Employment Standards TRIBUNAL

An appeal

- by -

Robert D. Clark
("Clark")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2002/508

DATE OF DECISION: December 10, 2002

DECISION

OVERVIEW

This is an appeal filed by Robert D. Clark ("Clark") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*). Mr. Clark appeals a Determination that was issued by a delegate of the Director of Employment Standards (the "Director") on September 17th, 2002 (the "Determination").

By way of the Determination, the Director's delegate dismissed Clark's complaint that he was induced to become an employee of OceanWorks International Corporation ("OceanWorks") contrary to section 8 of the *Act.* Further, the delegate also determined that Clark's claim for unpaid wages--on account of time spent purchasing some work-related tools and reviewing a "confidentiality agreement" at home--had no legal merit.

In a letter dated November 25th, 2002 the parties were advised by the Tribunal's Vice-Chair that this appeal would be adjudicated based on their written submissions and that an oral hearing would not be held (see section 107 of the *Act* and *D. Hall & Associates v. Director of Employment Standards et al.,* 2001 BCSC 575).

THE DETERMINATION

The delegate concluded, as a matter of fact and on the balance of probabilities, that OceanWorks "being a manufacturer of specialized and patented products, would expect it employees to keep confidential any information obtained during the course of their employment" and that "it is reasonable to assume that a prudent employer would...bind [prospective employees] by means of a written agreement".

The delegate further concluded that even if Clark had *not* been told that he would be required to sign a confidentiality agreement, that omission did not amount to an affirmative misrepresentation that induced Clark to accept employment with OceanWorks.

The delegate held that Clark's time spent reviewing the terms of the confidentiality agreement was not compensable "work" as defined in section 1 of the *Act.* With respect to the time spent purchasing work-related tools, the delegate observed that "an employer can require an employee to provide his own tools" and that any time incurred by Clark purchasing tools (which he agreed he would do) was not compensable working time.

REASONS FOR APPEAL

Mr. Clark's reasons for appeal are set out in a letter to the Tribunal dated October 4th, 2002 (appended to his appeal form). Mr. Clark's reasons may be summarized as follows:

- the Director's delegate conducted an incomplete investigation and issued his Determination without a full consideration of the relevant facts; and

- the delegate misinterpreted various provisions of the *Act*, and in particular, section 8.

ANALYSIS

Mr. Clark says that if a more complete investigation had been conducted, his claim would have prevailed. Without suggesting that the delegate did, in fact, conduct an incomplete investigation (and the material before me does not lead me to that conclusion), it is nonetheless my view that Clark's complaint was properly dismissed since OceanWorks did not, in my opinion, contravene the *Act*.

Time spent purchasing tools

Regarding the purchase of the tools, Mr. Clark submits that "it would be my position that the employer knew I did not have the tools and asked that they be purchased [and] thus the employer does owe minimum daily pay of 4 hours". However, the call-in provision in force at the relevant time (the former section 34) is triggered by an employer requiring an employee to report for work. I agree with the delegate that an employee who goes out on their own time to purchase personal tools or equipment that they require in order to qualify for employment is not undertaking compensable work while carrying out such activity.

An employer may lawfully require of a prospective employee, as a precondition to being hired, that they bring to the job certain tools and equipment. An employee may lawfully agree that they will acquire such tools if they do not already own them. In this sense, the employer's demand is not conceptually different from a situation where the employer demands that a prospective employee have certain skills or educational qualifications or certifications. In *Walden v. Danger Bay* (1994), 90 B.C.L.R. (2d) 180, the B.C. Court of Appeal affirmed that an employee's skills and abilities could be characterized as "tools and equipment" for purposes determining whether the person is an employee under the common law "four-factor" test. In my view, an employer is no more required to compensate a prospective employee for time spent acquiring tools than it is required to compensate a prospective employee for time spent obtaining requisite degrees or certificates.

In my view, Clark's demand to be compensated for time spent purchasing tools that he required, as a condition of being hired, is wholly misconceived.

The Confidentiality Agreement

The material before me shows that prior to commencing his duties on October 15th, 2001, the precise terms of the confidentiality agreement were not discussed nor was a particular form of agreement provided to Mr. Clark prior to October 15th. The actual agreement was presented to Mr. Clark on his second day at work, October 16th. Mr. Clark reviewed the document, had some subsequent discussions with OceanWorks representatives but ultimately refused to sign the agreement. Both parties agree that Mr. Clark's employment was terminated on October 17th because he would not sign a confidentiality agreement.

OceanWorks says that during a telephone conversation on October 12th Mr. Clark was offered a job and was also told that he would be required to sign a confidentiality agreement. The delegate, although noting that there was "no cogent evidence before me to help me determine whether the signing of the [confidentiality agreement] was made known to [Clark] during the pre-hire stage" nonetheless concluded that the necessity of such an agreement was probably discussed between the parties during their negotiations.

If Clark was informed during the parties' pre-employment negotiations that he would be required to sign a confidentiality agreement then obviously there cannot have been any misrepresentation (*i.e.*, a false statement with respect to a material fact) that induced Clark to enter into an employment relationship with OceanWorks. If Clark was concerned about the particular terms of the agreement, then it would have been incumbent on him to refrain from entering into an employment relationship until such time as he was fully satisfied with the terms of any proposed agreement.

On the other hand, Clark's position is that there was no discussion whatsoever about a confidentiality agreement until a form of agreement was presented to him on his second day of work. If that is what transpired then Clark might well have a reasonable argument that such an agreement does not form part of the parties' employment contract--among other reasons, the agreement might fail for lack of consideration [see *e.g., Watson v. Moore Corporation* (1996), 134 D.L.R. (4th) 252 (B.C.C.A.)]. Thus, in those circumstances, his termination might be characterized as a dismissal without just cause. However, given his very short tenure, he would not be entitled to any compensation for length of service under the *Act* and, insofar as section 8 is concerned, I fail to see how one could say that they were induced to enter into an employment contract as a result of a condition of employment of which they were wholly unaware.

If Clark had been specifically informed that there would not be any need for him to sign a confidentiality agreement only to have the employer subsequently reverse its position and demand that he sign such an agreement, section 8 might have been implicated. However, as noted, that is not Clark's position.

As for Clark's claim that he is entitled to be paid for time spent reviewing the document, I do not conceive that such time (which really amounts to time spent preparing for employment contract negotiations) is compensable work.

ORDER

The appeal is dismissed.

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal