

An appeal

- by -

William O. Valmonte and Mary Ann Valmonte
(the “Valmontes”)

- 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.: 2009A/151

DATE OF DECISION: February 2, 2010

DECISION

SUBMISSIONS

Mary Ann Valmonte	on behalf of herself and William O. Valmonte
Melba Oabe	on her own behalf
Joy Archer	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) brought by William O. Valmonte and Mary Ann Valmonte (the “Valmontes”) of a Determination that was issued on October 16, 2009 by a delegate of the Director of Employment Standards (the “Director”). The Determination found the Valmontes had contravened Part 3, sections 17, 18 and 21, Part 4, section 40, Part 5, sections 45 and 46 and Part 7, section 58 of the *Act* in respect of the employment of Melba Oabe (“Oabe”) and ordered the Valmontes to pay Oabe \$5,842.95, an amount which included wages and interest.
2. The Director also imposed administrative penalties on the Valmontes under Section 29(1) of the *Employment Standards Regulation* (the “Regulation”) in the amount of \$3000.00.
3. The total amount of the Determination is \$8,842.95.
4. In this appeal, the Valmontes say additional evidence has come available that was not available at the time the Determination was being made.
5. None of the parties to this appeal has specifically requested an oral hearing before the Tribunal and while we have a discretion whether to hold an oral hearing on an appeal – see section 36 of the *Administrative Tribunals Act* (“ATA”), which is incorporated into the *Employment Standards Act* (s. 103), Rule 17 of the Tribunal’s *Rules of Practice and Procedure* and *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575 – I have reviewed the appeal, the submissions and the relevant material submitted by all of the parties, including the section 112 (5) record filed by the Director, and have decided the appeal can be decided on that material and that an oral hearing is not necessary.

ISSUE

6. The issue in this appeal is whether the Valmontes have demonstrated a reviewable error in the Determination.

THE FACTS

7. The Determination sets out the following background, and undisputed, facts relating to this matter:

The Valmontes hired Ms. Oabe as a Nanny in their home in Surrey, which falls within the jurisdiction of the Act. Ms. Oabe was employed from February 2007 to September 21, 2007. The rate of pay was \$8.00 an hour. The Valmontes paid Ms. Oabe’s airfare to Canada.

The complaint was filed within the time period allowed under the Act.

8. Oabe complained the Valmontes had contravened the *Act* by failing to pay regular wages, overtime wages, annual and statutory holiday pay, compensation for length of service and by making unauthorized deductions from wages. The complaint generated several areas of dispute. These are identified in the Determination, but it suffices to say the Valmontes disputed all of the claims made by Oabe. As well, the Valmontes raised an issue about the true identity of Oabe. The Director found the matter of Oabe's true identity was not relevant to her claim under the *Act* as there was no dispute she was employed by the Valmontes and performed work for them.
9. The Director conducted a complaint hearing on August 27, 2009, and issued the Determination now under appeal on October 16, 2009.
10. The Director found the Valmontes had failed to pay regular wages, overtime wages, annual and statutory holiday pay and had made unauthorized deductions from wages. The Director denied Oabe's claim for length of service compensation, finding the Valmontes had established just cause to terminate Oabe's employment.
11. The Determination includes a finding that the Valmontes failed to comply with the requirements of section 28 of the *Act* with respect to Oabe's employment, noting the Valmontes had "provided what payroll records they had to the Branch" but that certain records were not included, including a record of daily hours worked by Oabe, which is required by section 28(1)(d) to be kept by an employer.
12. There were several areas where the evidence provided by each of the parties conflicted. The Director made findings of fact on that evidence based on the best evidence available and an assessment of the relative credibility of each of the parties on the particular matter in dispute.

ARGUMENT

13. The appeal is based on new evidence becoming available. The appeal includes a sworn statement from a person in the Philippines concerning Oabe's true identity and material submitted as new evidence of four general types:
 1. daily work schedule for Oabe;
 2. time sheets;
 3. excerpts from a desk calendar covering April, August and September, 2007; and
 4. payroll information.
14. The Valmontes say this new information shows the findings made by the Director on the issues of regular wages, overtime wages, annual and statutory holiday pay and the deductions from wages were incorrect.
15. In respect of regular wages, the Valmontes say Oabe was paid the appropriate amount and they do not agree any regular wages were owed. The Valmontes say no overtime was required and, in particular, no overtime was required on Saturdays. They say the daily work schedule submitted by Oabe during the complaint hearing was fabricated. They also say Oabe should have gotten approval before any overtime work was performed and there was no required work order.
16. The Valmontes say Oabe intentionally misrepresented the actual facts and the claims she made were fraudulent.

17. The Valmontes say Oabe was not required to work on statutory holidays and there was no need to work those days. They say Oabe was off work with pay on those statutory holiday days which the Director found she had worked¹. The excerpts from the desk calendar have been provided to support this submission. The Valmontes say the evidence provided by Oabe to support her claim for statutory holiday pay was altered and the Director failed to recognize that matter.
18. The Valmontes say the Director's calculations concerning the deductions were incorrect.
19. The Valmontes complain that the annual vacation pay, which was initially withheld, was fully, and voluntarily, paid to the Director. The inference in the appeal is that no further annual vacation pay should have been ordered².
20. In a submission dated November 23, 2009, Mrs. Valmonte filed additional information in respect of the appeal. In that communication, Mrs. Valmonte says William O Valmonte is not the employer, that only she is the employer. No additional information has been provided or submission made on this matter by any party.
21. The Director and Oabe have provided responses to the appeal.
22. Generally, the Director says the Valmontes have not established any basis for the Tribunal altering the findings made in the Determination and that they are simply attempting to reargue their position using evidence, the majority of which, if it is legitimate, was available at the time the Determination was being made and which could have been submitted to the Director. The Director says that in the absence of some compelling explanation for failing to provide this evidence during the complaint process, it should not be considered by the Tribunal in the appeal.
23. The Director says that in any event, this "new" evidence should be viewed with suspicion as much of it contradicts evidence provided by the Valmontes at the complaint hearing and, in some respects, this "new" evidence is internally inconsistent. The Director also questions the relevance of some of the "new" evidence, such as the affidavit relating to the true identity of Oabe.
24. In her response, Oabe says the Valmontes have provided no valid ground of appeal. She echoes the position of the Director that the evidence relating to work hours and pay was in their possession at the time the Determination was being made and could have been provided. She wonders why, if the documents existed but had gone missing – as the Valmontes say in the appeal – the Director was not informed of this at the time and given an explanation for how they could have gone missing.
25. Otherwise, Oabe disagrees with some of the assertions made by the Valmontes in the appeal but which are not relevant to my decision.
26. In their final response, the Valmontes address the responses made by the Director and Oabe.
27. Apart from clarifying the thrust of some of the points raised in the appeal, the response does not affect the nature of the positions taken by the Director and Oabe on the "new" evidence submitted with the appeal or the characterization by the Director of the appeal being an attempt to reargue the position taken before the Director in response to several issues raised by the complaint.

¹ The Director found Oabe worked only one statutory holiday during her employment with the Valmontes.

² The annual vacation pay that was ordered was only that which was payable on the unpaid wages the Director found in the Determination were owed to Oabe.

28. The Valmontes say the point of the additional documents was to show Oabe's evidence was fabricated, and the Director was wrong to accept that evidence, and that the Director failed to properly consider their evidence.

ANALYSIS

29. 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.*

30. 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.

31. The *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03.

New Evidence

32. As indicated above, the Valmontes have grounded this appeal on new evidence becoming available: section 112(1)(c). I therefore need to address whether any of the new evidence submitted by the Valmontes will be considered in this appeal.

33. The Tribunal is given discretion to accept or refuse new or additional evidence. The Tribunal has taken a relatively strict approach to the exercise of this discretion and tests the proposed evidence against several considerations, including whether such evidence was reasonably available and could have been provided during the complaint process, whether the evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it be reasonably capable of belief, and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination: see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03. New or additional evidence which does not satisfy any of these conditions will rarely be accepted.

34. I conclude the new evidence submitted with this appeal should not be accepted.

35. The sworn statement speaking to the true identity of Oabe goes to a matter that was considered in the Determination and found by the Director to be irrelevant to the merits of the complaint. The Valmontes have not shown that conclusion was wrong in any way. As the Director put it in the Determination, the identity of the complainant has no bearing on whether there is merit to the wage claims made. There is no issue that Oabe signed the employment contract, performed work for an employer and made the claim under the *Act* for unpaid wages. Similarly, in this appeal, the "true" identity of Oabe is irrelevant to whether the Director committed an error in finding the person who performed the work for the Valmontes and filed the complaint under the *Act* was entitled to wages under the *Act* for that work. Accordingly, the sworn statement

relating to the true identity of Oabe is not accepted because it is not relevant to any material issue in dispute in the appeal.

36. Otherwise, all of the evidence submitted by the Valmontes with their appeal was, if one accepts their explanation, known by them to exist before the Determination was made and could, with some diligence, have been “discovered” and provided during the complaint process. As well, there is nothing in their submissions that has convinced me this evidence is either credible or probative. Parts of the “new” evidence provided by the Valmontes contradict evidence given by them at the complaint hearing and runs against findings and conclusions of fact made by Director. On the latter point, I reiterate that the Tribunal has limited authority to consider appeals based on alleged errors in findings and conclusions of fact made in the Determination.
37. As well, the attempt to enter and argue “new” evidence in the appeal flies in the face of the long standing approach by the Tribunal to such attempts after having failed to fully cooperate in the complaint process: see *Tri-West Tractor Ltd.*, BC EST # D268/96 and *Kaiser Stables Ltd.*, BC EST # D058/97. In this case, the Director had apparently issued a Demand for Employer Records, which generated a response that did not include the documents which the Valmontes now argue are relevant to Oabe’s claims.
38. In result, this “new” evidence will not be considered and the appeal will be decided on the Determination and the material in the section 112(5) Record.
39. As stated above, the *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law. The Tribunal has adopted the following definition of “error of law” set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):
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.
40. In the *Britco Structures Ltd.* decision, the Tribunal concluded that findings of fact were reviewable as errors of law under the third and fourth categories of the *Gemex* test: that is, if they are based on no evidence or on a view of the facts which could not reasonably be entertained. The Tribunal also noted that the test for establishing an error of law on this basis is stringent, requiring the appellant to show that the findings of fact are perverse and inexplicable, in the sense that they are made without any evidence, they are inconsistent with and contradictory to the evidence or they are without any rational foundation.
41. The Valmontes have not specifically alleged an error of law by the Director in respect of the findings and conclusions of fact in the Determination. It is implicit in their appeal submissions, however, that they contend the Director committed errors in the findings made on several of Oabe’s claims. For example, the appeal submissions refer to alleged errors by the Director in failing to consider the payroll records that were submitted by the Valmontes in response to the Demand for Employer Records, in failing to appreciate that Oabe provided three different sets of “fabricated records” and in failing to appreciate the entire claim was part of an elaborate fraud perpetrated by Oabe.

42. In this case, nothing in the appeal has shown the Director ignored the evidence the Valmontes provided during the complaint process or was not aware of the inconsistencies in some of the evidence provided at the complaint hearing, including evidence provided by the Valmontes. In all of the areas challenged by the Valmontes in their appeal, the Director was faced with competing evidence. The Determination quite clearly indicates the evidence submitted by the Valmontes was considered but, in some areas, this evidence was totally rejected in favour of evidence provided by Oabe, in some areas it was rejected in part in favour of a view of the evidence that, overall, was more probable in the circumstances and in other areas it was accepted. The reasons for the conclusions made by the Director on how this evidence was dealt with are set out in the Determination and they do not indicate any reviewable error.
43. There are other elements to the appeal, such as the arguments relating to the annual and statutory vacation pay claims and the penalty for making unauthorized deductions, that are fundamentally misconceived and are not accepted.
44. The suggestion in one of the appeal submissions that William O. Valmonte is not an employer under the *Act* is also not accepted. This position was never argued before the Director, has no factual foundation and was never pursued in any substantive way in the appeal.
45. The allegations of fraud and misrepresentation are serious allegations that require clear proof. These allegations are not established on any of the evidence found in the Record.
46. As a result of my conclusions on the grounds and arguments made by the Valmontes in this appeal, I find this appeal is an effort by the Valmontes to have the Tribunal review and alter findings of fact made in the Determination without persuading me there is any basis or authority for me to do so under any of the grounds set out in section 112(1). Accordingly, the Valmontes have not met their burden and the appeal is dismissed.

ORDER

47. Pursuant to Section 115, I order the Determination dated October 16, 2009, be confirmed in the amount of \$8,842.95, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal