Employment Standards TRIBUNAL

An appeal

- by -

Werachai Laoha
("Laoha")

- 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: Lorne D. Collingwood

FILE No.: 2001/205

DATE OF HEARING: June 19, 2001

DATE OF DECISION: July 11, 2001

DECISION

OVERVIEW

Werachai Laoha (who I will refer to as both "Laoha" and "the appellant") has appealed, pursuant to section 112 of the *Employment Standards Act* ("the *Act*"), a February 14, 2001 Determination by a delegate of the Director of Employment Standards ("the Director"). The Determination is that Brothers Company Glass Car Care Ltd., which is operating as Broco Auto Glass and Upholstery (and I will refer to as both "Broco" and "the employer"), does not owe Laoha length of service compensation.

The delegate has decided that the employee resigned his employment. The delegate also indicates that the employer may have had just cause to terminate Laoha.

Laoha on appeal claims that he did not quit but was forced to leave because he was threatened by his employer. The appellant also claims "severance moneys" on the basis that, prior to being threatened, the employer told him that he would be laid off and paid "severance pay", then brought back as a subcontractor.

APPEARANCES:

Werachai Laoha	on his own behalf
Fred Beck & Paul Crowther	on behalf of Broco

ISSUES TO BE DECIDED

The issue is whether Laoha is or is not owed compensation for length of service. In that regard, the employee claims that Broco's Vice-President told him on November 1, 2000 that he was going to be "laid off" and paid "severance pay" yet no compensation of the sort has been received. The employee also claims that he did not quit. According to Laoha, the Vice-President tried to punch him and, with that, he left work, afraid to return.

What I must ultimately decide is whether the appellant has or has not shown that the Determination ought to be varied or cancelled, or a matter referred back to the Director, for reason of an error or errors in fact or law.

FACTS

Broco is in the business of replacing auto and truck glass. It also repairs upholstery.

In the period that Laoha was employed by Broco, he operated a business. Through the business, Laoha imported auto glass for later selling on a wholesale basis. At one point he suggested that Broco might want to buy glass from his company. Broco did not as the price was too high.

Laoha claims that he was not, prior to his termination, in any business but the glass importing business. I find, however, that he was, prior to the termination, actively working to establish a business that would directly compete with his employer. Mega Bose Auto Glass & Upholstery, Ltd. ("Mega") was registered on March 29, 2000 and that company is owned by Laoha. By December, 2000, a mere few weeks after the termination, Laoha was not only in the business of importing glass but in the business of installing auto glass and also making repairs to car and truck upholstery. And it is clear that Laoha had arranged for Mega's use of the former Anvil Glass building during the employment and that the building was being readied for use by Mega on the 1st of November, 2000.

The building which was once known as the Anvil Glass building is right across the street from Broco. On the 2nd of November, 2000, painters were painting the building for Laoha and/or Mega. It just so happened that the painters knew Fred Beck, the President of Broco. They walked over to Broco and told Beck that the building was being painted for Laoha and that he was planning to open a business which would compete with Broco.

On hearing from the painters, Beck immediately called Laoha into his office and he asked Laoha about his plans for business and what it was that he was doing across the street. Beck made it clear that Laoha could not operate in competition with Broco and remain an employee and, with that, Laoha said that Merle Beck, Fred's brother and Vice-President of Broco, had already said that he would be laid off just as soon as work on a truck seat was complete, paid severance pay, and brought back as a subcontractor. That led Fred to summon Merle. Merle said that he never did tell Laoha that he was going to be laid off and paid severance moneys.

The meeting ended when Laoha walked out. The parties agree on that but they present two rather different accounts of what it was that caused Laoha to leave the meeting. According to the employee, he left because Merle Beck tried to punch him. He tells me that, on leaving the meeting, he packed up his tools and left for good, absolutely terrified of what Merle might do to him. According to Fred Beck, Laoha was threatened with termination and that was all that he was threatened with. The employer denies announcing a plan to lay Laoha off and pay him severance moneys and claims that, when it was made clear to Laoha that none would be paid, he started yelling that Broco had to do the right thing and pay him severance pay and that he then stormed out of the meeting. The employer also claims that the employee subsequently failed to report for work and that he returned only to pick up his tools a day or two later.

There are no independent witnesses. The delegate has had to assess the credibility of witnesses and, on doing so, she prefers the employer's account of matters over that of the employee. She has concluded that it was Laoha that suggested that he be laid off and brought back as a sub-contractor. She found that the employer's version of events fits what is known about the circumstances of the termination, in part because Merle Beck does not have the authority to terminate an employee. And it is her conclusion that the employment ended when and because Laoha stopped work, walked out the meeting on the 2nd and then took the step of removing his tools.

I find that Laoha never did finish the work that he was doing on the truck seat. There is agreement on that point.

Although I believe that, given the subject matter, the meeting that took place on the 2nd must have been somewhat heated, there is not evidence to establish that Merle Beck threatened Laoha as alleged.

Laoha on appeal claims that persons interviewed by the delegate have made false statements and that the delegate has been misled in regard to the facts. On hearing from him and a witness, however, I find that he neither shows me that the delegate has been duped by a witness or witnesses, shows me that the delegate is wrong on some fact, nor shows me that the delegate has failed to consider any fact. It appears that this appeal stems from a mistaken understanding of severance pay and the circumstances in which an employer is required to pay 'severance moneys'.

ANALYSIS

The *Act* assigns employers a liability to pay compensation for length of service. That compensation is what is commonly referred to as severance pay.

> ***63*** *(1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.*
>
> *(2) The employer's liability for compensation for length of service increases as follows:*
> *(a) after 12 consecutive months of employment, to an amount equal to 2 weeks' wages;*
> *(b) after 3 consecutive years of employment, to an amount equal to 3 weeks' wages plus one additional week's wages for each additional year of employment, to a maximum of 8 weeks' wages.*

The matter of whether an employee is or is not entitled to length of service compensation depends on the circumstances of the termination. Where an employer lays off an employee and

the lay off becomes permanent, the employer is required to pay the compensation. If the lay off is temporary, however, the employer is not required to pay the compensation. Where the employee is simply fired, the matter of whether the compensation is or is not to be paid to the terminated employee depends on whether termination is or is not for just cause. And finally, the liability to pay compensation for length of service is discharged where the employee retires and/or resigns the employment.

> *63 (3)* ***The liability is deemed to be discharged if the employee***
>
> *(a) is given written notice of termination as follows:*
> *(i) one week's notice after 3 consecutive months of employment;*
> *(ii) 2 weeks' notice after 12 consecutive months of employment;*
> *(iii) 3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice;*
>
> *(b) is given a combination of notice and money equivalent to the amount the employer is liable to pay, or*
>
> *(c)* ***terminates the employmen****t, retires from employment, or is* ***dismissed for just cause****.* *(my emphasis)*

It is the delegate's conclusion that Broco is not required to pay length of service compensation to Laoha because the employee, in effect, quit. And as matters are presented to me, I am neither shown that she is wrong on the facts, shown that she failed to consider some important fact, nor shown that her decision is patently unreasonable. There is not, as such, reason to alter or cancel her Determination.

It is not for the Tribunal to second guess decisions reached by the Director and her delegates. Unless it is shown that a delegate has failed to consider evidence or missed some important fact or failed to apply the *Act*, the decisions will be given a sympathetic reading and upheld so long as they are reasonable.

In this case, the delegate was presented with two competing accounts of how the employment was terminated and, as such, she had to assess the credibility of witnesses and choose between the two. That is not an easy task as there are many factors to consider in assessing credibility. The manner of the witnesses is of some interest (Is the witness clear, forthright and convincing or evasive and uncertain?) but of greater importance are factors like the ability of the witness to recall details; the consistency of what is said; reasonableness of story; the presence or absence of bias, interest or other motive; and capacity to know. As the Court of Appeal has said, the essential task is to decide what is most likely to be the truth given the circumstances [*Faryna v. Chorny* (1952) 2 D.L.R. 354, B.C.C.A.].

> "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 the story of a witness in such a case must be its harmony with the preponderance of the probabilities that a practical and informed person would readily recognize as reasonable in that place and in those conditions."

The delegate has decided to prefer the employer's account of matters over that of the employee. In doing so, she explains that she found that Broco's account of matters fits what is known to be fact. I can find no fault with that assessment of credibility. Indeed, I am also inclined to believe the employer because there is much about what Laoha has to say that does not add up. For example, he tells me that the reason that he walked out of his meeting with the Becks is that he was absolutely terrified of what Merle Beck might do to him but he also tells me that he stayed to pack up his tools. That is unlikely. If he were that afraid of Merle Beck, I believe that he would have immediately left Broco. He would not have stayed to pack up his tools, nor would he have returned to Broco without first checking to see if Merle Beck were there. There is no evidence that he did so, indeed, it is not even suggested that he did so.

Even if it is that Laoha did not quit, and it is the employer that acted to terminate the employment, I am satisfied that the employee is, nonetheless, not entitled to length of service compensation. As noted above, Laoha was working to establish a business in competition with his employer. Laoha maintains that he was not actually in competition with Broco while employed but it is enough that he was working to establish the business that became Mega while he was employed by Broco. It is clear to me that Broco had just cause to terminate the employment and that, as such, its liability to pay length of service compensation was discharged.

According to Laoha, Merle Beck told him on the 1st of November that he was going to be permanently laid off just as soon as work on a truck seat was complete and it is also said that severance moneys were promised. None of that has been shown to me but, even if it were true, it does not follow that the employer has an obligation to pay length of service compensation. Where an employer notifies an employee that he or she is going to be permanently laid off at some particular point and the employee resigns prior to the announced point of lay off, what has been found to be the case here, the obligation to pay the compensation is discharged. It is also discharged if the employee is terminated for just cause before the point where the announced point of layoff, the case if it is that Laoha did not resign. Laoha never finished the work that he was to do on the truck seat.

I have decided to confirm the Determination.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated February 14, 2001 be confirmed.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal