Employment Standards TRIBUNAL

An appeal

- by -

Ancient Mariner Industries Ltd.
(the "Employer")

- 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: Robert E. Groves

FILE No.: 2014A/162

DATE OF DECISION: February 19, 2015

British Columbia

DECISION

SUBMISSIONS

Ken Meiklejohn on behalf of Ancient Mariner Industries Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), Ancient Mariner Industries Ltd. (the "Employer") has filed an appeal of a determination (the "Determination") issued by a delegate of the Director of Employment Standards (the "Delegate") on October 30, 2014.

2. The Delegate determined that the Employer had contravened sections 18, 58 and 63 of the *Act* and that it owed the complainant, Stephen Cochran (the "Complainant") wages and interest in the amount of $9,468.32.

3. The Delegate also imposed two administrative penalties of $500.00. The total found to be owed by the Employer was, therefore, $10,468.32.

4. I have before me the Delegate's Determination, the Reasons for the Determination, the Employer's submission on appeal, and the record the Director has delivered to the Tribunal pursuant to section 112(5) of the *Act*.

5. Submissions from the other parties to the appeal have not been requested as I am of the view that this is an appropriate case for consideration under section 114(1) of the *Act*. Pursuant to that section the Tribunal may dismiss all or part of an appeal if it determines, among other things, that the appeal has no reasonable prospect of success.

FACTS

6. The Employer operates a business selling signage and awnings. It employed the Complainant as a salesperson for a period of months in 2012.

7. The Employer terminated the Complainant's employment, allegedly for cause, in November 2012. The Complainant then filed a complaint under section 74 of the *Act* claiming that the Employer had failed to pay him base salary that was owed to him, as well as commissions and compensation for length of service.

8. The Delegate conducted a hearing of the complaint, attended by the Complainant and the Employer's principal, Kenneth Meiklejohn ("Meiklejohn"). Having considered the evidence offered by the parties, and the documents submitted by them, the Delegate determined that the Employer had failed to prove its allegation that the Complainant had given cause for the termination of his employment. The Delegate also accepted most of the Complainant's claim for wages.

9. The Employer's appeal relies on all three of the statutory grounds referred to in section 112(1) of the *Act*, which reads as follows:

> 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 being made

ISSUE

10. The issue before me at this stage of the proceeding is whether there is any reasonable prospect the appeal can succeed.

ANALYSIS

11. In my view, the Employer's submission on appeal has failed to demonstrate that there is any reasonable prospect it can succeed. Accordingly, it must be dismissed.

12. It is clear from the way that the Employer has framed the issues in its submission that it has misconstrued the purpose of an appeal under the *Act*. An appeal does not entail a reconsideration of the evidence presented by the parties to a delegate, in the hope that the Tribunal will reach different conclusions of fact from those which have been found to support a determination at first instance. This is so because the appellate jurisdiction of the Tribunal under section 112(1)(a) does not permit it to correct errors of fact. Instead, the Tribunal may only correct errors of law. An error of fact does not amount to an error of law unless the Tribunal concludes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have made the impugned finding of fact (see *Gemex Developments Corp. v. B.C. (Assessor)* (1998) 62 BCLR 3d 354; *Delsom Estates Ltd. v. British Columbia (Assessor of Area 11 – Richmond/Delta)* [2000] BCJ No.331).

13. The Employer's appeal submission is based almost entirely on the assertion that the Delegate made erroneous findings of fact. Indeed, on its Appeal Form, the Employer states, explicitly, that the Determination should be cancelled because "[t]he facts are completely wrong".

14. The Employer states that the Delegate's Reasons refer to the Employer's enterprise as a "wholesale business". The Employer says this is incorrect, because it is, in fact, a "retail" business. Even if I were to find, which I decline to do, that the Delegate's characterization was mistaken, the Employer nowhere provides an explanation why the proper description of the precise nature of the business is material to the issues the Delegate was required to consider. I am not persuaded that it is.

15. The Employer argues that since the Complainant's "Employment Agreement" signed by him on May 13, 2012, identifies him as being hired as "President" he became "a company officer and equally responsible for any wages that have to be paid." Again, the Employer fails to close the circle on these statements by explaining why they should lead to my granting it relief on this appeal. Even if the Complainant was an officer of the company, in addition to being an employee, that fact would not, of necessity, preclude the Complainant from claiming wages under the *Act* (see *Re McPhee*, BC EST # D183/97).

16. I note that the Delegate obtained a corporate search for the Employer which showed Meiklejohn as an officer and director, but not the Complainant.

17. The "Employment Agreement" confirms the true nature of the Complainant's legal relationship with the Employer. It states explicitly, in clause 6, that the Complainant's status is that of an "employee". Further, in clause 5 of the Agreement, which describes the Complainant's duties, he acknowledges that he is not authorized to act as the Employer's agent, to execute contracts on its behalf, or to obligate it in any way.

Moreover, clause 3 stipulates that no sale for which the Complainant could expect a commission would be deemed complete unless approved by a director of the Employer. These restrictions are entirely at odds with the Employer's assertion that the Complainant was an officer of the company, or that he exercised any *de facto* controlling influence over the Employer.

18. There does not appear to have been any dispute before the Delegate that the Complainant was employed as a salesperson by the Employer. Whether the Complainant was referred to as "President" in that capacity appears to me to be irrelevant for the purposes of deciding the Employer's liability to him for wages under the *Act*.

19. The Employer challenges the Delegate's finding that the Complainant's taking vacation in November 2012 without express permission provided cause for discharge. The Employer does not dispute the Delegate's finding that the Complainant informed Meiklejohn in advance that he intended to take the vacation. It also takes no issue with the Delegate's finding that it did not withhold consent for the vacation. Instead, it asserts that Meiklejohn was "not very happy about it" and "there was nothing [he] could do about it." Finally, the Employer states in its submission that it was only after the Complainant went on vacation and Meiklejohn took over his projects that it became apparent the Complainant had to be fired, because of issues relating to "poor pricing, no quality control and theft." In these circumstances, I am not persuaded that it was either perverse or inexplicable for the Delegate to conclude that the Complainant gave no cause for discharge because he went on vacation in November 2012.

20. The Employer takes issue with the Delegate's findings of fact regarding a $900.00 cash advance on a sale the Complainant received from a customer, and which the Employer alleged the Complainant appropriated for himself. The Delegate accepted the Complainant's evidence that he and Meiklejohn discussed the $900.00 and it was decided that the Complainant should retain it to pay for "expenses". Other evidence established that Meiklejohn did provide the Complainant with cash from time to time for this purpose. In the absence of convincing proof that the Complainant kept the $900.00 for his own use, and did not employ it to pay legitimate expenses associated with the business, the Delegate declined to find that the Employer had made out a case for cause on the basis of theft.

21. In its submission on appeal, the Employer takes direct issue with the Delegate's findings of fact on this point, and repeats its allegation that the Complainant intended to steal the $900.00. As I have said, it is not the purpose of a section 112 appeal to review a delegate's findings of fact, absent exceptional circumstances. No such circumstances are evident here. The Delegate conducted a hearing, at which the Complainant and Meiklejohn gave evidence, and were cross-examined. The Delegate was in the best position to determine which version of events was more likely to be correct, and he accepted the version offered by the Complainant. In my opinion, it was not unreasonable for her to do so. The account of the Complainant was plausible, and it was supported by evidence confirming his receipt of cash from Meiklejohn in the past, for expenses. I see no reason to disturb the Delegate's findings on this point.

22. A further ground for appeal asserted by the Employer is that the Delegate erred in finding that the Complainant was owed wages in the form of commissions because some of the projects for which the Complainant claimed them were either completed after he was terminated, or were not completed at all. The Employer submits that the Complainant should not be entitled to any commission amounts payable after he left because it was his responsibility to see that his sales projects were completed and the company was paid. The Employer submits that the Complainant did not do this.

23. In her Reasons, the Delegate noted that the Employer had provided no evidence apart from Meiklejohn's oral statements to the effect that some of the sales contracts for which the Complainant claimed commission had

been cancelled, remained unpaid, were not completed to the satisfaction of the clients, or were completed after the Complainant's employment was terminated. Having regard to the statutory requirements to keep records that are imposed on employers in the *Act*, the Delegate was of the opinion that Meiklejohn's bald statements were insufficient to overcome the Complainant's evidence that commissions were payable, because the relevant contracts were completed before his employment ended.

24. On appeal, the Employer's submission refers to "[s]ales agreements, invoices and back up data" which it has included and which, I infer, is meant to reinforce its position that the Complainant is not entitled to some, or all, of the commissions he has claimed.

25. The documents the Employer has submitted number nearly 260 pages. Nowhere in its submission on appeal does the Employer provide any specific guidance as to what the various documents are meant to demonstrate, and why they are sufficient to persuade me that the Delegate made an error that is reviewable under section 112. Instead, I am left to sift through the documents on my own and perhaps draw inferences that the Employer hopes will support its position in this matter.

26. With respect, such an approach is at best unhelpful. It is not for the Tribunal to fashion an argument for a party on appeal, or to intuit the direction in which the party wishes the Tribunal to be led. Rather, it is the obligation of a party on appeal to present its own argument and to demonstrate clearly the reasons why a determination cannot be permitted to stand.

27. Many of the documents appended to the Employer's appeal submission appear to be duplicates of documents that the Employer relied on in the proceedings before the Delegate, and which are contained in the record. There are others, however, which were clearly within the control of the Employer, and therefore available to it, at the time the Delegate conducted her hearing, but which the Employer did not produce to her, and which it now wishes the Tribunal to consider as "new" evidence in its appeal.

28. Several of these "new" documents appear to relate to the Employer's stated position before the Delegate that the Complainant should not receive commissions in respect of sales that were either cancelled or remained uncompleted after his employment was terminated. I decline to make any comment regarding the probative value of the documents the Employer now wishes me to consider, because they are untested, but it seems clear the Employer believes they are important enough that they be drawn to my attention on this appeal.

29. Why, then, did the Employer not produce them to the Delegate? The Employer's appeal submission provides no explanation. The manner in which the Employer decided to present its case to the Delegate may do so, however. As I noted earlier, the Employer provided no evidence beyond Meiklejohn's oral statements that contracts for which the Complainant claimed commissions were either cancelled, remained unpaid, or were completed after the Complainant's departure. The Employer's position at the hearing was that the Complainant had the burden of proving his entitlement to commissions by providing evidence that product was installed to the satisfaction of the clients and that proper payment for that product had been made. I infer from this that the Employer made a conscious decision not to tender to the Delegate the evidence it now wishes me to consider on appeal because it thought it was unnecessary to do so.

30. The Tribunal's power to allow an appeal based on new evidence under section 112(1)(c) incorporates an obligation to exercise a discretion. The discretion must be exercised with caution. A rationale for this approach is embedded in section 2(d) of the *Act*, which stipulates that it is a purpose of the legislation to provide fair and efficient procedures for resolving disputes over its application and interpretation. It would discourage the vindication of that purpose if an appellant were to be permitted, as a matter of routine, to seek out other evidence to bolster a case which failed to persuade at first instance, particularly if the evidence was

available to the party at the initial hearing and the party elected not to produce it, as appears to have occurred here. Rather, proceedings under the *Act* are likely to be more fair and efficient if parties are encouraged to take care to seek out all relevant information during the investigation phase, and present it to a delegate conducting a hearing, so that it may be considered by the person charged with the duty to find facts *before* a determination is issued.

31. In the circumstances, I am not persuaded that the Employer has presented a case on appeal demonstrating that relief should be granted pursuant to subsection 112(1)(c). Evidence relating to the completion of contracts for which the Complainant was seeking payment of commissions should have been presented by the Employer to the Delegate, and not for the first time on appeal.

32. There is one final aspect of the Employer's appeal submission that I must address. In it, the Employer's representative, Meiklejohn, identifies the Delegate by name and states that she "has committed fraud and perjury in her determination..." because she "completely ignored key evidence and facts."

33. I accept that Meiklejohn is a lay person. He may, therefore, have been unaware of the significance attributed to words like "fraud" and "perjury" for the purposes of the law generally, but even more importantly when they are employed to describe the conduct of adjudicators in quasi-judicial proceedings such as those mandated by the *Act*. Suffice to say, I doubt there could be a more serious outcome for a statutory officer such as the Delegate to be found to have committed fraud, let alone perjury, in the performance of her duties. It is for this reason that it is viewed to be entirely reprehensible for a person to even suggest such forms of misconduct without convincing proof.

34. Here, there is nothing in the record that could lead even the most fastidious observer to suspect there might be a basis for such outrageous allegations. Put bluntly, the Employer's appeal submission should never have been framed so as to impugn the conduct of the Delegate in this way.

ORDER

35. Pursuant to section 115 of the *Act*, I order that the Determination dated October 30, 2014, be confirmed.

Robert E. Groves
Member
Employment Standards Tribunal