Employment Standards TRIBUNAL

Citation: Metasoft Systems Inc. (Re)
2019 BCEST 128

An appeal

- by -

Metasoft Systems Inc.
("Metasoft")

- 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:** Robert E. Groves

**FILE NO.:** 2019/70

**DATE OF DECISION:** November 21, 2019

# DECISION

## SUBMISSIONS

| | |
|---|---|
| Deleram Norani | on behalf of Metasoft Systems Inc. |
| Elisabeth Rogers | on her own behalf |
| Dan Armstrong | delegate of the Director of Employment Standards |

## OVERVIEW

1. This is an appeal brought by Metasoft Systems Inc. ("Metasoft") challenging a determination (the "Determination") of a delegate (the "Delegate") of the Director of Employment Standards (the "Director") dated May 10, 2019.

2. The Determination found that Metasoft had contravened sections 58 and 63 of the *Employment Standards Act* (the "*ESA*") and ordered that it pay wages and interest totaling $14,019.44 in respect of a complaint filed by one of its former employees, Elisabeth Rogers (the "Complainant"). The Determination also ordered Metasoft to pay $1,000.00 in administrative penalties.

3. I have before me Metasoft's appeal form and submissions, submissions delivered by the Complainant and the Director, and the record the Director is required to deliver to the Tribunal pursuant to subsection 112(5) of the *ESA* (the "Record").

4. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *ESA*, the Tribunal may hold any combination of written, electronic, and oral hearings when it decides appeals. I find that the matters raised in this appeal can be decided on the basis of a review and consideration of the written materials now before me.

## FACTS

5. I incorporate by reference the facts that are stated in the Determination. What follows is a summary of the more salient facts as found by the Delegate.

6. Metasoft operates a software development and consulting business. It employed the Complainant from August 24, 2011, until July 31, 2018. At the time her employment ended the Complainant was a Senior Sales Representative ("SSR"). Her remuneration consisted of commissions resulting from sales of subscriptions to a database that provides information regarding funding for non-profit organizations.

7. In 2016 Metasoft began to impose important changes affecting the terms of the Complainant's employment contract, which resulted in a significant decline in the Complainant's remuneration. The Delegate determined that the Complainant acquiesced in those changes, with the exception of a final alteration which occurred in May 2018.

8. A condition of the Complainant's employment was that she was required to meet a sales quota, and to perform a fixed number of sales presentations each month. The numbers that were established meant that the Complainant needed to spend her working time conducting the presentations to potential buyers and then closing sales. Critically, the Complainant's ability to close sales and meet her quota depended on more junior employees called Sales Development Representatives ("SDR's") performing a rigorous program of preliminary work to qualify the "leads" to whom the presentations would be delivered as prospects who were likely to want to buy the subscriptions offered for sale by Metasoft.

9. In May 2018, Metasoft implemented further changes to the Complainant's working conditions, which ultimately led to the Complainant's ceasing to continue to work for the company. The changes were implemented unilaterally, and without any notice. The Delegate's characterization of what occurred was that Metasoft "effectively dissolved" the Complainant's more "elite" employment position and "foisted junior responsibilities onto her, reducing her ability to earn a living."

10. More specifically, Metasoft now expected SSR's like the Complainant to conduct much of the time-consuming preliminary work that was necessary to qualify the leads – the work that had been previously performed by the SDR's – with the result that the Complainant had significantly less time to conduct the presentations and, most importantly, to close sales, which was the aspect of her work on which her being paid commissions entirely depended.

11. The Complainant voiced her concerns about the changes to her superiors on several occasions after they were implemented, but the changes remained in effect.

12. One of the remedies suggested by the Complainant was that the time period within which she was permitted to close a sale be extended for certain leads thought to be near a decision to buy. On several previous occasions, Metasoft management had approved requests for extensions by the Complainant without incident, but when she sought an extension on a lead in July 2018, Metasoft refrained from providing the requisite permission.

13. Indeed, Metasoft went further. In an email to the Complainant dated July 23, 2018, it reprimanded her for manually transferring two other lead files back to her portfolio when the time for closing sales had expired for them. Based on her past experience with approvals for extensions, the Complainant had simply assumed that the leads would be returned to her. The email interpreted her actions as a "theft" of potential sales from other employees. It also stated that any further breach of a corporate rule or policy would result in the Complainant's immediate dismissal for cause.

14. The day prior, July 22, 2018, the Complainant forwarded an email to a superior stating that she did not accept the changes to her employment contract and would view herself to have been constructively dismissed if Metasoft did not provide her with a fixed number of qualified leads per month, or failed to reinstate the terms of her contract in place prior to 2015, which had included a base salary in addition to commissions. Metasoft did not respond to this email prior to the Complainant's receiving the reprimand email the following day.

15. The Complainant protested the reprimand email, but when she sought clarification regarding the terms and conditions of her continued employment her approaches were rebuffed, and she received no

substantive answer. In a final attempt to speak to her superior, she was told he was "leaving it to the lawyers."

16. On July 31, 2018, the Complainant's legal counsel forwarded a letter to Metasoft confirming that the Complainant had been constructively dismissed and would not be returning to work for the company.

17. Having found these facts, the Delegate determined that Metasoft substantially altered the conditions of the Complainant's employment in May 2018, and so, pursuant to section 66 of the *ESA*, it had terminated her employment.

18. The Delegate found that it was a condition of the Complainant's employment that Metasoft provide her with qualified leads, an obligation the company ceased to perform once the May 2018 changes were implemented.

19. The Delegate decided that the May 2018 changes were significant because the Complainant's ability to earn commissions depended on her being able to invest her time selling subscriptions to qualified leads. After May 2018, the leads the Complainant was required to contact were substantially inferior to the leads the SDR's had been referring to her previously. Prior to May 2018, the SDR's had ensured that the leads had a budget capable of accommodating a subscription, and a willingness to attend a sales presentation with an appetite to make a purchase. After May 2018, no such rigorous qualification process had been done for the vast majority of leads with whom the Complainant was expected to deal.

20. For the Delegate, the significance of the effect of the changes to the conditions of the Complainant's employment was revealed in her sales results in the period after the changes were implemented. The Complainant had but one sale from the new leads in June 2018, and no sales from them in July. The Complainant received commissions from several other sales during those months, but they were sales that were already in her "pipeline" before the May 2018, changes took effect.

21. The Delegate rejected Metasoft's assertion that the Complainant's lack of production after the changes implemented in May 2018, was due to her being absent from work for significant periods. The Delegate acknowledged that the Complainant missed two weeks of work in June 2018, due to a back injury, but otherwise her attendance at work was consistent with normal expectations, a fact that was corroborated by at least one other witness who provided evidence regarding this point. Several witnesses gave evidence that the sign-in sheets used by Metasoft to track attendance, on which the company relied to show the Complainant's absences, were unreliable, because employees often did not make it a part of their routine to complete them.

22. The Delegate determined that Metasoft's failure to respond positively to the Complainant's request for an extension was also a marked departure from the previous practice. The Delegate found that there was no evidence of bad faith on the part of the Complainant regarding extensions, and so the reprimand was unwarranted.

23. The Delegate further decided that the failure of Metasoft to explain the timing of the reprimand, so soon after the Complainant formally rejected the changes and advised she believed she had been constructively dismissed, led to an adverse inference as to the company's *bona fides*. In addition, the Delegate found that the statement of the Complainant's superior that he was "leaving it to the lawyers" must be

construed by a reasonable person to mean that Metasoft no longer intended to be bound by the Complainant's employment contract.

24. There was evidence noted by the Delegate suggesting that Metasoft had been prepared to offer the Complainant a different position within the company before she departed. The Delegate found, however, that the job for which particulars were defined by Metasoft was an entry level position paying significantly lower remuneration. The inference to be drawn from the Delegate's comments is that he found the other employment position alleged to have been made available was not a reasonable alternative to the work she was then performing as an SSR.

25. The Delegate decided that since Metasoft had terminated the Complainant's employment, it was required to pay her compensation for length of service pursuant to section 63 of the *ESA*.

26. Metasoft did not dispute that it had failed to pay the Complainant the appropriate sums for vacation pay under section 58 of the *ESA*.

**ISSUE**

27. Is there a basis on which the Determination should be varied or cancelled, or referred back to the Director?

**ANALYSIS**

28. The appellate jurisdiction of the Tribunal is set out in subsection 112(1) of the *ESA*, which reads:

> 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.

29. Subsection 115 (1) of the *ESA* should also be noted. It says this:

> 115 (1) After considering whether the grounds for appeal have been met, the tribunal may, by order,
>
> (a) confirm, vary or cancel the determination under appeal, or
>
> (b) refer the matter back to the director.

30. Metasoft's appeal asserts that the Delegate failed to observe the principles of natural justice, and that evidence has become available that was not available at the time the Determination was being made.

31. A challenge to a determination on the basis that there was a failure to observe the principles of natural justice raises a concern that the procedure followed by a delegate of the Director was unfair. Two

principal components of fairness are that a party must be informed of the case it is required to meet and offered an opportunity to be heard in reply. A third component is that the decision-maker be impartial.

32. The Record discloses that Metasoft was apprised of the case it needed to meet in the complaint and had a more than adequate opportunity to reply. Metasoft takes no issue with the fairness of the Delegate's conduct of the investigatory process on this basis.

33. The fairness issue Metasoft identifies in its submission is what it refers to as the "predisposed mindset" of the Delegate. The basis for this assertion is grounded in a comment made by the Delegate in his Reasons that the principal of Metasoft "pretended not to know" what a lead extension was when the Complainant requested that one of her leads not be transferred to another employee in July 2018. Metasoft's response to the Delegate's remark is that the principal participates in matters relating to individuals like the Complainant when his managers request him to do so, and that he does not need to "pretend" to be aware or unaware of any matter.

34. The substance of Metasoft's objection is that the Delegate's comment reveals bias. I disagree.

35. An allegation of bias against the Delegate is a serious matter, because it suggests that his decision was not the product of an impartial mind. Such an allegation must never be made unless there is cogent evidence presented to support it. An argument alleging bias that is based on speculation, or a mere suspicion of impropriety, will be unsuccessful (see *Re Zadehmoghadami (cob E-Hot Wired Computers)*, BC EST # D171/05, and *Re Dang*, BC EST # D184/05).

36. Here, in an email directed to the Complainant on July 16, 2018, the principal specifically queried what she meant by a "lead extension" that she had requested. The discussion arose in the context of the Complainant's pursuit of the practice the Delegate found to have been common at Metasoft, and to which I have alluded earlier, where SSR's requested extensions of time to close sales on leads where evidence existed that a purchase was about to be made. Since the practice was well-known, the Delegate's comment amounted to a finding that the principal's query was disingenuous. In my view, that characterization on the part of the Delegate was entirely reasonable. In no way does it support a conclusion that the Delegate was biased.

37. The other submissions Metasoft makes in the appeal attempt to challenge several of the Delegate's findings of fact. Those challenges may be summarized as follows:

- The May 2018 changes did not fundamentally alter the Complainant's conditions of employment. The leads she received were all "qualified". All that Metasoft was now asking her to do in addition was ask the leads if they were ready to buy.
- No evidence was led that the leads the Complainant received after May 2018 were inferior. The Delegate simply accepted the Complainant's evidence that the new leads were "raw leads". In support of its argument on this point Metasoft submits, as new evidence, several hundreds of pages of computer data showing the Complainant's leads from May to July 2018, proving, it contends, that those leads were qualified.
- The decline in the Complainant's production after the May 2018 changes was due to the fact that the Complainant missed many days of work during that period, and was not related to

the quality of her leads. In support, Metasoft has provided, as new evidence, a table showing the time it submits the Complainant was logged onto the company's computer system during the relevant period.

- The Delegate erred in finding that the commissions paid to the Complainant after the May 2018 changes were largely derived from qualified leads developed before the changes were made. In support, Metasoft submits, as new evidence, documentation showing the revenue generated by the Complainant from January to July 2018.
- The Delegate erred in stating that the Complainant's base salary and ability to work remotely were "rescinded" in 2017. Metasoft asserts that the 2017 changes to her conditions of employment were mutually agreed upon. On this point, I observe that the Delegate acceded to Metasoft's position, in substance. He determined that while the 2017 changes were imposed by Metasoft unilaterally, it provided consideration in the form of an improved commission rate, and the Complainant agreed to the changes.
- The Metasoft principal's refusal to meet with the Complainant, and his comment about "leaving it to the lawyers" were the result of a concern that the Complainant was gathering evidence to support a lawsuit against the company. I note, however, that Metasoft does not dispute that the comment was made.

38. For all of these reasons, Metasoft argues that the Delegate erred in deciding that the company had substantially altered a condition of the Complainant's employment. Instead, Metasoft submits that it was the Complainant who terminated her employment with the company.

39. The Tribunal's power to allow an appeal based on "new evidence" under subsection 112(1)(c) of the *ESA* incorporates an obligation to exercise a discretion. The discretion must be exercised with caution. A rationale for this approach appears in subsection 2(d) of the *ESA*, which stipulates that it is a purpose of the legislation to provide fair and efficient procedures for resolving disputes over its application and interpretation. It would hinder the achievement of that purpose if an appellant were to be permitted, as a matter of routine, to seek out new evidence to bolster a case which failed to persuade at first instance. Moreover, proceedings under the *ESA* are likely to be fairer and more efficient if parties are encouraged to take care to seek out all relevant information during the investigation phase and present it to the Director before a determination is issued.

40. One of the criteria that the Tribunal will apply in determining whether an appeal should be allowed on this basis is to ask, therefore, whether the evidence could not, with the exercise of due diligence, have been presented to the Director during the investigation or adjudication of a complaint and prior to a determination being made. In other words, was the evidence really unavailable to the party seeking to present it? At the same time, even if the evidence might have been discovered with greater diligence, the Tribunal may nevertheless consider it if an appellant can demonstrate that it is important in the sense that if the Director were to have accepted it as reliable, it may have led the Director to a different conclusion on a material issue (see *Re Merilus Technologies Inc.*, BC EST # D171/03; *Re Specialty Motor Cars*, BC EST # D570/98).

41. In this instance, Metasoft has tendered the evidence its submissions identify as new for the purpose of bolstering the case it presented, without success, before the Delegate. There is, in addition, no indication

that the evidence, and the sources for it, were unavailable to Metasoft during the proceedings before the Delegate, and for that reason could not have been offered before the Determination was made. Quite simply, the evidence is not "new".

42. In addition, I am not persuaded that the evidence is probative, to the requisite degree.

43. The computer documentation Metasoft has tendered is incomprehensible to the untutored eye. As it relates to the question whether the leads delivered to the Complainant after the May 2018 changes were qualified in the same manner as was the practice before the changes were made, the information is unhelpful. Even if, as Metasoft argues, the information shows that some of the post-change leads had been contacted previously, the degree to which they were "qualified" is a question to which the computer documentation does not provide a compelling answer.

44. The revenue information submitted by Metasoft is also inconclusive, at best. It is based, largely, on figures for 2018 beginning in January. The changes affecting the Complainant's remuneration did not occur until May of that year. A reading of the revenue information does not reveal the degree to which sales that occurred after the May 2018 changes were the result of development work performed before the changes were made.

45. As for the computer log information Metasoft has submitted, the Delegate's conclusions relating to the Complainant's attendance at work throughout the relevant period, along with short absences due to illness, were confirmed by other witnesses in a position to know whether the Complainant was present or not. The time the Complainant may have been working offline in order to qualify leads or give sales presentations also does not appear to have been accounted for in the information provided by Metasoft.

46. The other matters raised by Metasoft directly confront the findings of fact made by the Delegate in support of the Determination.

47. In order for the Tribunal to decide that the Delegate's findings of fact were made in error, it must be shown that those findings were irrational, perverse, or inexplicable. This is so because the appellate jurisdiction of the Tribunal under section 112 of the *ESA* does not permit it to correct errors of fact. Instead, the Tribunal may only correct errors of law. An error of fact does not amount to an error of law unless the Tribunal concludes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have made the impugned finding of fact (see *Gemex Developments Corp. v. B.C. (Assessor of Area #12 - Coquitlam)* (1998) 62 BCLR (3d) 354; *Delsom Estates Ltd. v. British Columbia (Assessor of Area 11 – Richmond/Delta)* [2000] BCJ No.331).

48. Metasoft did not challenge the Determination on the ground that the Delegate committed errors of law under subsection 112(1)(a) of the *ESA*. Nevertheless, its failure to tick the appropriate box on its appeal form is not fatal. The Tribunal will look to the substance of an appeal, and not its mere form (see *Triple S Transmission Inc. o/a Superior Transmissions*, BC EST # D141/03).

49. That being said, I do not discern that Metasoft has met the burden on it to establish that the Delegate's findings of fact it questions were irrational, perverse, or inexplicable. It disagrees with them, to be sure, but that is insufficient. As has been shown in the facts, and the Delegate's characterization of them, to which I have alluded in this decision, there was at least some probative evidence in the form of oral

testimony or documentary information on all the points referred to by Metasoft in its appeal on which the Delegate could reasonably rely in reaching conclusions on the facts that were contrary to the positions taken by Metasoft.

50. As the Tribunal has stated on many other occasions, an appeal is not a re-investigation of a complaint nor is it intended to be an opportunity to re-argue positions taken during the proceedings ending in a determination by the Director in the hope that the Tribunal will come to a different conclusion (see, for example, *M.S.I. Delivery Services Ltd.*, BC EST # D051/06). In this case, much of Metasoft's submission consists of a repetition of arguments made without success before the Delegate. I see no basis in the material offered by Metasoft on appeal which leads me to conclude that the orders made in the Determination should be disturbed.

51. For these reasons, Metasoft's appeal cannot succeed.

## ORDER

52. Pursuant to subsection 115(1)(a) of the *ESA*, I order that the Determination dated May 10, 2019, be confirmed.

**Robert E. Groves**
**Member**
**Employment Standards Tribunal**