Employment Standards TRIBUNAL

Citation: Miningsky Technology Ltd. (Re)
2020 BCEST 43

An appeal

- by -

Miningsky Technology Ltd.
(the "appellant")

- 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:** Kenneth Wm. Thornicroft

**FILE NO.:** 2020/008

**DATE OF DECISION:** May 6, 2020

# DECISION

## SUBMISSIONS

Martin Sheard — counsel for Miningsky Technology Ltd.

## INTRODUCTION

1. On December 5, 2019, Shannon Corregan, a delegate of the Director of Employment Standards (the "delegate"), issued a Determination under section 79 of the *Employment Standards Act* (the "*ESA*") ordering the present appellant, Miningsky Technology Ltd. (the "appellant"), to pay a former employee, Zetong Zhang (the "complainant"), the total sum of $42,024.15 on account of unpaid wages and section 88 interest.

2. Further, and also by way of the Determination, the delegate levied a $500 monetary penalty (see section 98) based on the appellant's failure to pay wages in accordance with section 18 of the *ESA*. Thus, the appellant's total liability under the Determination is $42,524.15.

3. The appellant appeals the Determination on the grounds that the delegate erred in law and failed to observe the principles of natural justice (see sections 112(1)(a) and (b) of the *ESA*).

4. In my view, this appeal has no reasonable prospect of succeeding and, as such, must be dismissed under section 114(1)(f) of the *ESA*. My reasons for reaching that conclusion are set out in greater detail, below.

## THE DETERMINATION

5. The appellant operates a cryptocurrency mining business. The dispute between the parties concerns an alleged unpaid commission.

6. The complainant and the appellant (represented by its sole director, Ningtao Zhang, and its legal counsel), appeared before the delegate at a complaint hearing held on August 19, 2019. The complainant testified on his own behalf. Ningtao Zhang and the appellant's former Sales and Customer Service Manager testified for the appellant.

7. On December 5, 2019, the delegate issued the Determination and her accompanying "Reasons for the Determination" (the "delegate's reasons"). In rendering her decision, the delegate did not find Ningtao Zhang to be a credible witness, noting that he "made several statements [that] ranged from mere internal inconsistencies to statements unsupported by documentary evidence to deliberate untruths" (delegate's reasons, page R11). The delegate indicated that where there was a conflict in the evidence as between the complainant and Ningtao Zhang, "I prefer the Complainant's evidence" (page R12).

8. The complainant was employed as a Miningsky vice-president for about one year, from January 1 to December 20, 2018. As detailed in the delegate's reasons, the parties entered into a written employment agreement that provided for an annual $75,000 salary. The complainant's salary was later increased to $96,000 per annum effective February 1, 2018. In the summer of 2018, the appellant introduced a

supplementary commission plan, and this plan was the source of the complaint. Under the terms of the new commission policy, payments were based on monies received from the appellant's clients.

9. By letter dated December 5, 2018, the complainant's employment was terminated, without cause, "due to a change in business conditions". Appendix A to the termination letter included provisions that the termination effective date was December 20, 2018, and that the complainant was to return all company property and not to make copies of any company documents.

10. Before signing the document, the complainant unilaterally added a provision (Clause 7 – Sales Commission) to an electronic version of Appendix A that a pending $38,936 commission payment would be made when the appellant "receives an escrow payment from [its law firm]" relating to a deposit received from one of its clients, Allrise.

11. The complainant testified that the wording of Clause 7 was "based on the parties' mutual understanding". In his testimony before the delegate, Ningtao Zhang stated that he "did not have a problem with Clause Seven as long as the Complainant returned the company property" (delegate's reasons, page R9).

12. On December 6, 2018, the complainant signed the December 5th termination letter acknowledging that he accepted the terms of Schedule A "in full and final satisfaction of any claims that I may have". The complainant also signed Schedule B to the termination letter, being a form of release in favour of the appellant.

13. On November 5, 2018, the appellant's legal counsel advised the appellant that it had received a $194,680 deposit from one of the appellant's clients, "Allrise". These funds were held in the law firm's trust account. I understand that on December 6, 2018, the appellant's law firm released $16,353.12 to the appellant, and on December 20, 2018, a further $76,314.56 was released to the appellant leaving $102,012.32 in trust. Thus, as of December 20, 2018, a total of $92,667.68 was released to the appellant from its lawyer's trust account from the Allrise deposit. It is not entirely clear what has transpired with respect to the residual funds on deposit with the appellant's law firm. However, the delegate noted, at page R15 of her reasons, there was no evidence that the funds had been returned to Allrise and that she was unable to conclude "that the remainder of the funds will not be delivered to Miningsky".

14. On February 1, 2019, the complainant filed his unpaid wages complaint, alleging that he was entitled to a 20% commission relating to an approximate $196,000 deposit provided by a client of the appellant.

15. On July 29, 2019, the appellant filed a civil action in the B.C. Supreme Court against the complainant alleging that he wrongly withheld company property. In light of this proceeding, the appellant argued that the Director of Employment Standards should, pursuant to section 76(3)(f) of the *ESA*, cease adjudicating the unpaid wage complaint. The Director refused the appellant's request to cease adjudicating the complaint (see delegate's reasons, pages R3 – R4).

16. Turning to the merits of complainant's unpaid wage claim, the delegate determined that a commission policy was in place and that the complainant was entitled to a commission under this policy. She further determined that this unpaid commission was a form of "wages" due and payable under section 18 of the *ESA*. Thus, the amount due should have been paid to the complainant within 48 hours of his dismissal.

17. The delegate found that a document entitled "Employee Commission Regulations" (i.e., the employer's commission policy) constituted the best evidence regarding the parties' agreement with respect to the payment of commissions. This latter document was signed by Ningtao Zhang, as "CEO", on behalf of the appellant on August 14, 2018. Although the complainant did not sign the commission policy document, his name appears at the bottom of the second page of the 2-page document. This policy did not specify when commissions would be considered "earned" but did state that it was "valid" for the period from August 12 to November 31 [*sic*], 2018.

18. The appellant apparently advanced "several arguments" regarding when a commission became payable under its commission policy. However, the delegate held that she was not required to make an affirmative finding as to when a commission became *payable* under the policy because, so long as it was *earned* before the complainant was terminated, the appellant was obliged to pay the amount in question under section 18 of the *ESA* (see delegate's reasons, page R15). Section 18(1) of the *ESA* states: "An employer must pay all wages owing to an employee within 48 hours after the employer terminates the employment".

19. The delegate rejected the appellant's position that any commission earned by the complainant on the Allrise contract was "intended to be split or shared with other employees" (page R16). The delegate also noted "that although a portion of the [Allrise] funds remain in escrow, at least $92,667.68 has been released, and there is nothing preventing [the appellant] from paying those employees who earned commissions on the Allrise deal at least a percentage of the commissions [the appellant] claims they are owed" (page R16).

20. As for the commission amount that the complainant earned on the Allrise transaction, the delegate noted that the commission policy stated that commissions "will be based on the total deposit received from the client" and that in regard to the Allrise contract, the applicable commission rate was 20%. Thus, the complainant was entitled to a commission in the amount of 20% of the total $194,680 deposited with the appellant's law firm on November 5, 2018, being $38,936. In addition, the delegate awarded 4% vacation pay on this sum ($1,557.44) for a total wage payment order, before interest, of $40,493.44.

21. The delegate, in her "Findings and Analysis" (pages R11 *et seq.* of her reasons), did not address the release that the complainant signed in favour of the appellant in exchange for a $38,936 commission payment. The delegate, at page R4 of her reasons, indicated that although the termination agreement "confirms the parties' mutual understanding that the Complainant earned and is entitled to commissions", this agreement was "not the source of Complainant's entitlement to wages [but rather] it is merely a confirmation of it". The delegate determined that the complainant's commission entitlement "flows from the work he performed for Miningsky" and that "he would be entitled to wages for work performed whether or not he satisfied the terms of the Termination Agreement and the Release". The delegate continued (at page R4): "Consequently, the issue that is before the Supreme Court of British Columbia (i.e., whether the Complainant has satisfied the terms of the Termination Agreement and the Release) is separate from – and irrelevant to – the issue of whether he is owed wages".

## REASONS FOR APPEAL

22. As noted above, this appeal is based on two separate grounds, error of law and a breach of the principles of natural justice. The appellant says, firstly, that the Determination should be cancelled. Alternatively,

it says that the complainant's commission entitlement should be referred back to the Director of Employment Standards with directions regarding how any earned commission on the Allrise transaction should be apportioned. The appellant's position on each ground of appeal is summarized, below.

*The delegate erred in law*

23. The appellant's principal challenge under this ground of appeal concerns the delegate's treatment of Clause 7 of Appendix A of the Termination Agreement. This provision – drafted by the complainant, but seemingly generally accepted by the appellant – reads as follows:

> **7. Sales Commission**
> By sales contract between Miningsky and Zetong Zhang, a sum of $38,936.00 CAD is due when MiningSky receives an escrow payment from Steve Veitch Law Corporation ("SVLC"). This sales commission is calculated based on the client's (Allrise IP Holding or Allrise Financials) 20% initial deposit.

24. The appellant maintains that this provision "was a negotiated instrument" and a "compromise" that "was contingent on both parties satisfying their respective obligations". The appellant says that this compromise was given "in exchange for the return of Company property" including a "hardware currency wallet and digital currency". The appellant further says that the complainant's "retention of company property and concomitant breach of the Termination Agreement disentitles [the complainant] to payment of the negotiated amount set out in Clause Seven".

25. The appellant maintains that the question of whether the complainant breached the Termination Agreement (by failing to return company property), and what commission entitlement he might have (if any) under that agreement, "should therefore have been left to the BC Supreme Court determine" [*sic*]. The appellant's argument continues: "The Delegate therefore erred by taking jurisdiction to enforce the Termination Agreement or, in the alternative, by awarding the full amount under Clause Seven to the [complainant]". The appellant submits that the delegate should have stopped investigating the complaint under section 76(3)(f) of the *ESA*.

*The delegate breached the principles of natural justice*

26. The appellant's argument regarding this ground of appeal might equally be characterized as an alleged error of law. The appellant, referring to testimony from the appellant's former customer service manager, says that the delegate ignored her evidence in determining that any commission payable in relation to the Allrise transaction did not have to be "split" or shared with one or more other employees.

## FINDINGS AND ANALYSIS

*Alleged Errors of Law*

27. The Appellant asserts that its agreement to pay the $38,936 commission (as set out in Clause 7, above) was predicated on a *quid pro quo*, namely, payment in exchange for return of property. The Appellant maintains that the Complainant did not return company property and is, therefore, in breach of the commission payment agreement. However, in my view, there are several obvious problems with the

Appellant's assertion that the Complainant is, and presumably continues to be, in breach of an obligation to return company property.

28. First, the commission payment set out in Clause 7 is not conditional on the return of company property – the only condition concerns receipt of an escrow payment (although Clause 6 of the agreement does fix a "return of company property" obligation). On its face, Clause 7 formalizes an existing pecuniary obligation by the appellant to the complainant, with the payment obligation crystallizing when the appellant receives "an escrow payment" from its law firm.

29. Second, the delegate made a factual finding that the complainant did *not* steal, nor was he wrongfully withholding, any company property. In essence, the appellant's argument on this score amounts to an attack on the delegate's finding of fact. Although an error of law may arise from a finding of fact, such an error arises only if the finding is wholly untenable given the evidentiary record before the factfinder.

30. In response to the appellant's assertion regarding the complainant's alleged failure to return company property, the complainant testified that he returned his office key and access card (a statement apparently not in dispute), and that he "never had any company property in his possession and rejects [Ningtao Zhang's] statement that he retained any company property after December 20, 2018, or that he stole company passwords" (delegate's reasons, page R6). Ningtao Zhang testified that he believed the complainant did steal company property (delegate's reasons, page R9). But, as previously noted, the delegate did not find Ningtao Zhang to be a credible witness, and where his testimony conflicted with the complainant's evidence, she preferred the complainant's evidence (see page R12). More particularly, with specific reference to the theft allegations made against the complainant, the delegate held (at page R12):

> [Ningtao Zhang] stated that the Complainant had stolen company property, but he was not worried because the property was not significant. It is difficult to believe that a director of a corporation would be unconcerned that the Vice President of that corporation had stolen company property. [Ningtao Zhang] then stated that he wanted to fire the Complainant in October 2018 after he stole company passwords. As there is no indication that Miningsky attempted to mitigate any potential harm caused by the theft of company passwords, nor any indication that Miningsky took disciplinary action against the Complainant for the theft, I do not find this claim believable.

31. The delegate found that Ningtao Zhang's assertion that the complainant stole (and had failed to return) company property was not believable, and she was entitled to make that finding based on the conflicting evidence before her. The delegate's finding that Ningtao Zhang was not a credible witness is supported by a reasonable assessment and analysis of the disputed facts as between the complainant and Ningtao Zhang.

32. Third, in this appeal, the appellant does not directly challenge the delegate's finding that the complainant did not steal or otherwise wrongfully withhold any company property. No new evidence has been submitted under section 112(1)(c) of the *ESA* showing that the delegate erred in finding that there was no theft or wrongful withholding of the appellant's property. The section 112(5) record does not contain any credible evidence that the complainant stole, and/or has refused to return, any company property. The appellant simply continues to assert that the complainant is a thief. But there is no proof that is so. The appellant has not explained how or why the delegate's finding that the complainant is not a thief amounts to a perverse finding.

33. The delegate accepted that the appellant's commission policy, introduced in the summer of 2018, was a free-standing contractual agreement, and that the document entitled "Employee Commission Regulations" constituted the best evidence regarding when commissions would be payable. This agreement provided, in this case, that a 20% commission would be payable "based on the total deposit received from the client".

34. The delegate held, correctly in my view, that commissions are "wages"; indeed, commissions are expressly defined as "wages" in section 1 of the *ESA*. Since the commission policy did not specifically address when or how commissions were *earned*, the delegate considered the terms of the policy, and the evidence before her, before concluding that the complainant had earned a commission relating to the Allrise transaction when his employment was terminated. The Allrise funds ($194,680) were deposited with the appellant's law firm on November 5, 2018 – within the August 12 to November 31 [*sic*], 2018 commission payment period as set out in the commission policy. Thus, as of November 5, 2018, the complainant had earned a 20% commission referable to the Allrise deposit (i.e., $38,936).

35. As for when the commission became *payable*, the policy itself stated that commissions "shall be paid when Miningsky receives the deposit and when the miners are delivered to the sites". However, the delegate, applying section 18 of the *ESA*, determined that since the complainant had earned a commission on the Allrise sale before he was terminated, the appellant was required to pay that commission to the complainant within 48 hours following his termination. I am unable to conclude that the delegate erred in interpreting section 18 in this manner. Section 18 provides that all earned wages are payable within a defined time period (depending on whether there is a resignation or dismissal) after the parties' employment relationship ends. This is so even if the wages would not otherwise have been payable until a much later point in time (for example, in the case of vacation pay or a deferred earned bonus).

36. I am not persuaded that the delegate erred by refusing to exercise her statutory discretion to stop investigating the complaint under section 76(3)(f) of the *ESA* simply because the appellant filed a Notice of Civil Claim ("NOCC") against the complainant in the B.C. Supreme Court on July 29, 2019.

37. I fail to see why that unilateral action on the appellant's part somehow obliged the delegate to stop investigating the complaint. In essence, the NOCC is a claim for damages predicated on the complainant having wrongfully taken (and/or refusing to return) the employer's property. The complainant's section 74 complaint concerned unpaid "wages" as defined in the *ESA*. This complaint was clearly one that fell within the core jurisdiction of the delegate. Before the delegate, the complainant asserted that he was owed an earned commission. The appellant maintained that the complainant was not entitled to any commission because he failed to return certain company property. In my view, it would have been a breach of natural justice for the delegate to have refused to address the appellant's argument as to why it was not obliged to pay the wages claimed.

38. The delegate ultimately rejected the appellant's position, finding as a factual matter that there was no theft and/or wrongful withholding of property. In light of this finding of fact, perhaps it could be equally argued that the B.C. Supreme Court should defer to the delegate's finding on that matter by reason of *res judicata* or issue estoppel. In any event, in my view, the complainant was entitled, as a matter of law, to have his unpaid wage complaint investigated or adjudicated by the Director of Employment Standards.

*Natural Justice*

39. As noted above, the appellant's natural justice argument could be equally characterized as an alleged error of law. The appellant says that the complainant was not entitled to the full commission otherwise payable on the Allrise transaction, as it was required to be "split" with one or more other employees. The delegate addressed this assertion as pages R15 – R16 of her reasons. The appellant says that in doing so, the delegate failed to take into account the testimony of the appellant's former customer service manager. She testified that based on her experience with a prior sale (where she received a 10% share of the commission, as did the complainant, with two other employees receiving 40% each), she "expected to receive a commission on the Allrise deal" (delegate's reasons, page R11).

40. The delegate rejected the appellant's position that the Allrise commission was required to be split among several employees. The delegate noted that splitting or sharing commissions was not referred to in the commission policy. Further, Ningtao Zhang did not dispute the total amount of the commission payable to the complainant as set out in Appendix A, Clause 7 of the Termination Agreement prior to the complainant's dismissal. The appellant did not raise the matter of sharing the Allrise commission until about six months after the complainant's dismissal, by which time the complainant had already filed his section 74 complaint.

41. The delegate referred to the customer service manager's evidence relating to the sharing of a commission for another previous transaction, but also noted that this fact did not, of itself, necessarily lead to the conclusion that the Allrise commission had to be shared. The delegate did not ignore the customer service manager's evidence. Rather, she did not find it particularly probative regarding the complainant's commission entitlement on the Allrise transaction. Her reasons regarding why she rejected the appellant's position that the Allrise commission had to be shared are, in my view, transparent and intelligible. I am unable to conclude that the delegate's reasons are so deficient that they amount to a denial of natural justice.

42. To summarize, I am not persuaded that the delegate erred in law or failed to observe the principles of natural justice in making the Determination. Accordingly, this appeal must be dismissed.

## ORDER

43. Pursuant to section 114(1)(f) of the *ESA*, this appeal is dismissed. Pursuant to section 115(1)(a) of the *ESA*, the Determination is confirmed as issued.

**Kenneth Wm. Thornicroft**
**Member**
**Employment Standards Tribunal**