from Canada Customs and Revenue Agency concerning the insurability for unemployment insurance purposes of his employment with YVR. The Agency ruled that he had established 340 insurable hours during the period July 2, 1999 to November 19, 1999. The letter indicates Craig could object to the ruling, but he apparently did not do so. The records provided by YVR showed Craig worked 341 hours during the time period commencing September 25 and ending November 30, 1999.

On May 23, 2000, Craig filed an affidavit from Richard D. Stepan. The objective of Mr. Stepan's affidavit was to suggest that Craig was employed at YVR in early June, 1999. YVR filed a response to this affidavit, but it adds nothing of relevance to the substance of the appeal and it has not been added to the material on file nor considered in this decision.

ANALYSIS

The actual appeal, filed May 1, 2000 adds nothing of substance to the material considered by the investigating officer when making the Determination. More particularly, there was no evidence provided with the appeal to contradict the findings made by the investigating officer.

On May 23, 2000, Craig filed the affidavit of Mr. Stepan. On its face, at least, it purports to support Craig's contention that he was employed by YVR for longer than three consecutive months. There are two issues in respect of the affidavit. The first is whether it should be considered at all. The second is whether, if it is considered, it is sufficiently cogent to affect the conclusion of the investigating officer.

I accept that the investigating officer was not given the name "Rick" during the investigation. It makes no sense that she would have interviewed all other persons whose names were proffered by Craig and YVR, identified each of them by name in the Determination and provided an outline of the information each provided, while intentionally failing to interview "Rick". Generally, the Tribunal will not allow information or evidence that was reasonably available and could have been produced at the time of the investigation but which, either intentionally or negligently, was not produced or withheld from the investigating officer to be introduced and relied on in an appeal. The general approach is grounded on the statutory objectives of efficiency and finality in resolving complaints under the *Act*. It may be relaxed in appropriate circumstances, but much will depend on the reason for the failure to provide the information to the investigating officer.

In this case, Craig has given no reason why the investigating officer was not referred to Mr. Stepan during the investigation. This is surprising, since it is apparent that Mr. Stepan was a person known to Craig at the time the investigation was being conducted. I am inclined not to allow the information contained in Mr. Stepan's affidavit to be introduced in support of this appeal.

As a result, Craig has not met the burden of showing the Determination was wrong and his appeal is dismissed.

Even had I considered the affidavit, I would have declined to give it sufficient weight to change the conclusion reached by the investigating officer. The affidavit is vague and is inconsistent with assertions of fact made by Craig himself. It is telling, in my opinion, that Craig does not contend that any of the summaries of his witness' statements are incorrect or misleading nor does he say why the statement summaries of YVR's witnesses should not be accepted, beyond a bare allegation that all the statements were coerced. More critically, he does not say that his own assertion about when he commenced his employment with YVR is wrong, yet that assertion and the statements made by Mr. Stepan in his affidavit cannot stand together. Craig told the investigating officer that he started his employment with YVR on June 28, 1999. He supported

this claim with a calendar he provided to the investigating officer. The calendar recorded his first 8 hours of work on June 28 and also noted, on that date, "started for Computer Surplus". He now maintains in this appeal that he started work on July 2, 1999. He has never contended that he started his employment with YVR earlier than June 28, 1999.

Mr. Stepan's affidavit suggests that Craig was employed at YVR in early June and makes specific reference to June 16 as a date he attended YVR and observed Craig participating in installing a sound card in his computer. The affidavit does not indicate whether Mr. Stepan's statements are supported by anything other than his own recollection. I do not accept that having a sound card installed in one's computer is of sufficient significance that the date, unsupported by any documentation such as receipt or warranty (which is neither attached nor alluded to), would be recalled with such specificity almost eleven months after the event. I do not place much weight on the fact that Mr. Stepan has provided this affidavit under oath. The validity of his statements turns exclusively on his ability to say with certainty that he made his observations in "early June", a matter he could easily be mistaken about.

As I stated above, even if I were to have accepted this affidavit, it is not sufficiently clear and cogent to establish that the conclusion made in the Determination relating to the date on which Craig started his employment is wrong.

The appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated April 6, 2000 be confirmed.

David B. Stevenson
Adjudicator
Employment Standards Tribunal