Employment Standards TRIBUNAL

An appeal

- by -

Ananak Windows Ltd.
("Ananak")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2011A/8

DATE OF DECISION: April 18, 2011

DECISION

SUBMISSIONS

Michael M. Sinclair	counsel for Ananak Windows Ltd.
Harinder Singh Bedi	on his own behalf
Greg Brown	on behalf of the Director of Employment Standards

INTRODUCTION

1. Sarvpreet Kaur ("Kaur") and Harinder Singh Bedi ("Bedi") filed timely unpaid wage complaints against their former employer, Ananak Windows Ltd. ("Ananak"), under section 74(3) of the *Employment Standards Act* (the "*Act*"). I shall refer to Ms. Kaur and Mr. Bedi jointly as the "complainants". A delegate of the Director of Employment Standards (the "delegate") investigated the two complaints. On December 21, 2010, the delegate issued a Determination and accompanying "Reasons for the Determination" (the "delegate's reasons") upholding both complaints. The delegate ordered Ananak to pay Ms. Kaur $1,854.75 and Mr. Bedi $14,072.32 on account of unpaid regular wages (section 17), statutory holiday pay (section 45), vacation pay (section 58), compensation for length of service (section 63) and section 88 interest. Thus, the unpaid wage claims payable to the complainants totalled $15,927.07.

2. In addition, the delegate levied four separate $500 monetary penalties (see *Act*, section 98) based on his determination that Ananak contravened sections 8 (false representations), 17 (regular payment of wages), 18 (payment of wages on termination) and 28 (failure to maintain payroll records). The monetary penalties are payable to the Director of Employment Standards. Accordingly, the total amount payable under the Determination is $17,927.07.

3. Ananak appeals the Determination on all three statutory grounds, namely: i) that the delegate erred in law, ii) failed to observe the principles of natural justice in making the Determination and iii) on the ground that it has new evidence that was not available when the Determination was issued (see *Act*, subsections 112(1)(a), (b) and (c)). In addition, in a submission filed on March 23, 2011, Ananak's legal counsel requested that the appeal be heard by way of an oral hearing.

4. Ananak also applied for a suspension of the Determination pending the adjudication of its appeal (see section 113), however, since the Director undertook not to take any enforcement proceedings until the appeal proceedings were concluded, the Tribunal declined to issue a section 113 order. This decision was communicated to the parties by way of a letter from the Tribunal's Appeal Manager dated January 20, 2011.

5. I shall first turn to Ananak's application to have an oral appeal hearing.

IS AN ORAL APPEAL HEARING REQUIRED?

6. The delegate conducted an investigation into the two original complaints as he was entitled to do under section 76 of the *Act*. The delegate could have conducted an oral hearing (see 76(3)) but chose instead to proceed with an investigation. It appears that Ananak never applied for an oral hearing before the delegate. Ananak's legal counsel says that there should be an oral appeal hearing because there was a "denial of an oral

hearing at the lower level [*i.e.*, before the delegate] which precluded our client from the opportunity to cross-examine the Claimants" (March 23, 2011, submission).

7. It should be noted that an appeal to the Tribunal is not an appeal *de novo*. The grounds of appeal are constrained by section 112. An appellant must show that the delegate either erred in law or breached the principles of natural justice. Alternatively, an appeal may succeed if the appellant has new and relevant evidence that was not available when the determination was being made. In the case at hand, Ananak grounds its "natural justice" argument on the assertion that it understood there was going to be a complaint hearing before the delegate. Ananak says that since an oral hearing was not conducted, it was not "able to put forth its position in respect of a number of the issues addressed in the [delegate's reasons]" (January 18, 2011, submission, page 1). Finally, counsel says that the investigative process did not permit Ananak to cross-examine the complainants and since an Ananak representative was not present when the delegate interviewed the complainants, Ananak was "not made privy to information that the Delegate was basing the decision on" (January 18, 2011, submission, page 2).

8. If Ananak succeeds on its "natural justice" arguments, the usual remedy would be to refer the matter back to the Director (see section 115(1)(b)). I do not need to hear *viva voce* evidence to determine if there has been a breach of the rules of natural justice since the allegations made in support of that statutory ground are clearly set out in Ananak's material.

9. Similarly, I do not find it necessary to hear *viva voce* evidence to determine whether the delegate erred in law since Ananak's alleged errors are clearly set out in its appeal materials and do not require me to make any findings of fact. Ananak's "new evidence" is rather vaguely particularized, however, again, I do not find it necessary to hear any *viva voce* evidence in order to rule on this particular ground of appeal.

10. Accordingly, Ananak's application for an oral appeal hearing is refused. I now turn to Ananak's grounds of appeal.

DID THE DELEGATE ERR IN LAW?

11. Ananak says that the delegate erred in law in two respects. The first alleged error concerns Mr. Bedi's vacation pay award and the second alleged error concerns the delegate's finding that Ananak contravened section 8 of the *Act*. Ananak's submissions on the first of these two points are set out below:

> At page 13 [sic, R13 of the delegate's reasons] the [delegate] awards vacation pay to Mr. Bedi in the total sum of $987.90 being 4% of Mr. Bedi's total earnings between March 11, 2008 and March 17, 2009…
>
> By granting vacation pay for the full 12 months worked by the Complainant the Director has erred in law contrary to Section 80 of the *Employment Standards Act*.

12. Section 80 states that a wage payment order "is limited to the amount that became *payable* in the period beginning (a) in the case of a complaint, 6 months before the earlier of the date of the complaint or the termination of the employment…" (my *italics*). Mr. Bedi's employment ended on March 17, 2009, and his complaint was apparently filed on February 27, 2009. The delegate's vacation pay calculation was predicated on 4% of Mr. Bedi's 2008 ($21,980.02) and 2009 ($2,717.65) earnings based on his T4 Statements of Earnings provided by Ananak (earnings from March 11, 2008, to March 17, 2009). Thus, the vacation award was calculated as follows: $24,697.67 x 4% = $987.90)

13. Mr. Bedi was not entitled to any vacation leave until he completed 12 consecutive months of employment (section 57(1)). The *Act* does not (although an employment contract may) provide for any vacation leave

during an employee's first year of employment. Thus, as of March 10, 2009, (*i.e.*, 12 months after his employment commencement date), Mr. Bedi had a crystallized right to vacation leave. Mr. Bedi's employment ended on March 17, 2009, about one week after he completed his first year of employment. Had Mr. Bedi taken vacation leave after March 10, 2009, (and he did not), he would have been entitled to 2 weeks' unpaid vacation leave and, in addition, to vacation pay in the amount of 4% of his total earnings during his first 12 months of employment (section 58(1)) since he was not paid any vacation pay along with his regular pay on his scheduled paydays (see subsection 58(2)(b)). Mr. Bedi's vacation pay would have been *payable* "at least 7 days before the beginning of [his] annual vacation" (section 58(2). Mr. Bedi did not take any vacation leave after completing his first year of employment. Accordingly, since his employment ended on March 17, 2009, his vacation pay was payable within 48 hours of this date (section 18). Mr. Bedi filed his unpaid wage complaint on February 27, 2009. Thus, Mr. Bedi's vacation pay entitlement clearly crystallized within the 6-month "wage recovery" period. The delegate did not err in law in making the vacation pay award.

14. The second alleged error of law concerns section 8 of the *Act*:

> 8. An employer must not induce, influence or persuade a person to become an employee, or to work or to be available for work, by misrepresenting any of the following:
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> (a) the availability of a position;
>
> (b) the type of work;
>
> (c) the wages;
>
> (d) the conditions of employment.

15. Section 8 essentially codifies the tort of pre-contractual misrepresentation (see, *e.g.*, *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 for an example of this tort in the pre-employment context).

16. Mr. Bedi was hired through the federal government's "Temporary Foreign Worker Program". As part of this process, Ananak secured a "Labour Market Opinion" ("LMO") dated July 19, 2007, that authorized Ananak's hiring of Mr. Bedi (who was then residing in India) at an annual salary of $33,600 ($2,800 per month) based on an 8-hour day/40-hour workweek into an "Assistant Manager – Accounting" position. Ananak issued an employment confirmation letter on July 19, 2007, confirming the salary and position for a 2-year employment duration.

17. Ananak never employed Mr. Bedi as an accounting manager; rather, he worked as a general labourer and at a reduced wage (relative to the LMO and employment offer) of $10 per hour. The delegate determined that in so doing Ananak contravened section 8 of the *Act*:

> I find that Ananak contravened Section 8 of the Act when they did not pay Mr. Bedi the agreed upon wage rate of $16.15 per hour [see the section 1 definition of "regular wage" - $2,800 x 12/52 x 40 = $16.15 per hour] for a 40 hour workweek according to his LMO. Mr. Bedi also never performed the duties of the position for which he was hired by Ananak for (Assistant Manager – Accounting and Business Management). Instead, Mr. Bedi worked as a General Labourer for Ananak from March 11, 2008 to March 17, 2009. This misrepresentation with respect to his wage rate, hours of work and his alleged position with the company was ongoing and continued for Mr. Bedi's entire employment history with Ananak. I am satisfied that Ananak induced, influenced and persuaded Mr. Bedi to work for them by misrepresenting the wage rate, hours of work and the position and that they have contravened Section 8 of the Employment Standards Act. I further find that the date of the contravention of Section 8 is March 17, 2009, which is the last date that Mr. Bedi worked for Ananak.

(delegate's reasons, page R10).

18. Ananak's legal counsel submits that "the alleged contravention in this case occurred at the commencement of Mr. Bedi's employment, in March, 2008" (January 11, 2011, submission) and that since the complaint was not filed within six months of March 2008 (as noted above, the complaint appears to have been filed on February 27, 2009), the complaint was statute-barred under section 74(4) of the *Act* which provides as follows:

> 74. (4) A complaint that a person has contravened a requirement of section 8, 10 or 11 must be delivered under subsection (2) [*i.e.*, in writing to an Employment Standards Branch Office] within 6 months after the date of the contravention.

19. By way of reply, Ananak's legal counsel advanced a second argument regarding section 8 based on the assertion that section 8 creates an "offence" that, by reason of section 124 of the *Act*, must be prosecuted within 2 years "after the facts on which the proceeding is based first comes to the director's knowledge". Counsel says that since the LMO was issued on July 19, 2007 (the same date as Ananak's letter setting out its employment offer to Mr. Bedi) any prosecution had to be commenced within 2 years of that date.

20. In my view, counsel's argument on this point is fundamentally misconceived. While I suppose the section 8 contravention could have given rise to a prosecution under section 125, the simple fact is that no such prosecution, to my knowledge, has ever been commenced. The matter now before me is entirely civil in nature. In the context of these proceedings, Ananak is not charged with a regulatory offence under section 125 given Ananak's contravention of section 8; rather, section 8 was the basis for a determination of Ananak's civil liability. Sections 124 and 125 are wholly irrelevant here.

21. Returning to the matter of whether the section 8 complaint was statute-barred under section 74(4), the delegate's position is that there was a "continuing" section 8 contravention throughout Mr. Bedi's entire tenure with Ananak that continued up to and including the date of his termination, namely, March 17, 2009. The delegate also relies on the Tribunal's decision in *6307485 Canada Ltd.*, BC EST # D121/09. I have reviewed this latter decision and, in my view, it has no application whatsoever to the case at hand. While the facts are quite similar – a determination made under section 8 on the basis that the wages actually paid were not as set out in a LMO and as otherwise agreed between the parties – the question of whether the former employee's complaint was statute-barred under section 74(4) was not addressed in any fashion.

22. Ananak does not allege that the delegate erred in law in determining that it misrepresented Mr. Bedi's terms and conditions of employment. Rather, in essence, it says that the delegate had no jurisdiction to make a finding under section 8 since the complaint – as it related to section 8 – was statute-barred.

23. I have carefully reviewed the section 112(5) record in this matter – including Mr. Bedi's original complaint – and it is clear that Mr. Bedi never filed a complaint under section 8. Rather, his position was simply that he was not paid the wages to which he was entitled under his employment contract. This is clearly set out in his explanatory December 10, 2009, e-mail to the delegate: "…I started getting paid only $10hr as [Ananak's Manager Surinder Gill] said that she can't pay me more but it will be adjusted later on, thus asked me to continue to work in the manufacturing unit as there was a shortage of labour and asked me to work as a Labour in the windows manufacturing unit" [sic]. While it is clear that the delegate, on his own volition, reframed the complaint as possibly evidencing a section 8 contravention, he was entitled to investigate a possible section 8 contravention in the absence of a specific complaint – this is the express effect of section 76(2) of the *Act*: "The director may conduct an investigation to ensure compliance with this Act and the regulations, *whether or not the director has received a complaint*" (my italics). It is not disputed, leaving aside section 8 for the moment, that Mr. Bedi's complaint was otherwise timely under section 74(3).

24. In my view, the delegate did not even need to proceed under section 8. The remedy granted, namely, unpaid wages reflecting the difference between the parties' contractual agreement and the wages actually paid for the 6-month period dating back in time from the end of Mr. Bedi's employment, is identical to that which would otherwise have been granted under sections 17 and 18 (payment of all earned wages). Although the delegate could have issued a much broader remedial order under section 79(2) to remedy the section 8 contravention, he did not do so. For example, Mr. Bedi could have been awarded compensation, well beyond the 1-week award under section 63, reflecting his ongoing wage losses and/or reimbursement for his relocation expenses from Indian to Canada (see, *e.g.*, *Saltair Neighbourhood Pub*, BC EST # D478/97, confirming BC EST # D186/97, and *Edwards*, BC EST # D307/02).

25. I wish to reiterate that the remedy actually granted was identical to that which could otherwise have been granted under sections 17 and 18. That said, it is clear and obvious that Ananak contravened section 8 and thus it was properly penalized under section 98 for that contravention. The 6-month time limit set out in section 74(4) does not bind the Director of Employment Standards when the Director is proceeding on his own motion under section 76(2).

26. Simply for the sake of completeness, I will also address the delegate's position that there was a "continuing contravention" and thus a section 8 complaint would not have been barred by section 74(4). I do not accept that in the circumstances of this case, the section 8 contravention arose anew each day that Mr. Bedi continued in Ananak's employ. Section 74(4) requires that the complaint be filed "within 6 months after the date of the contravention". In this case, virtually from the outset of his employment, Mr. Bedi knew that Ananak did not intend to honour the wage bargain the parties had struck and that he may have been misled. Accordingly, as soon as he understood that he had been misled, the 6-month time limit commenced running against him. In my view, the proper interpretive approach to section 74(4) is that set out in *Battler et al.*, BC EST # D202/98 at page 5:

> The wording of the section [74(4)] is ambiguous. Contravention is an infringement or breach of a statute so that, on the strict wording of section 74(4), the time limit would not run until the Director issued a Determination finding a breach. This means that the time limits would not begin to run until the Director found a breach and in cases where no breach was found, the time limit provision would not be operative. This is a nonsensical result which is, nonetheless, supportable on a strict interpretation of the *Act*.
>
> A better approach is that urged in *Helping Hands* [(1995) 15 B.C.L.R.(3d) 217 (B.C.C.A.)] which found the *Act* to be remedial legislation that requires a "fair, large and liberal construction as best insures the attainment of its objects", namely to "afford protection to the payment of an employee's wages which may not be available to the employee at common law." This purposive approach calls for the recognition of several principles in interpreting section 74(4), including the necessity of knowledge on the part of the wronged employees before the time limit is triggered. In other words, the employees must know about the misrepresentation before the time limit that binds them begins to run. Thus, the date of contravention under section 74(4) is not triggered until the employees are aware of the misrepresentation.

(see also *Vikas*, BC EST # D232/02, and *Fulbrook*, BC EST # D415/02)

DID THE DELEGATE FAIL TO OBSERVE THE PRINCIPLES OF NATURAL JUSTICE IN MAKING THE DETERMINATION?

27. Ananak's legal counsel says that Ananak "was under the impression throughout the investigation process that it would have the opportunity to defend itself at a hearing however no hearing was ever convened" and that, accordingly, Ananak "was therefore denied its opportunity to be heard" (January 18, 2011, submission, page 1). Ananak's counsel does not say how or why Ananak was given the impression that an oral hearing would be conducted. Certainly, there is nothing in the section 112(5) record to indicate that an oral hearing was ever

contemplated in this matter. On July 20, 2009, a delegate (not the delegate who issued the Determination) wrote to Ananak setting out the nature of the complainants' unpaid wage claims and he asked Ananak to either accept the claims or provide a written response by August 14, 2009. There is no mention in the August 14 letter of any possible oral hearing. Ananak replied, albeit very briefly, by letter dated August 13, 2009, and the main point in contention at this point appears to be Ananak's assertion that the complainants received an additional $2,000 "cash" payment not reflected in the unpaid wage calculations.

28. On January 19, 2010, the delegate issued a Demand for Employer Records under section 85 and Ananak responded by providing an incomplete set of payroll records. Further, the delegate met with Surinder Gill (Ananak's "Manager" and the mother of Ananak's sole director and officer, Baljinder Gill) on June 25, and again on July 7, 2010, to discuss the matter further. I am satisfied that, in this case, the delegate fully complied with section 77 of the *Act*: "If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond".

29. Ananak's complaint, of course, is that it wanted an oral complaint hearing where the complainants' evidence could be tested through cross-examination. There is nothing in the record to indicate that it ever applied for an oral hearing. Further, I adopt the comments of my colleague Tribunal Member Bhalloo in *6307485 Canada Ltd.*, supra, at paras. 63 – 65:

> 63. With respect to Ms. Berger's argument that the failure of the Director or the delegate to allow the parties to call "*viva voce* evidence" or provide the "opportunity for full explanation" and "an opportunity to resolve the record and resolve any inconsistencies" constitutes breach of natural justice on the part of the Director. Essentially, Ms. Berger is reiterating the argument she advanced on behalf of McDonald's in the appeal of the Initial Determination that an oral hearing of the matter is warranted. This argument was rejected by me then and I reject it again. In my view, while the Director is mandated under Section 76 to "accept and review a complaint made under section 74" and afforded the discretion to conduct an investigation under section 76(2), he is not required under the *Act* to hold a hearing of any complaints, although he has such discretion under Section 76 of the *Act*. He may simply make a determination on the basis of his investigation, provided he gives "the person under investigation an opportunity to respond" under section 77.
>
> 64. In addition, I note that the Supreme Court of Canada stated in *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] S.C.J. No. 39:
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> > …it cannot be said that an oral hearing is always necessary to ensure a fair hearing and consideration of the issues involved. The flexible nature of the duty of fairness recognizes that meaningful participation can occur in different ways in different situations.
>
> 65. In this case, I find that the delegate complied with the duty of fairness when affording both parties an opportunity to present their case to him during the second investigation leading to the New Determination.

30. Similarly, in this case, I find that Ananak was afforded every reasonable opportunity to present its own evidence and to respond to the complainant's position.

31. In his February 11, 2011, submission to the Tribunal, the delegate made the following statements (at page 4):

> Surinder Gill was given copies of both of the complaints and was given an opportunity to provide what payroll records Ananak had for both of the complainants. Details relating to each complaint were fully disclosed to the employers. The employer was fully aware of the investigation process and of all the claims made by both complainants…

> At no time during these meetings [June 25 and July 7, 2010] was there any discussion of an Adjudication hearing taking place…
>
> I told Ms. Gill that the complaints were being investigated through written submissions only and that there would be no hearing. She understood during our meetings that the matter was going to be determined through written submissions alone. Ms. Gill gave me her e-mail address to that I could send her all submissions received by both complainants which was done.

32. The delegate's February 11, 2011, submission was provided to Ananak as part of the appeal process and none of the above factual assertions was challenged in Ananak's reply submission.

HAS NEW EVIDENCE BECOME AVAILABLE?

33. Although this ground was briefly particularized in Ananak's initial appeal documents, it appears to have been abandoned. Nevertheless, I shall deal with what I have before me regarding this ground of appeal. Ananak's legal counsel made a general statement about evidence that was not presented to the delegate but the only two pieces of evidence identified in any detail were, first, evidence regarding a $2,000 cash payment allegedly made to the complainants and, second, evidence relating to Ananak's position that it had just cause to terminate Mr. Bedi's employment.

34. The delegate was alive to Ananak's assertion that the complainants had been paid $2,000 in cash toward their unpaid wages. This matter is specifically addressed at page R4 of his reasons and at pages 4 and 5 of his February 11, 2011, submission to the Tribunal. There is no proof that any cash payment was ever made (for example, a receipt) and even if there were such a document, it presumably would have been available at the time the Determination was being made and I have no explanation before me as to why proof of cash payment was not submitted to the delegate during his investigation.

35. As for the just cause assertion, this is not particularized in any fashion – I have before me a bare assertion that Ananak might be able to produce some evidence to support its position that it had just cause for dismissing Mr. Bedi. What that cause might be remains somewhat of a mystery. I do note that Ananak issued a Record of Employment to Mr. Bedi in which it stated that he "quit". In the absence of any evidence regarding just cause, I simply cannot determine what might be admissible under section 112(1)(c) but it seems to me that any such evidence would presumably have been available at the time the Determination was being made and thus falls outside the ambit of section 112(1)(c). It follows that I would not give effect to this ground of appeal.

ORDER

36. Pursuant to section 115 of the *Act*, I confirm the Determination as issued in the total amount of $17,927.07 together with whatever further interest that may have accrued under section 88 of the *Act* since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal