Employment Standards TRIBUNAL

An appeal

\- by -

Jeff Rolando

\- 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: Carol L. Roberts

FILE No.: 2011A/1

DATE OF DECISION: March 1, 2011

BRITISH COLUMBIA

DECISION

SUBMISSIONS

Jeff Rolando	on his own behalf
Tammy Saunderson	on her own behalf carrying on business as Simply Music
Robert Joyce	on behalf of the Director of Employment Standards

OVERVIEW

1. This decision arises out of an appeal by Jeff Rolando pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director of Employment Standards (the "Director") issued May 11, 2010. On September 14, 2010, Tribunal Member Yuki Matsuno issued a decision dismissing Mr. Rolando's appeal on all issues but for his claim for moving expenses. The Member concluded that the delegate erred in law by misinterpreting and misapplying section 21(2) of the *Act* and referred the matter back for further investigation on this aspect of the complaint. (BC EST # D094/10)

2. On December 29, 2010, the delegate issued a letter reporting back on the outcome of his supplementary investigation. The delegate's conclusion was that Mr. Rolando's former employer, Simply Music, was not obliged to compensate Mr. Rolando for his moving expenses.

3. Mr. Rolando disagrees with the delegate's conclusions.

4. Section 36 of the *Administrative Tribunals Act* ("*ATA*"), which is incorporated into the *Employment Standards Act* (s. 103), and Rule 16 of the Tribunal's *Rules of Practice and Procedure* provide that the Tribunal may hold any combination of written, electronic and oral hearings. (see also *D. Hall & Associates v. Director of Employment Standards et al.,* 2001 BCSC 575). This appeal is decided on the record and the submissions of the parties.

FACTS

5. Simply Music hired Mr. Rolando as a music instructor on September 4, 2009. Mr. Rolando was hired under a Labour Market Opinion issued by Service Canada and moved from the United States to Fort St. John as a temporary foreign worker (TFW). Simply Music terminated Mr. Rolando's employment on November 16, 2009.

6. Mr. Rolando alleged that Simply Music contravened the *Act* in failing to pay him moving expenses. The delegate found that because there was nothing in the *Act* that obligated an employer to pay moving expenses, any such obligation would have to be based in contract.

7. The delegate found that Simply Music made no representations to Mr. Rolando to pay his moving expenses. In his appeal, Mr. Rolando argued that the Employment Standards Branch's "Fact Sheet on Foreign Workers" (Fact Sheet) provides for the payment of moving costs to foreign workers. Member Matsuno noted that while the Fact Sheet was not law, the delegate was obliged to consider the provisions of section 21 of the *Act* when considering a claim of compensation for moving costs. The Member referred to the Tribunal's decisions in *Re Park Hotel* (BC EST # D257/99) and *Whitehall Bureau of Canada Limited* (BC EST # RD075/10) and found that the delegate had not turned his mind to the application of section 21 in

considering Mr. Rolando's complaint. The Member was unable to determine whether or not the delegate had properly considered the question of whether Simply Music had made Mr. Rolando responsible for the employer's business costs. She concluded that the delegate

> considered the issue very narrowly by characterizing the employer's obligation to pay for the transportation of a foreign worker to Canada as being engaged only where there is a clear contractual obligation for the employer to pay for that expense. Based on that narrow and incomplete view of section 21(2), the Delegate found that since there was no evidence before him (presumably in the form of a clear contractual obligation, though this is not made clear) to show that the Employer was obligated to pay for Mr. Rolando's moving expenses, Mr. Rolando's complaint on this point should be dismissed.

8. The Member went on to find that

> there is nothing in the *Act* and section 21(2) that limits an Employer's obligation to pay for a business cost to those cases where the Employer's obligation is expressed in a clear contractual term. In some cases, no contractual terms exist, and the determination is made on the basis of other evidence. In one particular recent case, a provision in the employment contract provided for repayment of travel costs to the employee, who were foreign workers, after 24 months; however, the Director in that case found that the travel costs were a business cost within the meaning of section 21(2) solely on the basis of the requirements of the statute and independent of any contractual obligation. The Director's conclusion was confirmed by the Tribunal: *Glacier Park Lodge* (BC EST # D059/09, reconsideration application on this point declined, BC EST # D094/09).
>
> As a consequence, I find that the Delegate misinterpreted and misapplied section 21(2)…

The Referral Back

9. Following the referral back decision, the delegate invited Simply Music and Mr. Rolando for further information and evidence regarding this issue. In a letter dated September 29, 2010, the delegate advised Mr. Rolando of the continued investigation and requested that Mr. Rolando provide him with any evidence of a discussion regarding his moving expenses and any receipts for his moving costs. Mr. Rolando did not respond to the delegate's letter.

10. The delegate determined that Mr. Rolando's claim was based solely on the Branch's Fact Sheet, which states that an employer cannot require an employee to pay any portion of a business cost, including the costs of bringing a foreign worker to Canada. The delegate noted that section 21(2) of the *Act* prohibited an employer from requiring an employee to pay any of an employer's business costs except as permitted by the regulations.

11. The delegate referred to *Glacier Park Lodge* (GPL) and noted that the delegate in that case found that the employer was responsible for the airfare of the foreign worker, a conclusion upheld by the Tribunal. The delegate said "In GPL and in most TFW contracts this expense is included and stipulated in the contract." The delegate states that the delegate in GPL determined that the employees' travel costs were a cost of doing business when hiring TFW's. The delegate found that Simply Music was not seeking a TFW, noting that advertising was restricted to the Human Resource Canada posting site and locally. Mr. Rolando responded to that advertising and provided Simply Music with information on how to obtain the necessary documentation for him to work in Canada. The delegate found that Simply Music would not have hired Mr. Rolando if it had to pay his moving expenses.

12. The delegate found that the LMO issued by Service Canada allowing Simply Music to hire Mr. Rolando did not have any provisions regarding Mr. Rolando's travel costs.

13. The delegate determined that Mr. Rolando voluntarily chose to relocate to Canada and concluded, in the absence of any information to the contrary, that Simply Music was not obliged to pay Mr. Rolando's moving costs. The delegate also noted that Mr. Rolando took issue with several terms of his employment agreement which he communicated to Simply Music at the start of his employment. Moving expenses were not raised as one of those issues.

14. The delegate concluded that, as Mr. Rolando failed to respond to his further investigation and provided no receipts as requested, Mr. Rolando understood that he would be responsible for bearing his own relocation costs.

ARGUMENT

15. The essence of Mr. Rolando's submission is that Simply Music should be responsible for his moving costs because the permanent position he was offered, and accepted, was not permanent because the employment contract "contained illegal clauses". He suggests that he incurred his own moving costs based on the offer of the permanent position and that any costs he incurred would be, in effect, amortized over the period of his employment.

16. Attached to Mr. Rolando's submission are copies of receipts for costs incurred during his move to Canada. Mr. Rolando says that he did not provide this information by October 22, 2010, as requested by the delegate because his mother did not receive the delegate's correspondence until October 21, 2010. Mr. Rolando says that he did not have sufficient time to provide this information to the delegate.

17. The delegate argues that, having failed to participate in the referral back, the Tribunal should give no weight to Mr. Rolando' submissions and seeks to have the decision upheld.

18. Ms. Saunderson says that Mr. Rolando responded to an ad placed on the HRDC job bank and that she was not seeking a foreign worker. She said that Mr. Rolando contacted her and made inquiries into how to obtain an LMO. She further states that Mr. Rolando did not seek reimbursement of his moving expenses until after his employment was terminated.

ANALYSIS

19. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

- the director erred in law
- the director failed to observe the principles of natural justice in making the determination; or
- evidence has become available that was not available at the time the determination was being made

20. While it is clear that Mr. Rolando disagrees with the delegate's conclusion, a disagreement with the result, in and of itself, is not a ground of appeal. Mr. Rolando must demonstrate clear and convincing reasons why the Tribunal should interfere with the delegate's decision on one of the three stated grounds of appeal.

21. Mr. Rolando has not provided any basis for his disagreement with the delegate's decision. Having reviewed the record, I am unable to find that any of the grounds of appeal have been established.

22. I note at the outset that Member Matsuno found no basis for Mr. Rolando's contention that Simply Music misrepresented the terms of his contract. Therefore, there is no basis for Mr. Rolando's contention on the

issue of this referral back that Simply Music is obliged to pay his moving costs because the contract contained "illegal clauses".

23. There is also no evidence that Simply Music offered or promised to pay Mr. Rolando's moving costs, a conclusion that was upheld by Member Matsuno.

24. I find no error in the delegate's conclusion that Mr. Rolando's moving costs were not a cost of doing business under section 21.

25. In *Glacier Park Lodge,* the Tribunal upheld the delegate's conclusion that the employer was obliged to pay the employees' moving costs under section 21 of the *Act*. In that case, the employees entered into 24 month contracts following a positive Labour Market Opinion issued by Service Canada. The delegate found as a fact that the employer needed employees and was prepared to pay their travel costs in order to fill a need for employees. The Determination found that "paying the travel cost is part of the employer's cost of doing business when hiring temporary foreign workers".

26. Section 21 requires Mr. Rolando to establish that

(1) he incurred costs during the course of his employment;

(2) the costs incurred were required, as that term has been accepted and applied by the Tribunal (see for example, *Director of Employment Standards (Re Park Hotel and Hunter's Grill* BC EST # D257/99); and

(3) the costs were business costs.

27. There is no evidence that Mr. Rolando's moving costs were business costs. Unlike *Glacier Park Lodge*, there was no term in the LMO that obliged the employer to pay Mr. Rolando' moving costs. There is also no evidence that Simply Music was prepared to pay his moving costs. Mr. Rolando offered to relocate and the issue of his moving costs was not raised with the employer until after his employment was terminated.

28. I accept that Mr. Rolando did not receive the delegate's letter inviting him to participate in the referral back investigation until the day before the deadline. Nevertheless, there is no evidence Mr. Rolando made any attempt to contact the delegate to seek an extension of time in which to do so. Mr. Rolando could have emailed or telephoned the delegate to explain his situation and sought additional time in which to participate.

29. The Tribunal will not allow the appeal procedure to be used to make the case that should have and could have been given to the delegate in the investigative or hearing process. In *Tri-West Tractor Ltd.* (BC EST # D268/96), the Tribunal held that it would not allow appellants to "sit in the weeds", failing or refusing to cooperate with the delegate during an investigation and then later file an appeal of the Determination when they disagreed with it.

30. Nevertheless, having reviewed Mr. Rolando's late submissions, I conclude that it constitutes nothing more than a reiteration of his original complaint and submissions to Member Matsuno. The only "new" aspect of his submission is the copies of the moving receipts. Having found no basis to conclude that the delegate's decision is in error, I have not considered those receipts.

31. The appeal is dismissed.

ORDER

32. I Order, pursuant to Section 115 of the *Act*, that the Determination dated May 11, 2010, be confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal