Employment Standards TRIBUNAL

An appeal

- by -

Aygen Telatar
("Telatar")

- 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

TRIBUNAL MEMBER: David B. Stevenson

FILE No.: 2003A/322

DATE OF DECISION: March 9, 2004

DECISION

SUBMISSIONS

Angie Aygen Telatar	on her own behalf
Lindsie M. Thomson	on behalf of Sprott Shaw Community College Ltd.
Richard Saunders	on behalf of the Director

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by Angie Aygen Telatar ("Telatar") of a Determination that was issued on November 7, 2003 by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded the *Act* had not been contravened and, accordingly, Telatar was owed no wages by her former employer, Sprott-Shaw Community College Ltd. ("Sprott-Shaw").

Telatar contends the Director failed to comply with principles of natural justice in making the Determination.

The Tribunal has decided an oral hearing is not necessary in order to decide this appeal.

ISSUE

The issue in this appeal is whether Telatar has shown an error in the Determination that would justify the intervention of the Tribunal.

THE FACTS

Sprott-Shaw operates a community college from approximately twenty campus locations in the province. Telatar was employed by Sprott-Shaw as an Admissions Advisor from July 30, 2001 to January 2, 2003, when she was dismissed. The Determination states she was employed at a rate of pay of $1,153.84 bi-weekly with an incentive package.

In her complaint, Telatar claimed she was entitled to regular wages from January 2002 to January 2003 and wages in the form of bonuses for December 2002 and for January 2003 to September 2003. The claim for regular wages was based on a wage increase which Telatar said she did not receive, but was entitled to, following the first six months of her employment. The claim for wages in the form of bonuses related to four students who graduated from Sprott-Shaw in December 2002, to students who were registered by her, and graduated from, Sprott-Shaw campuses other than the Langley campus and to students which were registered by her prior to her termination, but would not graduate until after her termination.

In response to the complaint, Sprott-Shaw argued that Telatar was not owed any regular wages, as she did not qualify for a salary increase, and was not owed any bonuses, as such bonuses were conditional on a

student graduating and completing an "exit interview" conducted by an Advisor. In a letter dated February 10, 2003, responding to Telatar's Request for Payment, Sprott-Shaw stated:

> With regard to the . . . bonus which you claim, it is the policy of Sprott-Shaw (of which you are aware) that bonuses are based on performance and on each person that you assist to graduate. The bonuses are not paid **before** a person graduates.
>
> Although you signed up various students in 2002, these students do not graduate until 2003, long after the termination of you employment. Sprott-Shaw has never paid and does not have a policy of paying bonuses for students who may be graduating in the future. Bonuses are only paid to employees where they specifically complete the assignment of assisting employees to graduate. In effect, bonuses do not become payable until after a student graduates.

The Director received evidence and information from the parties at an oral hearing which was held on August 27, 2003 and found that Telatar had not established her entitlement to a wage increase. The Director also concluded, based on the "past and present practice" of Sprott-Shaw to pay the bonus to Advisors on completion of a graduating student's "exit interview", that Telatar was not entitled to any bonuses.

ARGUMENT AND ANALYSIS

The burden in this appeal is on Telatar to show an error in the Determination. She says the error is a failure by the Director to comply with principles of natural justice in making the Determination. Counsel for Sprott-Shaw correctly submits that an appeal is not a re-investigation of the complaint nor an opportunity to simply re-argue positions taken during the investigation in the hope of achieving a different result.

Counsel for Sprott-Shaw also correctly points out that while Telatar has alleged a failure by the Director to comply with principles of natural justice, the appeal does not indicate why the Tribunal should reach that conclusion. The appeal does little more than argue the Director erred in finding she had not established any entitlement to a wage increase and erred in finding she was not entitled to any bonuses.

While I agree that Telatar has not expounded the ground of appeal chosen by her, the Tribunal has recognized that most appellants do not appreciate legal distinctions in the grounds of appeal. Accordingly, the Tribunal does not take an overly technical approach to the grounds of appeal chosen by an appellant on the appeal form. In *J.C. Creations Ltd. o/a Heavenly Bodies Sport*, BC EST #RD317/03, the Tribunal stated:

> Given the purposes and provisions of the legislation, including Section 77 of the *Act* - which is a statutory requirement - it would in our view be inappropriate to take the overly legalistic and technical approach of refusing to consider a procedural fairness ground because the party ticked the "error of law" box instead of the "natural justice" box on the appeal form. The substance of the appeal should be addressed both by the Tribunal itself and the other parties, including the Director. It is important that the substance, not the form, of the appeal be treated fairly by all concerned.

It is apparent this appeal is about what Telatar perceives to be the failure by the Director to give effect to her terms of employment. In respect of her argument on the wage increase, she says:

> When I was fired from Sprott-Shaw Community College, I was told I was not meeting my target, which was stated at Business Plan and Incentive Assignments Form. All the reports made by Sprott-Shaw Community College shows otherwise.

Her original complaint stated:

> On my contract which was signed on July 30, 2001, I was contracted to have a wage increase to $36.000.00 a year from $30.000.00 after a performance review conduct within 6 months of my start date. This was never done, although, I started up the Langley Campus successfully. On September 5, 2002, I had a performance review done, even though I exceeded my target by 26% . . . I wasn't given a wage increase then either.

The Director concluded that there was nothing in the *Act* requiring Sprott-Shaw to provide a wage increase to Telatar. There is no error in that conclusion. The Determination might have gone on to analyze whether Telatar was entitled under her contract of employment to the wage increase claimed, as there is ample authority for the proposition that the authority of the Director is not restricted to enforcing compliance with minimum standards provided in the *Act*, but also has authority to enforce the employment relationship, including those aspects of that relationship which exceed the minimum standards. The specific term of the contract of employment relating to this point is found in the offer of employment found in the July 30, 2001 letter to Telatar from Mr. Dang:

> . . . there will be a salary and performance review conducted within six months of your start date. Should you exceed the performance level set then your new salary at this time will be raised . . .

Notwithstanding that omission, I do not find there any error resulted. There is nothing in the contract of employment that contemplates any wage increase other than the one that might have followed the performance review contemplated in the above statement and there is no evidence in the material on record or in the appeal that would allow a conclusion Telatar was entitled to the increase described.

With respect to the claim for the bonuses, I confess to some difficulty with the reasoning of the Director on this matter. There was no issue that, everything else being equal, the bonuses fell within the definition of wages, being money that was *"paid or payable by an employer as an incentive and relates to hours of work, production or productivity"*. The offer of employment described the bonuses as "an incentive package". The Business Plan and Incentive Assignments Form set out the terms of a number of bonuses which could be achieved. The relevant plan in this case is identified as the Graduate Bonus Plan and is described as follows:

> **Graduate Bonus Plan**
>
> A Bonus Plan for each graduate, as per the Sprott-Shaw definition of graduate that the Advisor has responsibility for.
>
> - ($100/$300/$400) bonus paid upon successful completion of the program.
> - $100 for a graduate of a single program
> - $300 for a graduate of a double program*
> - $400 for a graduate of a triple program
>
> **N.B.** In addition please note that all courses registered in the 20/20 rule (20 weeks X 2) will be counted as 2 starts! As well, the ABM course is counted as a registered double.
>
> Note:
> Students transferring to other campuses will be deemed to be inherited by the receiving advisor and will be claimed as a bonus as allocated to each Advisor as allocated by the Provincial Marketing Director. Should the program be a double/triple, then the receiving and sending Advisors will share the bonus respectively.

Telatar signed the operative Business Plan and Incentive Assignments Form on September 5, 2002.

At issue in this part of the claim was Telatar's entitlement to bonuses for four students who graduated in December 2002, but whose "exit interviews" were apparently conducted by another Advisor after Telatar was dismissed, and for all students who were registered by her but would graduate after her termination.

In respect of the former, the Director seems to provide two reasons for the decision to deny this claim: first, that she did not conduct the "exit interviews" of the four students; and second, that she was, in any event, paid $1200.00 in bonuses for December 2002. The second reason suggests, without any specific finding, that Telatar was not entitled to any bonus payments in excess of what she received.

In respect of the latter issue, the Determination noted the positions of the respective parties. Telatar's position was that her contract of employment did not say she lost entitlement to the bonus if she ceased her employment with Sprott-Shaw. The Determination also set out the position of Sprott-Shaw as follows:

> Shaw maintains the past and present practice with Admissions Advisors receiving graduating bonuses has been consistent. Bonuses are only paid when an exit interview has been conducted with a graduating student. If an Advisor conducts the interview with a student registered by another Advisor, they share the bonus 50-50. If an Advisor conducts an interview on a graduating student registered by another Advisor who is no longer employed at Shaw, the Advisor conducting the interview receives 100% of the bonus.

The Determination notes that Telatar confirmed the majority of the work with each student is in the final graduation interview, which takes roughly one-half hour to complete.

There are two bases upon which Telatar's claim of entitlement to the bonuses could be supported or rejected – by application of the provisions of the *Act* to the facts or on an interpretation and application of her contract of employment. The difficulty in addressing this part of the appeal is, first, that the factual findings are unclear and, second, that the factual findings are not addressed in the context of either the *Act* or the employment contract.

Counsel for Sprott-Shaw says Telatar has provided no reasons supporting her appeal on the Director's decision on the bonuses. I agree Telatar's appeal on this part of the appeal is not grounded in any reasoned examination of the Director's decision. I am, however, inclined to view that deficiency as being equally attributable to the insufficiency of the reasons provided by the Director on this point as any other reason and does not foreclose scrutiny of the Determination.

The *Act* requires an employer to pay an employee all monies that meet the definition of wages without deduction or set-off, unless such deduction or set-off is allowed under Sections 21 or 22 of the *Act*. As indicated above, the definition of wages includes money that is paid or payable by an employer as an incentive. Under the *Act*, wages, including incentives, are payable when earned. The *Act* does not define when incentives are earned, but as the definition suggests, are typically related to work performed and, consequently, are earned as work is performed, see *Shell Canada Products Limited*, BC EST #RD488/01 (Reconsideration of BC EST #D096/01). While the Determination makes reference to the amount of work involved in the final graduate interview - "roughly one-half hour" - there is no assessment of whether her entitlement to the bonuses is related only to that work performed and if not, on what other work might entitlement be based. There is some suggestion on the facts that the bonus is not based exclusively on the work relating to the "exit interview", but recognizes other aspects of an advisor's responsibilities as well.

The Tribunal has said that an employer and employee may, subject to the requirements of the *Act*, agree to preconditions governing the payment of money by the employer to the employee and if such preconditions are not satisfied, such money does not become wages within the definition set out in the *Act*, see *Re Cascadia Technologies Ltd.*, BC EST #D010/97 and *Re Kocis*, BC EST #D331/98 (Reconsideration of BC EST #D114/98). Such preconditions do not arise from any provision of the *Act*, but from the employment contractual. More particularly, the Tribunal has noted there is no specific or general prohibition in the *Act* against an employer and an employee agreeing to conditions that govern when or whether incentive based remuneration becomes payable. Consistent with the Tribunal's decision in *Re Kocis*, the entitlement of an employee to such remuneration depends on the facts and the interpretation of the employment contract. The interpretation of an employment contract is a question of law.

Returning to the employment contract in this case there are several relevant considerations which are not addressed in the Determination.

I note first that the July 30, 2001 offer of employment says that Telatar's salary will be a fixed amount "with an incentive package". The Business Plan and Incentive Assignments Form sets out the terms of various bonus plans, including the Graduate Bonus Plan. The terms of that bonus plan are set out above. While it is clear from the terms of employment that a graduating bonus is conditional on a student successfully completing the program, nothing in those terms says the bonus is not payable if the Advisor does not conduct the "exit interview' or is not employed at the time the student graduates. There appears to have been some consensus, both in the evidence and in the material, that if an advisor conducted the "exit interview" of a student registered by another advisor, the bonus was shared equally. It is not clear to me how that entitlement exists where both advisors are employed, but is lost to one if he or she is dismissed.

It is significant that the document defining the terms on which the bonus is payable was prepared by Sprott-Shaw. In such circumstances, it is a usual rule of interpretation that any ambiguity or uncertainty in the terms be construed more favourably to Telatar. In the context of the *Act*, that principle is reinforced and supplemented by the statement of purposes found in Section 2 and by the application of statements of principle that are expressed in such cases as *Helping Hands v. Director of Employment Standards*, (1995) 131 D.L.R. (4th) 336 (B.C.C.A.), *Machtinger v. HOJ Industries Ltd.*, (1992) 91 D.L.R. (4th) 491 (S.C.C.) and *Health Labour Relations Association of B.C. v. Prins*, (1982) 40 B.C.L.R. 313, 82 C.L.L.C. 14,215, 140 D.L.R. (3rd) 744. To acknowledge and rely on, as the Director did, the policy of Sprott-Shaw to only pay the bonus to Advisors who are in their employ at the time a student graduates is unhelpful, as such a policy may be inconsistent with the *Act*, the employment contract or both. As well, such assertions of "policy" are unilateral expressions which may not reflect the intention of the parties as disclosed by their agreement. Neither of those considerations are examined against the "policy" asserted by Sprott-Shaw.

The above comments, all of which are relevant to this part of the appeal, must be addressed by the Director. The appeal succeeds in part. The Determination, specifically the matter of Telatar's claim for wages in the form of bonuses, is referred back to the Director.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated November 7, 2003 be referred back to the Director.

David B. Stevenson
Member
Employment Standards Tribunal