Employment Standards TRIBUNAL

An appeal

- by -

Ocean City Realty Ltd.
("Ocean City" or the "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.: 2003A/277

DATE OF DECISION: September 24, 2003

DECISION

OVERVIEW

This is an appeal by an employer, Ocean City Realty Ltd., ("Ocean City " or "Employer"), from a Determination dated June 27, 2003 (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*"). Joanne MacDougall, (the "Employee") filed a complaint that she was terminated without notice and had not been paid compensation for length of service. The Delegate gave notice of a hearing date and conducted a hearing. The Employer did not attend the hearing, did not apply for an adjournment of the hearing, but provided a written submission alleging that the Employee quit her employment. The Delegate determined that the Employee was terminated and found an entitlement to the sum of $3,553.71 which included compensation for length of service, vacation pay, interest, and an administrative penalty. The Employer filed an appeal alleging a breach of natural justice, and new evidence. The Employer filed new evidence supporting its allegation of a quit.

In my view, the Delegate accorded a reasonable opportunity to the Employer to participate in the determination of the Employee's complaint. Having provided a reasonable opportunity, the Delegate did not err in preferring the oral evidence of the Employee and her witnesses heard at a hearing over the written submission of the Employer. It cannot be said that it was a breach of natural justice to determine the facts on the basis of the Employee's oral evidence. Any evidence submitted was "only new" in the sense that it was not before the Delegate, because the Employer chose to fail to attend the hearing. I therefore dismissed the appeal and confirmed the Determination.

ISSUE:

Did the Delegate provide an adequate opportunity to the Employer to participate in the investigation of Ms. MacDougall's complaint?

FACTS

I decided this case, on the basis of written submissions, after considering the notice of appeal filed by the Employee, the written submissions of the Employer and Employee, and reading the Determination and the record supplied by the Delegate. The Delegate issued the Determination and the written reasons on May 28, 2003.

Ms. Joanne MacDougall was employed as a receptionist at the Sooke office of Ocean City Realty Ltd. She was employed in that position for seven years. Up until March 18, 2003, Ocean City was engaged in real estate sales from an office in Sooke. Ms. MacDougall was issued a record of employment by the Employer on May 12, 2003, indicating that she was laid off for a shortage of work. She did not receive any advance notice of the lay-off.

She filed a complaint with the Director. The Delegate issued a written notice to the Employer and to Ms. MacDougall on June 3, 2003, indicating that an oral hearing would be held on June 23, 2003. The Employer received that notice on or before June 5, 2003. The Delegate also issued a written demand for Employer records on June 3, 2003. Mr. Hamerton of Ocean City provided some records to the Delegate,

including a written submission, but did not attend at the hearing. The Delegate received the following fax dated June 17, 2003 referring to a "mediation meeting - Monday 10AM:

> Enclosed is self explanatory - I am away on holidays till July 6th/03 & on a Alaska Cruise - so will not attend above.
>
> Don Treager presently manager of Ocean City Realty will address anything you require 744-7699.
>
> I am not at Ocean City Realty anymore & have little involvement in that company anymore.

The fax also contained a four page submission outlining that Ms. MacDougall quit her employment. Ms. MacDougall did attend the hearing before the Delegate with two witnesses. She provided documents to the Delegate, one of which was a record of employment, signed by a representative of the Employer, which noted a layoff due to shortage of work. A corporate registry search report dated May 30, 2003 indicates that as of May 16, 2003, Robert M. Hampton was the president and Donald J. Tregear was the secretary of Ocean City Realty Ltd. Neither Mr. Hamerton nor Mr. Tregear attended the hearing before the Delegate. The issue noted in the Determination was whether Ms. MacDougall was terminated from her employment without 7 weeks written notice, or did she voluntarily quit.

On the basis of the information before her, the Delegate found that Ocean City Realty Ltd. decided to close its main Victoria office, and that it had a lease on Sooke office space past March 2003, and that as of March 18, 2003 Ocean City was looking at different options for the Sooke operation. The Delegate found that Mr. Hamerton asked Ms. MacDougall on March 18, 2003 to have all realtors clear out the next day. The Delegate found that Ocean City ceased operating a real estate business in Sooke on March 18, 2003, and there were no realtors left in the office. The Delegate determined that Ms. MacDougall was issued a record of employment that advised that she was being laid off and was not being recalled. The record of employment did not indicate that Ms. MacDougall quit her employment. The Delegate found that Mr. Hamerton told Ms. MacDougall that she was laid off on March 18, 2003. The Delegate found that:

> A layoff, or termination of employment is more consistent with the circumstances of the office closing, than is a voluntary quit by Ms. MacDougall.

The Delegate issued a Determination finding that Ms. MacDougall was entitled to the sum of $3,553.71 consisting of annual vacation pay in the amount of $170.75, compensation for length of service in the amount of $2843.75, interest of $39.33, and an administrative penalty of $500.00.

Employer's Argument:

The Employer argues that the Delegate failed to observe the principles of natural justice, by accepting the Employee's version of the facts, where credibility was an issue. The Employer disputes the Employee's allegation that she was laid off, and says in fact that the Employee quit her employment. The Employer says that new evidence has become available which was not available at the time the Determination was made. After receiving the Determination, the Employer offered the Employee her job back, but at a different physical location. The Employer seeks to cancel the Determination.

Employee's Argument:

The Employee says that the Delegate was given notice of the hearing, and failed to attend. The Employee says that the Employer could have, but did not, advance its versions of the facts at the hearing before the Delegate, and it is "too late". The Employee denies the Employer's allegations that she quit her employment.

Delegate's Argument:

The Delegate provided a record of the proceedings. The Delegate objects to the attempt by the Employer to provide new evidence, which should have been provided at the hearing, prior to the issuance of a Determination. The Delegate submits that the further information should not be admitted pursuant to the decisions of the Tribunal in *Gill, BCEST #D 50/97, Tri-West Tractor Ltd., BCEST #D 268/96, Kaiser Stables, BCEST #D 58/97*.

ANALYSIS

In an appeal of a Determination, the burden rests with the appellant, in this case the Employer, to establish an error in the Determination, such that I should vary or cancel the Determination. In this case the Employer relies on the grounds set out in sections 112(1)(b) of the *Act* (breach of natural justice), and 112 (1)(c) (new evidence):

> 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 being made.

After the issuance of the Determination, the Employer filed the appeal and offered additional written materials including its own statement, and written statements from others to the effect that Ms. MacDougall quit her employment. The materials offer a further explanation of the course of business dealings which resulted in the closure of the Sooke office.

The Tribunal has laid down a policy in cases such as *Tri-West Tractors Ltd*, which prevent an appellant from "laying in the weeds", failing to participate in an investigation of a complaint, and then seeking to tender evidence at a Tribunal hearing, or in written submissions, to establish that the Delegate erred in the Determination. The question is whether this principle, applies in this case.

In my view, the principle in *Tri-West Tractors* only applies where the Delegate has afforded a reasonable opportunity to a person under investigation, to participate in the investigation of that complaint. That duty is set out in section 77 of the *Act:*

> If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.

In my view, this duty applies whether the Delegate chooses to proceed by way of investigation or by way of an evidentiary hearing.

Provided that the Delegate does afford a reasonable opportunity to participate, it is not a breach of natural justice to determine the complaint on the basis of evidence tendered by one party alone. A party who seeks to challenge the Determination on the basis of "new evidence" in these circumstances will usually be unsuccessful on the basis of *Tri-West Tractors Ltd.* In my view, this approach is amply justified by the purpose of the Act, which is to provide fair and efficient procedures to resolve disputes over the application and interpretation of the Act. It is unfair and inefficient for a party to fail to participate in an investigation and then seek to challenge the conclusions reached in that investigation by an allegation of breach of natural justice coupled with an allegation of "new evidence". I note that while a Delegate may well have come to a different conclusion if all parties fully participate in an investigation, that different conclusion does not demonstrate error on the part of the Delegate.

In this case, the Delegate provided a written notice which sets out the consequences of a failure to participate. After giving notice to each party of the date, place and location of the hearing, the notice reads as follows:

> The Branch Adjudicator may make a Determination based on information before them, **even if you choose not to participate or be represented at the hearing.**
>
> We have enclosed copies of all documents currently on our file from the parties. Please provide any additional documents you intend to provide at the hearing, to our office no later than **4:00 p.m. Wednesday June 11, 2003**. Any new information submitted will be provided to the other parties by mail before the hearing.
>
> All parties should be prepared to present all relevant evidence at the hearing. This includes bringing with them any witnesses, in person, who they feel should provide relevant evidence.
>
> For additional information on the hearing process, please refer to the Employment Standards Hearing Fact sheet attached.
>
> **Adjournment of Hearings**
>
> In extraordinary circumstances the Branch Adjudicator may grant adjournments. Requests for adjournments must be in writing, include reasons, and be delivered to the Branch Adjudicator at least one week before the scheduled hearing date.

The notice also provides a mechanism for the Employer to apply for an adjournment of the hearing, if the Employer was unable to attend. In this case, the Employer says that its principal had a "pre-booked holiday", and that was the reason for non-attendance. I accept that a pre-booked holiday, in this case, would be a legitimate reason for an adjournment of the Delegate's process. The Employer, however, did not request an adjournment, and did not provide all its materials in advance of the proposed date. The failure to seek an adjournment, is fatal to the Employer's allegation of a breach of natural justice.

In my view, in these circumstances the Delegate has afforded a reasonable opportunity to the Employer to participate in the investigation of the complaint. The *Act* empowers a Delegate to proceed by way of a hearing, rather than an inquiry. In this case the Delegate chose to proceed by a hearing, and provided a written notice to the parties which establishes fair, reasonable, and efficient procedure to resolve the

employment standards complaint filed by Ms. MacDougall. This procedural approach is in line with the purposes of the *Act*, in particular:

> 2(d) to provide fair and efficient procedures for resolving disputes over the application and interpretation of the Act.

The Delegate quite rightly proceeded, and determined the case on the basis of the available evidence. The Delegate had before her oral evidence under oath from the Employee and other witnesses as well as written documents filed by the Employee. As the Employer argues, the question of quit or termination involves a large element of credibility. In my view, given that the Delegate decided to proceed by oral hearing, it would have been an error on the part of the Delegate to accept the "written submission" of the Employer on the issue of "quit" over oral evidence provided by the Employee. The Employer had the opportunity to attend the hearing, and test the Employee's evidence, and provide oral evidence to the Delegate. The findings of the Delegate, with respect to a failure to provide notice or compensation for length of service and the quantum of the compensation, appears to be supported by the evidence.

While the Employer wishes this case to be determined on a different basis, it should have requested an adjournment of the Delegate's process, and advanced its information at the hearing. Given my findings that a reasonable opportunity was extended to the Employer to participate in the hearing prior to the Determination, I do not admit or consider the additional information provided by the Employer. Any material filed by the Employer is only new to the extent that it was not before the Delegate, because the Employer did not participate in the process leading to Determination, when the Delegate extended a reasonable opportunity to participate.

For all the above reasons, I am not satisfied that the Employer has demonstrated any error in the Determination and therefore I dismiss the appeal.

ORDER

Pursuant to s. 115 of the *Act* the Determination dated June 27, 2003 is confirmed.

Paul E. Love
Adjudicator
Employment Standards Tribunal