

An appeal

- by -

Michael P. Blasko
(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)

TRIBUNAL MEMBER: Robert C.P. Walker

FILE No.: 2012A/129

DATE OF DECISION: January 10, 2013

DECISION

SUBMISSIONS

Michael P. Blasko

on his own behalf

INTRODUCTION:

1. Michael P. Blasko (the “Appellant”) appeals pursuant to section 112 of the *Employment Standards Act* (the “Act”) against a Determination of the Director of Employment Standards issued October 10, 2012, together with accompanying Reasons for Determination of the same date. The delegate held that the Appellant was employed as a partly-commission paid sales employee and was subject to section 37.14 of the *Employment Standards Regulation* (the “Regulation”). Further, the delegate held there was insufficient evidence to confirm the Appellant had an agreement entitling him to bank overtime and take time off in lieu; or be paid wages for the time he did not take. The Determination letter stated that the Act had not been contravened. Accordingly, no wages were outstanding; and no further action would be taken.
2. This matter has been forwarded to me for consideration under section 114 of the Act. At this stage the parties have not made written submissions other than the Appellant’s written argument accompanying its Appeal. No party has sought an oral hearing. I have determined that this matter may be decided at this stage based upon the filed Appeal documents, including the Determination and Reasons for Determination, and the Record filed by the Director.
3. The Appellant’s Appeal Form dated November 13, 2012, states as the sole ground of appeal that evidence has become available that was not available at the time the Determination was being made. The new evidence is appended to the appeal in the form of a brief three-line letter dated November 7, 2012, directed “To Whom it May Concern,” from Craig Sharp, a former manager of the Appellant’s employer, stating in part, “Mike Blasko and I had an agreement that he would be compensated for any extra time he worked in the form of paid time off.”

BACKGROUND FACTS

4. The Appellant commenced employment in sales with Island Carbide Sales & Service Ltd. (dba Island Saw and Tool) in May of 2007. During the majority of the Appellant’s employment the company’s director Allan Watt was an absentee owner. At material times Mr. Craig Sharp and Ms. Pauleen Homes managed the operational and financial sectors respectively of Island Saw and Tool. In May of 2011 Mr. Watt returned to the business to take over operations. The Appellant left his employment in January 2012.
5. The Appellant argued before the delegate that there was a written agreement between he and Mr. Sharp that all overtime hours worked would be banked and in return he would receive paid time off in lieu of banked hours with the stipulation that he could not book time off at the same time as other outside salesmen. He could not produce a copy of the written agreement and Mr. Watt advised there was no such agreement indicated in corporate or personnel records. Neither Mr. Sharp or any other of the Appellant’s managers were called to testify regarding the alleged written agreement or the record keeping of overtime and discussion of time off in lieu.
6. The delegate also stated as part of her reasons: “An additional and perhaps bigger issue may be that there is no indication from either party that there was ever an intention to pay out extra hours worked as overtime.

Even if there was an agreement that the complainant (Blasko) was entitled to time off in lieu of overtime, Mr. Blasko has not provided any evidence that there was ever an agreement to pay wages for extra hours worked if he didn't take time off in lieu."

ANALYSIS

7. Section 112(1) of the *Act* sets out the grounds upon which an appeal may be made to the Tribunal from a Determination of the Director. It provides, in part:

- 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:
- (c) evidence has become available that was not available at the time the determination was being made.

8. Section 114 of the *Act* states:

- 114 (1) At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of the appeal if the tribunal determines that any of the following apply:
- (a) the appeal is not within the jurisdiction of the tribunal;
 - (b) the appeal was not filed within the applicable time limit;
 - (c) the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process;
 - (d) the appeal was made in bad faith or filed for an improper purpose or motive;
 - (e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;
 - (f) there is no reasonable prospect that the appeal will succeed;
 - (g) the substance of the appeal has been appropriately dealt with in another proceeding;
 - (h) one or more of the requirements of section 112(2) have not been met.
- (2) Before considering an appeal, the tribunal may
- (a) refer the matter back to the director for further investigation, or
 - (b) recommend that an attempt be made to settle the matter.
- (3) If the tribunal dismisses all or part of an appeal the tribunal must inform the parties of its decision in writing and give reasons for that decision.

NEW EVIDENCE

9. Section 112(1)(c) of the *Act* has been considered by the Tribunal on many occasions. The Tribunal has set out four conditions that must be met before new evidence will be considered. (see *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc*, BC EST # D171/03; and *Alano Club of Chilliwack operating as Alano Club Coffee Bar*, BC EST # D094/05).
10. The Appellant must establish that:
- (i) the evidence could not, with the exercise of due diligence, have been discovered and presented to the director during the investigation or adjudication of the complaint and prior to a Determination being made.

- (ii) the evidence must be relevant to a material issue arising from the complaint.
- (iii) the evidence must be credible in the sense that it is reasonably capable of belief.
- (iv) the evidence must have high potential probative value, in the sense, that, if believed, it could on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

11. Further, the Appellant has the burden to persuade the Tribunal there is an error in the determination under one or more of the statutory grounds set out in section 112(1): see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99, and *AM-PM Work Force Ltd*, BC EST # D009/11.
12. The evidence the Appellant purports to introduce in this appeal is not new evidence. He is attempting to respond to the delegate's comments that he failed to call Mr. Sharp to give evidence at the hearing by now providing a witness statement of an alleged contract (interestingly there is no indication of there being a written contract in the statement - merely an oral contract). This is obviously evidence that existed and could have "been discovered"- or produced - at the hearing or during the investigation. Clearly the Appellant has not met his legal burden to allow the introduction of new evidence under section 112(c). Further, he has not met his burden to persuade the Tribunal there is an error in the Determination.
13. Even if I accepted this evidence I am not persuaded that if it were believed it would have led the Director to a different conclusion on the material issue. As noted in paragraph 6, above, the delegate set out what she thought was the bigger issue of an intention to pay out the banked time as overtime. There is no evidence in the witness statement of Mr. Sharp that would confirm that the employer and the Appellant had agreed that any banked hours not used would be paid out as overtime.
14. Section 114(1)(f) of the *Act* provides that the Tribunal may dismiss all or part of an appeal if there is no reasonable prospect that the appeal will succeed. It is clear to me that there is no reasonable prospect that the appeal would succeed because the introduction of the purported "new" evidence would not be permitted.
15. As well, using section 114(1)(c) the Tribunal has held that a "frivolous" appeal is one in which "no justiciable question has been presented and which is readily recognizable as devoid of merit in that there is little prospect that it can ever succeed: see, for example, *Greg Brewer operating Smallbone Millwork & Design*, BC EST # D476/98, and *AM-PM Work Force Ltd*, *supra*. In my opinion this appeal is also frivolous and should be dismissed.

ORDER

16. I Order that this appeal be dismissed pursuant to section 114 of the *Act*.

Robert C.P. Walker
Member
Employment Standards Tribunal