Employment Standards TRIBUNAL

An appeal

- by -

Kipling C.S. Warner
("Mr. Warner")

- 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/30

DATE OF DECISION: May 6, 2015

DECISION

SUBMISSIONS

Faizal Nuraney	counsel for Kipling C.S. Warner
Gagan Dhaliwal	on behalf of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), Kipling C.S. Warner ("Mr. Warner") has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on January 16, 2015.

2. The Determination was made in respect of a complaint filed by Mr. Warner who alleged his former employer, Simba Technologies Incorporated ("Simba"), had contravened section 8 the *Act* by misrepresenting the type of work he would be doing.

3. The Determination found Simba had not contravened the *Act*.

4. Mr. Warner has filed an appeal of the Determination, alleging the Director erred in law and failed to observe principles of natural justice in making the Determination.

5. In correspondence dated February 25, 2015, 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.

6. The section 112(5) Record (the "Record") has been provided to the Tribunal by the Director. A copy has been delivered to Mr. Warner, through his counsel, and he has been given the opportunity to object to its completeness. Mr. Warner initially objected to its completeness. The Director acknowledged an omission and amended the Record. Mr. Warner is satisfied the Record is complete and the Tribunal accepts it is complete.

7. I have 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 Mr. Warner and my review of the "record" that was before the Director when the Determination was being made. Under section 114(1) of the *Act*, 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.*

8. 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*, Simba 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

9. The issue to be considered at this stage of the proceedings is whether the appeal should be allowed to proceed or should be dismissed under section 114 of the *Act*.

THE FACTS

10. Simba operates a software development company. Mr. Warner was employed as Senior Open Source Developer from February 24, 2014, to March 14, 2014, at a salary of $75,000 a year. Following the termination of his employment with Simba, Mr. Warner filed a complaint with the Director alleging Simba had contravened section 8 of the *Act* by misrepresenting the type of work he would be doing.

11. The Director did some investigation and conducted a complaint hearing. At the complaint hearing, Mr. Warner provided evidence on his own behalf; George Chow ("Mr. Chow"), Simba's chief technical officer, gave evidence on behalf of Simba.

12. The Director recorded Mr. Warner's position as being that he was hired to work exclusively on open source software, which, according to the definition provided by Mr. Warner is "computer software source code made available without a licence in which copyright holder provides users with rights to run, study and change the program". Mr. Warner argued Simba, contrary to the promise made, put him to work on an internal piece of software that is proprietary.

13. Based on an assessment of the evidence, the Director found no evidence that Simba "explicitly promised" Mr. Warner he would work exclusively on open source projects. The Director found the work Mr. Warner was asked to perform at the commencement of his employment was not inconsistent with what had which had been discussed between Mr. Chow and Mr. Warner in their pre-hiring interviews. The Director also found no evidence that Simba did not intend to follow through with its assurance to provide Mr. Warner with an opportunity to work on open source projects.

14. The Director concluded Simba had not made any assertions or representations during the hiring process that were intended to mislead or deceive Mr. Warner into believing he would be working exclusively on open source software and denied the complaint.

ARGUMENT

15. Counsel for Mr. Warner argues the Director erred in law. He has applied the definition of "error of law" from *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam),* [1998] B.C.J. No. 2275 (B.C.C.A.), which the Tribunal has adopted and consistently used in considering this ground of appeal. In the *Gemex* decision, the Court of Appeal defined an error of law as:

> 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.

16. Counsel for Mr. Warner submits the Director erred in law by misinterpreting section 8 of the *Act*, by acting without evidence and by adopting a method of assessment which is wrong in principle.

17. Counsel submits the Director asked the wrong question under section 8, which he says should have been whether Simba misrepresented "the type of work" Mr. Warner would be performing rather than whether he was hired to work exclusively on open source software.

18. The appeal submission says the Director also erred in law in finding Mr. Warner stated "he was hired to work exclusively on open source software". Counsel asserts Mr. Warner "never expected to work exclusively on open source software" and never took such a position before the Director. Counsel concedes Mr. Warner "expected that he would work on non-open source software in one form or another", but that Mr. Warner did not, at any material time, "provide any services toward open source software". Counsel says Mr. Warner's position "has at all times been" that he was induced to join Simba by their creating a "special role of 'Senior Open Source Developer'".

19. The appeal alleges the Director erred in law by acting on a view of the facts that could not reasonably be entertained by finding, first, that there was no evidence Mr. Warner was explicitly promised he would work exclusively on open source software, second, that there was no evidence Simba did not intend to follow through with providing Mr. Warner with an opportunity to work on open source software and, third, that work on the "Drill project" would eventually require development of a communication layer that would be open source.

20. Counsel for Mr. Warner also submits the Director committed an error of law in making a decision without understanding the nature of open source software and appreciating that it does serve a commercial purpose.

21. Counsel also contends that the Director's apparent view of open source software having no commercial purpose put the Director in a position of inherent bias, which he submits is also supported by a reading of that section of the Determination setting out Mr. Warner's evidence and argument. Counsel says that in large part that section describes the evidence and argument of Simba and leaves out many of Mr. Warner's arguments.

ANALYSIS

22. As the Tribunal has frequently noted, when considering whether the appeal has any reasonable prospect of succeeding, the Tribunal looks at relative merits of an appeal, 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.

23. 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.*

24. 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. More particularly, a party alleging a breach of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Ltd. d.b.a. Honda North*, BC EST # D043/99.

25. The *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such 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 they are without any rational foundation.

26. Mr. Warner has grounded this appeal in an allegation that the Director committed an error of law and a failure by the Director to observe principles of natural justice in making the Determination.

27. I am not persuaded the Director has committed any reviewable error in making the Determination.

28. Mr. Warner has not shown the Director made an error in interpreting or applying section 8 of the *Act*. That provision states:

> ***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:*
>
> *(a) the availability of the position;*
>
> *(b) the type of work;*
>
> *(c) the wages;*
>
> *(d) the conditions of employment.*

29. The elements of section 8 have been set out and discussed in the Tribunal decision, *Jeff Parsons*, BC EST # D110/00. In order to find a contravention of section 8, there must be found to have been a misrepresentation in respect of one or more of the matters identified that has the prohibited result. It is clear

from the Determination that the Director understood the nature of the required section 8 analysis. At page 12 of the Determination, the Director states:

> Amongst other things, section 8 prohibits an employer from inducing, influencing or persuading a person to become an employee by misrepresenting the type of work for which the person is being hired.

30. It is also apparent, both from the Director's analysis and from the material in the Record, that Mr. Warner was contending the "type of work" for which he was hired was to be exclusively on open source software. The Director received the evidence, which has become the Record, and heard the arguments of the parties; I have access to the Record, which includes Mr. Warner's "Anatomy of a Fraud" (the "Anatomy"), where he says, at page 18 of his "Anatomy", under heading 3.3:

> "It is important to pause a moment and to take stock of what Chow has just pledged. The software that I would allegedly be developing would be characterized as such.
>
> I. It would not be distributed under a Simba Technologies licence;
>
> II. it would be externally distributed under the Apache Software Foundation;
>
> III. these constraints would apply to everything that I would be writing;
>
> IV. and by extension, all of this software would be free software."

31. It is clear from any reasonable reading of Mr. Warner's "Anatomy" that his objection to the work he was performing at Simba was that he was being asked to write "non-free software" rather than free, or open source, software. In addition to what he has written, Mr. Warner has attached a letter to his "Anatomy" that states it is from Dr. Richard Stallman, who introduces himself in the letter as the president of the Free Software Foundation. That letter is addressed to Simba Technologies c/o Kip Warner; it includes the following paragraph:

> Kip Warner, a free software activist, tells me that he accepted an employment opportunity with Simba Technologies in February of 2014 under the title of "Senior Open Source Developer," a title implying that the employee's main work would consist of developing software that is "open source", and that you assured him that all the software he would be developing would be given to the Apache Software Foundation, which would release it in its usual manner, which means it would be free software (and open source).

32. I do not accept there is any distinction to be made in stating Mr. Warner's position as being hired to work exclusively on open source software or stating it in terms of the "type of work" he would be doing. They are the same thing – writing open source software for distribution outside of Simba's licences. Neither do I accept that Mr. Warner did not take the position before the Director that he expected to work exclusively on open source software. No other conclusion is possible from a reading of his "Anatomy". Accordingly, I find no merit to the submission that the Director failed to consider the appropriate question under section 8 of the *Act*. I do find it curious, however, that Mr. Warner's counsel would concede he "never expected to work exclusively on open source software" and, more specifically, that he expected to "work on non-open source software in one form or another, and to the extent required by his employer", since it strongly suggests what Simba has contended all along – that Mr. Warner took the position knowing the type of work he would be asked to do would not be exclusively on open source software. It is quite possible such a concession entirely erodes the foundation upon which the claim was based but I make no decision on that.

33. In any event, continuing my analysis, I do not find the Director placed any higher burden on Mr. Warner to establish his claim than the burden required in any complaint, which is to demonstrate the validity of the claim on the evidence and on a balance of probabilities.

34. Counsel for Mr. Warner contends the Director "flew in the face" of transcript evidence in finding there was no evidence Mr. Warner was promised he would work exclusively on open source projects. This argument, and its reliance on the excerpt from the January 30th conversation between Mr. Chow and Mr. Warner, ignores the paragraph immediately following reference to that excerpt:

> In isolation, this would imply that Mr. Warner was being hired solely to work on open source projects, but when read in context of the entire conversation and the one preceding it, it is abundantly clear that this was a statement forecasting into the future.

35. In other words, the finding of "no evidence" did not find the excerpt was relevant to the question when it was considered in the context of all the evidence; that it spoke to the future, not the past. A review of the Record indicates the Director's view of the excerpt was reasonably grounded in the material submitted by the parties, was a conclusion that could reasonably be made and was not, therefore, an error of law. This argument simply seeks to have the Tribunal take a different view of that evidence than was taken by the Director. As noted above, the Tribunal has no authority to consider challenges to findings of fact in the absence of an error of law, and there is none shown here.

36. As well, this appears to be another element of Mr. Warner's appeal that is significantly impacted by the concession made above.

37. The remaining aspects of the appeal are of the same nature as the above argument, challenging specific findings of fact without demonstrating such findings raise an error of law. Without a demonstrated error of law the Tribunal may not second guess findings of fact made by the Director. Additionally, in making his argument on the challenged findings, Mr. Warner has, to some extent, added assertions of fact to the evidence and has, in other respects, contradicted findings made in the Determination. Both are inappropriate and not allowed in an appeal unless the additional evidence is submitted under section 112(1) (c) where it can be considered against the criteria used by the Tribunal for allowing new or additional evidence: see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03.

38. An example of the first type of assertion of fact is found in the description by Mr. Warner of open source software serving a commercial purpose. In respect of this assertion, the Record contains no evidence relating to the purpose served by open sourced software. The comments about its commercial character are gratuitous and unsupported by anything in the Record. In any event, it has no apparent relevance to the issues considered by the Director.

39. Examples of the second type are found in the assertion that Mr. Warner was "never advised he would contribute in respect of such an open source software component" and in the comments about open source software being licensed or unlicensed.

40. In respect of the these, the Director found the excerpt from the January 30th conversation, in which Mr. Chow says, "everything that we are identifying and looking to do is going to be under the [Apache Software Foundation], so everything that you are going to be contributing toward therefore is not under Simba license" to be a statement of future intent. To suggest Mr. Chow never spoke with Mr. Warner about future contributions because specific work wasn't identified is disingenuous and not accepted. Also, Mr. Warner provided the Director with a definition of open source software that says it is "computer software source code made available without a license". Apart from failing to establish the relevance of whether open source software is licensed or not to the Determination, I fail to see how the Director can be criticized by Mr. Warner for a perception that was, at least in part, created by him.

41. I find no error of law is shown and no merit to this ground of appeal.

42. Mr. Warner alleges the Director failed to observe principles of natural justice in making the Determination by demonstrating a bias toward him. Such an allegation must be proven on the evidence. As the Tribunal noted in *Dusty Investments Ltd. d.b.a. Honda North*, BC EST # D043/99 (Reconsideration of BC EST # D101/98), the test for determining bias, either actual bias or a reasonable apprehension of bias, is an objective one and the evidence presented should allow for objective findings of fact:

> . . . because allegations of bias are serious allegations, they should not be found except on the clearest of evidence: see *A.B. Lumber Co. Ltd. and North Coast Forest Products Ltd. v. B. C. Labour Relations Board and another*, B.C.J. No. 1858, August 7, 1998, Vancouver Registry No. A980541.

43. An allegation of bias or reasonable apprehension of bias against a decision maker is serious and should not be made speculatively. The onus of demonstrating bias or reasonable apprehension of bias lies with the person who is alleging its existence. Furthermore, a "real likelihood" or probability of bias or reasonable apprehension of bias must be demonstrated. Mere suspicions, or impressions, are not enough.

44. In *R. v. S. (R.D.), [1997] 3 S.C.R. 484,* the Supreme Court added the following to the concern expressed above:

> Regardless of the precise words used to describe the test (of apprehension of bias) the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed, an allegation of reasonable apprehension of bias calls into question not simply the ***personal*** integrity of the judge, but the integrity of the entire administration of justice. (emphasis added)

45. As well, the Tribunal has adopted the view that allegations of bias, as has been made here, must be considered in light of the fundamental nature of the statutory purposes and the complaint process within which a delegate of the Director functions.

46. It follows from all of the above that the burden of proving actual or a reasonable apprehension of bias is high and demands "clear and convincing" objective evidence. Subjective opinions, however strongly held, are insufficient to support a finding of actual or a reasonable apprehension of bias.

47. The burden requires objective evidence from which a reasonable person, acting reasonably and informed of all the relevant circumstances would conclude the object of the allegation was biased against him. That burden has not been met; there is no clear objective evidence from which it can reasonably be found the Director was disposed to hold an adverse view of Mr. Warner such that the Director's ability to conduct a complaint hearing, analyze the evidence neutrally and render an impartial decision was compromised.

48. There is absolutely nothing in the appeal that remotely suggests the Director exhibited a bias against Mr. Warner. The assertion that such bias can be found in the way the Determination is structured is so far short of meeting the required evidentiary burden to be worthless. The allegation has no objective foundation and, to the extent it can even be viewed as a subjective opinion, that view does not support a finding of bias.

49. In sum, I find the appeal has no basis, no merit and no prospect of succeeding. The purposes and objects of the *Act* would not be served by requiring the other parties to respond to it.

50. I dismiss the appeal under section 114(1) (f) of the *Act*.

ORDER

51. Pursuant to section 115 of the *Act*, I order the Determination dated January 16, 2015, be confirmed.

David B. Stevenson
Member
Employment Standards Tribunal