Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

Arbutus Tree Service Ltd.
("Arbutus Tree Service")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 2003A/207

DATE OF DECISION: September 26, 2003

DECISION

OVERVIEW

This is a timely application filed by legal counsel for Arbutus Tree Service Ltd. ("Arbutus Tree"), pursuant to section 116 of the *Employment Standards Act* (the "*Act*"), for reconsideration of an adjudicator's decision issued on June 9th, 2003 (B.C.E.S.T. Decision No. D187/03). The adjudicator confirmed a Determination that was issued by a delegate of the Director of Employment Standards on February 26th, 2003 (the "Determination"). By way of the Determination Arbutus Tree was ordered to pay its former employee, Seth Mennie ("Mennie"), the sum of $3,308.45 on account of unpaid overtime pay (section 40), minimum daily pay (section 34), compensation for length of service (section 63) and interest (section 88).

Arbutus Tree's reconsideration application is set out in an 8-page letter to the Tribunal. In this application, counsel says that the adjudicator's decision ought to be set aside because there was a denial of natural justice and the decision is tainted by errors of fact and/or law.

Before turning to the merits of the application, I propose to summarize the factual background.

BACKGROUND FACTS

Mr. Mennie was employed by Arbutus Tree as an arborist from April 1996 until January 23rd, 2002. Mr. Mennie worked relatively autonomously in the role of a *de facto* "crew chief" and, at some point, had a falling out with the principal of Arbutus Tree, Mr. Norm Oberson.

During the course of his employment, Mr. Mennie kept track of his own hours and submitted them for payment on a regular basis; Arbutus Tree now takes the position that Mennie's record of hours is inaccurate, indeed, that it is fraudulent.

In any event, and according to Mr. Oberson (submission to the Tribunal dated May 23rd, 2003 at p. 3):

> On January 23rd, Mr. Mennie was suspended for 30 days. He phoned at approximately 10:00 a.m. to inform me that the crew was quitting for the day due to hazardous road conditions...I asked Mr. Mennie if the decision to quit work was unanimous and he said it was. I asked him for the reason for quitting, and he replied that working conditions were hazardous because the tires on the pick-up truck were bald and he had just witnessed a traffic accident. I accepted Mr. Mennie's reasons...Faced with the worker's report that Mr. Mennie had quit work on Monday and again on Wednesday for no valid reason, I informed the workers that Mr. Mennie was being suspended for 30 days. I then went to Mr. Mennie's house 15 minutes later and informed him face to face of the suspension...I told him he was being suspended for 30 days, and that I would be in touch with him and the workers to resolve the problem.

Following Mr. Oberson's meeting with Mr. Mennie, Arbutus Tree sent a letter, dated February 5th, 2002, to Mr. Mennie. In his February 5th letter Mr. Oberson set out his position that a 30-day suspension was justified since Mr. Mennie "quit working in the morning without a valid reason" and because Mr. Mennie falsely reported that the decision to quit work on January 23rd was a "unanimous" decision of the entire

work crew when in fact the crew "unanimously wanted to continue working". It is to be noted that this disciplinary action was taken without any regard to alleged time record falsification by Mennie.

Mr. Mennie seemingly accepted his fate and wrote a letter, dated February 20th, 2002, to Mr. Oberson. In his February 20th letter, Mr. Mennie took issue with Mr. Oberson's account of the events of January 23rd, reiterated his position that he was a loyal and hardworking employee and, finally, indicated that he wished his employment to continue.

Mr. Oberson replied to Mr. Mennie's letter with a further letter dated February 25th, 2002:

> Re: Thirty day suspension
>
> Thank you for your letter dated February 20, 2002 in which you thoughtfully discuss many issues concerning yourself, your co-workers, and your company.
>
> This letter is to advise you that your thirty day suspension expires on February 27, 2002. However, before returning to work please provide a statement as to the condition of your "tennis elbow" (and/or Epicondylitis) and whether or not it will effect [sic] your ability to work.

According to Mr. Oberson (May 23rd, 2003 submission at pp. 4-5):

> ...I sent a registered letter to Mr. Mennie reminding him that his 30-day suspension was up and requesting him to bring me a doctor's note before returning to work. Mr. Mennie did not produce a doctor's note nor did he show up for work. As a result, I terminated his employment...
>
> I required the [medical] letter to provide clarity on his medical condition as he had changed his medical status 4 weeks prior on January 23rd 2002 the same day that he was suspended.
>
> Mr. Mennie never provided a doctor's note and he did not show up for work on February 28th 2002. He ignored my letter and my phone messages and did not attempt to contact me until March 7th 2002, minutes after receiving a letter from WCB denying his claim.

Mr. Mennie's view of these latter events were set out in a letter to Mr. Oberson dated March 13th, 2002. Mr. Mennie's view was that upon receipt of Mr. Oberson's February 28th letter, he (Mennie) made several attempts to contact Oberson by telephone and they finally made contact and agreed to meet at a restaurant on March 10th. At this meeting, Oberson told Mennie that Mennie was "let go until further notice". This action resulted in Mennie's demand for, among other things, 3 weeks' severance pay and payment of accrued overtime pay. The dispute was not resolved and accordingly Mennie filed a complaint with the Employment Standards Branch.

I wish to point out that, based on the above, the only reason advanced for terminating Mr. Mennie's employment was a failure to report for work following his suspension and/or to provide some sort of medical report.

PREVIOUS PROCEEDINGS

The Determination

The Director's Delegate addressed two issues in the Determination, namely, Mennie's claims for: i) unpaid overtime and minimum daily pay and ii) compensation for length of service.

With respect to the former, the delegate noted that Arbutus Tree failed to comply with its record-keeping obligations under the *Act* and thus did not have any time records with respect to Mennie. Further, although Arbutus Tree challenged Mennie's own time records, the delegate observed that Arbutus Tree had never challenged Mennie's records of hours worked (which were regularly submitted to Arbutus Tree) while the latter was employed by Arbutus Tree. Arbutus Tree apparently paid Mennie for all hours claimed but did not pay the appropriate wage premiums for overtime or for minimum daily pay.

As for the matter of compensation for length of service, one of the crew members provided a statement corroborating Mennie's position that the decision to abandon work on January 23rd due to hazardous weather conditions was a unanimous decision of the entire work crew. Further, there was no evidence before the delegate that Arbutus Tree had ever followed a progressive discipline protocol regarding Mennie's alleged performance deficiencies or that Mennie had engaged in a form of "time theft". In light of those findings, the delegate was not satisfied that Arbutus Tree had met its evidentiary burden of proving just cause.

The Appeal

Arbutus Tree appealed the Determination on the grounds that the delegate failed to observe the principles of natural justice and on the basis that it had new evidence that was not available at the time the Determination was issued. Although Arbutus Tree sought an oral hearing the Tribunal determined that an oral hearing was not necessary [see section 107 of the *Act*].

The adjudicator held, based on the material before her, that neither ground of appeal had been made out. With respect to the "natural justice" argument, Arbutus Tree essentially argued that the delegate had a "closed mind" regarding certain evidence that Arbutus Tree submitted was relevant--in particular, evidence about Mennie's alleged "lies" to the Workers Compensation Board, the Insurance Corporation of B.C. and to Mr. Oberson.

These latter allegations were not substantiated. Indeed, at least insofar as Mennie's WCB and ICBC claims were concerned, these claims were eventually resolved in Mr. Mennie's favour. Further, the adjudicator observed that even if the delegate did refuse to consider evidence about Mr. Mennie's "lies" to other third parties, this evidence did not call into question Mr. Mennie's entitlement to overtime pay, minimum daily pay and compensation for length of service. Indeed, with respect to the matter of credibility, Arbutus Tree's various submissions to the delegate and to the Tribunal were, as noted by the adjudicator, "inconsistent and conflicting". The record before me indicates that this latter observation by the adjudicator was well-founded. I might add that a refusal to consider irrelevant evidence does not amount to a breach of the rules of natural justice.

The so-called "new evidence" related to the evidence of one of Mr. Mennie's co-workers. According to its appeal documents, this person "has come forward after the Determination was made and provided me [i.e., Mr. Oberson] oral statements contradicting Mr. Mennie's claims".

A consideration by the Tribunal of "new evidence" may justify a cancellation or variance of a determination, or a referral back for further investigation. However, before any such order can be made the new evidence must satisfy the four-part test set out in *Davies et al.*, B.C.E.S.T. Decision No. D170/03. Among other things, the new evidence must be "new" in the sense that it was not readily available when the delegate was considering the matter, it must be credible and also be "material" in the sense that the evidence would probably have significantly affected the outcome of the Determination had it been before the delegate. The adjudicator held, at page 6 of her reasons, that the "new evidence" [which was, in fact, more in the nature of an assertion than "evidence"] did not satisfy the *Davies* test:

> ...Arbutus claims that a former employee is returning to Canada, and that his evidence ought to be considered. There is no indication what that evidence is, how it might be relevant to the issues in the Determination or why it could not have been obtained during the investigative process with due diligence. The burden is on the appellant to obtain that information and place it before the delegate in the first instance. This ground of appeal is not an opportunity to have the Tribunal seek new evidence that may or may not be helpful to a dissatisfied party.

THE APPLICATION FOR RECONSIDERATION

Counsel for the Arbutus Tree says that the delegate breached the principles of natural justice. However, it should be remembered that the instant application is an application for reconsideration of the *adjudicator's* decision, not that of the original delegate. Undoubtedly, in some case, a consideration of the adjudicator's decision will involve a review of the delegate's findings, however, even in such cases the central focus must be on the adjudicator's decision.

In this latter regard, counsel for Arbutus Tree says (application for reconsideration, p. 4) in regard to Mennie's overtime and minimum daily pay claims that:

> ...[Arbutus Tree] stated that [Mennie] had claimed at least an additional half hour each day, that he had a systematic problem with [Mennie] regarding reporting of start and finish times and lunch breaks taken, that [Mennie] overcharged for travel time, and gave specific examples of times when [Mennie] had over-reported his hours. In the absence of a negative finding of credibility against [Arbutus Tree], the Delegate was required to provide some explanation as to why these submissions were rejected. The mere presence of stated near-contemporaneous notes of hours worked as a basis for accepting those hours worked completely ignores [Arbutus Tree's] submission that those hours were inflated. The Delegate accepted that [Mennie's] notes were accurate without allowing [Arbutus Tree] to put his credibility into question. It is submitted that this is a breach of natural justice requiring a new oral hearing.

In my view, counsel for Arbutus Tree has not fairly characterized either the delegate's finding or the adjudicator's decision with respect to Mennie's overtime and minimum daily pay claims. The Employer's position was clearly understood by the delegate and is set out in detail at pp. 2-3 of the Determination. However, the delegate found Mennie's time records to be credible and further noted that Arbutus Tree had no records of its own (contrary to its legal obligations under the *Act*). In addition, Arbutus Tree was attempting to reconstruct Mennie's working hours after the fact and its position in this regard was significantly undermined by its own actions in seemingly accepting Mennie's time records while was employed by Arbutus Tree. Far from not making a credibility finding, as I read the Determination, the delegate made an adverse finding as against Arbutus Tree. I find, as did the adjudicator, that the delegate's position in this latter regard was entirely reasonable.

Arbutus Tree also submits that the disposition of its appeal without an oral hearing resulted in it being denied natural justice and/or otherwise constituted a legal error on the part of the adjudicator. I do not agree. While it is true that an oral hearing is appropriate where there are serious credibility issues to be addressed, the nature of the allegations advanced by Arbutus Tree in its appeal documents simply did not raise a serious credibility issue. In effect, Arbutus Tree's appeal was a simple rehash of the vague, uncorroborated, conflicting and rather fanciful allegations that had already been rejected by the delegate.

Arbutus Tree says that the delegate had a "closed mind" about certain evidence but, again, that misstates the delegate's position. The delegate and the adjudicator properly narrowed their consideration to evidence that which was relevant to the issues before them, namely, whether Mennie worked certain hours and whether he quit or was fired.

Finally, Arbutus Tree says that the adjudicator erred in finding that it did not have legal cause for terminating Mennie's employment. Both the delegate and the adjudicator turned their minds to the correct legal tests and, on the facts of this case, I cannot say that their separate findings that there was no cause for termination were incorrect.

ORDER

The application to vary or cancel the decision of the adjudicator in this matter is refused.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal