Employment Standards TRIBUNAL

An appeal

- by -

Royal Pacific Millworks Ltd.
("Royal")

- 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: Shafik Bhalloo

FILE No.: 2015A/161

DATE OF DECISION: January 18, 2016

DECISION

SUBMISSIONS

Yueping Li on behalf of Royal Pacific Millworks Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), Royal Pacific Millworks Ltd. ("Royal") has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the "Director") on October 23, 2015 (the "Determination").

2. The Determination concluded that Royal contravened Part 7, section 58 (vacation pay) and Part 8, section 63 (compensation for length of service) of the *Act* in respect of the employment of Donald Simister ("Mr. Simister"), and ordered Royal to pay Mr. Simister wages and interest in the amount of $6,412.69.

3. The Determination also levied two (2) administrative penalties of $500.00 each against Royal for its contraventions of sections 58 and 63 of the *Act*.

4. The total amount of the Determination is $7,412.69.

5. Royal has appealed the Determination on the grounds that the Director erred in law and breached the principles of natural justice in making the Determination. Royal is seeking the Employment Standards Tribunal (the "Tribunal") to cancel the Determination.

6. By way of letter, dated December 2, 2015, the Tribunal informed Mr. Simister and the Director that it had received an appeal by Royal, dated November 30, 2015, and enclosed the same for information purposes only. In the same letter, the Tribunal also requested the Director to provide the section 112(5) "record" (the "Record") by December 16, 2015.

7. On December 8, 2015, the Tribunal received the Record from the Director and forwarded a copy of the same to Royal, and provided the latter an opportunity to object to its completeness. Royal did not file any objections to the completeness of the Record, and I accept the Record as complete.

8. I have decided this appeal is an appropriate case for consideration under section 114 of the *Act*. At this stage, I will assess this appeal based solely on the Reasons for the Determination (the "Reasons"), the appeal submissions of Royal, and my review of the Record that was before the Director when the Determination was made. Under section 114 of the *Act*, the Tribunal has discretion to dismiss all or part of an appeal, without a hearing of any kind, for any reason listed in subsection 114(1). If satisfied the appeal, or part of it, has some presumptive merit and should not be dismissed under section 114(1), the Tribunal will invite Mr. Simister and the Director to file reply submissions on the appeal. Royal will then be given an opportunity to make a final reply to these submissions, if any.

ISSUE

9. The issue to be considered at this stage of the proceeding is whether all or part of the appeal should be dismissed under section 114 of the *Act*.

THE FACTS

10. The facts delineated below are based on the summary of facts found in the Reasons. I only set out those facts relevant to Royal's appeal and not all the facts.

11. On June 25, 2014, Mr. Simister filed a complaint under section 74 of the *Act* against Royal, a cabinet-making business in Sidney, British Columbia, alleging that Royal contravened the *Act* by failing to pay him compensation for length of service and vacation pay (the "Complaint").

12. On July 2, 2014, the delegate of the Director conducted a BC Online: Registrar of Companies – Corporation Search of Royal. The search showed that Royal was incorporated on October 31, 2013, and Yueping Li ("Ms. Li") was its sole director.

13. On January 12, 2015, the delegate conducted a hearing into the Complaint (the "Hearing"). At the Hearing, Royal was represented by counsel, Constance Isherwood ("Ms. Isherwood"), and Ms. Li, who testified with the help of her translator. Mr. Simister attended with his representative, his partner, Sheri Grierson ("Ms. Grierson"), and produced two (2) witnesses, Christopher Herlin Veaux ("Mr. Veaux") and Bernice Leaver ("Ms. Leaver"), who were former work colleagues.

14. At the Hearing, the delegate considered the evidence of the parties on the following questions:

    1. Does section 97 of the *Act* (sale of a business or assets) apply in order to determine Mr. Simister's length of service with Royal?
    2. Does Royal owe Mr. Simister compensation for length of service? If so, in what amount?
    3. Does Royal owe Mr. Simister vacation pay? If so, in what amount?

15. With respect to the first question above, the delegate explained the purpose of section 97 of the *Act* as follows:

> The purpose of section 97 is to preserve the employment status of employees when their employer's business is sold or otherwise disposed of. It provides that when an employee is not terminated by the original employer, and so is still an employee of the business at the date of disposition, that the employee's employment continues with the new business so the new employer becomes responsible for any outstanding wages. This includes compensation for length of service, which must be calculated from the date the employee was originally hired.

16. In concluding that section 97 of the *Act* did apply in the case of Mr. Simister, the delegate noted that it was undisputed that Mr. Simister started employment as a cabinet maker at the same location as Royal's in 2007, with Dan Johnson Woodworking Ltd. ("Johnson"). When Johnson sold the business to Decora Select Kitchens and Baths Ltd. ("Decora") in February, 2012, Johnson did not terminate Mr. Simister's employment and the latter continued working as a cabinet maker with Decora. Johnson did issue Mr. Simister a Record of Employment ("ROE #1") on February 1, 2012, which showed that Mr. Simister commenced work with Johnson on July 9, 2007, and his last day was January 31, 2012. ROE #1 showed code "A" as the reason for issuing a Record of Employment, which code stands for a shortage of work. There was also a checkmark in the box denoting "unknown" for expected date of recall.

17. During his employment with Decora, on February 2, 2013, Decora issued Mr. Simister with a Record of Employment ("ROE #2"), which showed his start date of employment with Decora as February 6, 2012, approximately six (6) days after his last day worked at Johnson. ROE #2 shows code "K" as the reason for

its issuance which stands for "other". In the comments section of ROE #2, it states "employee requested ROE". The delegate noted that Mr. Simister explained at the Hearing that since things were slow at work with Decora, he commenced an Employment Insurance claim to supplement his income with Decora, but he continued to work at Decora on a regular basis after February 2, 2013.

18. The delegated also noted that Decora issued a second Record of Employment ("ROE #3") to Mr. Simister on January 20, 2014. ROE #3 shows Mr. Simister's start date with Decora as February 1, 2013 (not February 6, 2012 as in ROE #2) and his final day of work as September 26, 2013. ROE #3 showed code "K" with an explanation in the comments box that stated "change of ownership of business".

19. The delegate noted that Mr. Simister testified that he knew that the principal of Decora, Glen Undseth ("Mr. Undseth"), had some serious health issues in 2012 and 2013, and was trying to sell the business in 2013. However, he never received a notice of termination before the sale of Decora, on October 28, 2013, to Ms. Li (who then incorporated Royal to continue the cabinet making business). Mr. Simister also did not receive any severance from Decora.

20. The delegate also noted that Ms. Leaver, who was employed as a bookkeeper with Decora and its predecessor, Johnson, and performed administrative and payroll duties and issued Mr. Simister ROE's #'s 1 to 3, testified that Mr. Simister was not terminated from his employment with Decora prior to the sale to Royal. She said he was neither provided a written notice of termination, nor any severance pay by Decora.

21. In contrast to Ms. Leaver's and Mr. Simister's evidence, Royal argued that Mr. Simister was indeed terminated from his employment with Decora prior to the sale of the business to Ms. Li. In support of its argument, Royal produced the contract of purchase and sale with Decora dated October 28, 2013 (the "Contract") and an unsigned letter dated October 23, 2014, from Mr. Undseth (the "Letter") who Royal did not produce as a witness at the Hearing.

22. The Contract contained a provision that stated that the seller, effective the end of the day before the completion date of October 28, 2013, would terminate the employment of all employees of the business and pay all amounts payable to such employees in connection with their employment with the seller. In the Letter, Mr. Undseth states Decora only had three (3) hourly payroll employees and two (2) subcontract staff at the time of the sale of Decora, and they had all been given "several months [*sic*] notice of the imminent sale" and issued ROEs from Decora "[t]he day before the sale and transfer of ownership to Ms. Li".

23. In response to the Letter and Mr. Undseth's representations therein, the delegate noted that Ms. Leaver denied that any ROE was issued by Decora at the time of the sale, or before the sale. She stated that if an ROE was to be prepared, it would have been done by her. She further stated that she only issued two (2) ROEs for Decora, "one well before the sale and one after the sale" (presumably ROE #2 and ROE #3 as they both show Ms. Leaver as the issuer of the ROE for Decora).

24. In preferring the evidence of Mr. Simister and Ms. Leaver to that of Royal's witnesses and concluding that section 97 of the *Act* applies to determine Mr. Simister's service, the delegate stated:

> I prefer the direct evidence of both Mr. Simister and Ms. Leaver in these circumstances. I find it is more probable that Mr. Simister was not terminated by Decora before the sale. I find that he was not given notice of termination or any severance pay by Decora.
>
> The evidence also does not indicate that Mr. Simister was terminated by Decora any time before he actually commenced work with Royal in December 2013.

> Royal argues that the contract of sale with Decora provided that Mr. Simister was to be terminated by Decora. He was supposed to be a newly hired employee with no inherited service.
>
> Section 4 of the Act says that all the provisions of the Act are minimum standards and that any agreement that purports to waive any provision of the Act has no effect. As a result, I find that the sale agreement does not in any way negate the effect of Section 97 in these circumstances.

25. The delegate also noted, in the Reasons, that before and after the sale of Decora to Ms. Li, there was a shortage of work for Mr. Simister at the shop. In 2013, while in the employ of Decora, because of the shortage of work at the shop, he enrolled in an Employment Insurance wage top-up program. However, he continued to work all of the hours that were available to him at the shop.

26. On September 26, 2013, his last day of work with Decora, the delegate stated that Mr. Simister was on a temporary lay-off from Decora until he commenced work approximately ten (10) weeks later, on December 9, 2013, with Royal. The delegate stated that this period of lay-off "is within the 13 weeks of temporary lay-off within a 20 week period that is allowed by the Act", and concluded that Mr. Simister, therefore, was an employee at the time of the sale of Decora to Ms. Li (and the transfer of assets from Ms. Li to Royal subsequently) and, therefore, his employment was continuous from Decora to Royal, pursuant to section 97 of the *Act*.

27. As for the transfer of assets from Ms. Li to Royal, the delegate states that although the Contract was between Decora and Ms. Li, the latter, very shortly after, incorporated Royal and effectively disposed, or transferred, the assets to Royal, and this does not in any way "negate the application of Section 97 in these circumstances". In the result, the delegate concluded that Mr. Simister's service was continuous through the sale from Johnson to Decora to Ms. Li and also through the transfer of assets from the latter to Royal. Therefore, Mr. Simister's employment with Royal is deemed to have commenced on July 9, 2007, when he first started working with Johnson.

28. With respect to the second question, that is, whether Royal owes Mr. Simister compensation for length of service pursuant to section 63 of the *Act*, the delegate noted that counsel for Royal argues that section 63 does not apply to the facts in this case for the following reasons:

1. Mr. Simister's employment was not terminated by Royal. He declined to work and refused reasonable alternative employment, pursuant to section 65(1)(f) of the *Act*.
2. Mr. Simister was involved in a temporary on-call work arrangement with Royal, pursuant to section 65(1)(a) of the *Act*.
3. Mr. Simister does not qualify for compensation for length of service under section 63 of the *Act* because the latter section speaks of greater than 3 "consecutive months" of employment and "consecutive years" of employment, but the evidence shows that Mr. Simister had periods of less than full time work with both Decora and Royal, and had to apply for supplemental Employment Insurance benefits as a result.

29. The delegate rejected all three (3) above arguments of Royal's counsel in the Reasons.

30. With respect to counsel's contention that Mr. Simister is not entitled to compensation for length of service by virtue of the application of section 65(1)(f) of the *Act*, the delegate noted that Mr. Simister was earning $30.00 per hour and paid 6% vacation pay. However, in February 2014, Royal informed him that it would be reducing his hourly rate to $26.00 and reducing his vacation pay to 4%. Mr. Simister adduced into evidence at the Hearing two emails dated March 5, 2014, from Ms. Li evidencing the reductions in both his hourly rate

and vacation pay. Mr. Simister informed Ms. Li that he was not agreeable to the reductions to his hourly rate and vacation pay, but he was not quitting. He simply did not want to work at the reduced compensation rates. Based on the foregoing evidence, the delegate calculated that the reduction in wages and vacation pay amounted to approximately 15% of Mr. Simister's total compensation. This was a substantial alteration in the terms and conditions of employment of Mr. Simister by Royal and amounted to a termination of his employment pursuant to section 66 of the *Act*, according to the delegate. Therefore, reasoned the delegate, Mr. Simister's refusal to work at the reduced wages did not amount to "a refusal of reasonable alternate employment pursuant to Section 65(1)(f)".

31. In the alternative, the delegate reasoned that that Mr. Simister's employment was terminated under the *Act* pursuant to the "layoff" provisions of the *Act*. More particularly, in the Record of Employment issued by Royal to Mr. Simister on February 17, 2014 ("ROE #4), it shows that the first day Mr. Simister worked for Royal was December 9, 2013, and the last day was February 14, 2014. When, on June 25, 2014, Ms. Li wrote him an email indicating that Royal had work for him and asked him if he wanted to come back to work, Mr. Simister's lay-off from Royal had reached eighteen (18) weeks. The *Act* deems a lay-off that exceeds thirteen (13) weeks as a termination of employment. Therefore, reasoned the delegate, Mr. Simister's employment was terminated by Royal and he is entitled to termination pay in lieu of notice under section 63 of the *Act*.

32. With respect to counsel's argument that section 65(1)(a) of the *Act* applies to exempt Mr. Simister from compensation for length of service, the delegate noted that the evidence indicated that Mr. Simister worked whenever there was work available for him. The evidence did not indicate that he was on-call or a temporary employee. The only time Mr. Simister declined any work was when his wage rate was lowered by $4.00 per hour. Therefore, section 65(1)(a) of the *Act* did not apply in this case.

33. With respect to counsel's contention that the evidence indicates that Mr. Simister had periods of less than full-time or continuous work with both Decora and Royal and, therefore, did not qualify for compensation for length of service under section 63, the delegate, in rejecting this argument, noted that employees who work part-time, irregular hours or with brief periods of lay-offs are not generally exempt from the provisions of section 63. They are employed consecutively until the employment is terminated, or when, for example, the employee quits or is dismissed or is given excessive lay-off as defined in the *Act*. In Mr. Simister's case, the delegate noted that he did have some brief periods of temporary lay-off during his employment due to shortages of work but none of these lay-offs exceeded thirteen (13) weeks, such that the employment would be deemed to be terminated by the employer. In the result, the delegate concluded that Mr. Simister had "consecutive" employment with all three (3) employers – Johnson, Decora and Royal – commencing on July 9, 2007, and, therefore, section 63 of the *Act* applies, entitling him to six (6) weeks' compensation for length of service.

34. As Mr. Simister's days and hours of work varied from week to week when he was employed with Royal, there was not a normal pattern of work. In attempting to calculate the amount of weekly liability under section 63 of the *Act* based on an average of the employee's weekly wages at the regular wage during the last eight (8) weeks of work, the delegate excluded the period between December 28, 2013, and January 3, 2014, as Royal's shop was closed and no wages were earned during this period. Based on the eight (8) week period preceding December 28, 2013, the delegate calculated Mr. Simister's wages to be $7,050.00, or $881.25 per week, and then went on to find that Mr. Simister was entitled to $5,287.50 representing six (6) weeks' compensation for length of service.

35. With respect to the third question of whether Royal owed Mr. Simister vacation pay, the delegate noted that the evidence of the parties was clear that Mr. Simister did not receive vacation pay on each paycheque from

Royal and that Royal did not pay vacation pay after Mr. Simister's employment ended. While Royal argued, at the Hearing, that it discovered Mr. Simister was overpaid for some time that he did not actually work, the delegate noted that the *Act* does not allow an alleged overpayment of regular wages to be offset from vacation pay that is owed under the *Act*. The delegate then calculated vacation pay based on the payroll records adduced by Royal. More particularly, the delegate noted that the payroll records indicate a total of $8,550.00 was paid in wages by Royal to Mr. Simister, and he was owed additional wages of $5,287.50 on account of compensation for length of service, totalling $13,837.50 in wages earned by Mr. Simister. The delegate calculated that 6% of the latter amount totalled $830.25 in total vacation pay owed by Royal to Mr. Simister.

36. The delegate noted that section 18 of the *Act* requires payment of all wages within 48 hours of the termination of an employee's employment. Since Royal failed to pay Mr. Simister compensation for length of service, pursuant to section 63, as well as vacation pay, pursuant to section 58, the delegate issued two (2) administrative penalties against Royal for these contraventions of the *Act*.

SUBMISSIONS OF ROYAL

37. On behalf of Royal, Ms. Li made written submissions.

38. These submissions appear under three (3) distinct headings, namely: (i) "Partially take evidence from complainant side"; (ii) "Incorrectly interpret the Act"; and (iii) "Miscalculation". The submissions are somewhat disjointed under these headings and a bit scattered, although I will attempt to summarize them below.

39. Under the first heading above, Ms. Li challenges the delegate's decision to prefer the evidence of Ms. Leaver over Mr. Undseth's evidence in the Letter. She states that Ms. Leaver's evidence is "questionable". She states that Ms. Leaver "said she was supposed to do the layoff notice and ROE, but she didn't do it"[1].

40. She states that Mr. Undseth is the one who sold the assets of Decora to Royal and has "the right to make decisions and terminate the employment [of employees] by himself". Mr. Undseth "could write the termination letters to all employees" including Ms. Leaver and "doesn't have to go through Ms. Leaver". Therefore, when Mr. Undseth states in the Letter that all employees were issued their Records of Employment from Decora the day before the sale and transfer of ownership of Decora's assets to Ms. Li, "he terminated employment of all employees", and his evidence should be preferred.

41. Ms. Li also questions Ms. Leaver's evidence that employees, including Mr. Simister, were never told by Mr. Undseth, in advance, about the specific date of October 28, 2013, for the sale of Decora's assets and were told only after the completion of the sale. Ms. Li states Mr. Simister knew (suggesting that Ms. Leaver's testimony is questionable or unreliable).

42. Also in the interest of challenging the credibility and reliability of Ms. Leaver's evidence, Ms. Li states that Ms. Leaver prepared Mr. Simister's ROE #2 and ROE #3 and they both contain some inconsistent information. In particular, she states that ROE #2 was issued to Mr. Simister on February 2, 2013, and ROE #3 shows that he commenced work on February 1, 2013, a day before ROE #2 was issued. She also questions how Mr. Simister can claim Employment Insurance benefits when he did not work during the period the ROEs were issued.

[1] Ms. Li appears to have misread the Reasons as the delegate's summary of Ms. Leaver's evidence is that Ms. Leaver stated that if a Record of Employment "had been issued she would likely have been the person to prepare it for Mr. Undseth".

43. Ms. Li also argues that the delegate's use of the words "prefer" and "probable" in accepting the evidence of Ms. Leaver and Mr. Simister "shows uncertainty" on the part of the delegate. It is also "not fair" she states, for the delegate to "believe a former employee" – Ms. Leaver – over Mr. Undseth who was the "decision maker" at Decora.

44. Ms. Li also disagrees with the delegate's conclusion that Mr. Simister did not decline or refuse reasonable alternate employment pursuant to section 65(1)(f) of the *Act* when he was offered work with Royal at a reduced wage of $26.00/hour (and 4% vacation pay). She states that other cabinet makers at Royal, including particularly the foreman and the estimator, "contributed themselves" by agreeing to receive lower pay rates during the period of work shortage Royal experienced. Ms. Li seems to suggest that because others may have agreed to a lesser wage rate, then so should have Mr. Simister. She suggests that his refusal to join others in consenting to a reduced hourly rate was unreasonable, and the delegate should have so concluded, pursuant to section 65(1)(f) of the *Act*.

45. With respect to the submissions under the second heading, Ms. Li questions why the delegate did not conclude that Decora terminated Mr. Simister's employment on September 26, 2013, when it temporarily laid him off, but concluded that Royal terminated his employment because the period of lay-off with Royal exceeded thirteen (13) weeks – between February 15, 2014, and June 25, 2014. Partly relying upon the Employment Standards Branch's *Interpretation Guidelines Manual* (the "Guidelines") (which she attaches to her written submissions), Ms. Li argues that the *Act* does not give employers a general right to temporarily lay-off employees. Therefore, when Decora first laid-off Mr. Simister on September 26, 2013, it terminated his employment. However, she states that Mr. Simister is now out of time to pursue Decora for compensation for length of service.

46. Ms. Li also adds that Mr. Simister only started working for Royal on December 9, 2013, and worked only ten (10) weeks. In these circumstances, he is not qualified to receive six (6) weeks' compensation for length of service.

47. Under the final heading, Ms. Li argues that Mr. Simister has falsely recorded an additional hour of work every day. She states that after Royal recalculated his timesheets, it found that he falsely reported a total of 32 hours on his timesheets.

ANALYSIS

48. Section 112(1) of the *Act* sets out the following grounds upon which a person may appeal a determination:

> (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.

49. In this case, Royal is appealing the Determination on two (2) grounds; namely, the Director erred in law and failed to observe the principles of natural justice in making the Determination.

50. The onus lies on Royal to establish its grounds of appeal. That is, to succeed, Royal must provide persuasive and compelling evidence that the delegate erred in law or failed to observe the principles of natural justice in making the Determination.

51. Having reviewed the Reasons, the Record, and Ms. Li's written submissions on behalf of Royal in the appeal, I do not find any merit in either ground of appeal – error of law or natural justice – advanced by Royal in the appeal, and I will discuss my reasons below.

(a) Natural Justice

52. In *Imperial Limousine Service Ltd.* (BC EST # D014/05), the Tribunal succinctly explained the principles of natural 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)

53. I do not find there is anything in Ms. Li's written submissions to support Royal's natural justice ground of appeal. In my view, the delegate did not breach the principles of natural justice in reaching the conclusions that he did in the Reasons. It is clear from the Reasons and from Royal's submissions that Royal knew the case it was required to meet. Royal knew the three (3) key issues or questions the delegate considered at the Hearing, which I have set out at paragraph 14 of this decision. It is also clear from the Reasons that, at the Hearing, Royal was afforded an opportunity to adduce evidence and make submissions, as well as to respond to Mr. Simister's case. What Royal and Ms. Li are complaining of, under the natural justice ground of appeal, is that the delegate did not accept Royal's evidence that Mr. Simister's employment was terminated by Decora or Mr. Undseth before the sale of Decora's assets on October 28, 2013, to Ms. Li and, instead, preferred the evidence of Mr. Simister and his witness, Ms. Leaver. It is clear to me that the delegate heard conflicting evidence in the submissions of the parties at the Hearing, and he assessed that evidence, weighed it and decided which evidence he preferred in reaching factual findings on the question of whether Mr. Simister's employment was terminated by Decora before the sale to Ms. Li occurred. While Ms. Li and Royal do not agree with the delegate's decision to prefer the evidence of Mr. Simister and Ms. Leaver, and vigorously challenge the credibility of Ms. Leaver, in my view, a delegate presiding over a hearing is far better positioned to deal with issues of credibility than the Tribunal on an appeal. The Tribunal is also generally reluctant to substitute the delegate's findings of fact even if it is inclined to reach a different conclusion on the evidence. Having said this, in this case, not only do I find that it was open to the delegate to prefer the evidence of Mr. Simister and his witness, Ms. Leaver, over Royal's, but I too am inclined to the same conclusion as the delegate.

54. Having said this, I do not find any of Ms. Li's submissions, summarized at paragraphs 39 to 42 above, pose a meritorious challenge to Ms. Leaver's credibility, nor do I find her submission that the delegate's use of the words "prefer" and "probable" show any uncertainty on the part of the delegate in preferring the evidence of Mr. Simister and Ms. Leaver over Royal's.

55. In the circumstances, I dismiss Royal's natural justice of ground of appeal.

(b) Error of Law

56. In *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam*), [1998] B.C.J. No. 2275, the British Columbia Court of Appeal defined error of law to include the following instances:

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.

57. In *Britco Structures Ltd.* (BC EST # D260/03), the Tribunal stated that the definition of error of law expounded on by the Court in *Gemex, supra*, should not be applied so broadly as to include errors which are not, in fact, errors of law, such as errors of fact alone, or errors of mixed law and fact which do not contain extricable errors of law. The Tribunal, in *Britco*, *supra*, also added that unless there is an allegation that the delegate erred in interpreting the law or in determining what legal principles are applicable, there cannot be an allegation that the delegate erred by applying the incorrect legal test to the facts.

58. In this case, Ms. Li appears to be advancing three (3) arguments under the error of law ground of appeal. The first one appears to be a re-argument of Royal's counsel's argument at the Hearing that Mr. Simister's employment was not terminated by Royal but he refused reasonable alternative employment, pursuant to section 65(1)(f) of the *Act*. More particularly, she submits that because other cabinet makers working for Royal agreed to a reduced hourly rate, Mr. Simister should also have agreed to a reduction in his hourly rate and vacation pay. His refusal to do so amounted to a refusal of reasonable alternate employment under section 65(1)(f) of the *Act*. Therefore, he is not eligible to receive compensation for length of service under section 63 of the *Act*, and the delegate's decision not to apply section 65(1)(f) of the *Act* in the circumstances amounted to an error of law.

59. I do not agree with Ms. Li. I do not find the delegate erred in law, within the meaning of "error of law" as defined by *Gemex, supra*, in rejecting the application of section 65(1)(f) to the facts in this case. I find the delegate had a sound evidentiary basis on which to reject the application of section 65(1)(f) of the *Act*. More particularly, I find persuasive the delegate's reason that Royal's unilateral reduction in Mr. Simister's wages and vacation pay, which amounted to approximately 15% of his total compensation, was a substantial alteration in the terms and conditions of his employment such as to amount to a termination of his employment under section 66 of the *Act*. Therefore, Mr. Simister's decision to decline to work for Royal when Ms. Li contacted him in June 2014 (after he had sought compensation for length of service from Royal) did not amount to a refusal of reasonable, alternate employment, pursuant to section 65(1)(f) of the *Act*.

60. The second argument Ms. Li appears to make under the error of law ground of appeal turns on the meaning of the term "temporary lay-off". In the Reasons, the delegate, in the alternative, states that if Mr. Simister's employment was not terminated by Royal as a result of the application of section 66, then his employment was terminated under the *Act* pursuant to the lay-off provisions of the *Act*, because the *Act* states that a temporary lay-off is a deemed termination of employment once thirteen (13) weeks of lay-off are exceeded. According to the delegate, Mr. Simister's lay-off with Royal commenced on February 15, 2014, and continued until Ms. Li re-called him on June 25, 2014, eighteen (18) weeks later. Ms. Li argues that the *Act* does not give an employer a right to temporarily lay-off an employee and, therefore, when Decora laid-off Mr. Simister on his final day of work with Decora on September 26, 2013, Decora terminated his employment then. She attaches to her submissions a copy of the Employment Standards Branch's Guidelines pertaining to the definition of "temporary lay-off", which sets out some exceptions where temporary lay-off can be made up to 13 weeks in any 20 week period, namely: (i) where it is provided for in the contract of employment; (ii) where temporary lay-off is implied by well-known industry-wide practice, such as in the logging industry; and (iii) where it is agreed to by the employee.

61. I agree that the Guidelines accurately set out the exceptions where temporary lay-off will be permitted. In this case, while there is neither any evidence of a contract of employment between Decora and Mr. Simister providing for a temporary lay-off, nor evidence of a well-known industry-wide practice allowing for a temporary lay-off, there is some evidence that Mr. Simister, by his conduct, appears to have consented to a lay-off by Decora. More particularly, in the Reasons, the delegate notes that Mr. Simister himself said that he was on temporary lay-off pending the sale of the business by Decora to Royal and expected to continue working for the purchaser just as he had done when Johnson sold its business to Decora, and he continued working with the latter after a few days' break (layoff). Mr. Simister appears to have accepted lay-offs (of less than 13 weeks) between sales between his employers. His evidence is that he always expected to continue working, and returned to the shop to work for the new employer; he never considered his employment terminated after each sale and temporary layoff associated the sale. In contrast to this, when Mr. Simister was laid-off by Royal on February 15, 2014, his actions unequivocally indicate that he did not consent to this lay-off which effectively lasted eighteen (18) weeks until June 25, 2014, when Ms. Li first recalled him for possible work. Before the recall date, Mr. Simister emailed Ms. Li on May 19, 2015, requesting compensation for length of service and vacation pay. This email would suggest that he did not consent to the layoff by Royal as he would not have demanded compensation for length of service pay. It is noteworthy that in previous layoffs from Johnson and Decora, he never requested compensation for length of service. In any event, even if the layoff from Royal on February 15, 2014, was consensual on the part of Mr. Simister (which I reject), it was for a period of eighteen (18) weeks and thus exceeded the thirteen (13) week layoff period allowed under the *Act*. In these circumstances, I do not find the delegate misinterpreted or misapplied the layoff provision of the *Act* or erred in law.

62. The third argument of Ms. Li under the error of law ground of appeal pertains to her submission that Mr. Simister falsely reported hours on his timesheets and Royal, therefore, overpaid him 32 hours. It appears that Royal made such submissions to the delegate at the Hearing. In particular, at page R8 of the Reasons, the delegate notes that Ms. Li said that when "they reviewed [Mr. Simister's] timesheets after the complaint was filed they discovered that he was paid for some time he did not actually work". I find the delegate correctly determined in the Reasons that the *Act* does not allow an alleged overpayment of regular wages to be offset from any vacation that is earned and owed under the *Act*. I do not find the delegate to have erred in law in so interpreting the *Act*.

63. In these circumstances, I find Royal's appeal has no reasonable prospect of succeeding, and I dismiss it, pursuant to section 114(1)(f) of the *Act*.

ORDER

64. Pursuant to section 114(1)(f) of the *Act*, I dismiss the appeal. Accordingly, pursuant to section 115(1) of the *Act*, the Determination, dated October 23, 2015, is confirmed, together with any further interest that has accrued under section 88 of the *Act* since the date of issuance.

Shafik Bhalloo
Member
Employment Standards Tribunal