Employment Standards TRIBUNAL

An appeal

- by -

Sunwest Food Processors Ltd.
("Sunwest")

- 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.: 2012A/125

DATE OF DECISION: February 6, 2013

DECISION

SUBMISSIONS

Brenda Taylor — on behalf of Sunwest Food Processors Ltd.

OVERVIEW

1. Pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") Sunwest Food Processors Ltd. ("Sunwest") has filed an appeal of a Determination issued by a delegate (the "delegate") of the Director of Employment Standards (the "Director") on September 27, 2012.

2. The Determination found that Sunwest had contravened Part 4, section 40 and Part 8, section 63 of the *Act* in respect of the employment of Anastasia Polianskaia ("Polianskaia") and ordered Sunwest to pay Polianskaia an amount of $4,076.87, an amount that included wages and interest under section 88 of the *Act*.

3. The Director also imposed administrative penalties under Section 29(1) of the *Employment Standards Regulation* (the "*Regulation*") in the amount of $1,000.00.

4. The total amount of the Determination is $5,076.87.

5. In its appeal, Sunwest alleges the Director erred in law in finding Polianskaia entitled to overtime and length of service compensation and seeks to have the Determination varied or cancelled. Sunwest has also grounded the appeal on new evidence coming available that was not available when the Determination was being made. While not specifically identified on the Appeal Form, Sunwest also alleges in its submission that the Director failed to comply with principles of natural justice in making the Determination.

6. The Tribunal has decided this appeal is an appropriate case for consideration under section 114 of the *Act* and, at this stage, I am assessing this appeal based solely on the Determination, Sunwest's written submissions, and my review of the section 112(5) "record" that was before the Director when the Determination was being 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 of the reasons listed in subsection 114(1), which 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;*
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> *(b) the appeal was not filed within the applicable time period;*
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> *(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 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.*

7. If satisfied the appeal or a part of it has some presumptive merit and should not be dismissed under section 114(1), Polianskaia will and the Director may be invited to file a reply submission. On the other hand, if it is found the appeal is not meritorious, it will be dismissed under section 114 of the *Act*.

BACKGROUND

8. Sunwest operates a poultry processing plant. Polianskaia was employed by Sunwest as a human resources supervisor from September 13, 2010, to October 31, 2011, when she was dismissed. She filed a complaint with the Director of Employment Standards in November 2011, claiming she was owed overtime wages and length of service compensation. Sunwest opposed the claims. The Director conducted an investigation. There was an unsuccessful attempt to mediate a resolution. A telephone complaint hearing was conducted by the Director on May 17, 2012.

9. On the overtime claim, Polianskaia testified she was asked to work overtime and the plant manager, Mr. Rick Gagner, was aware she was working overtime. Sunwest's response was that Polianskaia did not work any overtime, but if she did, she did not follow any of the company's policies regarding overtime work, which, they argued, Polianskaia, as HR supervisor, ought to be aware and did not work the hours claimed. Sunwest submitted and relied on a January 19, 2012, e-mail between Ms. Taylor and Mr. Gagner in which Mr. Gagner says he told Polianskaia he would approve overtime in order for her to catch up on her work, but any request for overtime had to be made in advance and a record kept. He said in the e-mail that he approved no overtime for Polianskaia and saw no record of overtime worked by her. Mr. Gagner did not give oral testimony at the complaint hearing.

10. The Director found, on the evidence provided, that Polianskaia had worked overtime, accepting the record of hours provided by her, finding confirming evidence of overtime worked and finding there was knowledge on the part of Mr. Gagner that she was working overtime.

11. On the claim for length of service compensation, Sunwest argued Polianskaia was terminated for just cause, specifically "a lack of forthrightness and integrity", *i.e.* dishonesty and misrepresentation, and cited four incidents showing this form of misconduct in support of their decision.

12. The Director noted the just cause standard in the circumstances is that expressed by the Supreme Court of Canada in *McKinley v. BC Tel*, [2001] S.C.J. No. 40. The Director examined each of the supporting incidents and found that while there was evidence of a misrepresentation by Polianskaia in what I will refer to as the "LinkedIn website" incident, such misrepresentation was not directed at Sunwest and did not affect their interests, and that in respect of the other incidents Sunwest had not established on the evidence provided that Polianskaia had acted "dishonestly". In respect of the first two incidents, the Determination states:

> The difficulty with the evidence provided by Sunwest in both these instances is that the evidence was presented by a person who was not a witness to the events. The evidence Sunwest relies on is in the form of emails which purport to describe conversations that occurred months earlier. By providing evidence in this form, Sunwest has deprived Ms. Polianskaia with the opportunity to cross-examine the evidence, and therefore the evidence must be given less weight. No evidence was given by Sunwest regarding the seriousness of the purported dishonesty or any intent on the part of Ms. Polianskaia to act dishonestly. On the other hand, Ms. Polianskaia gave her evidence which was subjected to cross-examination by Sunwest. I am not convinced Ms. Polianskaia was given any final warning regarding dishonesty . . .

13. Concerning the last incident relied on by Sunwest, which concerned an allegation that Polianskaia had been dishonest in representing the effect of an injury suffered at work on her level of mental and physical functionality, the Director found Sunwest had not proved this allegation. There was a substantial amount of

evidence provided by both parties. In particular, the Determination notes that Sunwest "provided a great deal of evidence from medical professionals", which the Director accepted. Sunwest also provided a report from private investigators hired by them to observe and take video of Polianskaia over two days and record his observations. The Determination notes the private investigator did not give evidence. No video was provided to the Director, but was viewed by at least one doctor, who provided an opinion on his observations. In summarizing the effect of the evidence on this issue, the Director said:

> Whether or not Ms. Polianskaia was capable of returning to work is a medical issue and should be decided by medical practitioners. Dr. Wasswa-Kintu personally examined Ms. Polianskaia on October 17 while Dr. Bawa viewed a video. Therefore I prefer the evidence of Dr. Wasswa-Kintu because she was in a better position to establish Ms. Polianskaia's fitness for resuming her duties. Ms. Polianskaia was under the care of her personal physician, a physiotherapist and a registered kinesiologist during the entire period of her recovery. Based on the evidence before me, I cannot find she was dishonest in her representations of her injuries.

14. In sum, the Director found Sunwest had not proved dishonesty in three of the four incidents relied on and in the other incident found the dishonesty was not sufficient to give rise to a breakdown in the employment relationship "because it had no impact on the operations of Sunwest".

REASONS FOR THE APPEAL

15. I will set out the grounds for Sunwest's appeal in their entirety and provide an outline of the reasons supporting each ground of appeal.

16. On the appeal respecting the overtime wage claim, Sunwest says:

> ". . . the Director of Employment Standards made an error in law in making the determination that overtime should be paid to Ms. Polianskaia for the all the hours originally outlined by Ms. Polianskaia on a desk calendar and then transposed to a handwritten table which was submitted as evidence to [the Director] after the May 17, 2012 hearing. The Company is confident that, if the Employment Standards Tribunal agrees to review all the evidence – old and new – it will either vary the amount owing or dismiss any payment. If the latter, the Company would anticipate that the monetary penalty for non-compliance of section 40 of the *Employment Standards Act* would also be made void."

17. The reasons supporting this ground of appeal address many parts of the Determination, including the Director's statement that Mr. Granger is the "plant manager", the January 19, 2012, e-mail, the comment of the Director that an employer bears the burden of controlling adherence to company policies on overtime and statements summarizing the evidence provided.

18. The appeal submission expresses Sunwest's disagreement with those parts of the Determination addressed and provides additional explanations and submissions on the challenged statements and summaries of evidence. In some areas, the appeal submission simply expresses disagreement, in other areas, it re-visits evidence, such as the January 19, 2012, e-mail, to restate its position and its argument or to cast its submission in the context of other documents in the "record", which Sunwest says should be re-examined by the Tribunal.

19. On the compensation for length of service issue, Sunwest says:

> ". . . the Director made an error in law in making the determination that Ms. Polianskaia should be compensated for length of service. The Company is confident that, if the Employment Standards Tribunal agrees to review all of the evidence – old and new – that it will determine that Ms. Polianskaia

> was terminated for just cause and therefore, is not entitled to length of service compensation. Consequently, if this was the finding of the Employment Standards Tribunal there should be no monetary penalty paid by the Company for failure to comply with section 63 of the *Employment Standards Act*."

20. Under this ground of appeal, the submission simply lists forty-one documents Sunwest says "ought to be reviewed".

21. The appeal also includes the following:

> The Company also feels that . . . the Director of Employment Standards, should have made a conclusive statement about Ms. Polianskaia did not [sic] meet the definition of Manager and the reasons.

22. The appeal says Sunwest "feels very strongly about this point". The reason for their position, it appears, is that if Polianskaia is a manager under the *Act*, she would not be entitled to overtime. Sunwest asks the Tribunal to revisit this point – although it would actually be visiting the issue for the first time – and make a "concise and clear ruling" on this matter.

23. The appeal then states: "the Director failed to observe principles of natural justice in making the determination" and returns to address each of the four incidents on which Sunwest relied in asserting just cause. In respect of each incident, Sunwest says the Director acted on a view of the facts which could not be reasonably entertained or adopted a method of assessing the evidence that was fundamentally wrong.

24. Regarding the first incident, Sunwest submits two documents referred to by Polianskaia in her evidence – an original and a revised job posting – are said to have been missing from the company's records when a search was made for them in August 2012 and their absence has impeded Sunwest's ability to "revisit the objective evidence of this incident". The appeal submission also says Mr. Gagner should be allowed to give oral evidence about the incident and, in conjunction with that evidence, the four documents listed in the submission should be reviewed. Sunwest says it is confident if this occurs, the Tribunal will find Polianskaia was, as they have alleged, caught in a lie in that incident, warned and given another chance.

25. Similarly, with the second incident, the appeal submission implies Mr. Gagner should be allowed to give oral testimony about this incident, saying the steps taken by him subsequent to the incident make no sense if Mr. Gagner had not found Polianskaia in another lie.

26. A substantial part of the appeal submission addresses the finding of the Director on the allegation that Polianskaia misrepresented the level of her mental and physical functionality from her work related injuries.

27. At the outset, Sunwest's submission on this point introduces assertions of fact not found in the Determination or the "record". The submission acknowledges, and refers, to the many documents reviewed by the Director in making his finding on this incident, but says the Director gave "disproportionate weight" to the fact Polianskaia was under doctors' care for the entire period of her medical leave, that she was personally examined by Dr. Wasswa-Kintu on October 17, 2011 (who found her unable to work in any capacity and scheduled to be re-examined November 23), that her visits to physicians resulted in extensions of the time estimated for her injuries to heal and that WCB considered her injuries severe enough to enrol her in an occupational rehabilitation program.

28. Sunwest submits the Director "did not consider the significance of the inconsistencies of Ms. Polianskaia's in reports and conclusions of her own functional levels through her absence from August 31, 2011 to various parties" or given credence to the "fact" – on which there was no evidence – that Dr. Bawa would have had access to all of the records from Polianskaia's doctors and providers.

29. The submission provides a list of thirty-four documents that Sunwest says the Tribunal should "review", some of which are not included in the "record" but all of which existed before the Determination was made.

30. Concerning the "LinkedIn website" incident, Sunwest submits the Director failed to recognize there is a "strong possibility" Polianskaia's misrepresentation of the facts in this incident means she would misrepresent the facts in the other situations. Sunwest expresses its disagreement with the conclusion of the Director that Polianskaia's misrepresentation in this incident was not directed at, and had no impact on, Sunwest. Sunwest says it would be important for the Tribunal to allow Mr. Gagner to give oral evidence on this point.

31. Sunwest, in part, grounds its appeal in new evidence coming available that was not available when the Determination was being made. Sunwest identifies the following "new" evidence it seeks to add under this ground:

i. the oral testimony of Mr. Gagner;

ii. the video taken by the private investigator of his observations of Polianskaia; and

iii. Ms. Taylor's notes summarizing discussions she had with Mr. Granger and/or Polianskaia on the first two incidents.

32. Sunwest submits Mr. Gagner's evidence ought to be allowed because he was unavailable due to other commitments when the complaint hearing was conducted and it now appears his oral testimony is relevant and critical to the Tribunal's view of the respective credibility of the parties' version of events concerning the first two incidents. It also appears Sunwest now considers it important to provide evidence of the company's perspective on the "LinkedIn website" incident to refute the Director's view of it.

33. Sunwest considers the video evidence to be important because the report and the photographs in it were not, apparently, "sufficiently clear to provide an accurate understanding of the extent of Ms. Polianskaia's physical and mental functional abilities" and the video, in their submission, provides the most clear and objective assessment of those functional abilities on the investigation dates. Also, they say looking at the video may explain why Polianskaia did not have her attending physicians and the physiotherapist view and comment on it.

34. The notes made by Ms. Taylor will, simply put, provide Sunwest with a further opportunity to establish their version of the facts concerning the first two incidents.

35. Sunwest submits the proposed "new" evidence satisfies the test used by the Tribunal when considering if such documents should be allowed in an appeal.

ANALYSIS

36. I shall first address the "new evidence" ground of appeal. The evidence sought to be admitted under this ground is not "new"; it is evidence that existed at the time the Determination was being made and its nature indicates it could have been presented during the complaint process. Whatever reasons have been formulated in the appeal for not providing this evidence, at its root that omission is based on how Sunwest chose to conduct its case. Apparently, the findings of the Director have now directed Sunwest to the weaknesses of the evidentiary basis of their case and have caused them to attempt to bolster it with what they refer to as "new" evidence. This is not a case where there was no evidence provided in the area the "new" evidence is intended to address. There was evidence provided but the Director found the evidence did not, on balance, prove the assertions dependent on it. Sunwest is quite candid about the objective of seeking to introduce the

additional evidence: they feel this evidence might be sufficient to alter the findings made by the Director in those two key areas.

37. An appeal to the Tribunal under section 112(1) (c) does not simply provide an opportunity for a person dissatisfied with the result of a Determination to seek out evidence to supplement what was already provided to, or acquired by, the Director during the complaint process, with the objective of having the Tribunal review and re-weigh the evidence and reach a different conclusion if, in the circumstances, that evidence could have been provided at the time the Determination was made.

38. While the admission of evidence on appeal has a discretionary aspect, the Tribunal takes a principled approach to that task; one which is based on well established criteria: see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03. The additional evidence presented does not satisfy the criteria established. Significantly, it is not consistent with the terms of the ground of appeal its inclusion is based on. New evidence in an appeal is statutorily limited to evidence that was not available when the Determination was being made. This statutory limitation, and the approach of the Tribunal generally to evidence presented in an appeal that is neither "new" nor in the "record", is firmly grounded in the objective of fairness, efficiency and finality in the decision making process: see section 2(d) of the *Act*.

39. In reaching a conclusion on the new evidence ground of appeal, I have considered whether a decision of an Umpire sitting on an appeal by Sunwest from a Board of Referees decision confirming benefits awarded to Polianskaia under the *Unemployment Insurance Act* should be included in the appeal evidence. This decision was submitted by Sunwest to the Tribunal very late in the appeal process "for [our] reference" and while there is no application from Sunwest to add it as "new evidence", I will presume they have provided the document for that purpose. Their covering correspondence suggests as much.

40. Accordingly, I must consider this evidence against the approach, set out above, the Tribunal takes for allowing such evidence. The evidence submitted has not been disclosed to the other parties prior to this decision because I do not find it should be included in the evidence on this appeal. In making this decision, I adopt entirely and apply (with necessary adjustments) the following excerpt from the Tribunal's decision in *Abbotsford Concrete Products Ltd.*, BC EST # D045/10:

> The Umpire's decision appears to meet the first and third conditions listed in *Bruce Davies,* above. Having been issued on December 21, 2009, it is plausible that the Umpire's Decision may not have been available to be presented to the Delegate before he issued the Determination on December 24, 2009. I also find that the decision is credible. However, the Umpire's decision does not meet the second and fourth conditions, for related reasons. The Appellant puts forward the Umpire's decision to show that Ms. Simpson resigned her employment. However, as the Delegate points out, the Umpire's decision is issued under a completely different statutory regime - federal Employment Insurance legislation. It is an appeal decision that considered the Board of Referees' decision within the limited jurisdiction of the Umpire to hear these cases under the *Employment Insurance Act*. In the absence of any evidence of its relevance to the question of whether Ms. Simpson is entitled to compensation for length of service under the *Employment Standards Act,* I find that the Umpire's decision is not relevant to any material issue arising from the complaint. The Umpire's decision has little probative value for similar reasons.

41. There is no reasonable prospect Sunwest can succeed on this ground of appeal; I find no merit in it.

42. An appeal is not simply another opportunity to argue the merits of a claim to another decision maker. An appeal is an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds.

43. In this appeal, Sunwest says the Director made errors of law on the overtime and compensation for length of service issues. However, this ground of appeal does nothing more than ask the Tribunal to re-visit the evidence that is in the "record" or that may have been added to the evidence and reach a different conclusion than that reached by the Director. This is the type of appeal the Tribunal has consistently denied, as it is directed at having the Tribunal alter findings and conclusions of fact without showing those findings and conclusions raise an error of law. There is no presumptive merit in such an appeal and, accordingly, no reasonable prospect it will succeed.

44. Although not indicated in the Appeal Form, Sunwest has argued the Director failed to observe principles of natural justice by acting on a view of the facts which could not be reasonably entertained or adopting a method of assessing the evidence that was fundamentally wrong. This type of argument has elements of both error of law and natural justice: see *D. Kendall & Son Contracting Ltd.*, BC EST # D107/09. In advancing this argument, Sunwest is required to provide some evidence to support their argument: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99. They have not done so. Their arguments relating to this assertion only reflect the basic tenet of the appeal generally, which is a disagreement with the conclusions reached by the Director on the "just cause" question. There is no presumptive merit to this argument and no reasonable prospect it can succeed.

45. Finally, Sunwest submits the Director should have made some definitive statement about whether Polianskaia was a manager under the *Act*. I need only make two points about this argument: first, Sunwest has raised this point for the first time in this appeal; and second, the awarding of overtime wages to Polianskaia is a definite statement of her status under the *Act*. There is no merit whatsoever in this argument.

46. After a review of the Determination, the section 112(5) "record" and the appeal, and applying well established principles which operate in the context of appeals to the Tribunal, I find this appeal as a whole lacks any presumptive merit and that the purposes and objects of the *Act* would not be served by requiring the other parties to respond to it. Accordingly, I dismiss the appeal and confirm the Determination.

ORDER

47. Pursuant to subsection 114(1) of the *Act*, the appeal is dismissed on the ground that there is no reasonable prospect that it will succeed. Accordingly, the Determination dated September 27, 2012, is confirmed in the amount of $5,076.87, together with any interest that may have accrued under section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal