

An appeal

- by -

Wallmark Homes Ltd.
("Wallmark")

- 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: Carol L. Roberts

FILE No.: 2013A/81

DATE OF DECISION: February 13, 2014

DECISION

SUBMISSIONS

Brian Elidoros

on behalf of Wallmark Homes Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) Wallmark Homes Ltd. has filed an appeal of a Determination issued by the Director of Employment Standards (the “Director”) on October 29, 2013. In that Determination, the Director ordered Wallmark to pay its former employee, Isaac Jenkins, \$8,725.73 in wages and interest. The Director also imposed an administrative penalty in the amount of \$500 for Wallmark’s contravention of Section 18 of the *Act*, for a total amount payable of \$9,225.73.
2. Wallmark appeals the Determination contending that the Director’s delegate erred in law.
3. Section 114 of the *Act* and Rule 22 of the Tribunal’s *Rules of Practice and Procedure* provides that the Tribunal may dismiss all or part of an appeal without seeking submissions from the other parties or the Director if it decides that the appeal does not meet certain criteria.
4. These reasons are based on Wallmark’s written submissions, the section 112(5) “record” that was before the delegate at the time the decision was made and the Reasons for the Determination. If I am satisfied that the appeal, or part of it, has some presumptive merit and should not be dismissed under section 114 (1), the Respondent and the delegate may be invited to file further submissions. If the appeal is not meritorious, it will be dismissed.

FACTS

5. Mr. Jenkins worked for Wallmark as a project manager from May 17, 2004, until August 13, 2012. He was paid a salary and an annual bonus of up to 12% of his yearly gross salary, to be paid out quarterly based on satisfactory performance reviews.
6. After Mr. Jenkins’ employment was terminated August 13, 2012, a cheque in the amount of \$12,450 was prepared for him, which represented his bonus, vacation pay and two weeks compensation for length of service. Mr. Jenkins claimed that on the day his employment was terminated, he spoke with Wallmark’s Chief Financial Officer, Sonia Lee, and that Ms. Lee told him that he was to receive 100% of his bonus for the period June 2011 to May 2012 and 50% for the period May 2012 to August 2012. This was confirmed by way of an e-mail dated August 13, 2012.
7. Mr. Jenkins subsequently contacted a lawyer because he believed that his vacation pay had been incorrectly calculated and because he believed he was entitled to more compensation for length of service than he had been offered. As a result of these efforts, Mr. Jenkins received a cheque in the amount of \$4,000 representing compensation for length of service and vacation pay. The issue of the bonus remained outstanding.
8. On November 4, 2012, Mr. Jenkins filed a complaint with the Employment Standards Branch, alleging that Wallmark had contravened the *Act* by failing to pay him his bonus.

9. The delegate held a hearing into Mr. Jenkins' complaint on June 13, 2013. Wallmark was represented by Wallmark's Director of Construction, Brian Elidoros. Mr. Elidoros, who is also a Director of Wallmark, was Mr. Jenkins' supervisor. Mr. Jenkins represented himself.
10. The parties agreed that Mr. Jenkins' bonus was 12% and that if a bonus was to be paid, it would be in the amount of \$8,450. They also agreed on the criteria that were to be used to evaluate his job performance. At issue before the delegate was whether or not Mr. Jenkins was entitled to the bonus.
11. Mr. Jenkins testified that he met with Mr. Elidoros on May 7, 2012. He said that although Mr. Elidoros raised a number of concerns with his job performance, he understood at the conclusion of the meeting that he would receive his bonus, an understanding he supported by providing a contemporaneous text he had sent to his wife. Mr. Jenkins said that at no time did Ms. Lee or Mr. Elidoros tell him that he would not be receiving his bonus. Mr. Jenkins also said, and there was no dispute, that in mid-May, he had been assigned as a project manager for a new construction project.
12. Mr. Elidoros disputed Mr. Jenkins' assessment of the meeting and contended that Mr. Jenkins did not receive a bonus because his job performance was unsatisfactory. He raised Mr. Jenkins' performance on a number of projects and said that at the time he met Mr. Jenkins on May 7, 2012, the financial analysis of the projects had not been completed. Mr. Elidoros further asserted that Mr. Jenkins had also not completed some paperwork that formed part of the bonus analysis, an assertion Mr. Jenkins disputed.
13. On June 4, 2012, Mr. Elidoros wrote to Mr. Jenkins warning him about his performance and advising him that he was to be reassigned to another position within the company. The letter was silent on the question of whether or not there would be a reduction in his pay or whether or not the payment of the bonus was in jeopardy. On June 19, 2012, Mr. Jenkins was reassigned to a new project.
14. Mr. Elidoros testified that Mr. Jenkins' performance was, in his opinion, not conducive to receiving his bonus. He asserted that Mr. Jenkins was inexperienced and had cost Wallmark over \$80,000 in additional expenses. Mr. Elidoros provided the delegate with documents dated December 31, 2012, regarding the financial performance of the company but did not explain how Mr. Jenkins' performance was reflected in the documents. Mr. Elidoros also provided the delegate with a number of e-mails between Mr. Jenkins, himself and other site managers relating to some deficiencies in various construction projects.
15. Mr. Elidoros testified that Ms. Lee "must have been unaware" of Mr. Jenkins' performance when the bonus amount was agreed to on August 13, 2012. He testified that Ms. Lee made the decision to withhold the bonus payment after meeting with Mr. Elidoros regarding Mr. Jenkins' performance. Mr. Jenkins asserted that Ms. Lee's decision to withhold the bonus was made only after he threatened to take legal action on August 15, 2012.
16. The delegate determined that the bonus payment was deemed to be wages under the *Act* and that her task was to decide if the bonus was earned and payable. She also determined that it was Wallmark's burden to refute Mr. Jenkins' assertion that he was entitled to a bonus.
17. After reviewing the criteria Mr. Elidoros used to evaluate whether Mr. Jenkins was entitled to a bonus, the delegate concluded that her task was to decide whether or not Mr. Jenkins' job performance was satisfactory and whether or not he was entitled to the payment of the bonus.
18. The delegate determined that issues were not of credibility but the sufficiency of the evidence. She found the evidence presented did not support Wallmark's general assertion that Mr. Jenkins had cost the company

“more than 80k.” She noted that Wallmark had not completed any quarterly reports upon which the bonus entitlement was based.

19. The delegate concluded, after weighing all of the evidence, that Wallmark’s decision not to pay a bonus to Mr. Jenkins was

... grounded in the circumstances surrounding his departure rather than pursuant to the terms and conditions of the bonus plan. In other words, Wallmark’s decision to withhold the bonus cheque was not based entirely on an assessment of Mr. Jenkins’ job performance. Rather, it appears Wallmark changed its position on their earlier agreement to pay a bonus to Mr. Jenkins. Based on the circumstances surrounding Mr. Jenkins’ termination, I accept that Wallmark’s position that Mr. Jenkins was not entitled to a bonus was greatly influenced by what happened when he left the Company and not by the fact his quarterly performance was below the level to trigger a bonus as agreed to by the parties.

20. In coming to this conclusion, the delegate noted the following factors:

- at no time before his termination was Mr. Jenkins told he would not be getting his bonus, even after he was re-assigned to a new position;
- Wallmark presented no evidence that Mr. Jenkins’ performance was unsatisfactory even though some performance concerns were raised by Mr. Elidoros in his June 4, 2012, letter;
- Mr. Jenkins’ performance was not assessed prior to May 2012, nor in fact, at any time;
- Wallmark never warned Mr. Jenkins that his job was in jeopardy;
- The only evidence supporting Wallmark’s contention that Mr. Jenkins’ job performance was unsatisfactory consisted of six e-mails; three of which were dated after Mr. Jenkins’ employment was terminated. The delegate found that Wallmark could not rely on events that post-dated his employment to support its contention that Mr. Jenkins’ performance was unsatisfactory.

21. The delegate also found that it was not credible that Ms. Lee was unaware of Mr. Jenkins’ performance deficiencies on August 13, 2012, when she agreed to pay Mr. Jenkins a bonus. She concluded that Ms. Lee had decided to pay Mr. Jenkins a bonus even though she was aware there were some performance issues.

22. The delegate concluded, based on the August 13, 2012, e-mails between Mr. Jenkins and Ms. Lee, that Mr. Jenkins was to receive a bonus in the amount of \$8,450.

ARGUMENT

23. Mr. Elidoros’s appeal submission consists of a single paragraph:

Isaac Jenkins did not meet the criteria set out in the area’s that any bonus’s should be paid it was clear in our meeting with the board and Isaac that this was not done in accordance with what we agreed on when the bonus system was in place, he admitted he made mistakes therefore no bonus was to be paid. It was a performance bonus, and Isaac failed to do his job properly on several occasion.
[reproduced as written]

ANALYSIS

24. Section 114 of the *Act* provides that 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, 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 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.
25. Having reviewed the section 112 record and Wallmark's submissions, I dismiss the appeal.
26. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
- the director erred in law;
 - the director failed to observe the principles of natural justice in making the determination;
 - evidence has become available that was not available at the time the determination was being made.
27. The Tribunal has consistently said that the burden is on an appellant to persuade the Tribunal that there is an error in the Determination on one of the statutory grounds. I conclude that Wallmark has not met that burden.

Error of Law

28. The Tribunal has adopted the factors set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)* (1998] B.C.J. (C.A.) as reviewable errors of law:
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.
29. Questions of fact alone are not reviewable by the Tribunal under section 112. In *Britco Structures Ltd.*, BC EST # D260/03, the Tribunal held that findings of fact were reviewable as errors of law if they were based on no evidence, or on a view of the facts which could not reasonably be entertained.

30. Although Wallmark contends that the delegate erred in law in concluding that Mr. Jenkins was entitled to a bonus, Mr. Elidoros has advanced no argument in support of that ground of appeal or explain how the delegate erred in her conclusion. Rather, he simply repeats the arguments he made before the delegate.
31. In my view, the delegate fairly weighed all the evidence before her and arrived at a reasoned conclusion. Wallmark has provided me with no basis to interfere with that conclusion.

ORDER

32. Pursuant to section 114(1)(f) of the *Act*, I dismiss the appeal. Accordingly, the Determination, dated October 29, 2013, is confirmed in the amount of \$9,225.73, together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal