

An appeal

- by -

Foothills Acoustics Ltd.
(“Foothills”)

- 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/28

DATE OF DECISION: April 29, 2014

DECISION

SUBMISSIONS

Janice Malo

on behalf of Foothills Acoustics Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Foothills Acoustics Ltd. (“Foothills”) has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the “Director”) on January 29, 2014 (the “Corporate Determination”).
2. The Corporate Determination concluded that Foothills contravened Part 3, section 18 (wages); Part 7, section 58 (vacation pay); and Part 8, section 63 (compensation for length of service) of the *Act* in respect of the employment of Betty Kam (“Ms. Kam”), and ordered Foothills to pay Ms. Kam wages and interest in the amount of \$18,815.35. The Determination also levied an administrative penalty in the amount of \$500.00 against Foothills for contravention of section 18 of the *Act*. The total amount of the Corporate Determination is \$19,315.35.
3. Foothills has appealed the Corporate Determination on the grounds that new evidence has become available that was not available at the time the Corporate Determination was made, and seeks the Employment Standards Tribunal (the “Tribunal”) to cancel the Corporate Determination. I note that identical appeal submissions have been advanced in relation to the appeal of the Corporate Determination and a S.96 determination (the S.96 Determination) made against Foothill’s sole director, Harvey Malo (“Mr. Malo”), that was issued by the Director at the same time as the Corporate Determination (collectively “The Determinations”). The appeal of the S.96 Determination is dealt with separately.
4. The Tribunal has decided this appeal is an appropriate case for consideration under section 114 of the *Act* and Rule 22 of the Tribunal’s *Rules of Practice and Procedure* (the “*Rules*”). At this stage, I am assessing this appeal based solely on the Reasons for the Corporate Determination (the “Reasons”), the appeal and written submissions of Foothills, and my review of the section 112(5) “record” that was before the Director when both Determinations were being made. If I am satisfied that Foothills’ appeal, or a part of it, has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, the Tribunal will invite Ms. Kam and the Director to file reply submissions on the appeal, and Foothills will be afforded an opportunity to make a final reply to those submissions, if any.

ISSUE

5. The issue in this appeal is whether there is any reasonable prospect the appeal will succeed.

BACKGROUND AND FACTS

6. Foothills operated a construction business and employed Ms. Kam as its Office Manager from June 20, 2001, to October 18, 2013.
7. On December 5, 2013, Ms. Kam filed a complaint under section 74 of the *Act*, alleging that Foothills contravened the *Act* by failing to pay her wages, vacation pay and compensation for length of service (the “Complaint”).

8. The delegate of the Director conducted an investigation of the Complaint, and contacted Foothills' Director, Mr. Malo. It appears from the "record" that Mr. Malo was assisted by his wife, Janice Malo ("Mrs. Malo"), in making submissions to the delegate during the investigation as he is seriously ill, battling brain cancer. Mrs. Malo, I note, has also made submissions on behalf of Foothills in the appeal of the Corporate Determination and on behalf of Mr. Malo in the appeal of the S. 96 Determination. Her submissions in both Determinations discuss Mr. Malo's medical condition in great detail, which I will briefly review in the subsequent sections below.

9. After reviewing the evidence and submissions of Foothills' and Ms. Kam's, the delegate concluded that Ms. Kam was owed regular wages, compensation for length of service, and vacation pay. With respect to Ms. Kam's claim for regular wages, the delegate noted:

The Employer has not disputed the Complainant is owed regular wages for her final week of work. The ROE indicates the Complainant did not receive her final week of wages in the gross amount of \$1,575.00 due to insufficient funds. Under the Act, the Employer's inability to pay wages does not release it from its obligation to pay those wages. Accordingly, I find the Complainant is owed \$1,575.00 gross wages for her final week of work of October 14-18, 2013.

10. With respect to Ms. Kam's claim for compensation for length of service, the delegate stated:

The Employer's evidence was that the Complainant "lost her employment as a direct result of the company's financial dilemma". The ROE supports this evidence as it notes the reason for issuing the ROE was "shortage of work/end of contract or season". While the Employer in its original submission said the Complainant was not fired, it is clear that her employment was terminated by the Employer due to the business no longer operating and not being able to pay employees. The Employer also argued that the Complainant took advantage of Mr. Malo's health condition by failing to ask for written notice of termination. However, section 63 of the Act places the onus of giving written notice on the employer. In this case, the Employer failed to give the Complainant written notice of termination or termination pay in lieu of notice. The Complainant being aware of the financial distress of the company does not release the Employer from its obligation to provide written notice of termination or payment in lieu of notice. It is clear the Complainant's employment was terminated due to the financial distress of the Employer and accordingly, the Complainant would be owed compensation for length of service. She was employed for over 12 years, therefore, she would be entitled to the maximum amount of 8 weeks of compensation pay allowed under the Act. Her weekly gross salary was \$1,575.00, therefore, I find the Employer owes the Complainant \$12,600.00.

11. With respect to Ms. Kam's claim for vacation pay, the delegate stated:

The Employer contends the Complainant took a number of days off such that she would not be entitled to any remaining vacation pay. The Complainant says she only took five vacation days in 2013. The Act requires that an employer keep records to show when an employee took vacation time off. While vacation pay may be paid through paying the employee a salary while on vacation, a salary amount cannot include vacation pay. This means that if an employer chooses to provide vacation pay through "salary continuance", then it must ensure that the employee takes off the amount of vacation time they are supposed to receive. The Complainant says she was entitled to four weeks of vacation. While the Act only requires an employer to provide three weeks of vacation after an employee has worked more than five years, the Director will enforce more than the minimum standards where additional vacation is part of the conditions of employment.

12. The delegate then determined Ms. Kam's vacation pay in the amount of \$4,480.88, based on consideration of her period of employment in 2013, the wages she earned during the said period, her regular salary rate and the time she took off for vacation.

13. The delegate also levied a penalty of \$500.00 under section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) for contravention by Foothills of section 18 of the *Act* for failing to pay Ms. Kam outstanding wages, including regular wages, compensation for length of service and vacation pay, within 48 hours of the termination of her employment.

SUBMISSIONS OF FOOTHILLS

14. Mrs. Malo submits medical letters from both Mr. Malo’s family physician, Dr. Kevin Oswald (“Dr. Oswald”), and his oncologist, Dr. Kong E. Khoo (“Dr. Khoo”). In her accompanying submissions, Mrs. Malo states:

I have submitted doctor information that clearly indicates Harvey was not in [sic] sound mind or body to know or write a termination letter for Betty Kam.

If you require more detailed information (before making a decision) from Dr [sic] Koo (Oncologist) through the months of June-October, an extension would be required to allow time for me to get that information.

After reviewing the evidence, noting dates of doctor visits, dates of hospitalizations and radiation treatments, its [sic] evident Harvey was in critical condition from the time of discovering the tumor in June of 2013 to present time, through the closer [sic] of his company, and incapable of fulfilling his duties as owner, director and manager of Foothills Acoustics.

15. Mrs. Malo then goes on to review in more detail Mr. Malo’s medical condition, explaining that the symptoms Mr. Malo suffered as a result of his brain tumor, including the radiation treatments he underwent, took “pieces of Harvey’s memory, changed his personality and has made it incapable of him ever working again never mind, run and manage a business [sic]”. She also goes on to explain that Mr. Malo has “become someone she does not recognize or know”. She states “[he] cannot drive a vehicle; he lost his writing skills, can’t keep thoughts straight, [has] difficulty with comprehension, has problems with balance and lots of confusion”. She then summarizes the medical treatments Mr. Malo has undergone since June 2013, and how his condition has deteriorated since that time.
16. I have reviewed the medical records, including letters, provided by Dr. Oswald and Dr. Khoo, and, while I do not find it necessary to review in great detail the explanations of both physicians regarding Mr. Malo’s condition here, both physicians are of the view that Mr. Malo is suffering from cancer to his brain; his condition is serious and deteriorating since the summer of 2013; and he is incapable of working.
17. I also note that Mrs. Malo, in her submissions, asks why Ms. Kam has proceeded with her Complaint, and what would have persuaded her to do this. Mrs. Malo goes on to suggest the possibility that Ms. Kam was influenced by the Employment Standards Branch to pursue a larger claim than what Ms. Kam may have initially contemplated pursuing. I do not find it necessary to set out in any more detail those submissions here because I find them irrelevant.
18. Mrs. Malo concludes her submissions by asking:
- Should a person be held responsible for something they had no control over? Taking advantage of Harvey’s condition, Betty knew exactly what she had to gain by not getting a termination letter. She was the *office manager*, had written termination letters in the past, she knows the rules. She could have just been thankful to Harvey for treating her like a queen the past nineteen years and moved on. I know it’s difficult to believe a person could take advantage of someone so ill for their own personal financial gain, but in the case 056-245, that’s exactly what has happened. It’s unethical what she has done, knowing the condition Harvey is in. It’s immoral.

But...unethical or not, it wouldn't be enough for the Board to reverse the determination which is why I've asked his doctors to confirm what I've tried to tell you in the past. His illness is severe, the damage is permanent and his cancer is terminal.

19. I also note Mrs. Malo has included with her written submissions a copy of the Certificate of Judgment for the sum of \$13,764.44 attached against Mr. Malo's property in Kelowna. This evidences that the delegate has commenced collections proceedings against Mr. Malo based on the S. 96 Determination.

ANALYSIS

20. As indicated previously, Foothills appeals the Corporate Determination on the basis that new evidence has become available that was not available at the time the Corporate Determination was made. The test this Tribunal is bound by in determining whether evidence qualifies as "new evidence" and will be considered on appeal, is delineated in *Re: Merilus Technologies Inc.*, BC EST # D171/03. In *Re Merilus Technologies*, the Tribunal set out the following four (4) conditions that must be met before new evidence will be considered:

- (i) 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;
- (ii) the evidence must be relevant to a material issue arising from the complaint;
- (iii) the evidence must be credible in the sense that it is reasonably capable of belief; and
- (iv) 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.

21. The four (4) criteria set out above are a conjunctive requirement and, therefore, the party requesting the Tribunal to admit "new" evidence has the onus to satisfy each of the criterion before the Tribunal will admit the evidence on appeal.

22. In this case, while I find absolutely credible and believable the impassioned submissions of Mrs. Malo describing Mr. Malo's most unfortunate medical condition and corroborating those submissions with medical records from Mr. Malo's physicians (which records did not exist at the time the Corporate Determination was made), I find that Mr. Malo's medical condition and related information submitted by Mrs. Malo does not satisfy all of the requirements of the new evidence test set out in *Re: Merilus Technologies*. More specifically, the evidence Mrs. Malo has proffered, including the physicians' letters, are not relevant to any of the material issues arising from the Complaint. Further, the evidence Mrs. Malo has produced does not have the required 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 in this case to a different conclusion on any of the material issues. Having said this, I do not minimize Mr. Malo's medical condition, which is very serious and most unfortunate, but his medical state does not mitigate in any way Foothills' obligations under the *Act*.

23. I also note that although Mrs. Malo has not raised the error of law and natural justice grounds of appeal under section 112(1)(a) and (b) of the *Act*, I have considered both those grounds of appeal and do not find any basis under those grounds of appeal either to dismiss the Corporate Determination. I find that Foothills has been afforded its natural justice rights; it had ample notice of the Complaint and participated in the delegate's investigation by making written submissions.

24. With respect to the error of law ground of appeal, I have found nothing in the Reasons that would lead me to conclude that any of the following instances of error of law described in the British Columbia Court of

Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 exist in this case:

1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment 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. adopting a method of assessment which is wrong in principle.
25. I also find that the conclusions reached by the delegate in the Corporate Determination, on all three (3) issues or claims advanced by Ms. Kam in her Complaint, are supported by the evidence that was before the delegate during the investigation of the Complaint. In these circumstances, I find that there is no reasonable prospect that Foothills' appeal will succeed and, therefore, it must be dismissed, and the Corporate Determination confirmed.

ORDER

26. Pursuant to section 115 of the *Act*, I order the Corporate Determination dated January 29, 2014, be confirmed.

Shafik Bhalloo
Member
Employment Standards Tribunal