

An appeal

- by -

Mary Allen Client Support Group Society
(“MACSGS”)

- 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.: 2014A/31

DATE OF DECISION: May 27, 2014

DECISION

SUBMISSIONS

Andres Barker

counsel for Mary Allen Client Support Group Society

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “Act”), Mary Allen Client Support Group Society (“MACSGS”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on February 7, 2014.
2. The Determination found that MACSGS had contravened section 54 of the *Act* in respect of Violeta Malagayo (“Ms. Malagayo”) and ordered MACSGS to pay Ms. Malagayo wages in the amount of \$8,287.18, including interest, and an administrative penalty in the amount of \$500.00. The total amount of the Determination is \$8,787.18.
3. MACSGS has filed an appeal of the Determination, alleging the Director erred in law. The appeal asks that the Determination be cancelled.
4. In correspondence dated May 6, 2014, the Tribunal notified the parties, among other things, that no submissions were being sought from the other parties pending review of the appeal by the Tribunal and that following such review all, or part, of the appeal might be dismissed.
5. The section 112(5) “record” has been provided to the Tribunal by the Director and a copy has been delivered to MACSGS, who has been given the opportunity to object to the completeness of the section 112(5) “record”. There has been no objection and, accordingly, the Tribunal accepts it as complete.
6. The Tribunal has decided this appeal is an appropriate case for consideration under section 114 of the *Act*. At this stage, I am assessing this appeal based solely on the Determination, the appeal and written submission made on behalf of MACSGS and my review of the section 112(5) “record” that was before the Director when the Determination was being made. Under section 114(1), the Tribunal has discretion to dismiss all or part of an appeal, without a hearing of any kind, for any of the reasons listed in that subsection, which states:

114 (1) *At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of the appeal if the tribunal determines that any of the following apply:*

- (a) *the appeal is not within the jurisdiction of the tribunal;*
- (b) *the appeal was not filed within the applicable time limit;*
- (c) *the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process;*
- (d) *the appeal was made in bad faith or filed for an improper purpose or motive;*
- (e) *the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;*
- (f) *there is no reasonable prospect the appeal will succeed;*
- (g) *the substance of the appeal has been appropriately dealt with in another proceeding;*
- (h) *one or more of the requirements of section 112(2) have not been met.*

7. If satisfied the appeal or a part of it has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, Ms. Malagayo will, and the Director may, be invited to file further submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1) of the *Act*, it will be dismissed.

ISSUE

8. The issue being considered at this stage of the proceedings is whether there is any reasonable prospect the appeal can succeed.

THE FACTS

9. MACSGS is a non-profit society incorporated under the laws of the province for the purpose of providing homecare services for Ms. Mary Allen, a disabled person. Ms. Malagayo was employed by MACSGS as a home care support worker from February 15, 2004, to July 15, 2011. In July 2011, Ms. Malagayo went on leave for the birth of her second child. On June 15, 2012, Ms. Malagayo contacted one of the directors of MACSGS to discuss arrangements for returning to work. She did not return to the position she held with MACSGS prior to her leave, resulting in her filing a complaint with the Director on July 7, 2012.
10. Briefly, Ms. Malagayo alleged MACSGS had breached the *Act* by refusing to put her back into her job after her maternity leave.
11. MACSGS took the position that Ms. Malagayo was not on maternity leave from her employment as, consistent with her stated declaration not to return following the her leave, her employment had ended the last day she worked: July 15, 2011. Alternatively, MACSGS took the position that even if Ms. Malagayo was found to have been employed during her leave period, that employment ended at the conclusion of her one year maternity leave as she, “had clearly and unequivocally announced her intention not to return following the expiration of her leave and accordingly MACSGS had no obligation to return her to her position”. Finally, MACSGS submitted that even if the *Act* was breached, Ms. Malagayo had failed to mitigate her damages and their wage obligation should be limited accordingly.
12. The Director found the evidence did not support a finding that Ms. Malagayo had quit her employment and that MACSGS had been unable to meet the onus of showing the refusal to return Ms. Malagayo to her position was not motivated, in whole or in part, by her pregnancy leave. The Director found Ms. Malagayo had not taken sufficient steps to accept or locate reasonable alternate employment and those failings affected the amount of wages she might otherwise have received.

ARGUMENT

13. Counsel for MACSGS submits the Director erred in law in two respects: first, by disregarding the evidence of MACSGS’s witnesses without explaining why that evidence was not believed; and second, by making findings of fact that could not reasonably be entertained as they did not conform to either party’s version of events.
14. In making the appeal submissions, counsel relies on the facts recited at pages R2 to R10 of the Determination, which contains the summary of the evidence and argument of MACSGS on the complaint. The evidence and argument given by Ms. Malagayo is set out at pages R10 to R13 of the Determination. The evidence provided by the respective parties is not determinative of the factual findings which can be, or in this case were, made by the Director. The findings made by the Director on the evidence, and the analysis of

the issues, are made at pages R13 to R21 of the Determination, with the findings on the “quit issue” being addressed at pages R14 to R16. The findings are prefaced with the following comment, at page R14:

The Employer argues that this issue depends primarily on credibility; that if I accept the Complainant’s version of events, I must find the Employer’s version of events, as told by its witnesses, to be untrue or fabricated. With respect, I do not agree. I find that there were inconsistencies in the evidence of both parties, particularly in respect of the dates of certain events. This is not unexpected given the considerable passage of time since the original event. Where there is a conflict in material evidence, I have addressed the conflict and the relevant evidence.

15. It is not necessary to restate all of the evidence provided to the Director or to dissect the analysis of that evidence relative to the conclusions made. It suffices that the Director correctly stated the approach required when considering whether an individual had “quit” their employment: see *Burnaby Select Taxi Ltd.*, BC EST # D091/96, and correctly examined the evidence in the context of those requirements.
16. Counsel for MACSGS submits, citing para. 43 of *Satnam Education Society of British Columbia*, BC EST # D052/11, the Director rejected evidence provided by three witnesses presented by MACSGS, Mr. Gauthier, Mr. Theriault and Ms. Allen, without giving reasons and, in the course of doing so, reached conclusions that did not reflect a reasonable assessment of the evidentiary record.

ANALYSIS

17. When considering an appeal under section 114 of the *Act*, the Tribunal looks at its relative merits, examining the statutory grounds of appeal chosen and considering those against well established principles which operate in the context of appeals generally and, more particularly, to the specific matters raised in the appeal.
18. 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.*
19. The Tribunal has established that an appeal under the *Act* is intended to be 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 of review identified in section 112. This burden requires the appellant to provide, demonstrate or establish a cogent evidentiary basis for the appeal.
20. It is well established that 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. The Tribunal noted in the *Britco Structures Ltd.* case that the test for establishing an error of law on this basis is stringent, requiring the appellant to show that the findings of fact are perverse and inexplicable, in the sense that they are made without any evidence, that they are inconsistent with and contradictory to the evidence or that they are without any rational foundation. Unless an error of law is shown, the Tribunal must defer to findings of fact made by the Director. More particularly in this case, unless the appeal of MACSGS establishes the errors of law alleged, the appeal simply becomes a challenge to findings of fact made by the Director and cannot succeed.

21. I find the Director made no errors of law in reaching the challenged findings of fact in this case. As stated in the opening comments of the analysis, the Director neither accepted nor rejected the evidence provided by the respective parties. The Director noted there were inconsistencies in the evidence given by both sides and dealt with those inconsistencies in the analysis. The Director did not fail to address all of the evidence or fail to provide reasons for the view taken of that evidence in the context of the issue being addressed.
22. The position taken by counsel for MACSGS in this appeal about the relative believability of the evidence given by the respective parties is identical to the position taken before the Director during the complaint process. It cannot be said the Director was not alert to this aspect of the employer's case and in fact refers to it in the excerpt taken from the Determination and set out above.
23. I also note that typically (and this was a typical case) there is no one single element that will determine whether an employee quit. A conclusion on that question requires an assessment of all the subjective and objective evidence which in its totality must ultimately point, clearly and unequivocally, to an intention to quit.
24. The Director noted the evidence that Ms. Malagayo had indicated when she commenced her leave that it was not her intention to return to her employment. The Director also noted other evidence – provided by Ms. Morrison – that Ms. Malagayo had, in the same time frame, expressed “doubt” about whether she would return to working for Ms. Allen following her leave, that she provided no written confirmation of an intention to quit, that there were efforts by MACSGS in a July 8, 2012, e-mail to “retroactively” confirm she quit as of the date of the end of her maternity leave (despite indications by her, to Mr. Theriault on June 15, 2012, and to Mr. Gauthier and Ms. Morrison on July 3, 2012, that she wished to return to her position), the absence of evidence regarding the terms of the replacement employee's hiring and Ms. Malagayo asking if she could leave personal items in Ms. Allen's garage.
25. In my view, the Director was entitled to take a view of the evidence in its totality that is expressed in the Determination: finding it was not so “clear and unequivocal” as counsel asserted that Ms. Malagayo was quitting her employment as of the commencement of her leave; finding Ms. Malagayo expressed “ambivalence” about returning to her employment and finding, considering all of the subjective and objective elements of the case, that MACSGS had not met the burden of showing that she had quit her employment.
26. While I do not generally disagree with the submission of counsel for MACSGS that it can be an error of law to fail to provide adequate reasons for rejecting evidence, it is an error of law only insofar as it reflects one of the accepted errors of law listed in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] BCJ. No. 2275 (BCCA.). In the circumstances the error of law alleged here can only be viewed in the context of either a failure to observe principles of natural justice, which is neither pleaded nor argued, or an error in the handling of the evidence. In respect of the latter, I do not accept the Director acted on a view of the evidence that was in any way perverse and inexplicable, in the sense that findings of fact were made without any evidence, were inconsistent with and contradictory to the evidence or were made without any rational foundation.
27. The Director did not “reject” the evidence provided by MACSGS on Ms. Malagayo's comments about returning to work. I accept the Director did take a view of that evidence that did not align with the view expressed by Mr. Theriault and Ms. Allen, but that view was not inconsistent with the totality of the evidence accepted and analyzed by the Director. I do not find it unreasonable to conclude the evidence of Mr. Theriault and Ms. Allen concerning what Ms. Malagayo said in late June and early July 2011 about not returning to work was, considering the passage of nearly two years between those statements being made and their recollection of them, as likely to be a reflection of their understanding of the statements as a reflection

of what was actually said or what Ms. Malagayo intended to say. The Director's perception of that evidence is consistent with what Ms. Morrison recalls Ms. Malagayo saying, that she harboured some doubt about whether to return following her leave. The argument of counsel for MACSGS concerning those statements, in my view, also fails to acknowledge and appreciate, as the Director did, the "tension" between Ms. Malagayo and Ms. Allen at the time Ms. Malagayo's leave was commencing and that the tension could have contributed to her "doubt" about returning following her leave.

28. In sum, as noted above, I do not find MACSGS has shown the Director erred in law in reaching the conclusion Ms. Malagayo had not quit her employment. An assessment of this appeal shows it has no prospect of succeeding. The purposes and objects of the *Act* would not be served by requiring the other parties to respond to it.
29. The appeal is dismissed and the Determination is confirmed.
30. One final comment on an argument made by counsel for MACSGS is in order. Counsel refers to the reference by the Director regarding a "lack of evidence" concerning the hiring details of Ms. Malagayo's replacement, submitting the Director never mentioned what evidence was "lacking" in that respect. That argument suggests the Director has some duty to assist a party – in this case one represented by counsel experienced in this area – by indicating what evidence is required to support their case. The Tribunal has rejected the existence of such a duty: see *James Hubert D'Hondt operating as D'Hondt Farms*, BC EST # RD021/05.

ORDER

31. Pursuant to section 115 of the *Act*, I order the Determination dated February 7, 2014, be confirmed in the amount of \$8,787.18, together with any interest that has accrued under section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal