Employment Standards TRIBUNAL

An appeal

- by -

Taiga Building Products Ltd.
("Taiga")

- 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.: 2007A/040

DATE OF DECISION: July 13, 2007

DECISION

SUBMISSIONS

Shelley-Mae Mitchell	on behalf of Taiga Building Products Ltd.
Robert Wilson	on his own behalf
Mary Walsh	on behalf of the Director

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") brought by Taiga Building Products Ltd. ("Taiga") of a Determination that was issued on March 30, 2007 by a delegate of the Director of Employment Standards (the "Director"). The Determination found that Taiga had contravened Part 3, Section 18 and Part 7, Section 58 of the *Act* in respect of the employment of Robert Wilson ("Wilson" or "the complainant") and ordered Taiga to pay Wilson an amount of $13,457.88, an amount which included wages and interest.

2. The Director also imposed an administrative penalty on Taiga under Section 29(1) of the *Employment Standards Regulation* (the "*Regulation*") in the amount of $500.00.

3. The total amount of the Determination is $13,957.88.

4. The Determination was issued following a complaint hearing, supplemented by written submissions from Mr. Eastwood, representing Taiga, and from Wilson.

5. Taiga says the Director committed the following errors in law in making the Determination:

> (a) by failing to apply the proper onus of proof when assessing whether the bonus claimed by Wilson for the year 2005 was "wages" under the Act;
>
> (b) by concluding the bonus claimed by Wilson for the year 2005 was "wages" under the Act;
>
> (c) by concluding the bonus claimed by Wilson for the year 2005 was earned and payable as "wages" to Wilson; and
>
> (d) by concluding the amounts deposited by Taiga into Wilson's independent pension plan ("IPP") constituted "wages" under the Act such that they attracted vacation pay.

6. Taiga does not contend there is any error of law in respect of the findings of fact made by the Director.

7. Taiga does not challenge the calculation of the amount of the bonus. In his answer to the appeal, Wilson does challenge the calculation of the amount of the bonus. I will state here that his challenge runs into two insurmountable hurdles. First, it falls well outside the time limits in the Act for filing an appeal of the Determination, is not accompanied by an application for an extension of time and does not otherwise comply with the Tribunal's rules for filing appeals. Second, and in any event, it is grounded in a dispute

with findings of fact and is therefore not a matter within the authority of the Tribunal under Section 112 of the *Act*. Accordingly, the Tribunal is compelled to give no regard to his position on this matter and I will not address the matter of the calculation of the amount of the bonus any further.

8. Taiga has not sought an oral hearing on the appeal. In any event, the Tribunal has reviewed the material and the parties' submissions and does not consider an oral hearing is necessary in order to decide this appeal.

ISSUES

9. The issues are framed by the errors in law which are asserted by Taiga and listed above. The principal focus of the appeal is on the Director's conclusions that a bonus claimed by Wilson for the year 2005 and amounts paid into the IPP for Wilson were both wages under the *Act*.

THE FACTS

10. I do not intend to provide any extensive review of the findings of fact made in the Determination, as there is little dispute about those findings. There is an extensive analysis of the evidence and the findings of fact in the Determination. The argument of the appellant is whether those findings could properly lead to the conclusions reached by the Director concerning the bonus and the IPP.

11. I will comment, however, on one assertion of fact made by Taiga in their appeal submission that is not entirely in accord with findings made in the Determination. In the appeal submission, Taiga refers to the yearly bonus as "discretionary". The Director did not make a finding that the bonus was "discretionary". Rather, the Director found that while there were discretionary aspects to the bonus, those discretionary aspects did not affect or undermine its essential character as an incentive payment related to the complainant's production or efficiency. This appeal will be decided on the findings made in that respect. As noted above, the appeal makes no argument that any of the findings of fact made by the Director amount to an error in law.

ARGUMENT AND ANALYSIS

12. As a result of amendments to the *Act* which came into effect on November 29, 2002, 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 made.*

13. The Tribunal has consistently indicated that the burden in an appeal is on the appellant to show an error in the Determination under one of the statutory grounds.

14. The Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings amount to errors of law (see *Britco Structures Ltd.*, BC EST # D260/03). Reiterating what I have said above, I have no authority to accept assertions of fact that are not consistent with findings of fact made in the Determination without being shown those findings amount to an error in law.

15. The appellant alleges there are errors of law in the Determination. I shall deal with each of the alleged errors in the order presented in the appeal.

The onus of proof

16. Taiga submits the onus, or burden, of proving the bonus was 'wages" under the *Act* was on Wilson and, in the event there was any doubt on the issue of whether the bonus should be considered "wages", that doubt should have been resolved in Taiga's favour.

17. To place this argument against the relevant provisions of the *Act*, "wages" is defined in Section 1:

> ***"wages"*** *includes*
>
> *(a) salaries, commissions or money, paid or payable by an employer to an employee for work.*
> *(b) money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency.*
> *(c) money, including the amount of any liability under section 63, required to be paid by an employer to an employee under this Act.*
> *(d) money required to be paid in accordance with*
> *(i) a determination, other than costs required to be paid under section 79(1)(f), or*
> *(ii) a settlement agreement or an order of the tribunal, and*
> *(e) in Parts 10 and 11, money required under a contract of employment to be paid, for an employee's benefits, to a fund, insurer or other person.*
>
> *but does not include*
>
> *(f) gratuities,*
> *(g) money that is paid at the discretion of the employer and is not related to hours of work, production or efficiency,*
> *(h) allowances or expenses, and*
> *(i) penalties.*

18. More particularly, then, Taiga's position is that Wilson carried the legal burden of proof to show the bonus was captured by the above definition. When onus, or burden, of proof is used in the context of proceedings under the *Act*, an examination of that concept starts with the following excerpt from the Tribunal's decision in *World Project Management Inc.*, BC EST #D134/97 (Reconsideration of BC EST #325/96)[1]:

[1] This decision is referenced at page 32 of the Determination in the analysis of the question of whether Wilson earned a bonus for the year 2005.

> . . . it is not necessary to be so focused on the issue of "burden of proof". Rules about the legal burden, called by Wigmore "the risk of non-persuasion", define who is to lose if at the end of the evidence the tribunal is not persuaded. Various tests have been advanced over the years in various situations but as one writer (E.M. Morgan, "How to Approach the Burden of Proof and Presumptions" (1952-53) 25 Rocky Mountain L.Rev. 34 puts it, "the allocation (of the burden of proof) is determined according to considerations of fairness, convenience and policy". In most cases, convenience suggests that the party with the most ready access to the means of proof should have to produce it. One of the goals of proof is the production of reasonably accurate information and therefore there should be an obligation on the party having most access to such information to provide it or bear the risk of non-persuasion. Considerations of fairness suggest also that the party seeking change should bear the risk of non persuasion in that the status quo would otherwise prevail. Of course concerns of convenience and fairness may be affected by particular circumstance and, for example, may depend upon an assessment of the respective resources of the parties. Ultimately the notion of "burden of proof" is only of significance where the tribunal has not been persuaded.

19. In considering this ground of appeal, I also consider the following words from the Tribunal's recent decision, *Gordon Cameron*, BC EST #RD100/06:

> . . . the legal burden will not have a bearing on the decision unless, after considering all of the evidence, the evidence is so evenly balanced that the Tribunal can come to no sure conclusion: *Robins v. National Trust Co.* [1927] A.C. 515 (P.C.). In such case the party having the legal burden will not have satisfied the onus on it: *The Law of Evidence in Canada*, 2nd Ed., Sopinka, Lederman & Bryant, Butterworths, Toronto, 1999.

20. The short answer to this part of Taiga's appeal is that I do not read the Determination as reflecting any need to consider the question of the legal onus, or burden, of proof on the issue of whether the bonus was wages under the *Act*. The Determination sets out a substantial body of evidence which was analyzed by the Director in reaching a conclusion on that issue. That analysis quite clearly indicates that the evidence pointed firmly in the direction of the decision reached:

> Having considered the evidence before me on the structure and purpose of the bonus plan, I find the bonus falls within the definition of wages.
>
> (at p. 24)

21. There is no indication in the Determination that the issue was decided on an allocation of the legal burden of proof or that Taiga was required to shoulder a disproportionate share of the burden on that issue. While I appreciate, and accept, there was a burden on Wilson to persuade the Director on a balance of probabilities that the bonus was wages under the *Act*, it is apparent from reading the Determination that he had met that burden.

22. Taiga has cited the decision in *Lisa Julson*, BC EST #D106/97 for the proposition that Wilson had the legal burden of proving the bonus was wages. That case is different on its facts, as it involved a complete failure by Ms. Julson to provide any evidence to support her claim. As stated in that decision:

> Julson bore the onus of establishing that her wage was $40,000 per year. To meet that onus, she was required to demonstrate that both parties to the transaction, i.e., herself and In Stitches as represented by Dodge, agreed to a specific rate of pay. **No such evidence was presented.**
>
> (emphasis added)

23. *Julson* was not a case decided on an allocation of a "legal burden of proof", but on the failure of Ms. Julson to present any factual basis for her claim. As I have noted earlier, in this case there was a substantial body of evidence presented by the parties and considered by the Director in reaching the conclusion that the bonus was wages under the *Act*.

24. Taiga has not shown any reviewable error based on the onus of proof and this ground of appeal is dismissed.

The 2005 bonus is not wages

25. This ground repeats the argument made by Taiga before the Director during the complaint process: that the bonus does not meet the definition of wages under the *Act* because there were discretionary aspects to it. The Director addressed this argument from the perspective of whether the bonus scheme was an "incentive" related to hours of work, production or efficiency, and rejected the argument for three reasons:

> i) one of the key documents setting out the elements of the bonus scheme referred to the bonus as "incentive compensation", which was linked to individual performance and was based on "the profitability of the business unit" in which the individual worked;
>
> ii) the objective of an "incentive" generally is to incite or stir an employee to achieve the sought after goals through hours of work, productivity and efficiency and that objective was achieved in regard to Wilson; and
>
> iii) the bonus, or "incentive compensation", was to be based on an individual's direct and measurable contribution to the company's net profit, a result that can only be achieved through an individual's contribution of hours of work, productivity and efficiency.

26. The Director also relied on paragraph (g) of the definition of wages in Section 1 of the *Act* to dismiss the notion that the discretionary element to the payment of the bonus removed the bonus from the definition of wages. The Director read that provision as excluding discretionary payments of money from the definition of wages only if those payments are not related to hours of work, production or efficiency. I don't agree with the suggestion made by Taiga that the Director's reading of that paragraph creates an absurd result. Taiga may not accept or appreciate the effect of that part of the definition, but the result is dictated by a plain reading of the language. As a result, I cannot find any error in the Director's conclusion that the discretionary element of the bonus scheme did not affect its falling within the definition of wages in the *Act*.

27. I also don't accept the suggestion from Taiga that a "proper interpretation" of the bonus scheme is to view it as a two-stage process, with the first stage involving a completely discretionary decision by Taiga about whether an individual's performance warrants a bonus - presumably involving any factor Taiga considered appropriate - and, if the answer is yes, a consideration of whether the individual contributed to the operating income achieved. This suggestion is not dissimilar to the argument, reviewed below; that the Director took an overly restrictive view of what factors could be considered in deciding if an individual's performance was satisfactory. In respect of both propositions, Taiga has not met the burden of showing the decision of the Director amounts to an error of law. The interpretation which the Director placed on the employment agreement relating to the bonus scheme is not without an evidentiary foundation and is not unreasonable.

28. In sum, I am not persuaded that the Director made any reviewable error in finding the bonus scheme was an incentive related to hours of work, production or efficiency.

The 2005 bonus was not earned and payable to Wilson

29. The decision of the Director on this issue was based on an interpretation of the employment agreement between Taiga and Wilson relating to the bonus scheme. Taiga says that interpretation was wrong for several reasons, most of which are grounded in circumstances relating to Wilson's departure from the employ of Taiga.

30. There was no written employment agreement setting out the terms of the bonus scheme. The Record indicates the bonus scheme was a part of the total compensation package for persons employed by Taiga as lumber traders, as Wilson was, and had been modified from time to time by the company. The Director found one of the the "key documents" relating to the bonus scheme was a letter from the company dated March 31st, 2003. The Director had evidence that Taiga had made no assessment of Wilson's work performance in the period from January 1, 2005 to October 4, 2005. The Director also had evidence from the parties, some of it described as "contradictory", on the employer's policy and past practice respecting the administration and payment of the bonus, including the practice and policy relating payment of the bonus to employees who had quit or were terminated prior to year-end. On this last point, the Director found Taiga did not establish that being employed with the company at year end was a term of the bonus scheme and a precondition to payment of the bonus.

31. The Determination sets out the reasons for attributing the chosen meaning to the employment agreement relating to the bonus scheme. Those reasons are grounded in the language used in the key documents to describe the bonus scheme, evidence provided by the parties and the understandings of the parties derived from past practice. The appeal does little in the way of substantively addressing the alleged errors in the reasons, as opposed to disagreeing with the conclusions and providing an alternative interpretation of the agreement.

32. Taiga commences its argument by asserting the Director's error on this issue flows from an overly restrictive view of what factors might be included when assessing individual performance. This argument revisits a position repeatedly taken during the complaint process and in this appeal and is concisely summarized in the following excerpt from a communication found in the Record, dated April 19, 2006, outlining Taiga's reply to Wilson's "Self Help" document:

> . . . it is our position you are not entitled to a bonus for the 2005 year, given that you have breached your employment and fiduciary duties by soliciting Taiga's customers and taking advantage of Taiga's maturing business opportunities. Under the circumstances, your "performance" would clearly not entitle you to a bonus . . .

33. The Director considered whether an assessment of individual performance could include reference to matters that occurred after Wilson had resigned and found it did not. The Director concluded that individual performance was limited to an assessment of job, or work, performance during an individual's employment. Nothing in this appeal has convinced me that is an unreasonable interpretation of the employment agreement relating to the bonus scheme giving consideration to the evidence, including the circumstances of its creation and administration.

34. The Director found, on the evidence that, until his departure, Wilson's job performance was considered by Taiga to be satisfactory and, subject to financial targets being achieved, would have attracted the bonus.

35. Taiga has not shown the above findings and conclusions to be wrong in law. Taiga's argument on this point continues to be grounded in its position that entitlement to the incentive bonus is predominantly, if not exclusively, in their discretion. As indicated above, that position was not accepted by the Director.

36. Taiga argues the Director erred in law in finding Wilson was required to be employed at year end in order to be eligible for the bonus. In the complaint process, Taiga argued there was an established practice and an unwritten policy that required an individual to be employed at year's end in order to be eligible for the bonus. The Director found it was not a term of the bonus scheme that an individual had to be employed at the end of the calendar year to be eligible for the bonus. In so finding, the Director stated:

> . . . I find it more plausible that the management, having always operated from the premise that the bonus was discretionary, simply made decisions at a management level concerning an employee who left part way through the year. While management may not have considered paying a bonus in these circumstances, this does not suffice as incorporating this as a term into the employment contract.

37. In this appeal, Taiga's argument on this point is based on the "entire contract doctrine". Taiga argues that this doctrine holds that where a contract provides for remuneration at the end of a certain period, the employee is obliged to complete the stipulated period or forfeit any claim to the remuneration. Taiga relies on several cases, including two decisions of the BC Court of Appeal: *Nugent v. Midland Doherty Ltd.* (1989) 41 B.C.L.R. (2d) 249 and *Pimlott et al. v. Marbridge Investments Ltd.* (1967) 61 D.L.R. (2d) 309, in support of this argument.

38. It is not clear that this argument was made before the Director, but in any event those decisions – if they apply at all in adjudicating claims for wages under the *Act* – are distinguishable from this one. In this case, the Director interpreted the employment agreement as not requiring Wilson to remain in employment until the end of the year as a condition of obtaining the bonus. In the cases cited, the Court interpreted the employment agreement as including that requirement. Unless the Director's interpretation is wrong, the "entire contract doctrine" would not apply: see *Hannan v. Methanex Ltd.* [1998] B.C.J 318 (B.C.C.A.).

39. In any event, I do not accept the "entire contract doctrine" is a proper adjudicative tool in proceedings under the *Act*. The objective of the Courts adjudicating the common law contractual rights between an employer and an employee and that of the Director determining the respective statutory rights and obligations of an employer and an employee under the *Act* are significantly different. The main objective of the common law is to adjudicate a breach of contract and to provide appropriate relief for that breach, depending on the Court's view of the circumstances and factors in each case. The main objective of the Director is to administer a legislative scheme within a framework of statutory purposes that have found expression in several Court and Tribunal decisions, including *Machtinger v. HOJ Industries Ltd.*, (1992) 91 D.L.R. (4th) 491 (S.C.C.), *Helping Hands v. Director of Employment Standards*, (1995) 131 D.L.R. (4th) 336 (B.C.C.A.) and *Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27. These decisions, among other things, recognize the remedial nature of the *Act* and correspondingly endorse a large and liberal construction and application of its provisions. They were specifically referred to and recognized in the Determination as providing support for a broad approach to interpreting the *Act* in the circumstances of this case.

40. If there is a flaw in the Determination, it is not in the result, but in the organization. The Director treated the issues of whether the incentive bonus was "wages" under the *Act* and whether it was "earned and payable" as two separate questions. As a matter of law, however, the latter question is not a separate consideration but is one of the requisite components of the applicable part of the definition of wages. The particular part of the definition of wages which was the focus of the analysis, paragraph (b), has three components, or requisites, to a finding that amounts of money are wages for the purposes of the *Act*: first, the money is paid or payable; second that it be paid or payable as an incentive; and third that it relates to hours of work, production or efficiency (see *Shell Products Canada Limited Produits Shell Limitée*, BC EST #RD488/01). The Director should have avoided a conclusion that the bonus was wages under the *Act* until conclusions had been reached on each of the requisites.

41. Notwithstanding the fragmented approach, I agree with the overall analysis and decision of the Director on the issue of whether the bonus was wages under the *Act*. More particularly, and in the context of the burden placed on Taiga in this appeal, Taiga has not shown that the Director erred in law in reaching the conclusion that the bonus fell within the definition of wages as *"money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency"*. The facts, as applied to the relevant provisions of the *Act* and giving effect to the purposes of the *Act*, clearly support the Determination on that issue.

42. The decision of the Director to find the amounts paid under the bonus scheme to be wages because they were an incentive relating to hours of work, production or efficiency and deal separately with the "paid or payable" question has caused some duplication in the appeal submission. It clearly has not, however, affected the ability of Taiga to make this appeal or to express its disagreement with the Determination as it relates to the conclusion reached by the Director on each of the components of the definition.

43. The appeal on whether the Director erred in law in finding the bonus was wages under the *Act* is dismissed.

IPP is not "wages" and no vacation pay is payable on the IPP

44. The Director accepted Wilson's evidence that the amounts deposited into the IPP comprised all or part of his yearly bonus amounts. The decision to deposit the amounts to the IPP belonged exclusively to Wilson. The Director reasoned, logically and correctly, that since the yearly incentive bonus amounts were wages under the *Act*, the amounts deposited to the IPP were also wages. Under Section 58 of the *Act*, an employer is required to pay vacation pay on an employee's "total wages during the year entitling the employee to vacation pay". Once again, the Director reasoned, logically and correctly, that the amounts deposited to the IPP were included in "total wages" and vacation pay was required to be paid on them.

45. In the complaint process, Taiga argued, among other things, that because the amounts deposited to the IPP were not taxable and not paid to Wilson as income, they were not wages under the *Act*. The answer to that argument is found in the following passage from the Determination:

> . . . I am not bound by the ITA [Income Tax Act]. The ITA is a different statute, with a different purpose. Hence, how the ITA treats these amounts for income tax purposes does not govern how these amounts are treated under this Act.

46. Taiga makes the same argument in this appeal. The answer is the same: it is the application of the definitions and purposes of the *Act* that will determine the validity of a complaint under the *Act*, not the application of, or consequence of applying, federal legislation.

47. Taiga submits their position that the Director erred in finding the amounts deposited to the IPP are wages is supported by a reading of Section 22 of the *Act*, which allows an employee to make a written assignment of wages for the purposes stated in that section. The argument presumes Section 22 does not apply to the amounts deposited to the IPP. That presumption is not entirely free from doubt. It was not an issue that was before the Director nor is it an issue that is before the Tribunal in this appeal. In the final analysis the issue remains whether those amounts are wages under the *Act* and no reviewable error on that issue has been shown.

48. This ground of appeal is dismissed.

49. In closing its appeal submission, Taiga raises an issue relating to findings of fact made by the Director on the matter of Return of Capital Employed ("ROCE"). The submission states:

> Taiga disagrees with the Delegate's refusal to accept Taiga's evidence on the issue of Return of Capital Employed, and the delegate's finding as a result that simply "on the math" Wilson did earn a bonus in 2005.

50. There is nothing in Taiga's submission that shows the decisions being challenged on this point raise questions of law or, if they do, that the Director committed an error of law in respect of those decisions.

51. For the above reasons, the appeal is dismissed.

ORDER

52. Pursuant to Section 115 of the *Act*, I order the Determination dated March 30, 2007 be confirmed in the total amount of $13,957.88, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal