Employment Standards TRIBUNAL

Citation: Yapi Aim Group Inc. (Re)
2020 BCEST 17

An appeal

- by -

Yapi Aim Group Inc.
(the "Appellant")

- 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 (as amended)

PANEL: James F. Maxwell

FILE NO.: 2019/179

DATE OF DECISION: March 10, 2020

DECISION

OVERVIEW

1. Alessandro Ferrari (the "Employee") filed two complaints with the Employment Standards Branch as against Yapi Aim Group Inc. (the "Appellant"). The Employee alleged that the Appellant, with whom he had previously been employed, had failed to pay him amounts owed for regular wages, overtime, vacation pay, expenses, and compensation for length of service.

2. A delegate of the Director of Employment Standards (the "Director") issued a determination (the "Determination") pursuant to the *Employment Standards Act* (the "*ESA*") in which the Director held that the Appellant was liable to pay to the Employee sums for wages, annual vacation pay, and compensation for length of service, together with interest accrued thereon. In addition, the Director assessed administrative penalties in the sum of $2,000.00. The Director concluded that the total amount payable by the Appellant was $27,525.44.

3. The Appellant has filed an appeal of the Determination.

4. In its appeal, the Appellant alleges that the Director failed to observe the principles of natural justice in making the Determination.

5. Having reviewed the Determination, the parties' appeal submissions, and the record of proceedings provided by the Director, I conclude that this appeal must be dismissed, and the Determination confirmed pursuant to section 115 of the *ESA* for the following reasons.

ISSUE

6. Did the Director fail to observe the principles of natural justice in issuing the Determination?

FACTS

7. The Appellant is a company engaged in the business of steel manufacturing.

8. The relationship between the Employee and the Appellant began in or about March 2017. The relationship came to an end on March 4, 2019.

9. The Employee filed two complaints with the Employment Standards Branch: the first dated February 28, 2019 (the "First Complaint") and the second dated August 26, 2019 (the "Second Complaint"). Both complaints alleged that the Appellant had failed to pay to the Employee all sums owing pursuant to the relationship.

10. In the First Complaint, the Employee alleged that he had been employed with the Appellant as Chief Operating Officer from April 3, 2017, at a net rate of pay of $8,000.00 per month. The Employee was, at the date of the First Complaint, still employed by the Appellant. The Employee alleged that he had not

been paid regular wages, overtime, annual vacation pay, or expenses for the months of January and February 2019, in the sum of $16,500.00.

11. The Second Complaint was filed some months after the Employee had left the Appellant's employ on March 4, 2019. The Employee alleged that he had not been paid regular wages, compensation for length of service, or car allowance during the period January 1 to March 4, 2019. The Second Complaint did not indicate the amount the Employee claimed that he was owed.

12. On April 17, 2019, the Employee filed a Notice of Claim against the Appellant in the Provincial Court of British Columbia (Small Claims) in the sum of $35,000.00. The Notice of Claim alleged that in March of 2018, the Appellant had promised to issue to the Employee 5% of the total shares of the Appellant company and had failed to do so. The Notice of Claim sought the shares, or the value thereof, in the sum of $35,000.00, the maximum amount of the court's jurisdiction.

13. On May 7, 2019, the Employee filed a second Notice of Claim against the Appellant in Provincial Court. This second Notice of Claim alleged that in August of 2017, the Appellant had agreed to pay to the Employee the sum of $2,500.00 per month for the position of agent/consultant and none of these amounts had ever been paid. The Notice of Claim sought the maximum amount of the court's jurisdiction of $35,000.00.

14. On May 21, 2019, the Director notified the Appellant of the Employee's complaint and requested that the Appellant supply records related to the Employee's employment. Appended to the Director's May 21 letter were copies of two "factsheets" produced by the Employment Standards Branch, the first entitled "Complaint Resolution", which outlined the processes that could be involved in addressing the complaints, and the second entitled "Enforcement Measures and Penalties", which described the measures that could be taken by the Employment Standards Branch to recover monies owing to an employee.

15. The Director thereafter began an investigation into the facts surrounding the Employee's complaint.

16. On June 11, 2019, the Director sent a letter to the Employee and to the Appellant indicating that the Director had "not been able to successfully reach a determination with respect to my investigation of the subject complaint". The Director advised the parties that "[p]ursuant to my powers under section 84 of the Employment Standards Act, I am setting this matter down for a fact finding meeting on June 25, 2019 at 9:00 am." The letter went on to advise the parties that the meeting would be held by telephone, the parties were entitled to have legal counsel present, the parties would sworn under oath for examination by the Director and by one another, and that other witnesses could be called. Ultimately, the "fact finding meeting" was held on June 27, 2019.

17. On July 23, 2019, a Settlement Conference was conducted in Provincial Court. The court held that the Employee's two Notices of Claim were inter-related, and together exceeded the financial jurisdiction of the court. Therefore, both court actions were adjourned, and the Employee was told that he could apply to transfer the actions to the British Columbia Supreme Court.

THE DETERMINATION

18. On September 11, 2019, the Director issued the Determination that gives rise to this Appeal. The Director held that the Appellant had breached the *ESA* and was liable to pay sums for wages, annual vacation pay, and compensation for length of service, together with administrative penalties, in a total amount of $27,525.44.

19. The Director considered the limits set out in section 80 of the *ESA* for recovery of unpaid wages and concluded that the Employee could recover for the period March 1, 2018, to February 28, 2019 (with respect to the First Complaint), or the 12 month period prior to the end of employment on March 4, 2019 (with respect to the Second Complaint).

20. The Director found that the Employee had worked as a contractor on projects from March 2017 through March 2018. In support of this conclusion, the Director referenced a Master Fee Protection Agreement. The Director accepted the Employee's argument that this document represented an independent contractual relationship between the Appellant and the Employee, for the time prior to the Employee's employment with the Appellant.

21. The Director found that in March 2018, the Appellant and the Employee entered into a written employment agreement. It appears that the Director relied for this conclusion upon a document entitled "Employment Offer", which was executed by the Appellant but was not signed by the Employee. Pursuant to the Employment Offer, the Employee was to commence April 2, 2018, in the position of Marketing and Trade Director, at a salary of $6,000.00 per month. Based upon this document, and the operation of section 80 of the *ESA*, the Director concluded that the Employee was entitled to recover any outstanding wages for the period from April 2, 2018, to March 4, 2019.

22. The Director found that in approximately the fall of 2018 the Employee's salary was increased to $8,000.00 per month, net of deductions.

23. The Director found, based upon evidence supplied by the parties, that the Employee did not receive wage statements during the period of his employment, but did receive cheques that purported to be for salary during the period from May 9, 2018, to January 15, 2019.

24. The Appellant tendered wage statements for the Employee but was unable to reconcile the amounts or dates recorded therein to the amounts actually paid to the Employee.

25. Based upon the evidence supplied by the Employee, the Director concluded that the Employee was entitled to receive the sum of $92,348.84 in wages for the period April 2, 2018, to March 4, 2019, but in fact received only the sum of $73,605.44 during that time, resulting in unpaid regular wages in the sum of $18,743.40.

26. The Director held that the Appellant failed to pay the Employee the statutorily-required sums for annual vacation pay, and the Employee was entitled to receive the sum of $3,794.58.

27. Pursuant to the *ESA*, an employer is required to pay to an employee compensation for length of service at the end of the employment relationship, except if the employee quits, or is dismissed for just cause.

The Director rejected the Appellant's arguments that it was entitled to dismiss the employee for just cause, noting that the Appellant testified that it had no intention to dismiss the employee on March 4, 2019. The Director further rejected the Appellant's argument that the Employee had resigned his employment and found that by failing to pay unpaid wages owing at March 4, 2019, the Appellant had constructively dismissed the Employee. The Director held, therefore, that the Employee was entitled to receive the sum of $2,515.60 as compensation for length of service.

28. The Director assessed administrative penalties for breach of the *ESA* in the sum of $2,000.00, together with accrued interest on amounts owing in the sum of $516.92.

THE APPEAL

29. On October 15, 2019, the Appellant filed its appeal with the Tribunal. The Appellant alleged the Director had failed to observe the principles of natural justice in making the Determination.

30. The Appellant made further submissions in support of its appeal on November 25, 2019, and February 6, 2020. I summarize these submissions as follows:

- the decision of the Director was "not fair and not credible". The *Employment Standards Act* "is very one sided";
- the Employee filed a court action against the Appellant, which was dismissed, and filed a lien against the Appellant. These actions were a disservice and unnecessary expense to the Appellant;
- the Employee quit and was not dismissed by the Appellant;
- the Employee was unqualified for the position that he held. The Employee failed to fulfil his duties and committed fraud during his employment. The Employee engaged in personal activities during working hours;
- the Employee's performance of his duties was inadequate. The Employee was told of his poor performance, though the Appellant's concerns were not issued in writing as the Appellant did not have a Human Resources Department;
- the Appellant owes only one month of salary to the Employee;
- the Employee has been inconsistent in the amounts that he claims to be owed by the Appellant;
- the Appellant paid the Employee's expenses while the Employee was on vacation.

ANALYSIS

31. Section 112(1) of the *ESA* provides that a person may appeal a Determination 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.

32. In the present case, the Appellant has contended only that the Director failed to observe the principles of natural justice in making the Determination.

33. In *Triple S Transmission Inc.*, BC EST # D141/03, this Tribunal stated that a broad view should be taken of an appellant's submissions, particularly when those submissions are made by persons untrained in the law:

> In my view, the Tribunal must not mechanically adjudicate an appeal based solely on the particular "box" that an appellant has--often without a full, or even any, understanding--simply checked off.
>
> The purposes of the *Act* remain untouched, including the establishment of fair and efficient dispute resolution procedures and, more generally, to ensure that all parties receive "fair treatment" [see subsections 2(b) and (d)]. When adjudicating an appeal, I believe it is appropriate for the adjudicator to first inquire into the nature of the challenge to the determination (or the process that led to it being issued) and then determine whether that challenge, *prima facie*, invokes one of the statutory grounds. In making that assessment, I also believe that adjudicators should take a large and liberal view of the appellant's explanation as to why the determination ought to be varied or cancelled or why the matter should be returned to the Director.

34. In keeping with that guidance, I will not limit my examination to the single ground cited by the Appellant but will examine whether the Appellant's submissions give rise to any of the statutorily-permitted grounds of appeal.

(i) Error of Law

35. This Tribunal has adopted the following definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia* (Assessor of Area #12 – Coquitlam), [1998] B.C.J. No. 2275 (B.C.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. adopting a method of assessment which is wrong in principle.

36. I find nothing in the Appellant's submissions that suggests that the Director misinterpreted or misapplied a section of the *ESA* or a principle of general law. I find that the Director properly applied the law in reaching the conclusion that the Employee was justified in leaving the Appellant's employment when the Appellant declined to pay outstanding wages and that the Appellant's actions amounted, in law, to a constructive dismissal. The Director correctly rejected the Appellant's arguments that it had grounds to

dismiss the Employee for poor performance, especially in light of the Appellant's admission that it had no intention to dismiss the Employee.

37. I do not find that the Director acted without evidence or on a view of the facts that could not be reasonably entertained. The Director set out the evidence given by the parties and their documents in some detail. The Director explained what evidence he relied upon in reaching his conclusions and explained where he preferred the evidence of the Employee over that of the Appellant.

38. I do not find that the Director erred in assessing the quantum of unpaid wages.

39. The Appellant's arguments about the fact that the Employee initiated proceedings in other courts is irrelevant to this appeal, especially in light of the fact that the Provincial Court actions were adjourned prior to the issuance of the Determination.

40. Based upon the foregoing, I find that the Appellant has not established that the Director erred in law in making the Determination.

(ii) The principles of natural justice

41. The Appellant asserted that the Director failed to observe the principles of natural justice in making the Determination.

42. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, the Tribunal addressed the principles of natural justice that must be addressed by administrative bodies as follows:

> Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the *Act*, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party. (see *BWI Business World Incorporated* BC EST #D050/96).

43. Thus, natural justice requires that the parties in an administrative procedure have the opportunity to know the case against them, have the right to present evidence, and are heard by an independent decision maker who evaluates the evidence in an unbiased and neutral manner. They also have the right to be treated with procedural fairness.

44. When the Director first notified the Appellant of the complaints in this case, the Director supplied the Appellant with a "Factsheet" produced by the Employment Standards Branch that stated, with respect to employment standards complaints, that "[a]lthough some matters are resolved through investigation, most are resolved through a process of education, mediation and/or adjudication." The Factsheet then went on to describe each of the processes of investigation, education, mediation, and adjudication. With respect to 'investigation', the Factsheet stated that "[t]he officer will try to resolve the complaint informally, but if that is not possible, the officer will make a decision and issue a Determination." On the topic of 'education', the Factsheet stated that "[i]f the complaint is not resolved, it will be referred to

mediation." Regarding 'mediation', the Factsheet advised that "[a]n officer of the Branch will conduct a mediation, which is an informal meeting between the employer and the employee." Finally, regarding adjudication, the Factsheet advised the Appellant that "[i]f the complaint is not resolved through mediation, the Branch will schedule a complaint hearing to be conducted by an officer. If a hearing is scheduled, both parties will be required to attend along with any necessary witnesses. The hearing may be held in person or by teleconference."

45. The Director began the process of dealing with the complaints by commencing an investigation. Then, on May 21, 2019, the Director advised the parties that "I have not been able to successfully reach a determination with respect to my investigation of the subject complaint. … Pursuant to my powers under section 84 of the Employment Standards Act, I am setting this matter down for a fact finding meeting …" [emphasis added]. The Director advised the parties that the meeting would be held by teleconference, that the parties were entitled to have legal counsel present, that the parties would be examined under oath and would have the right to cross-examine, and would have the right to call witnesses. There were several other communications in which the Director continued to use the term "fact finding meeting".

46. There was nothing in the Factsheet which described a process involving a 'fact-finding meeting' conducted under oath.

47. This Tribunal has acknowledged that the Director has a broad discretion to choose the procedure to resolve a complaint that the Director feels is most appropriate for the circumstances. Nevertheless, the role played by the Director may differ depending upon the process chosen. In *Whitaker Consulting Ltd.*, BC EST # D033/06, this Tribunal discussed the differences between, for example, an investigation and a complaint hearing:

> Regardless of whether a delegate decides to proceed by way of investigation or adjudicative hearing, he or she will (subject to s. 76) ultimately issue a determination, but the nature of the delegate's role in gathering evidence upon which to base that determination will vary depending on whether the procedure is an investigation or an adjudicative hearing. If the delegate chooses to hold a hearing, then the delegate "schedules and convenes a hearing with both parties present, and adopts practices and a posture more akin to that of a judge or adjudicator": *Kyle Freney*, BC EST #D130/04. At such an oral hearing,
>
> > ...the parties are expected to provide whatever evidence they have in support of their respective positions. The delegate then makes a decision on the basis of the evidence presented at the hearing rather than on the basis of whatever evidence or information he or she might have been able to gather through an investigative process. (*Donald Healey*, BC EST #207/04)
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> In an oral hearing, the delegate's role is more like that of a traditional adjudicator in the sense that it is up to the parties to bring forth all relevant evidence and submissions for the delegate's consideration. The failure to adduce such evidence will result in a determination's being issued without it, and possibly, in the delegate's drawing an adverse inference from the failure to present such evidence.
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> If, on the other hand, the delegate conducts an investigation, then he or she performs a more inquisitorial function (*John Ladd's Imported Motor Car Company operating as John Ladd B.M.W.*, BC EST #D313/96) with corresponding powers to gather relevant evidence not only from the parties, but from non-parties if necessary. Section 77 of the *Act* provides that "If an investigation

> is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond." A failure to fulfill this obligation constitutes a breach of natural justice.

48. The onus is on the Appellant to show that the Director breached the principles of natural justice.

49. The Appellant's arguments consist of a number of attempts to re-argue this matter before this Tribunal and a number of rather vague assertions that the decision of the Director was "not fair and not credible" and that the *ESA* "is very one sided". It is not the mandate of this Tribunal to re-hear the original matter, but to determine if there are grounds upon which to dismiss, vary or send back the Determination.

50. I find that the Director afforded sufficient opportunities to the Appellant to know the case against it and the right to present its evidence. The Director undertook, initially, an investigation and, later, conducted a hearing in which both the Appellant and the Employee gave oral evidence and were afforded rights of cross-examination. The Director acted in a fair and impartial manner and carefully weighed all of the evidence. The Director then rendered a reasonable Determination based upon that evidence.

51. I do not find anything in the Appellant's submissions that supports the Appellant's assertion that the Director failed to apply the principles of natural justice in making the Determination, and I dismiss this ground of appeal.

(iii) New Evidence

52. A third ground upon which an appeal may be brought is that new evidence has become available which was not available at the time that the Determination was made. In this case, the Appellant has neither argued that new evidence has become available that would affect the Determination, nor presented any new evidence. Therefore, this is not a valid ground of appeal in this case.

ORDER

53. Having reviewed the Determination, the Appellant's submissions filed with the appeal, the Employee's submissions, and the Record tendered by the Director, I conclude that this appeal must be dismissed, and I confirm the Determination pursuant to section 115(1)(a) of the *ESA*.

James F. Maxwell
Member
Employment Standards Tribunal