Employment Standards TRIBUNAL

An appeal

- by -

Mountain View Christian Academy

- 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: John Savage

FILE No.: 2005A/22

DATE OF DECISION: April 7, 2005

DECISION

SUBMISSIONS

Roger Ewald, for Mountain View Christian Academy

Amanda Welch, for the Director of Employment Standards

FACTS

Mountain View Christian Academy hired Indhumathy Mathew and Kizhakekathil Mathew to teach at the Mountain View Christian Academy ("MVCA") in Terrace. The Mathews taught at the school for the year September 1, 2003 through August 30, 2004.

The Mathews left their employment August 30, 2004 and filed a complaint with the Director of Employment Standards September 22, 2004 claiming unpaid wages.

The major issue before the Delegate concerned the terms of employment of the Mathews. The Mathews asserted and the Delegate agreed that their contracts of employment were for the sum of $37,500 each or $75,000 for both for the school year as noted above.

The parties agree that the Delegate erred in determining of how much had been paid the Mathews during their employment. The parties agree that, should the Delegate's ruling otherwise stand, the wages owed Indhumathy Mathew is $18,750 and the wages owed Kizhakekathil Mathew is $9,925. The total wages payable to the employees therefore would be $28,675 plus interest.

MVCA argues that the Mathews were "working for what God provided" not a fixed sum. The Mathews assert that they were to be paid $37,500 each or $75,000 for both. The Delegate accepted the evidence of the Mathews.

MVCA argues that as what God provided was less than that claimed by the Mathews they were only entitled to what they were paid, or, alternatively, they were entitled only to minimum wage. Minimum wage would be substantially less than what the Delegate found owing.

The Tribunal has determined that this matter should be determined by the written submissions that have been received by the Tribunal.

ISSUES

The issues on appeal are:

1. Should fresh evidence be admitted given the conduct of the hearing by the Delegate?
2. Did the Delegate's conduct of the hearing result in a breach of natural justice?
3. Did the Delegate err in law in determining the terms of the contract of employment?
4. Did the Delegate err in law in determining the amount owed the Mathews?

APPEAL PROVISIONS

Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

(a) the director erred in law

(b) the director failed to observe the principles of natural justice in making the determination; or

(c) evidence has become available that was not available at the time the determination was being made

The burden of establishing that a Determination is incorrect rests with an Appellant. *Natalie Garbuzova* BC EST #D684/01.

On the evidence presented, I am unable to find that burden has been met, except with regard to the agreed upon revision to the amount unpaid.

ADMISSION OF NEW EVIDENCE

MVCA seeks to have admitted evidence "…that has become available that was not available at the time the Determination was being made". The evidence consists of a letter written June 9, 2004 to MVCA and recent conversations between third parties and one of the Mathews.

The letter noted was clearly available in the sense that it was in existence well before the Determination was made by the Delegate. It was only found, in the words of Mr. Ewald, "While looking for information to help in appealing the Determination…."

The recent conversations arguably are in the nature of admissions, but arise in the context of variety of conflicting evidence from persons without direct knowledge of the facts in dispute.

The Tribunal has considered the circumstances in which new evidence will be admitted in *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D 171/03. The Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:

1. the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;

2. the evidence must be relevant to a material issue arising from the complaint;

3. the evidence must be credible in the sense that it is reasonably capable of belief; and

4. the evidence must have high potential probative value, in the sense that, if believed, it could on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

Clearly the letter of June 9, 2004 could, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint. It should not be admitted.

The evidence of recent conversations arguably meets the first 3 criterion, since they were recently created, if admissions are relevant, and are reasonably capable of belief. The difficulty is with the fourth criterion. In my view the evidence does not have "high probative value". It is offered as a contradiction to earlier statements but on its face is consistent although perhaps more expansive of the original version of events. In my opinion this evidence does not qualify for consideration based on the criterion noted.

BREACH OF NATURAL JUSTICE

The principles of natural justice are in essence procedural rights that help ensure that the parties know the case they have to meet and have the ability to respond in a meaningful and informed way. In this case MVCA argues that "…we have not seen copies of the letters sent in by Sheldon Wiebe and Cindy Vold…" although the Delegate notes that they were informed of their contents and had the ability to respond.

Although it would have been preferable for the Delegate to provide these letters to MVCA I cannot conclude that the failure to provide copies of the letters constituted a breach of natural justice. The contents of the letters were made known to MVCA. MVCA had the ability to respond to that and in fact produced other information from third parties that tended to support their contrary view.

The Delegate was alive to the conflicting evidence adduced by the parties. The Delegate noted "The Mathews and MVCA offer very different versions of salary expectations, and both parties are able to provide witnesses to their respective versions of the agreement". It is apparent in reading these statements that there was considerable acrimony between the parties and their supporters.

In my opinion in this case there was no breach of natural justice when the contents of the letters were made known to MVCA but copies were not provided. The Delegate rightly noted the conflict in these after-the-fact statements and preferred to base her decision on the available material evidence that was in existence before the dispute arose. There is no breach of natural justice.

TERMS OF THE CONTRACT OF EMPLOYMENT

MVCA argues that the Mathews were "…working for God…" for "…what finances He provided…", an indeterminate sum. The Mathews argue that they had an oral contract of employment with MVCA for a specific sum.

In the context of the *Employment Standards Act* there are three fundamental preliminary questions. The first fundamental question is whether there is an employment relation. The second fundamental question requires identifying the parties to the contract of employment. The third fundamental question concerns the terms of the contract of employment.

In this case there is clearly an employment relation. The parties to the contract of employment are clearly MVCA and the Mathews. That employment relation is governed by the provisions of the *Employment*

Standards Act, other statutes and regulations and the common law. While the Mathews may have been "working for God" their employer regarding their work at the school was MVCA.

An employment contract under the *Employment Standard Act* is for wages for specific work. An employment contract, like other contracts, cannot be for an inherently indeterminate sum, or dependent on the beneficence of a Third Party ("for what finances He provided"). For example, a promise to pay "so long as I can manage it" fails for uncertainty, *Gould v. Gould*, [1970] 1 Q.B. 275 (C.A.).

So the task of the Delegate was to determine the terms and conditions of employment between MVCA and the Mathews. In dealing with this question the Delegate considered the conflicting evidence of the parties and their supporters, but chose instead to rely on the documentary evidence of contractual intention. The Delegate noted that payroll records provided some evidence, that they were records created prior to the dispute between the parties, and supported the contention that the contract of employment was for a combined total of $75,000:

MVCA started by paying both complainants $3125 a month. When MVCA was not able to pay the full amount, partial payment was made, and future payments were labeled back pay by MVCA's own records. For example: a payment of 1270.97 made on February 2, 2004 to Kizhakekathil Mathew was labeled as the balance of November's 2003 pay.

Another demonstration of MVCA's intention to pay the Mathews $75,000 for the whole academic year is the September 1, 2003 letter to Terrace Totem Ford that was signed by the Chair of MVCA, Roger Ewald. The letter clearly states that the Mathews would receive $75,000 for working MVCA's academic year. I do not believe that either MVCA or the Mathews would intentionally deceive a potential lender and assist the Mathews to assume a financial liability that could not be met.

It is clear that the Board, despite its' divisions and inability to solve MVCA's funding crisis, understood the Mathew's salary to be $75,000. On November 14, 2003, the school's bookkeeper presented the school's financial statement to the Board. In that statement, teacher's wages for the past two months were listed as $12,500.00, which is consistent with an annual salary of $75,000. No members of the Board objected to this expense.

In light of the Employer's own records, the Employer's assertion that the Mathews agreed to work for potentially nothing for a whole academic year is unlikely. I find it was the intention of both the Mathews and MVCA that the Mathews would work the ten-month academic year for a combined salary of $75,000 to be paid over a 12 month period from September 1st, 2003 to August 31st, 2004.

In a number of decisions of the Employment Standards Tribunal, panels have adopted the 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.). That definition can be paraphrased as finding an error of law where there is:

1. a misinterpretation or misapplication of a section of a statute;
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 methodology that is wrong in principle.

In my opinion, the finding by the Delegate that the intended salary was $75,000 for the Mathews for the year is a finding of fact. There is considerable evidence to support that finding, so it cannot be said either that there was no evidence to support the finding or that it is a finding that could not reasonably be entertained. Accordingly, there is no error in law.

AMOUNT OWED

Both parties agree that the amount owed the Mathews based on the terms of the contract of employment determined by the Delegate is $28,675 plus interest. The Delegate's determination was based on a misunderstanding the evidence. Once that misunderstanding is corrected the only conclusion available in law is to correct the amount claimed to the agreed upon sum.

SUMMARY

The appeal is allowed in part.

The determination of the Delegate is varied so that the sums owing are (1) for Indhumathy Mathew $18,750 and (2) for Kizhakekathil Mathew $9,925. The total owing, then, is $28,675 plus interest.

The administrative penalty is confirmed at $500.

John Savage
Member
Employment Standards Tribunal