Employment Standards TRIBUNAL

An appeal

- by -

Mall Media Inc.
(the "Appellant")

- 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: Philip J. MacAulay

FILE No.: 2006A/137

DATE OF DECISION: February 16, 2007

DECISION

SUBMISSIONS

Brian Lehn	on behalf of Mall Media Inc.
Jocelyne Yhalomi	on her behalf
Amanda Welch	on behalf of the Director of Employment Standards

OVERVIEW

1. This is the appeal of Mall Media Inc. (the "Appellant") pursuant to section 112 of the *Employment Standards Act* (the "*Act*") against determination No. ER 131-053 (the "Determination") issued by the Delegate of the Director of Employment Standards (the "Delegate") on December 7, 2006.

2. The Delegate found that the Appellant, Mall Media Inc. (the "Appellant") had contravened sections 28 (payroll records) and 58 (vacation pay) of the *Act* and ordered that it pay its former employee, Jocelyne Yhalomi (the "Employee") $4,560.66 for annual vacation pay and $283.32 of accrued interest on that amount. The Delegate also assessed two administrative penalties of $500.00 each for the contravention of both of those sections. As well, the Delegate ordered that the Appellant cease to contravene those sections of the *Act*.

3. In her summation of the total amount payable by the Appellant, the Delegate entered the amount of "Total Administrative Penalty Amount" as "$500.00" when it was clear, both from the findings of contraventions of two sections of the *Act* and the "Total Amount Payable" that the Determination involved a total of $1,000.00 for administrative penalties and not "$500.00".

4. In this regard I find that the total administrative penalties as assessed by the Delegate were $1,000.00 and that, therefore, the total amount payable by the Appellant pursuant to the Delegate's Determination was the sum of $5,843.98.

5. The Appellant requested an appeal of the Delegate's Determination. In the Appeal Request Form the Appellant noted the date of its appeal as December 13, 2007. Clearly the Appellant intended to date its request as December 13, 200**6**, and I so find.

6. In its Grounds for Appeal Form the Appellant sought a change or variation of the Determination and checked the grounds for appeal as:

> "(a) The Director of Employment Standards erred in law and,
>
> (b) The Director of Employment Standards failed to observe the principles of natural justice in making the Determination."

7. In her Determination the Delegate had found:

> 1) The Employee commenced employment with the Appellant on March 25, 1988 as a Specialty Advertising Manager. The Appellant is a marketing agency, specializing in shopping malls.
>
> 2) In 1993, the date for calculating the Employee's vacation entitlement changed from March to January. As well, the Delegate considered the Employee's contention that, rather than keeping track of the Employee's overtime hours, the parties had agreed that the Employee would have six weeks vacation per year instead.
>
> 3) Pursuant to the above alleged agreement concerning 6 weeks, the Employee claimed an entitlement of $10,021.21. The Appellant countered that the Employee had used all of her vacation time in any event and was therefore not owed any vacation pay. The Delegate concluded that the Employee had not used all of her vacation entitlement but restricted the basis of her claim to 6% of gross wages, rather than 6 weeks, thus calculating an amount due of $4,560.66 plus interest.

8. The Delegate stated that the two issues before her were:

> "1) Did Yhalomi use all of her earned vacation time while working for Mall Media?
>
> 2) Does Yhalomi's 6 week vacation entitlement per year mean she should be paid 12% on her gross wages for 2003 and 2004 less the wages she was paid for the two weeks vacation she took in 2004?"

9. There was a clear dispute between the parties as to whether or not the Employee had been taking her vacation time/pay during the years it was being earned or in the year following.

10. Pursuant to the provisions of section 57 of the *Act*, one is entitled to take one's vacation during the year <u>following</u> when it was earned.

11. There was a significant dispute between the parties whereby the Appellant maintained that the Employee took her remaining vacation entitlement during the final year it was being earned while the Employee's position was that she had been taking vacations in the year following it being earned in accordance with section 57.

12. The Delegate received evidence from various witnesses (including accountants of the Appellant) which, in her finding based upon a balance of probabilities, indicated that the subject Employee had been using her vacation entitlement in the year <u>after</u> they were earned. Perhaps more importantly, the Delegate determined that, in its evidence before the Delegate, the Appellant had confirmed that its own records of the vacation taken were, in the Delegate's words, "incomplete and incomprehensible". The Appellant argued that it was the practice of its employees to take vacation during the year it was earned but admitted that it had no records to prove that contention. In the Delegate's ultimate view, there were no proper records kept by the Appellant to confirm the Appellant's belief and, therefore, she accepted the Employee's position as being more reliable than that of the Appellant.

13. However, the Delegate went on to determine that the Employee's employment agreement did not promise 12% of her gross wages as vacation pay and determined that, "As long as the wages she receives while on vacation are as much as 6% of her gross wages, Mall Media has met the requirements of section 58(1)(b) of the Act."

14. Therefore, after taking into account two weeks of vacation taken by the Employee in the year prior to her cessation of work in May, 2004, her remaining entitlement based upon 6% of gross wages was $4,560.66.

15. Finally, the Delegate found that the Appellant:

1) contravened the Act with regard to the section 28 requirements. Section 28(1)(i) requires that the employer keep records of "the dates of the annual vacation taken by the employee, the amounts paid by the employer and the days and the amounts owing", and,

2) contravened the Act with regard to the section 58 requirement that all vacation pay due to an Employee be paid within 6 days of the cessation of employment (i.e. October 11, 2005)

and assessed $500.00 as an administrative penalty for each contravention.

ISSUES ON APPEAL

16. Did the Delegate err in law in finding that monies were due to the Employee for unpaid vacation?

17. Did the Delegate fail to observe the principles of natural justice in making her determination?

THE APPEAL GENERALLY

18. While the Appellant has indicated on its form its grounds for appeal are that the Delegate had erred in law and/or committed breaches of principles of natural justice, the substance of its appeal is that:

1) Contrary to the Delegate's findings, the Appellant maintains that the records he provided at the hearing did, in fact, prove that the Employee had taken her vacation time in the year it was earned rather than the following year. He alleged that not enough credence had been given to certain of the Appellant's detailed evidence. He also challenged the veracity of the accountant witnesses' testimony and reiterated that the records the Appellant had provided were accurate and should be preferred over that of the Employee.

2) The Employee had presented fraudulent and "purposefully altered" email documents at a meeting with a representative of the Employment Standards Branch in support of her position. The Appellant alleges that it was not until the Employee was confronted in the hearing before the Delegate that she admitted she had altered the documents. The Appellant submitted that such conduct amounted to fraud and should serve to discredit, not only the Employee's character, but also the evidence she had provided.

DELEGATE'S RESPONSE

19. In her response, the Delegate states that both of the above-noted issues (together with "all the relevant" evidence) were presented, and were considered, at the hearing. The Delegate states that the representative of the Appellant (i.e. Brian Lehn) attended the hearing and "had sufficient opportunity to submit his evidence and make his arguments".

20. She submits that there was, therefore, no denial of natural justice.

21. She states further that she had "addressed the issues of the altered documents and the reliability of the Appellant's records in the Determination". She says that, "I find Ms. Yhalomi did not act fraudulently and Mall Media's records were not clear or reliable as Mr. Lehn asserts". In the Determination the Delegate concluded "on a balance of probabilities" that the Employee's records were more reliable that those of the Appellant.

22. In the result, the Delegate says natural justice was not denied and, further, that no error of law has been identified and that the Appellant "is re-arguing" the case it made at the hearing.

EMPLOYEE'S RESPONSE

23. While the Employee continues to allege she was owed $10,021.35 as she had originally claimed, in her response she states that, in order to end the process, she accepts the Determination as to the amount of money she is owed as had been determined by the Delegate.

24. She continues to maintain that she took vacation time in the year following its having been earned as was found by the Delegate.

25. She objects to the "slanderous and incorrect allegations" made by the Appellant regarding the alteration of documents. She alleges that any changes she made to email documents were "to make it clearer so Mr. Lehn would understand and I truly thought the amendment to be correct".

ANALYSIS

26. The specific jurisdiction of this Tribunal in considering appeals from Determinations of the Director is set out in section 112 of the *Act*. The extent of the Tribunal's jurisdiction is thus restricted and, as has been considered in earlier cases before it, the burden is on the Appellant to show why the Determination should be cancelled or varied in some way, or referred back to the Director.

ERROR OF LAW:

27. The Tribunal has previously adopted the reasoning in Gemex Development Corp. v British Columbia (Assessor of Area #12-Coquitlam [1998] B.C.J. No. 2275 (C.A.) with respect to the factors which may be considered in defining what may be an error in law:

1) A misinterpretation or misapplication of a section of the 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) Exercising discretion in a fashion that is wrong in principle.

28. In Britco Structures Ltd. BC EST #D260/03, the Tribunal refined the *Gemex* tests in light of subsequent decisions of the Courts and stated the issue as follows:

> "It is clear from s.112 of the Act that a question of fact alone, is not within this Tribunal's jurisdiction. The following question appears to me to remain: to what extent, if at all, can a question of mixed law and fact fall within the Tribunal's jurisdiction as being an error of law; and in what circumstances, if at all, can a question of fact be characterized as a question of law?"

29. In Jane Welch operating as Windy Willows Farm, BC EST #D161/05 this Tribunal discussed Britco concerning the above:

> "On this issue, the Tribunal concluded that "the definition of error of law in *Gemex* ought not to 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". However, the Tribunal held that findings of fact were still reviewable as errors of law according to prongs (3) and (4) of the *Gemex* test above: that is, if they are based on no evidence, or on a view of the facts which could not reasonably be entertained. The Tribunal noted that the test for establishing an error of law on this basis is stringent, citing Mr. Justice Hood's reformulation of the third and fourth *Gemex* factors in Delsom Estate Ltd. v. British Columbia (Assessor of Area No. 11) – Richmond/Delta, [2000] B.C.J. No. 331 (S.C.) at para. 18, namely:
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> > …that there is no evidence before the Board which supports the finding made, in the sense that it is inconsistent with and contradictory to the evidence. In other words, the evidence does not provide any rational basis for the finding. It is perverse or inexplicable. Put still another way, in terms analogous to jury trials, the Appellant will succeed only if it establishes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have come to the determination, the emphasis being on the word "could"…

30. In this case, the fundamental complaint of the Appellant concerns the Delegate's finding that the Employee had been taking her vacation in the year following its having been earned. This is a "question of fact". The Appellant maintained that the Employee had been taking vacations during the year they were being earned and that, therefore, no outstanding vacation was owed at the time of the termination of employment.

31. In dealing with this basic conflict the Delegate heard the submission of the parties, evidence from accountants and specifically dealt with the issue of whether or not the Employee had altered any records to her benefit. Based upon the Determination itself it is clear that she considered all of these matters in coming to her conclusions. The Delegate heard evidence on the issue and acted on those facts upon a reasonable basis.

32. Both parties had every opportunity to present their case and to make submissions on both their own positions and that of the opposing party.

33. The Delegate had also considered the section of the *Act* dealing with the accrual of vacation and its payment (s. 57 and 58) together with the obligation of the Employer (i.e. the Appellant) to maintain appropriate payroll records (s. 28) including the dates vacation had been taken, amounts paid by the Employer and days of vacation owing.

34. The Delegate, having heard all of the evidence, concluded the factual issue in the Employee's favour.

35. Based upon the provisions of the *Act* and the authorities discussed earlier, I conclude that the Delegate's finding that vacation pay was due was a "finding of fact" and not a "finding of law". In my view the Appellant has not raised a valid reviewable error in law made by the Delegate as detailed in the *Gemex* case and as considered in following decisions.

36. Having found, as fact, on the evidence, that the Employee had been taking her vacation in the year following its having been earned, the Delegate then correctly applied the law (i.e. the *Act*) to that fact and calculated the amount due to the Employee.

37. I find no basis upon which the Delegate erred in law in so doing.

PRINCIPLES OF NATURAL JUSTICE

38. Basic principles of natural justice concern the procedural fairness of an adjudicative process. The parties are entitled to a neutral (i.e. unbiased) decision-maker who governs a process where the parties are provided an equal opportunity to make their case and respond to the opposite party. This includes the opportunity to challenge evidence of the other.

39. It is clear from the Determination that the Appellant raised its concerns about the truthfulness of the Employee before the Delegate in the following extract from her Decision:

> "Further, Lehn argues Yhalomi had not been honest with Mall Media aboiut when she took vacation. He alleges Yhalomi altered documents she sent to Lehn detailing her vacation days taken between 2001 and 2003. Lehn provided evidence illustrating the difference between documents he received from Yhalomi in 2003 and documents Yhalomi sent to Michael Cahil in November 2005 when she asked Mall Media for vacation pay. Lehn argued that whether or not Yhalomi's correction of her vacation schedule was legitimate, her attempt to submit an altered document as an original was fraudulent, and therefore Yhalomi is not an honest witness who can be believed."

40. I conclude that the Appellant was given full opportunity to present its case to the Delegate and to make submissions on the question of the weight to be given to the veracity of any documentation that was presented by the Employee. The Delegate had the benefit of those submissions and the broader testimony of the witnesses. In the result the Delegate concluded:

> "Therefore, I find, on a balance of probabilities, I accept Yhalomi's records of her vacation time as more reliable than Mall Media's records".

41. The Delegate saw and heard the parties and had the opportunity to consider their testimony on the disputed documents and otherwise. Having considered the Appellant's allegations, the Delegate was able to conclude that she should accept the Employee's employment records over those of the Appellant. It must be recalled that the initial onus is placed upon the employer under section 28 of the *Act* to keep accurate records with regard to vacation time. In this case, the Delegate had found that this Appellant had failed to meet that onus.

42. It is just this sort of consideration and adjudication of evidence and law that the *Act* entrusts to the Delegate of the Director. In fulfilling her duties under the *Act* in this case I cannot see that the Delegate committed any breach of the principles of natural justice or based her Determination upon an error of law.

ORDER

43. Given the above rulings and, pursuant to section 115 of the *Act*, I conclude that the grounds for appeal have not been met by the Appellant and I order that the Determination dated December 7, 2006, be confirmed.

Philip J. MacAulay
Member
Employment Standards Tribunal