Employment Standards TRIBUNAL

An appeal

- by -

Negar Ziaie Ardakani
("Ms. Ardakani")

- 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.: 2014A/10

DATE OF DECISION: April 1, 2014

DECISION

SUBMISSIONS

Negar Ziaie Ardakani — on her own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*Act*") Negar Ziaie Ardakani ("Ms. Ardakani") has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the "Director") on December 18, 2013 (the "Determination").

2. The Determination concluded that Ms. Ardakani's employer, Aurora Instruments Ltd. ("Aurora"), did not contravene the *Act*. Accordingly, the Director would take no further action with respect to Ms. Ardakani's complaint.

3. Ms. Ardakani has appealed the Determination on the grounds that the Director erred in law in making the Determination and that evidence has become available that was not available at the time the Determination was being made. Ms. Ardakani is seeking the Employment Standards Tribunal (the "Tribunal") to change or vary the Determination. Based on her submissions, it would appear she wants the Tribunal to make a finding that her employment was terminated by Aurora, and she is therefore entitled to compensation for length of service.

4. The Tribunal has decided this appeal is an appropriate case for consideration under section 114 of the *Act*. Therefore, at this stage, I will assess the appeal based solely on my review of the Reasons for the Determination (the " Reasons"), the written submissions of Ms. Ardakani and the "record" that was before the delegate when the Determination was being made. If I am satisfied that the appeal, or part of it, has some presumptive merit and should not be dismissed under section 114 of the *Act*, Aurora will and the Director may be invited to file further submissions. Conversely, if I find the appeal is not meritorious, it will be dismissed under section 114(1) of the *Act*.

ISSUES

5. The issues in this appeal are twofold, namely:

   (i) Did the Director err in law in making the Determination?

   (ii) Is there new evidence available that was not available at the time the Determination was made and, if so, is this new evidence sufficient to justify the Tribunal to change or vary the Determination under appeal?

THE FACTS

6. Aurora operates a business designing, developing and distributing bio-medical laboratory equipment and employed Ms. Ardakani from January 23, 2005, to February 15, 2013, initially as a Territory Manager.

7. On April 18, 2013, Ms. Ardakani filed her complaint with the Employment Standards Branch (the "Branch") stating that Aurora constructively dismissed her from her employment by changing the terms and conditions of her employment, and failed to pay her compensation for length of service (the "Complaint").

8. On October 10, 2013, a delegate of the Director held a hearing into the Complaint (the "Hearing"). Ms. Ardakani attended at the Hearing with her husband, Keyvan Mahlujy ("Mr. Mahlujy"), as her witness. Aurora was represented by its Owner, Dong Liang ("Mr. Liang"), and Aurora's Manager, Fay Jang ("Ms. Jang").

9. In the Reasons, the delegate summarizes the evidence of both parties and also sets out what he considers to be undisputed facts. I will briefly summarize the evidence in the Reasons below.

10. In the Reasons, the delegate notes that Ms. Ardakani testified that she commenced employment with Aurora as an Account Manager in January 2005, and, during her employment with Aurora, her Employment Contract was renewed on a yearly basis. At some point in 2011, Ms. Ardakani was away on her first maternity leave and returned in September 2011 to find that Aurora had re-assigned her previous territories to other staff and she was assigned the Western Europe territory which, she contended, typically had the lowest sales history.

11. Thereafter, on September 25, 2012, Ms. Ardakani testified that she received a new letter of employment from Aurora providing her two weeks' notice of her renewed contract of employment, effective October 9, 2012, which would see her salary reduced by almost 30%. She subsequently met with the Owner of Aurora, Mr. Liang, on October 2, 2012, to negotiate with him the new contract, and on October 5, 2012, received a revised employment agreement which cited her poor sales performance over the past 18 months as the reason for her salary reduction. The terms of the revised employment agreement were to be effective October 19, 2012, to March 31, 2013, but Ms. Ardakani objected to Aurora's characterization of her performance as poor and explained there were certain external factors, including her maternity leave and the downturn in the economy, that impacted her sales performance. She outlined these concerns in her letter of October 10, 2012, to Aurora, and submitted her resignation and sought six (6) weeks' compensation for length of service, and did not report to work on October 11, 2012.

12. Aurora, by email on October 12, 2012, requested Ms. Ardakani to return to work by October 18, 2012, and maintained that her employment had not been terminated. In response, Ms. Ardakani, by way of an email dated October 12, 2012, set out conditions she deemed necessary in order for her to return to work. Ms. Ardakani subsequently returned to work on October 18, 2012, and accepted a revised employment contract with Aurora, effective October 19, 2012, until March 31, 2013. The revised employment agreement contained certain changes and excluded any references to Ms. Ardakani's past performance. Ms. Ardakani agreed to these terms of employment, although she testified that Aurora had presented them as temporary until the company's financial situation improved.

13. Subsequently, on January 18, 2013, Ms. Ardakani sent an email to Aurora advising that she was pregnant with an expected due date in June of 2013. Approximately, one (1) month later, on February 15, 2013, Aurora provided Ms. Ardakani with a letter of contract renewal, as her existing contract was scheduled to end on March 31, 2013, in approximately six (6) weeks' time. The letter of contract renewal delineated a reduced basic salary for Ms. Ardakani and a new sales bonus structure, both of which would take effect on April 1, 2013, until March 31, 2014. Ms. Ardakani did not care for the change, particularly since she was leaving for her maternity leave in June 2013, and thought she only had two (2) months to achieve sales volumes required to earn the proposed bonus in the new contract offer. I note that Ms. Ardakani taped her conversation with Mr. Liang, which she adduced to the delegate at the Hearing in the form of a transcript, as well as a DVD, and the delegate reviewed the transcript, as have I in this appeal. In the meeting with Mr. Liang, Ms. Ardakani did not manage to get the concessions she was seeking from Aurora.

14. I note that on behalf of Aurora, Mr. Liang testified that the letter of February 15, 2013, was open for negotiation and that it represented Aurora's opening position with respect to Ms. Ardakani's employment

contract. He testified that the letter did not constitute Aurora's final offer, but that the opportunity to engage in continued negotiations with Ms. Ardakani was compromised and negotiations were put in abeyance on February 18, 2013, when Ms. Ardakani advised that she was going on medical leave.

15. Mr. Liang also testified that the terms of the new contract did not reduce Ms. Ardakani's income, although it changed the salary structure. In his view, the changed salary structure for the new term had the potential for Ms. Ardakani to earn more money through increased bonuses that were tied to specific sales performance targets, and that this change to the salary structure would serve to benefit both Aurora and those employees who were high performers, and Ms. Ardakani was in that group.

16. After Ms. Ardakani informed Aurora that she was on medical leave on February 18, 2013, she wrote to Aurora on April 1, 2013, to advise that she considered her employment terminated.

17. The delegate considered the evidence of both parties, including their witnesses, which I have reviewed, although not delineated in any detail here, and set out three (3) questions that he felt he was required to consider and answer in the Reasons, namely:

> (i) Was there a substantial alteration to the terms and conditions of Ms. [Ardakani's] employment and, if so, did it amount to a termination?
>
> (ii) Was adequate notice provided pursuant to section 63 of the Act?
>
> (iii) What effect, if any, did Ms. [Ardakani's] medical leave and subsequent pregnancy/parental leave have on the contract renewal letter?

18. With respect to the first question, the delegate, in concluding that Aurora did not make a substantial alteration to the terms and conditions of Ms. Ardakani's employment and therefore did not terminate her employment, reasoned as follows:

> Ms. [Ardakani's] primary objection to the contract was that she would have only two months before her pregnancy/parental leave commenced in order to generate sales. As such she likely would not reach the annual sales volume required to earn any commensurate sales bonuses. She also testified that she advised Mr. Liang that had it not been for her upcoming maternity leave she would have signed the new employment contract. Ms. [Ardakani] presented no evidence or testimony that Aurora had made any changes to her salary prior to her medical leave. Ms. [Ardakani] also testified that Aurora's actions negatively impacted her health and presented complications for her pregnancy.
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> Aurora argued that the proposed changes to Ms. [Ardakani's] employment contract offered her the potential to earn even more salary through the new sales bonus structure. Aurora further argued that the letter of February 15, 2013, represented the employer's opening position in negotiations with Ms. [Ardakani]. Aurora pointed to the parties [*sic*] on-going discussions regarding the prior contract as evidence of past practice between the parties. Finally, Aurora maintained that when Ms. [Ardakani's] medical leave commenced on February 18, 2013, any negotiations were in abeyance pending Ms. [Ardakani's] return to work and they re-iterated several times that Ms. [Ardakani] remains an employee of Aurora.
>
> One of the most fundamental components of an employment contract is the wage rate or compensation provided to an employee for the work they perform. Any change to an employee's rate of pay that has an adverse impact on an employee may be sufficient to make a finding of a substantial change to a condition of employment. However, there must be an adverse impact to the employee's employment situation. The adverse impact may be in the form of a reduction in salary, a demotion, a change in job responsibilities or reduced hours of work.

> In addition an employee cannot claim that the terms and conditions of employment have been changed until it has actually been finalized and reduced by the employer. A resignation before the employer has implemented the changes would be premature. Typically, an employee will attempt to negotiate the terms with their employer prior to any changes being implemented.
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> At the time Ms. [Ardakani] began her medical leave on February 18, 2013, she was working under the terms and conditions of the contract she had accepted on October 19, 2012. Aurora had not implemented any of the proposed changes to Ms. [Ardakani's] salary structure as of February 18, 2013. Although Ms. [Ardakani] testified that Aurora's actions had an adverse effect on her health she did not present any evidence that her employment situation would be negatively affected. Therefore, based on the evidence before me, I have determined that no terms of the proposed contract were applied to Ms. [Ardakani's] employment and, to date, there has been no substantial alteration to the terms and conditions of her employment.
>
> Furthermore, the October 19, 2012, contract clearly stipulated that Ms. [Ardakani's] new contract would be negotiated prior to April 1, 2014. The use of the term 'negotiated' implies that the parties would have the opportunity to discuss the proposed terms and to present options for changes. I find based Ms. [Ardakani's] [*sic*] testimony and evidence that she had engaged in negotiations with Aurora in the past, specifically regarding the terms of her October 19, 2012 contract. Ms. [Ardakani] initially advised Aurora that she considered her position terminated after which she proceeded to exchange emails with Aurora in an effort to salvage the employment relationship. The parties eventually reached agreed upon terms for Ms. [Ardakani's] continued employment.
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> Aside from the very brief meeting between Ms. [Ardakani] and Mr. Liang on February 15, 2013, I find that negotiations between the parties have been suspended due to Ms. [Ardakani's] pregnancy/parental leave. Should Ms. [Ardakani] return to work on June 13, 2014, she and Aurora may resume negotiations for the terms of her future employment contract.
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> For these reasons, I find that Aurora did not terminate Ms. [Ardakani's] employment.

19. With respect to the second question, the delegate submitted that it was not necessary for him to consider whether adequate notice was provided in light of his conclusion on the first question.

20. With respect to the final question, the delegate considered the evidence of the medical leave and subsequent pregnancy leave of Ms. Ardakani and, in concluding that Ms. Ardakani was still an employee of Aurora and currently on pregnancy/parental leave, reasoned as follows:

> Ms. [Ardakani] testified that following the meeting with Mr. Liang on February 15, 2013, she was primarily concerned with her health condition and keeping her pregnancy free from complications. She stated that she did not engage in any further discussions with Aurora and that she did not give any further consideration to her employment status with Aurora. Ms. [Ardakani] stated she considered her employment to be in 'limbo'. Ms. [Ardakani] also testified that on March 5, 2013 Aurora deactivated her email account and she could no longer communicate with customers.
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> Aurora's position was that the notice provided to Ms. [Ardakani] on February 15, 2013, was interrupted by her medical leave that began on February 18, 2013. Aurora maintained that the notice period remains interrupted until such time Ms. [Ardakani] returns to Aurora as she is still an employee.
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> Section 67 of the Act sets out the situations in which a notice of termination provided by an employer has no effect. Subsection 1(a) states that written working notice has no effect if it is given while an employee is on '*…annual vacation, leave, temporary layoff, strike or lockout or is unavailable for work due to a strike or lockout or medical reasons'*. Subsection 1(b) states that written working notice has no effect if the employee continues to work past the end of the notice period.
>
> The Act is intended to provide for the basic minimum standards for an employee and to protect their interests from the actions of an employer over which an employee typically has no control. Section 67

> prevents an employer from giving any employee notice while on a leave described in subsection 1(a) and should an employer fail to comply they must pay compensation for length of service upon termination of an employee. It logically and consistently follows that if, after written notice is given to any employee, the employee commences a leave described in subsection 1(a) the notice period is suspended and would not begin again until the employee returned from the leave.
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> In the circumstances of this case I have that Ms. [Ardakani] did not commence her medical leave until February 18, 2013, three days after receiving the renewal contract notice from Aurora. Neither Ms. [Ardakani] nor Aurora has engaged in any communications or negotiations since her leave began on February 18, 2013. Aurora did not present any evidence in relation to the de-activation of Ms. [Ardakani's] email account; however, I can reasonably infer that when an employee is on leave an employer would take any necessary and reasonable steps to ensure that an employee is not performing work while on leave. I would consider de-activating an employee's email account a reasonable action taken by Aurora.
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> Based on consideration of all the evidence I find that Ms. [Ardakani] is still an employee of Aurora who is currently on pregnancy/parental leave. Until such time as Ms. [Ardakani] returns to Aurora from her leave and the parties conclude their negotiations I cannot make a finding that Ms. [Ardakani] has been dismissed from her employment.

ARGUMENT AND ANALYSIS

21. Section 112 of the *Act* describes the Tribunal's jurisdiction to consider appeals of the Director's determinations:

> 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:
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> (a) the Director erred in law;
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> (b) the Director failed to observe the principles of natural justice in making the determination;
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> (c) evidence has become available that was not available at the time the determination was being made.

22. In this case, Ms. Ardakani has appealed on the basis of the "error of law" and "new evidence" grounds of appeal. I will address each ground appeal below.

(i) *Error of Law*

23. In *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1988] B.C.J. No. 2275, the British Columbia Court of Appeal delineated the following elements as constituting an error of law:

> (i) a misinterpretation or misapplication of a section of the Act;
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> (ii) a misapplication of an applicable principle of general law;
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> (iii) acting without any evidence;
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> (iv) acting on a view of the facts which could not reasonably be entertained; and
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> (v) exercising discretion in a fashion that is wrong in principle.

24. In her submissions on appeal, Ms. Ardakani has submitted the CD recording of her meeting with Mr. Liang of February 15, 2013, as well as a transcript of that recording. I deal with this evidence more particularly under the heading "new evidence" below.

25. I have also carefully reviewed the 3.5 pages of written submissions of Ms. Ardakani, with the first page simply providing an overview of the facts she presented at the Hearing, and the balance of the submissions containing quotes from the Reasons, with highlighting of passages in the quotes, and providing further explanations of her evidence or disputing the delegate's findings of fact.

26. The Tribunal has indicated, time and time again, that it does not have jurisdiction over questions of fact (see *Re Pro-Serve Investigations Ltd.*, BC EST # D059/05) unless, of course, the matter involves errors on findings of fact which may amount to an error of law. The Tribunal, in *Re Funk*, BC EST # D195/04), expounded on the latter point stating that the appellant would have to show that the fact-finder made a "palpable and overriding error" or that the finding of fact was "clearly wrong" to establish error of law.

27. In this case, it is clear to me from reading Ms. Ardakani's submissions that she is challenging the delegate's findings of fact. If the delegate's findings of fact are based on no evidence or on a view of the evidence that could not reasonably be entertained, then certainly an error of law may be made out. As the Tribunal stated in *Britco Structures Ltd.*, BC EST # D260/03, quoting from the decision of the British Columbia Supreme Court in *Delsom Estate Ltd. v. Assessor of Area 11 – Richmond/Delta*, [2000] B.C.J. No. 331, an error of law in these circumstances is only found where it is shown:

> …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 judiciously and properly instructed as to the relevant law, could have come to the determination, the emphasis being on the word 'could'…

28. Having said this, I note that the Tribunal is generally reluctant to substitute the delegate's findings of fact, even if it is inclined to reach a different conclusion on the evidence. Moreover, in this case, based on my review of the "record", the Reasons and the submissions of Ms. Ardakani, and having considered the relevant or applicable tests for finding an error of law delineated in *Gemex*, *supra*, or in the Tribunal's decisions in *Re Britco*, *supra*, or *Re Funk*, *supra*, I am not persuaded that the delegate made a palpable or overriding error or reached a clearly wrong conclusion of fact or acted without any evidence or on a view of the evidence that could not reasonably be entertained. In these circumstances, I find that Ms. Ardakani has failed to discharge the burden on her to establish that the delegate erred in law in making the Determination, and I dismiss this ground of appeal.

(ii) *New Evidence*

29. With respect to the new evidence ground of appeal, the governing test for allowing new evidence on appeal is delineated in *Re Merilus Technologies Inc.*, BC EST # D171/03. Based on this decision, Ms. Ardakani must satisfy four (4) conditions before the new evidence will be considered, namely:

> (a) The evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the determination being made;
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> (b) The evidence must be relevant to a material issue arising from the complaint;

(c) The evidence must be credible in the sense that it is reasonably capable of belief; and

(d) The evidence must have high potential probative value, in the sense that, if believed, it could on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

30. In her submissions on appeal, Ms. Ardakani has submitted the CD evidence of her meeting with Mr. Liang of February 15, 2013, as well as a transcript of that recording. This is evidence that existed prior to the Hearing and well in advance of the Complaint but she did not disclose it until her appeal. I do not find this evidence qualifies as "new evidence" as it fails the "new evidence" test in *Re Merilus Technologies*, *supra*, because it is evidence that could have, with the exercise of due diligence, been adduced by her prior to the Determination being made.

31. As for the balance of her submissions, I find Ms. Ardakani has largely re-submitted the evidence presented at the Hearing and added further explanations with a view to disputing the delegate's findings of fact in the Reasons. I do not consider this to constitute "new evidence" in the slightest. I do, however, find Ms. Ardakani's appeal amounts to a re-argument of her case, which is not permissible on appeal. An appeal is not a forum for the unsuccessful party to have a second chance to advance arguments already advanced in the investigation or hearing stages, and properly rejected in the Determination.

32. In these circumstances, I dismiss Ms. Ardakani's appeal.

ORDER

33. Pursuant to section 115 of the *Act*, I order the Determination, dated December 18, 2013, be confirmed.

Shafik Bhalloo
Member
Employment Standards Tribunal