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 -

578047 B.C. Ltd. operating as Pro Gas & Heating
("Pro Gas")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE No.: 2000/612

DATE OF HEARING: December 11, 2000

DATE OF DECISION: January 02, 2001

DECISION

OVERVIEW

The appeal is pursuant to section 112 of the *Employment Standards Act* (the "*Act*") and by 578047 B.C. Ltd. operating as Pro Gas & Heating (which I will henceforth refer to as "Pro Gas" and "the employer"). Pro Gas appeals a Determination issued by a delegate of the Director of Employment Standards ("the Director") on August 8, 2000. In that Determination, Pro Gas is ordered to pay Rick Davis, Steve Gadsby and Lisa Garcia a total of $1,560.50 in wages and interest.

The appeal, as amended by Pro Gas, is that Lisa Garcia is not entitled to wages as set out in the Determination. The employer claims that the employment was terminated on the 6th of August, not the 13th of August.

APPEARANCES:

Leena Lowe	On behalf of Pro Gas
Edward Lowe	Witness for the employer
Michael Murru	Witness for the employer
Lisa Garcia	On her own behalf

ISSUES TO BE DECIDED

As originally filed, the appeal covered all parts of the Determination, the order to pay Davis, the order to pay Gadsby, and the order to pay Garcia.

I have been advised that the matter of the amount of money which Pro Gas owed Davis was subsequently settled by the parties and I am advised that the Director considers the matter settled. I find, therefore, that there is nothing for me to decide in respect to the order to pay Davis.

Pro Gas, on filing its appeal, claimed that it did not owe Gadsby as set out in the Determination, namely, $485.13 including interest. Gadsby was said to be an undercover agent who was conducting industrial espionage for another company and Pro Gas claimed that, as such, he was not an employee under the *Act* or, at least, not its employee. In addition to that, the delegate was said to be wrong in her calculations and lack credibility. At the outset of appeal hearing, however, I was advised by Leena Lowe of Pro Gas, that the employer had decided that it did not want to pursue any of those issues and that it had decided to accept the order to pay Gadsby.

I was also advised by Lowe, at the outset of the appeal hearing, that Pro Gas had decided that it would not proceed with yet another issue, that being a claim that the Determination is in error

because the delegate failed to take into account the fact that Garcia, like other Pro Gas employees, received paid coffee and cigarette breaks.

One issue remains to be decided and that is the subject of this decision. The issue is the matter of whether Garcia did or did not work the week of August 9 to 13, 1999. Underlying that issue is one of credibility. What I must ultimately decide is whether the appellant has or has not shown that the Determination ought to be varied or cancelled for reason of an error or errors in fact or law.

FACTS

According to Pro Gas, Garcia quit on the 6th of August, 1999. According to the Determination, the employees last day of work was the 13th and Garcia is owed pay for the week of August 9 to 13, 1999 ("the week of August 9").

The decision to award pay for the week of August 9 is based on statements by Michelle Redding, a former employee of Pro Gas, and Michael Murru. Redding, friend of Garcia, said that she was at Pro Gas in the week of August 9 and remembers seeing Garcia at work on at least two different days in the week. Murru, a current employee, indicated that Garcia was not at work in the week of the 9th but Redding is found to be more credible than Murru. According to the delegate, Redding "had a very clear recollection of events" whereas Murru "appeared confused in his statements". In regard to Murru statements, the delegate has this to say in the Determination:

> "In support of the claim that Garcia did not work up until August 13th, the employer provided a statement from Michael Murru. Murru was employed by Pro Gas at the time Garcia worked there. His written statement, dated June 8, 2000, says that he was present when Garcia quit and that she was not at work during the week of August 6 to 13. He last saw Garcia at Pro Gas on August 21st when she went to the Pro Gas office to pick up her belongings. He also states that he did not see Garcia or Redding at Pro Gas at any time during the week of August 6 to 13th.
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> In a telephone conversation, Murru said he was able to make his statement so long after events had occurred because he had reviewed the police report to refresh his memory. He initially stated that Garcia had taken the week off immediately prior to August 21st to prepare for some sort of legal matter. When it was pointed out to him that this was not the week in question, he said that he was confused and needed to go to Pro Gas to review his statement.
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> When Murru was interviewed, in person, he stated that he had reviewed his statement and also remembered the circumstances of Garcia's departure from the company because it occurred just shortly after his birthday. He stated that he met with Garcia at Donegals Pub on August 11 and she tried to obtain information about Pro Gas; she was not, according to Murru, working at this time. He states that he remembers this date clearly because it was just a week after his birthday (August 4) and Garcia had stated that she needed the week off work to prepare for

> a court case that was to be heard the week of the 16th to 20th. He stated that he did not know that Garcia had decided to quit her employment until the police were called to pro Gas on August 23 or 24 and he was asked to give evidence about her entry to the premises on the 21st.
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> In a later telephone interview, Murru stated that it was not the police report, but his letter of reprimand from Pro Gas, that he had reviewed to refresh his memory immediately prior to making his written statement. Murru also stated that he is presently working part time for Pro Gas & Heating."

Pro Gas, on appeal, claims that Redding is a disgruntled employee and that the delegate should not have preferred her evidence over that of Murru. The employer submits sworn affidavits by Jennifer Robertson, a current employee, and Jennifer Kennedy, a former employee, which indicate that Redding displayed a contempt for, and animosity towards, "Eddie Lowe" (Edward Lowe).

Michael Murru testifies that he never saw Garcia at work in the week of the 9th. And he tells me that, as far as he can recall, it was in the evening of the 11th, a week after his birthday, that he met Garcia for drinks. And, he says, it was on that day that Garcia told him that she no longer worked for Pro Gas.

Garcia tells me that Murru is wrong on his dates and that it was the 17th, not the 11th, that the two met for drinks. According to Garcia, it was after, not before, she went to work for Canada Furnace.

On the 12th of August, the Lowes happened to see Garcia in the company of Steve Gadsby who was by this time employed by Canada Furnace. When Garcia and Gadsby realized that they had been discovered by the Lowes, they, in separate vehicles, drove away. The Lowes attempted to follow the two but soon gave up. According to Leena Lowe, they only chose to follow Garcia and Gadsby out of curiosity. They were just surprised to see the two together and they were interested in who was dating who.

According to Garcia, Edward Lowe, the very next day, took her aside and told her that she was not allowed to talk to Gadsby as "inter-office relationships" were not allowed. That is denied by Pro Gas. Leena Lowe, under oath, tells me that Pro Gas does not really care who their employees see socially and, at the appeal hearing, she dismissed Garcia's claim as if it were utter nonsense. I might accept that, and Lowe's explanation for following Garcia and Gadsby, if it were not for what Lowe had to say in a letter to the Tribunal dated October 13, 2000. She said, "It was at this time (August 13, 1999) that we confronted her regarding her relationship with Steve Gadsby, a relationship which she denied". I am satisfied that Garcia was in fact confronted by Edward Lowe on the 13th and that she was in fact told to stay away from Gadsby.

The employer on the 13th, which was a pay day, asked Garcia and others to sign a no competition, non-disclosure form. Concerned about what signing the form would mean, Garcia left without signing it. She then accepted a job with Canada Furnace.

Both parties agree that Garcia, on her last day of work, whatever that was, said that she was not coming in for the next few days because she needed time off as she had to attend to a personal legal matter of some sort.

ANALYSIS

The burden of proof is on the appellant.

What is appealed is an order to pay Garcia for work in the week of August 9. That order stems from an assessment of credibility, the delegate interviewing Redding, Murru, Garcia and Leena Lowe. Redding stated that Garcia was at work in the week of August 9 and she was found more credible than Murru. Redding was able to clearly recall events whereas Murru was found to be both confusing and also a Pro Gas employee.

The delegate is said to be wrong in her assessment of credibility.

The employer submits, as proof of that, two affidavits which go to Redding's credibility. That is, however, new evidence. The Determination can hardly be faulted for the delegate's failure to consider evidence that was not before her.

The affidavits could have been produced at the investigative stage. The Tribunal does not normally accept such new evidence [The Tribunal has said in numerous decisions that it will not normally accept evidence which could have been produced at the investigative stage but was not. See for example *Tri-West Tractor Ltd.*, BCEST No. D268/96, and *Kaiser Stables Ltd.*, BCEST No. D058/97. Both decisions can be found at the Tribunal's website (bcest.bc.ca).] I have decided that I will not accept the new evidence in this case as it is not important that I do so. Nothing turns on that evidence.

The question is whether the delegated erred, given the evidence before her, in her assessment of credibility. It is not for me to second guess the delegate's assessment of the witnesses but to decide whether her conclusions are or are not reasonable.

There are many factors to consider in assessing credibility. It is by no means an easy task. The manner of the witness is to be considered (Is the witness clear, forthright and convincing or evasive and uncertain?) but also factors such as 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.

The essential task is to decide what is likely to be true in all of the circumstances. As the Court of Appeal noted in *Farnya 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."

When I consider the evidence before the delegate, I am led to conclude that decisions reached by the delegate in respect to credibility are reasonable. While the delegate has employed rather different wording, as befits a Determination, it is apparent that she has considered the clarity of statements made, the consistency of what at least Redding and Murru had to say, the reasonableness of their stories, the ability to recall details, self-interest and the potential for bias. The fact that Murru was employed by Pro Gas is considered and, rightly so, employees being open to both direct and indirect pressure from their employers. Murru is found to be inconsistent and confusing. Redding is, on the hand, found have a very clear recollection of events, that it was, for example, on the 13th that she saw Garcia working at Pro Gas and that she remembers that it was the 13th because it was a pay day, which the 13th was, and the day that Pro Gas handed out its non-competition forms which, again, it was.

Murru appears, on appeal, to recall, quite earnestly, that Garcia's last day of work was the 6th of August but I am not convinced that he is credible. He is open to pressure from Pro Gas. His recollection of matters is not really grounded by an events in that it is largely in relation to, and days after, his birthday. Most importantly, I am satisfied that he has already demonstrated that he has a less than clear recollection of events. In explaining matters to the delegate, he both indicated that he was present when Garcia quit and stated that he did not know that she had quit until police were called to Pro Gas on or about the 23rd of August. He said that Garcia was attending to legal matters in the week prior to August 21 and then admitted that he was confused when the delegate pointed out that the 21st was not the week in question. He indicated that he had reviewed the police report in refreshing his memory but then said that it was not a police report which he reviewed but his letter of reprimand.

Murru's testimony is further undermined by the employer and Garcia.

I find Garcia credible. She was forthright in answering questions posed on cross-examination and I asked her a number of very pointed questions. I found her answers to be logical, consistent and to leave no loose ends. Her story is reasonable. The employer's is not.

I find the employer's case to be wanting in several respects. There is, first and foremost, the inconsistency of what Leena Lowe has had to say in regard to why the Lowes followed Gadsby and Garcia, and in regard to whether Garcia was in fact told, on the 13th, not to see or talk to Gadsby. In deciding what happened in fact, I have found that Garcia was told, on the 13th, that she should stay away from Gadsby and, I find that that in itself suggests that Garcia was at work that day. And the fact that Pro Gas wanted Garcia to sign its no competition, non-disclosure form on the 13th, indicates that, despite what Murru has to say, Garcia was in Pro Gas' mind, still an employee at that point.

The Determination, is for the above reason, confirmed in respect to the order to pay Gadsby and the order to pay Garcia.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated August 8, 2000, be confirmed in the following two respects:

The order that 578047 B.C. Ltd., which operates as Pro Gas & Heating, pay Steve Gadsby $485.13; and

the order that 578047 B.C. Ltd., operating as Pro Gas & Heating, pay Lisa Garcia $369.26.

I further order that to each of the above amounts, the Director add, and the employer pay, whatever further interest has accrued pursuant to section 88 of the *Act*.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal