

An appeal

- by -

Anthony Baena  
(“Mr. Baena”)

- 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:** David B. Stevenson

**FILE No.:** 2015A/138

**DATE OF DECISION:** February 25, 2016

## DECISION

### SUBMISSIONS

Derek G. Knoechel	counsel for Anthony Baena
David T. McDonald	counsel for Retirement Concepts Senior Services Ltd.
Sukh Kaila	on behalf of the Director of Employment Standards

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Anthony Baena (“Mr. Baena”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on September 15, 2015.
2. Mr. Baena had filed a complaint with the Director that Retirement Concepts Senior Services Ltd. (“Retirement Concepts”) had contravened the *Act* by failing to pay all wages owed to him when his employment ended. Specifically, Mr. Baena claimed unpaid bonuses and annual vacation pay.
3. The Determination found Mr. Baena’s former employer, Retirement Concepts had contravened Part 7, section 58 of the *Act* in respect of Mr. Baena’s employment and ordered Retirement Concepts to pay Mr. Baena wages and interest in the amount of \$14,242.95 and to pay an administrative penalty in the amount of \$500.00. The total amount of the Determination is \$14,742.95.
4. This appeal alleges the Director erred in law and failed to observe principles of natural justice in making the Determination.
5. The Tribunal has requested the Director provide the section 112(5) record (the “record”) and that has been done. A copy of the record has been delivered to Mr. Baena, through his legal counsel, and to Retirement Concepts. No party has indicated the record does not accurately reflect the material that was provided to the Director during the complaint process and, accordingly, the Tribunal accepts it as being complete.
6. I have before me the Appeal Form and the appeal submission, the record and submissions made on behalf of Retirement Concepts and the Director in response to the issues raised in the appeal.

### ISSUE

7. The issues in this appeal are whether Mr. Baena has shown the Director erred in law or failed to observe principles of natural justice in making the Determination.

### THE FACTS

8. Retirement Concepts operates a business providing long-term care and assisted living to seniors in this province, in Alberta and in the province of Quebec. Mr. Baena was employed by Retirement Concepts as Vice President of Operations from October 17, 2005 to June 7, 2013, reporting to the CEO of Retirement Concepts, Dr. Azim Jamal (“Dr. Jamal”). The Determination indicates his annual salary at the time his

employment with Retirement Concepts ended was \$215,000.00; he was also entitled to a performance based annual bonus, benefits and four weeks paid vacation, or 8% vacation pay.

9. Mr. Baena gave notice of resignation from Retirement Concepts in December 2012. It was agreed between he and Retirement Concepts that he would remain in his position until June 7, 2013, and assist in the transition process. Part of the agreement was that Mr. Baena would be eligible for up to \$80,000.00, comprising a bonus for 2012 and the balance of 2013 if he achieved specified criteria, identified in the Determination as “Bonus Criteria”, comprising 16 items that were set out in an e-mail exchange between the parties in January 2013, and reproduced in the Determination at page R3.
10. Mr. Baena was paid a bonus in the amount of \$42,500.00. He received no annual vacation pay on this bonus. In his complaint, Mr. Baena claimed he was entitled to an additional \$17,500.00 of bonus (which was amended by a claim of an additional \$5,000.00 during the complaint process), annual vacation pay on bonuses he had received and those which he was claiming and annual vacation pay on wages already paid.
11. The Director identified the issues raised in the complaint as whether Mr. Baena was owed any additional amount in respect of the Bonus Criteria and whether he was owed annual vacation pay on bonus amounts awarded and/or wages already paid.
12. The Director found Mr. Baena had not shown he was entitled to receive any further bonus amounts and that he was entitled to annual vacation pay on the bonus amounts he had received and some additional annual vacation pay on wages already paid. A substantial portion of the annual vacation pay claim was denied.
13. On the bonus claim, the Director first found the bonus met the definition of wages under the *Act* and a claim for the bonus was therefore enforceable by the Director. Notwithstanding, the Director found Retirement Concepts had considered each of the bonus criteria and had made a bonus award based on its assessment of Mr. Baena’s fulfilment of the tasks required within each of the criteria in the specified time frame. That finding is challenged as it relates to a potential bonus award based on Mr. Baena preparing transition material for and orienting his replacement.
14. The Director found Retirement Concepts had not paid annual vacation pay on bonus payments made in the recovery period established under section 80 of the *Act*. That finding is not challenged.
15. The Director found Retirement Concepts had met its statutory obligation to pay Mr. Baena annual vacation pay by continuing his salary during his periods of vacation and, in so doing, rejected the argument made on behalf of Mr. Baena that crediting a continuation of his salary during vacation as annual vacation pay would be contrary to section 21 of the *Act*. That finding is challenged.
16. The Director did find Mr. Baena had not, because of errors made in recording vacation time taken, received all annual vacation pay to which he was statutorily entitled. Some of Mr. Baena’s claim for vacation pay was based on his assertion that he “routinely” performed work during his vacation and that such work should be taken into account when considering the issue of annual vacation pay entitlement on regular wages. In respect of that argument, the Director considered all of the evidence relating to the claim for annual vacation pay, finding, among other things, that Retirement Concepts vacation bank records were the best evidence available of the vacation days taken by Mr. Baena. The Director, while apparently not entirely rejecting Mr. Baena’s claim of performing some work on vacation days, did not accept that the claim of work performed should be taken into account when deciding the vacation pay claim. The Director did not accept the evidence of Mr. Baena that he was “required” to be available for work during vacation and in fact worked up to six hours a day during his vacation. The Director accepted the evidence that Mr. Baena was given the

flexibility to manage his own work load, which included the freedom to leave the office early if he wished. In the circumstances of the employment relationship and on the evidence, the Director found it impossible to reconcile times where Mr. Baena may not have been in his office for the full day, but which was not recorded as time off, with hours he may have worked while on vacation, but which was not recorded as time worked.

## ARGUMENT

17. Counsel for Mr. Baena submits there are three reviewable errors in the Determination.
18. Mr. Baena submits the Director erred in law and failed to observe principles of natural justice in making the Determination in respect of his claim of entitlement to a bonus amount of \$5,000.00 for “creating a transition binder and conducting an orientation” for his successor. He submits the Director either failed to address this item or committed an error by finding Retirement Concepts had acted reasonably in not awarding it.
19. Mr. Baena also submits the Director erred in law and failed to observe principles of natural justice in making the Determination in respect by “crediting [Retirement Concepts] with ‘paid vacation time’”, submitting this decision was inconsistent with jurisprudence relating to employees performing work outside of their regular working hours and with the definition of work in the *Act*.
20. Finally, Mr. Baena submits the Director wrongly credited Retirement Concepts with having paid him annual vacation pay in an amount greater than what is supported by the employer’s records.
21. In response to the appeal generally, Retirement Concepts submits Mr. Baena has not met the burden on him of showing an error in the Determination. More particularly, Retirement Concepts submits the appeal does not point to any error of law or breach of natural justice, but only raises disagreements with the factual conclusions made by the Director that are not shown to be errors of law. Retirement Concepts submits the factual conclusions reached by the Director were based on a reasonable view of the evidence presented.
22. In response to the first argument made by Mr. Baena, Retirement Concepts submits he is wrong in saying the Director did not consider the “transition binder/package” bonus claim, indicating several areas of the Determination where this claim is referenced.
23. In response to the second argument, Retirement Concepts submits this argument also represents an attempt by Mr. Baena to have the Tribunal overturn findings of fact that were reasonably grounded in the evidence.
24. On the third argument, Retirement Concepts agrees there was a mathematical error made in determining vacation paid, but says it operated to Mr. Baena’s benefit.
25. The Director, in response, says the first argument made by Mr. Baena expresses disagreement with findings made in the Determination that were based on the evidence presented, noting the evidence in respect of the criterion upon which the bonus in the appeal is claimed (the “transition binder/package criterion”) was that the work related to this criterion was “less than satisfactory” and that Retirement Concepts had used its discretion to deny this part of the bonus.
26. The Director makes a similar submission in respect of the second appeal argument, saying the findings and calculations were based on the information provided, and accepted. In respect of the third argument, the Director accepts there was an error in the math that should result in a variance of the Determination to find Mr. Baena is owed an additional \$1,497.49 in annual vacation pay plus interest on that amount.

## ANALYSIS

27. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *Act*, which says:
- 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.*
28. A review of decisions of the Tribunal reveals certain principles applicable to appeals that have consistently been applied. The following principles bear on the analysis and result of this appeal.
29. An appeal is not simply another opportunity to argue the merits of a claim to another decision maker. An appeal is an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds. More particularly, a party alleging a failure to comply with principles of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.
30. The grounds of appeal listed above do not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the Director unless the Director's findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03.
31. The Tribunal has adopted the following definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):
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.
32. I accept the third argument, that there has been a mathematical error in calculating annual vacation pay entitlement. That conclusion requires a variance in the Determination.
33. On the first argument, I am persuaded there is a reviewable error in the Determination that warrants it being returned to the Director.
34. In respect of this argument, it is clear from the Determination that the Director was alert to the bonus claim for the transition binder/package. The position of the respective parties and their evidence is stated in a number of areas in the Determination and the record. However, an examination of the analysis and reasons for Determination do not support a finding the Director considered this part of Mr. Baena's claim.

35. The Determination states, in the “Background” information, which generally connotes information about which there is no dispute between the parties and which the Director accepts as fact:
- As part of these [December 2012] discussions, **it was agreed** on 10 January 2013 that Mr. Baena would be eligible for a bonus of up to \$80,000 (the “Bonus”) comprising a bonus for 2012 and the balance of 2103 if he achieved specific criteria agreed upon (the “Bonus Criteria”). The Bonus Criteria were set out in an email exchange between Dr. Jamal and Mr. Baena in January 2013. (emphasis added)
36. The email is set out in the Determination and contains 16 criteria that total a potential \$80,000.00 bonus award. It includes a potential bonus of \$5,000.00 for developing a “transition binder/package to ensure a smooth transition of the new VP”.
37. The record indicated the matter of the bonus, except for some inquiries from Mr. Baena that were deflected by Dr. Jamal to a later date, was not pursued any further until May 2013. Mr. Baena raised the matter in an email dated May 4, 2013, to which he attached a document described by him as “detailing each of the performance criteria and the agreed amounts attached to each”. He indicated in this document a bonus of \$60,000.00 should be awarded to him relative to fifteen items of bonus criteria. The document formed the basis for a discussion which took place in a meeting between Dr. Jamal and Mr. Baena at the end of May.
38. The bonus criterion of “transition binder/package” was not included in the discussion document and, notwithstanding some allusion in the material to a discussion of a bonus award for matters that included orientation of the incoming Vice President, the Director found it was never discussed at the meeting. Mr. Baena did give evidence that this bonus criterion had been omitted in error and that the amount of \$5,000.00 recorded at item 6 should have been marked N/A. I note this latter evidence is consistent with the January 2013 bonus criteria list.
39. By the end of May 2013, Retirement Concepts had reached the position that a proper valuation of the bonus entitlement for Mr. Baena was limited to \$42,500.00. This position was taken following the discussion between Mr. Baena and Dr. Jamal and was based on Retirement Concepts’ assessment of the discussion document prepared by Mr. Baena in early May, their review of the discussion document and the ensuing discussion in late May.
40. The Determination indicates Dr. Jamal gave evidence that the discussion in late May followed the discussion document “exactly” and, as the transition binder/package criterion was not included in that document, it was not discussed. The Determination also notes Dr. Jamal stating he had been informed – sometime after Mr. Baena had left – that the transition material was not particularly helpful to Mr. Baena’s replacement. This evidence is noted in the written argument filed with the Director on behalf of Retirement Concepts, which is included in the record, that also asserts Dr. Jamal stated did not award this bonus claim because Mr. Baena had not included it in the discussion document.
41. It is readily apparent from a review of the record and the respective positions taken by the parties relating to this bonus criterion that there were matters concerning this claim which required analysis.
42. There are several reasons for this conclusion. The first, and most obvious one, is that on a reasonable view of all the evidence, there was an agreement reached in January 2013 that is not reflected in the discussion document, with the only explanation for the difference in the two lists of bonus criteria being the explanation from Mr. Baena: that the transition binder/package criterion was omitted in error.
43. Second, the bonus criteria the parties accepted and agreed to in January 2013 and the discussion document contained the same potential bonus amount of \$80,000.00. The evidence was that the discussion document,

in addition to not including the transition binder/package criterion mistakenly showed a \$5,000.00 amount on a criterion the parties had agreed would attract no bonus award. Unless this evidence was rejected, and there is no indication anywhere in the Determination that it was, \$5,000.00 of potential bonus amount seems to have evaporated without any consideration or comment from the Director.

44. Third, while the Director found Retirement Concepts was entitled to exercise discretion in awarding bonus amounts, a conclusion I do not find unreasonable in the circumstances and on the evidence, had “acted reasonably and in good faith” in determining the bonus awarded and had considered each of the bonus criteria in assessing the amount of bonus to award Mr. Baena such finding does not accord with the evidence that the transition binder/package criterion was never discussed at the meeting in late May and no bonus was awarded on that criterion because it was not included in the discussion document. The facts relating to that bonus criterion stood on quite a different footing than those relating to the other criteria. The question in respect to Mr. Baena’s claim, based on this criterion, was whether Retirement Concepts was acting “reasonably and in good faith” in making no decision on this criterion because it was not included in the discussion document even though it was one of the bonus criteria agreed to in January 2013.
45. Fourth, it is apparent Retirement Concepts never considered this bonus criterion other than to note its absence from the discussion document. The assertion relating to the utility of the transition documents suffers from three problems: first, that opinion was never formed until after the amount of the bonus award they were prepared to pay to Mr. Baena had been set; second, there is no evidentiary foundation for concluding the company was acting “reasonably and in good faith” when it formed this opinion; and third, it doesn’t address all of the work apparently contemplated with this criteria, which on evidence not rejected, including “orientation” for Mr. Baena’s successor.
46. The Director made the following finding concerning the terms of the bonus:
- . . . I accept that Retirement Concepts retained a degree of discretion over the Bonus payment, in that it would ultimately decide whether or not the Bonus Criteria had been fulfilled. I cannot agree with the Complainant’s assertion that Bonus Criteria were not subject to the company’s discretion and that they were all capable of objective measurement. It is clear that the assessment of whether, for example, a task has been completed successfully does naturally involve an element of subjective assessment (at page R17).
47. As indicated above, that finding does not accord with the evidence provided by Dr. Jamal that a bonus for this criterion was not awarded because it was not included in the May discussion document. It takes a perverse and inexplicable view of the facts; one which I find could not reasonably be entertained on the evidence presented. There is no consideration at all of whether, in the face of the agreement made in January 2013, this approach by Retirement Concepts was acting either “reasonably or in good faith”. If the above stated finding was intended to apply to the transition binder/package criterion, it was made without any evidence, and in fact in the face of contrary evidence, a circumstance which elevates that finding to an error of law.
48. There was common ground that Retirement Concepts and Mr. Baena had agreed in January to the bonus criteria and the potential bonus amount. The events of May 2013 were not in accord with that agreement, yet the Director made no attempt to reconcile how Retirement Concepts should have been able to resile from the agreement they had made. It may be the Director believed the agreement had changed, but if so, there is no analysis or finding in that respect and, frankly, no evidence there was any amendment at all to the January agreement or that Mr. Baena had abandoned a potential bonus award based on the transition binder/package criterion.

49. The evidence of Dr. Jamal that no bonus was awarded for the transition binder/package criterion because it was not listed in the discussion document might be an indication that he was aware of its absence and made a decision to ignore that criterion. If so, those circumstances would also compel an assessment of the obligation for good faith dealing. The facts may not support this view, but if they do not, there should at least be some indication this was considered.
50. In sum, I find the Director erred in law by failing to consider the evidence and failed to observe principles of natural justice in denying Mr. Baena's claim for a bonus award based on the transition binder/package criterion on the evidence submitted during the complaint process. This part of the Determination is cancelled and the matter is referred back to the Director for further investigation.
51. In reaching this conclusion, I have not ignored that Mr. Baena made no attempt from the date of the May meeting to the date of his complaint, December 6, 2013, to seek to address a bonus award related to the "transition/orientation" criterion with Retirement Concepts. Nor is there any reference to this matter in the complaint. Those things are, however, other pieces of the evidentiary foundation relating to Mr. Baena's claim that should have been, but were not, considered by the Director.
52. On the second argument, I substantially agree with the submissions of Retirement Concepts and the Director that this argument is no more than a disguised effort to have the Tribunal second guess findings of fact made by the Director. I find no error of law or failure to comply with principles of natural justice by the Director in making the finding respecting this ground of appeal and it is dismissed. The Director found the best evidence on this part of Mr. Baena's claim was the records of Retirement Concepts. I find nothing in the appeal that would impeach that finding. It is therefore irrelevant to speak of the circumstances in which the Tribunal might accept an employee's record of days and hours worked. Such a consideration does not arise in this case.

## ORDER

53. Pursuant to section 115(1) of the *Act*, I order the Determination dated September 15, 2015, be varied, first, to cancel the finding dismissing the bonus award claim relating to the "transition/orientation" criterion and, second, to find Mr. Baena is owed a further \$1,497.49 annual vacation pay, together with whatever further interest that has accrued under section 88 of the *Act*. The matter of the bonus award claim relating to the "transition/orientation" criterion is referred back to the Director. The remainder of the Determination is confirmed.

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**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**