

An appeal

- by -

Bishoy Riad Sahyoun

- of a Determination issued by -

The Director of Employment Standards

pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

PANEL: Richard Grounds

FILE NO.: 2018A/67

DATE OF DECISION: October 15, 2018

DECISION

SUBMISSIONS

Bishoy Riad Sahyoun	on his own behalf
Sukh Kaila	on behalf of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Bishoy Riad Sahyoun (the “Appellant”) has filed an appeal of a Determination issued on May 10, 2018, by Sukh Kaila, a delegate (the “Delegate”) of the Director of Employment Standards (the “Director”).
2. The Appellant filed a complaint under section 74 of the *ESA* alleging that Yellow Pages Digital & Media Solutions Limited (“Yellow Pages”) contravened the *ESA* by failing to pay all wages to him upon his termination. The wages in dispute related to travel expenses for a trip to Toronto, Ontario that the Appellant says was authorized by Yellow Pages as a business trip. The Appellant signed a Release (the “Release”) after his employment was terminated. The Release incorporated a termination letter which included a provision for severance pay and also included a provision that any outstanding wages would be paid. Yellow Pages refused to reimburse the Appellant for the travel expenses.
3. The Delegate concluded in his Determination that the Appellant and Yellow Pages had reached a bona fide settlement in good faith and, on this basis, stopped investigating the complaint. The Delegate did not investigate whether or not Yellow Pages had authorized the travel expenses as a business trip. The Appellant appealed the Determination on the grounds that the Director erred in law and failed to observe the principles of natural justice in making the Determination.
4. For the reasons that follow, the Determination must be cancelled and the matter referred back to the Director to complete the investigation.

ISSUE

5. The issues are whether or not the Director erred in law or failed to observe the principles of natural justice when the Delegate decided to stop investigating the Appellant’s complaint.

ARGUMENT

6. The Appellant submits that the Delegate “erred in neglecting to address any facts whatsoever” that the Appellant had outlined in a letter dated September 5, 2017. In that letter, the Appellant said that it was evident that “the unpaid business expenses are clearly defined by the Act as outstanding wages” and that signing the Release did not preclude his legal right to file a complaint. The Appellant submits that the Release was “incumbent” on the termination letter which provided that all outstanding wages were to be paid. The Appellant submits that wages are defined in the *ESA* to include expenses.

7. Submissions were requested from the parties on the merits of the appeal. The Delegate submits that “the Appellant’s argument was fully addressed in the Determination and it did not error (*sic*) in law or fail to observe the principles of natural justice”. The Delegate submits that it appears that the Appellant questions the interpretation of the term “wages” in the Release. The Delegate submits that the Appellant had signed the Release in good faith, entered into a contract with Yellow Pages, and “any dispute regarding the interpretation of this contract would require involvement of the courts”.
8. The Appellant did not make any further submissions.

THE FACTS AND ANALYSIS

FACTUAL ANALYSIS

Background Facts

9. The Delegate did not complete his investigation into the complaint and the background facts were not investigated in any detail. Accordingly, the background facts are largely based on the details contained in the Appellant’s complaint form and also on documents contained in the section 112(5) record (the “Record”) provided to the Tribunal by the Delegate.
10. In August 2016, the Appellant was hired by Yellow Pages in Burnaby, British Columbia to work as a Search Engine Marketing (“SEM”) Campaign Manager. The Appellant planned to take vacation in April 2017 and in March 2017 was “informed” by a SEM Senior Manager that he would work in Toronto, Ontario on April 27 and 28, 2017, immediately following his vacation. The Appellant had vacation scheduled for April 18 – 26, 2017.
11. On March 28, 2017, the Appellant purchased a flight (for April 24, 2017) from Vancouver to New York City and a flight (for April 29, 2017) from Toronto to Vancouver. On April 14, 2017, the Appellant purchased a flight (for April 26, 2017) from New York City to Toronto. The Appellant submitted an Expense Report for the cost of the flights and for the cost of a hotel in Toronto.
12. On April 13, 2017, a SEM Team Lead sent the Appellant an Outlook Calendar invite for a meeting in the Toronto office on April 28, 2017. On April 24, 2017, the SEM Senior Manager informed the Appellant without any reason that his visit to the Toronto office was to be cancelled. The SEM Team Lead sent the Appellant a notification cancelling the Outlook Calendar invite for the April 28, 2017, meeting.
13. On April 27, 2017, the Director of Business Development organized a meeting for the Appellant in the Toronto office. According to Yellow Pages, this meeting was not approved and when the Appellant showed up at the Toronto office he was escorted out of the building by the Director of Media Operations.

Termination of the Appellant's Employment and the Appellant's Request for Reimbursement

14. On May 1, 2017, Yellow Pages terminated the Appellant's employment and provided the Appellant with a termination letter and Release to sign. The termination letter included, among others, the following provisions:

1. You will be entitled to a total termination package of two weeks (2), comprising a termination notice of one (1) week and a severance of one (1) week which will be paid in lump sum.
2. You will be paid any outstanding accrued wages and vacation pay, less any required deductions.

...

15. The Release, between Yellow Pages identified as the "Company" and the Appellant identified as the "Employee", is reproduced as follows:

1. The Employee recognizes that her/his employment will terminate on May 1, 2017.
2. The Employee hereby acknowledges having received good and valuable consideration from the Company as referred to herein and as set forth in the letter of termination dated May 1, 2017 (the "Letter"), a copy of which is enclosed and forms an integral part hereof.
3. By virtue of said consideration and subject to compliance by the Company with its undertakings set forth in the Letter, the Employee hereby totally and irrevocably grants a full and final release to the Company, its subsidiaries, parent corporation, divisions, and associated or affiliated companies belonging to the same group, as well as to their shareholders, directors, officers, agents, employees and representatives (collectively the "Released Parties"), from any and all claims, past present or future, relating, directly or indirectly, to her/his employment or termination of employment with the Company.
4. Said consideration is also valid for, and the Employee hereby totally and irrevocably releases and forever discharges the Released Parties against, any rights, actions, complaints, claims, grievances, causes of action, demands, recourse, execution of any judgement or order, of any nature whatsoever, before any court or government agency of any kind, which result or may result from her/his employment or termination of employment with the Company.
5. Without limiting the generality of the foregoing, the Employee recognizes that the amounts and benefits to be remitted to her/him by the Company, as described in the Letter, include any and all amounts for salary, overtime, bonus, commissions, pension plan contributions, long term incentives, reimbursement of expenses, retirement contributions, vacation pay, benefits, group insurance coverage, reasonable notice of termination or pay in lieu thereof, collective notice of termination or pay in lieu thereof, termination pay, minimum statutory notice or pay in lieu thereof, any damages and any other amounts or benefits of any nature whatsoever related to the Employee's employment, or the termination thereof to which she/he may be entitled pursuant to her/his employment agreement (if any), applicable legislation including the *Employment*

Standards Act (British Columbia), *Human Rights Code*, common law and any other applicable law, program, plan, policy, or contract.

6. The Employee hereby agrees to keep confidential and not to use or disclose to anyone else any proprietary, restricted, private or other confidential information belonging to the Company, and in particular any strategic information or information related to planning or to customers or employees, gained through the performance of her/his duties with the Company.
7. The Employee further agrees, for a period of twelve (12) months after her/his termination date on her/his own behalf or on behalf of any person, whether directly or indirectly, alone, through or in connection with any person, not to solicit the services of, or induce the departure of, employees from the Company or any person working on a contractual basis with the Company in connection with the Company's business, in the province of British Columbia.
8. It is understood that the consideration granted and referred to herein in no way constitute an admission of any type on the part of the Company.
9. This *Release* precludes any claims or demands of any nature whatsoever submitted to the Company by the Employee or by her/his representative or an organization acting on her/his behalf.
10. The parties agree that the terms of this *Release* are confidential. Without limiting the generality of foregoing, the Employee agrees not to disclose or discuss the terms of the Letter and this *Release* to anyone except her/his immediate family, legal and financial advisors or as may be required by law. The Employee agrees not to disclose or discuss the terms of the Letter and this *Release*, in whole or parts, on social media, specifically and not limited to LinkedIn, Facebook, Twitter and You Tube.
11. This *Release* is binding on the heirs, successors and assigns of the signatory parties.
12. The Employee acknowledges that prior to signing this document, she/he had sufficient time to review the terms and conditions of the Agreement set forth in the Letter as well as this *Release*. The Employee further acknowledges that she/he was able to seek legal advice as well as satisfactory and sufficient explanations concerning the nature and scope of the terms of the letter and this *Release*.
13. The Employee and the Company understand that this Release contains the entire agreement between them and that the terms of this Release are contractual and not a mere recital.

The Employee acknowledges having signed the *Release* freely and voluntarily after due consideration.

16. The Appellant and Yellow Pages exchanged email correspondence on May 2, 2017, where Yellow Pages informed the Appellant that it would not reimburse him for the travel expenses because it was "personal travel requested by [the Appellant]". Yellow Pages stated that the Appellant had not been asked to come into the Toronto office and was escorted out of the office because the meeting he tried to set up with the Director of Business Development was not approved. The Appellant disputed the accuracy of this statement and stated that he had not initiated the meeting but instead that the Director of Business Development had tried to set the meeting up with him.

17. The Appellant signed the Release on May 4, 2017, and the release was received by Yellow Pages on May 8, 2017.
18. On June 22, 2017, Yellow Pages provided the Appellant with a letter wherein it stated that it would not reimburse the expenses for the Appellant's trip to Toronto because the trip was "something [he] had planned on [his] own accord" and he was "never asked by [his] leader or any leader to come to the Toronto office to work or conduct work related activities". This letter referred to email correspondence from May 4, 2017, where the Appellant indicated he had obtained legal advice that he could sign the release and still proceed with his request for reimbursement of the expenses for the trip. This May 4, 2017, email was not included in the Record provided by the Delegate.
19. On June 27, 2017, the Appellant submitted a complaint to the Employment Standards Branch requesting reimbursement of the business expenses for the trip to Toronto.

The Investigation by the Delegate and the Determination

20. On August 30, 2017, the Delegate sent a letter to the parties, acknowledging receipt of the complaint and requesting submissions on the issue of "whether or not the dispute giving rise to the complaint was resolved pursuant to s. 76(3) of the Act."
21. On September 5, 2017, the Appellant responded to the Delegate's August 30, 2017, letter and clarified that section 2 of the Release provided that the Release was "incumbent on conditions outlined" in the Termination Letter which provided that any outstanding accrued wages would be paid. The Appellant stated in his letter that the unpaid business expenses are defined by section 21(3) of the *ESA* as "outstanding wages" and that the Release does not preclude his legal right to file a complaint.
22. On September 7, 2017, Yellow Pages responded to the Delegate's August 30, 2017, letter and stated that the Delegate had addressed the issue as "regarding whether or not the release which was signed by both parties was intended to resolve all employment related claims of [the Appellant]". Yellow Pages advised in its letter that the signed Release was "intended to resolve all employment related claims" but that this did "not preclude an employee to be reimbursed for any employment related expenses they incurred during their employment". Yellow Pages advised the Delegate that the Appellant's trip to its Toronto office was "not an approved business trip" and that the Appellant had made the decision to stop by the Toronto office on his way home from a personal trip.
23. On November 30, 2017, Yellow Pages advised the Delegate by telephone (as referred to in the Determination) that it took the position that the Release "resolved any and all employment related claims". There is no documentation regarding this conversation in the Record provided to the Tribunal by the Delegate.
24. The Delegate completed a Determination dated May 10, 2018, wherein he exercised his discretion to refuse to continue investigating the matter "on the basis that the dispute that caused the complaint has been resolved". The Delegate relied on section 76(3)(i) of the *ESA* for this authority due to the fact that the Appellant had signed the Release which "contemplates the settlement of all claims".

25. The relevant portions of the Delegate's reasoning (under the heading "VI. Findings and Analysis") are reproduced as follows:

The Release signed by [the Appellant] clearly contemplates the settlement of all claims relating to his employment with Yellow Pages. In signing the Release, he acknowledged that he had the opportunity to seek legal advice. On its face, it is clear that the Release intends to operate to extinguish any and all claims under the Act, given that it mentions wages, reimbursement of expenses, vacation pay and "any other amounts or benefits of any nature." I am satisfied that the May 1, 2017 Termination Letter and subsequent Release represented the parties' entire agreement and that no matters under the Act were intended to be carved out of the settlement. In addition, I am satisfied on the evidence disclosed that settlement was intended to be a complete and final resolution of all claims that [the Appellant] might otherwise have had with respect to his employment and its termination.

[The Appellant] was given a week to sign the document, which I find is reasonable in the circumstances. During this time, [the Appellant] would have had the opportunity to seek clarification as to the specific financial terms of the Release. I also find it relevant that [the Appellant] signed the Release four days before the deadline. No evidence of coercion or duress was presented and I am satisfied that [the Appellant] understood the terms of the deal, and the effect of the Release before he signed the document.

I find that it would undercut the whole scheme of the Act if bona fide settlements could be overridden merely because one party, in hindsight, later decides that they made a bad (or less than optimal) bargain. Accordingly, when faced with a bona fide settlement, the appropriate course of action is to stop investigating the complaint. While there is a public policy interest in the enforcement of minimum standards, there is an equally compelling public interest in the enforcement of bona fide settlement agreements, even where a party alleges that the terms of that settlement may be something less than they are entitled to under the Act. Such settlements do not offend the Act.

I am satisfied that [the Appellant] and Yellow Pages reached a bona fide settlement in good faith and, as such, the terms and conditions should be respected by the parties and by the Director. I am therefore exercising my discretion in this case to refuse to continue investigating this matter on the basis that the dispute that caused the complaint has been resolved.

26. The Determination and the Record do not outline precisely what investigation was conducted by the Delegate which provided him with the evidence to make his decision. Although the Delegate spoke with a representative for Yellow Pages on November 30, 2017, it does not appear that he spoke with or invited any further submissions from the Appellant after this date. The Delegate did not investigate whether or not the Appellant's trip was authorized by Yellow Pages as a business trip.

ANALYSIS

27. Section 112 of the *ESA* sets out the Tribunal's jurisdiction to consider appeals of the Director's determinations:

- 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.

28. The Appellant appealed the Determination on the basis that the Director erred in law and failed to observe the principles of natural justice. The Appellant submits that the Release that he signed was “incumbent” on the Termination Letter which stipulated that all outstanding wages were to be paid.

29. In the complaint investigation before the Director, Yellow Pages did not take the position that business expenses could not be reimbursed in accordance with the terms of the Release but instead took the position that the Appellant’s trip to Toronto was not authorized and, therefore, was not a business expense that should be reimbursed.

30. If the trip to Toronto was authorized by Yellow Pages as a business trip, the expenses should be reimbursed according to the terms of the Release. Alternatively, if the trip was not authorized by Yellow Pages as a business trip, the terms of the Release would not extend the Termination Letter to include reimbursement for non-business expenses. Accordingly, whether or not the trip was an approved business trip was a fact that was necessary to decide before interpreting whether or not the Release applied to the expenses submitted for reimbursement by the Appellant.

31. The Delegate relied on section 76(3)(i) of the *ESA* to stop investigating the Appellant’s complaint. Section 76(3)(i) of the *ESA* provides as follows:

76 (3) The director may refuse to accept, review, mediate, investigate or adjudicate a complaint or may stop or postpone reviewing, mediating, investigating or adjudicating a complaint if

...

- (i) the dispute that caused the complaint is resolved.

32. The Delegate did not investigate the issue of whether or not the Appellant’s trip to Toronto was an authorized business trip. It was necessary for the Delegate to decide this fact before he could decide that the dispute that caused the complaint was resolved. Instead, the Delegate focussed on whether or not the Release signed by the Appellant was sufficient to conclude that the dispute that caused the complaint had been resolved. In doing so, the Delegate effectively accepted the position of Yellow Pages that the Appellant’s trip was not authorized and, therefore, was not a business expense that should be reimbursed under the terms of the Release.

33. The Delegate concluded that the Release signed by the parties amounted to a bona fide settlement made in good faith that resolved any and all employment related claims. However, as I’ve stated above, a preliminary fact that would need to be decided before such a conclusion can be reached is whether or not the Appellant’s trip was authorized by Yellow Pages. If the Appellant’s trip was authorized by Yellow Pages, the Release would not in fact preclude the reimbursement of the expenses. To conclude otherwise would ignore the plain and ordinary meaning of the provisions of the Release and Termination Letter.

Error of Law

34. The Tribunal has adopted the following definition of an error in law set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 - Coquitlam)*, [1998] B.C.J. No 2275 (C.A.):
- (1) a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
 - (2) a misapplication of an applicable principle of general law;
 - (3) acting without any evidence;
 - (4) acting on a view of the facts which could not reasonably be entertained; and
 - (5) exercising discretion in a fashion that is wrong in principle.
35. For example, see *Britco Structures Ltd.*, BC EST # D260/03.
36. The standard of review related to an alleged error of law is correctness. Accordingly, the Delegate must have correctly applied section 76(3)(i) of the *ESA* in order for the appeal to be dismissed on this ground of appeal.
37. The Delegate failed to investigate a fact that was necessary in order for him to interpret the provisions of the Release and the Termination Letter. By interpreting the terms of the Release and the Termination Letter without investigating whether or not the Appellant's trip to Toronto was authorized by Yellow Pages and then finding that the dispute that caused the complaint was resolved, the Delegate failed to correctly apply section 76(3)(i) of the *ESA*. In doing so, the Delegate committed an error of law.

Failure to Observe the Principles of Natural Justice in making the Determination

38. The principles of natural justice relate to the fairness of the process and ensure that the parties know the case against them, are given the opportunity to respond to the case against them, and have the right to have their case heard by an impartial decision maker. The Tribunal held, in *Britco Structures Ltd.*, *supra*, that a failure to consider relevant evidence can also amount to breach of natural justice. This latter reasoning was applied in *Jane Welch*, BC EST # D161/05, where the delegate failed to consider evidence related to whether or not the complainant in that case was an employee.
39. A key issue in this appeal is whether or not the Appellant's trip was authorized by Yellow Pages. The Delegate made his Determination without specifically addressing this issue. The only reference in the Determination to this issue is in the section titled "IV. Argument and Evidence of the Complainant" where the Delegate recited that the Appellant contended that the trip was "business related and work-sanctioned". The Delegate simply stated that Yellow Pages confirmed "that the Release signed by [the Appellant] resolved any and all employment related claims".
40. The Delegate focussed the Determination on whether or not the Release was all encompassing and did not consider whether or not the Appellant's trip was authorized by Yellow Pages. As discussed above, this fact needed to be decided before the limits of the Release could be determined. The Appellant advanced some evidence in his complaint form that the trip was authorized by Yellow Pages. Given the importance of this issue to the Appellant's complaint, I am satisfied that the failure to consider the

Appellant's evidence compromised the fairness of the complaint process. Accordingly, the Delegate failed to observe the principles of natural justice when he made his determination without considering the evidence related to whether or not the Appellant's trip was approved by Yellow Pages.

Remedy

41. The Delegate committed an error of law when he found that the dispute that caused the complaint was resolved pursuant to section 76(3)(i) of the *ESA*. In addition, the Delegate failed to observe the principles of natural justice when he failed to consider the evidence related to whether or not the Appellant's trip was authorized by Yellow Pages. It should be noted that these conclusions make no comment on whether or not the Appellant's trip was in fact authorized by Yellow Pages.
42. Section 115(1)(a) of the *ESA* provides that the Tribunal may confirm, vary or cancel the determination under appeal. Section 115(1)(b) provides that the Tribunal may refer the matter back to the director.
43. The Appellant requested in the appeal form that the Determination be varied. To do so, however, requires that the available evidence be sufficient to make a decision about the issue in dispute. The key issue in dispute relates to whether or not the Appellant's trip was authorized by Yellow Pages. The Delegate should have investigated this issue but did not do so. Accordingly, there is insufficient evidence to decide the matter on appeal.
44. Given the evidence is insufficient to decide the matter, the matter should be referred back to the Director to complete the investigation.

ORDER

45. I allow the appeal, cancel the Determination under section 115(1)(a) of the *ESA*, and refer this matter back to the Director pursuant to section 115(1)(b) of the *ESA*.

Richard Grounds
Member
Employment Standards Tribunal