

An appeal

- by -

Advanced Integration Technology Canada, Inc.
(“AIT”)

- 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: David B. Stevenson

FILE No.: 2008A/135

DATE OF DECISION: January 12, 2009

DECISION

SUBMISSIONS

Lorene Novakowski on behalf of Advanced Integration Technology Canada, Inc.
Greg Brown on behalf of the Director

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) brought by Advanced Integration Technology Canada, Inc. (“AIT Canada”) of a Determination that was issued on October 6, 2008 by a delegate of the Director of Employment Standards (the “Director”). The Determination found that AIT Canada had contravened Part 3, Section 26, of the Act in respect of the employment of Jody Johnstone (“Johnstone”) and ordered AIT Canada to pay Johnstone an amount of \$1,448.53, an amount which included wages and interest.
2. The Director also imposed an administrative penalty on AIT Canada under Section 29(1) of the *Employment Standards Regulation* (the “Regulation”) in the amount of \$500.00.
3. The total amount of the Determination is \$1,948.53.
4. In this appeal, AIT Canada submits the Director erred in law in making the Determination.
5. AIT Canada has not requested an oral hearing on the appeal. The Tribunal has reviewed the appeal, the submissions and the material submitted by all of the parties, including the Section 112 (5) record filed by the Director, and has decided an oral hearing is not necessary in order to decide this appeal.

ISSUE

6. The issue is whether the Director erred in law in concluding Johnstone was entitled to the wages claimed, which comprised AIT Canada matching RRSP contributions made by Johnstone in 2007 to AIT Canada’s “Group RRSP Plan for hourly employees”.

THE FACTS

7. The facts are quite straight forward.
8. AIT Canada designs, engineers and manufactures a broad range of custom equipment, machines and finished materials. Johnstone was employed as a CNC machinist from June 12, 2006 to August 10, 2007, when his employment was terminated. Following his termination, Johnstone filed a complaint that AIT Canada had not paid the matching portion of RRSP contributions he had made to the AIT Canada Group RRSP Plan in 2007. He claimed entitlement to an amount of \$1,360.00, which represented the amount that he had contributed to the Group RRSP Plan in 2007.

9. The position taken by AIT Canada in response to this claim was that Johnstone was not entitled to have his 2007 RRSP contributions matched by the company. Three reasons were given.
10. First, that the practice and policy of AIT Canada was to match RRSP contributions only for those employees who were in the employ of the company on December 31st of the relevant year and since Johnstone was not an employee of AIT Canada on December 31, 2007, he was not entitled to the matching portion of the RRSP contribution from them for that year. Second, that all AIT Canada benefits were subject to change at the discretion of the AIT Canada Board of Directors, who also reserved the right to “change, suspend, cancel, or dispute with or without notice” any benefit at any time. Presumably, this reason was meant to indicate the Board had decided, in their discretion, not to match his contribution for 2007 even if he was otherwise entitled to it. Third, the contents of the AIT Canada policy manual, which described the “Group RRSP Plan for hourly employees”, specifically indicated that the contents of the manual should not be construed as a promise or a contract between any employee and AIT Canada.
11. The Director conducted a complaint hearing. The evidence and argument of the parties provided at the complaint hearing is summarized in the Determination.
12. The Director concluded Johnstone was entitled to have his 2007 RRSP contributions matched by AIT Canada. The primary basis for this conclusion was the Director’s finding that AIT Canada and Johnstone had agreed that a matching of his RRSP contribution by AIT Canada was part of the wage package offered and accepted by Johnstone when he took employment with AIT Canada. The Director concluded that as a result of this agreement the matching contribution from AIT Canada was, as a matter of law, wages under the *Act* which was required to be paid as agreed. The Director also found the employment agreement did not include a requirement that he be employed on December 31st in any year to be entitled to the matching RRSP contribution from AIT Canada for that year.
13. The Director found that the limitation AIT Canada was imposing on Johnstone’s entitlement to the matching RRSP contributions was not supported by the Canadian employee manual, which in any event was not given to Johnstone until after he had commenced employment and his wage package had been set. There was no notice ever given to Johnstone that his wage package was being changed.

ARGUMENT AND ANALYSIS

14. As a result of amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are statutorily limited to those found in Subsection 112(1) of the *Act*, which says:
 - 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 made.*
15. The Tribunal has consistently indicated that the burden in an appeal is on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds.

16. In this appeal, AIT Canada says the Director erred in law. The nature of that error is summarized as follows in the submission filed with the appeal:
- . . . the error is based on a failure to observe the jurisprudence regarding the Director’s role in respect of employment contracts that are consistent with the *Employment Standards Act* (the “Act”), and by extension, with respect to a finding that the Respondent was obliged under the *Act* to pay Jody Johnstone (the “Complainant”) matching 2007 RRSP contributions upon termination.
17. Before addressing the substance of the appeal, I will comment on a point raised in the reply filed by the Director raising an issue concerning the timeliness of the appeal. The Director asserts the appeal was filed by AIT Canada outside of the time limited for appeal to the Tribunal under subsection 112(3) of the *Act* and that AIT Canada has given no reason for the late filing. The Director says the Tribunal has not requested any submissions from the parties on the delay. There is good reason for the Tribunal’s procedure in this case. The records of the Tribunal show that the appeal was sent to the office of the Tribunal at 4:32 pm on November 13, 2008 and accepted by the Tribunal as received at 9:09 am the following day. In such circumstances, the Tribunal would unquestionably exercise its discretion under section 109 to extend the time for filing and it was considered unnecessary to burden the process with additional time and associated cost to reach an obvious result. For greater certainty and clarification, the Tribunal has exercised its discretion to extend the time for filing and does not require submissions on that question.
18. Returning to the substance of the appeal, AIT Canada argues the source of the Director’s error was in failing to be directed by what AIT Canada stated was the eligibility requirements for Johnstone’s entitlement to have his RRSP contributions matched by company in 2007, which included the requirement to be employed as of December 31, 2007. AIT Canada says the Director’s conclusion that Johnstone was entitled to have his RRSP contributions matched either disregarded or was inconsistent with the evidence given by the company during the complaint hearing.
19. AIT Canada says this error resulted from the Director misdirecting himself on the evidence, relying on what Johnstone “was not expressly informed of” rather than on the evidence that should have been considered, which was the company’s evidence of the eligibility requirements for matching. Several authorities are referred to in support of the submission that the focus of the inquiry should have been “clear evidence of the eligibility requirements”. AIT Canada says the Director has effectively altered the company’s policy relating to the Group RRSP Plan and removed the eligibility requirements under that Plan.
20. The Director says the appeal is only an attempt by AIT Canada to have the Tribunal re-weigh the evidence and to re-argue the case based on the suggested view of the evidence. With respect, the Director’s submission is not particularly helpful as it does not address the essential points of the appeal, which are that the Director misdirected himself on the law and, as result, reached a conclusion on the evidence that he had no authority to make, was not available and was, therefore, wrong.
21. The appeal seeks to challenge, as a matter of law, the Director’s interpretation of the employment contract. As the Tribunal has indicated in several decisions, including *Re Kocis*, BC EST #D331/98 (Reconsideration of BC EST3D114/98), the interpretation of an employment contract is a question of law, although like most questions of law, a decision on what the terms of the employment contract are requires applying a legal standard to a set of facts.

22. Notwithstanding the limited assistance provided by the Director's submission, the burden remains on AIT Canada to persuade the Tribunal there is an error in the Determination and I have not been so persuaded.
23. I do not accept the central proposition asserted by AIT Canada in the appeal; that the Director, as a matter of law, was bound to interpret the employment contract as including the eligibility requirements as asserted by AIT Canada.
24. The Director has the jurisdiction to interpret and enforce the contract of employment, even where those terms exceed the minimum standards provided in the *Act*. There is ample authority supporting such jurisdiction: see, for example, *Dusty Investments d.b.a. Honda North*, BC EST #D043/99 (Reconsideration of BCEST #D101/98), *Halston Homes Limited*, BC EST #D527/00, *Shell Canada Products Limited/Produits Shell Limitée*, BC EST #RD488/01, *Susan A. McKay*, BC EST #D518/01, *Kamloops Golf and Country Club*, BC EST #D278/01 (Reconsideration denied, BC EST #RD544/01; judicial review dismissed, 2002 BCSC 1324), *Patrick O'Reilly*, BC EST #RD165/02, *Seann Parcker*, BC EST #D033/04 and *Grant Howard*, BC EST #D011/07. In the *Honda North* decision, the reconsideration panel stated:
- The Director has authority under the *Act* to regulate and enforce the employment relationship, including elements of the employment relationship that exceed minimum standards. There is no doubt that a primary purpose of the *Act* is to ensure employees receive “*at least basic standards of compensation and conditions of employment*”, but the application of the *Act* is not limited to enforcing only minimum standards.
25. I do not agree with the general assertion made by AIT Canada that when interpreting entitlements under an employment contract that otherwise meet the minimum standards of the *Act* the Director's authority is limited to deciding only “whether the eligibility requirements as set out by the employment contract have been met”. Such an assertion is not, as suggested in the appeal submission, supported by decisions of the Tribunal. In any event, in this case, the assertion only begs the question of whether the employment contract included any eligibility requirements that would have disentitled Johnstone from a matching of his 2007 RRSP contribution by AIT Canada.
26. In *Shell Canada Products Limited*, there was a finding of fact that the requirement to be actively at work in order to be eligible to receive the incentive pay at issue in that case was “clearly indicated” to the employee, who did not deny knowledge of this requirement or that it was part of his employment agreement. The Determination and the reconsideration decision were grounded in an interpretation of the employment contract that included the eligibility requirement.
27. The facts in *Susan A. McKay*, BC EST #D518/01 are virtually identical to those in the *Shell Canada Products* case. In that case, the terms and conditions of McKay's employment contract included incentive based compensation, referred to in the Determination as a “non-discretionary bonus”. McKay was well aware that her employment agreement relating to that incentive based compensation included eligibility requirements that required her to be an employee on the payment date of the incentive based compensation. She had terminated her employment before that date and as a result did not satisfy that requirement. Her argument on the appeal was that the Director should have ignored the eligibility requirement that was part of her employment agreement.
28. The facts of those cases differ from the findings of fact in this case, where the Director concluded that AIT Canada and Johnstone had agreed in June 2006 that his wage package included a matching RRSP contribution from the employer without reference to any eligibility requirement. The Director found

support for this conclusion in the AIT Canada employee manual produced in the fall of 2006. That manual, which is particular to employees of AIT Canada as Johnstone was, does not – as the Director noted in the Determination – qualify entitlement to a matching RRSP contribution as conditional on continued employment as of December 31st of the relevant year. The Director stated in the Determination:

I find that Johnstone was offered the RRSP's as part of compensation and wages by AIT Canada . . .

The promise of matching RRSP contributions on behalf of AIT Canada was part of the offer of employment made by AIT Canada to Johnstone when he was hired in June of 2006. The promise of matching RRSP contributions by AIT Canada was an integral part of the employment contract between Johnstone and AIT Canada.

29. Based on the material before him, the Director was entitled to make that finding and was also entitled on the evidence to reach the conclusion that the employment contract did not include a qualifying requirement that Johnstone be employed as of December 31, 2007 in order to claim entitlement to a matching RRSP contribution from AIT Canada for 2007.

30. The results in the *Compass Group* and *Webster* decisions are also attributable to the Director's interpretation and application of the terms of the employment contract in those cases. In the *Compass Group* decision, there were "plain clear facts" showing the employee was not entitled to the bonus claimed. Those facts arose from a reading of the employer's Bonus Incentive Plan document, which the parties, and the Director, appear to have accepted as being included in the claimant's terms and conditions of employment: at para 17. In *Webster*, the Director had found the employee had failed to prove the bonus he claimed was even included in his employment contract:

The delegate submitted that there was no conclusive evidence on which he could find an agreement between Curtis Lumber and Mr. Webster regarding his bonus, or that the bonus was not performance based.

31. The Tribunal, on appeal, agreed.

32. However, to reiterate, those are not the facts here, where the Director has concluded the evidence did show that the matching RRSP contribution was offered by AIT Canada and accepted by Johnstone and was included as part of his wage compensation package, without qualification. As indicated above, there was evidence that entitled the Director to reach such a conclusion.

33. The Director found the matching RRSP contribution met the definition of wages in the *Act* and that it was "required" to be paid by AIT Canada as wages. Implicit in that finding is a rejection of the proposition that such contribution was "discretionary". I can find no error in the reasoning of the Director leading to that finding.

34. It is apparent that there was a disagreement between Johnstone and AIT Canada about the terms of his employment. The Director chose to accept the position asserted by Johnstone over that advanced by AIT Canada. The Determination sets out two pages of reasons for that choice. The Director was not required to accept AIT Canada's view of the employment contract. In the Determination, the Director found the restriction AIT Canada was attempting to impose on Johnstone's entitlement to matching RRSP contributions were not supported by their employee manual. I can find no error in that finding and, further, agree completely with the Director's response to the efforts of AIT Canada to introduce elements

of the 401(k) Plan from AIT Canada's parent in the United States as bearing on Johnstone's entitlement. There is nothing in the Canadian employment manual describing the matching RRSP contribution that makes any reference at all to this document or incorporates any of its terms.

35. For the above reasons, AIT Canada has not satisfied its burden in this appeal and it is dismissed.

ORDER

36. Pursuant to Section 115 of the *Act*, I order the Determination dated October 6, 2008 be confirmed in the amount of \$1,948.53, together with any interest that has accrued under Section 88.

David B. Stevenson
Member
Employment Standards Tribunal