Employment Standards TRIBUNAL

An appeal

- by -

Celltech Research Inc.
("Celltech")

- 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

ADJUDICATOR: David B. Stevenson

FILE No.: 2002/550

DATE OF HEARING: February 10, 2003

DATE OF DECISION: March 4, 2003

DECISION

APPEARANCES:

on behalf of Celltech Research Inc.	Bernie Penner Ben Hewson
on behalf of the individual	In person

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by Celltech Research Inc. ("Celltech") of a Determination that was issued on October 16, 2002 by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded that Celltech had contravened the *Act* in respect of the employment of Shawn McMillen ("McMillen") and ordered Celltech to cease contravening and to comply with the *Act* and to pay an amount of $4,666.89. The amount found owing represents 3.5 days of regular wages and 3.62 days of annual vacation pay.

Celltech has appealed the Determination on the following grounds:

1. The Director erred on the facts;
2. The Director erred in calculating the amounts owed;
3. The Director failed to consider relevant facts; and
4. Celltech was denied the opportunity to respond to the investigation.

Celltech has asked that the Tribunal cancel the Determination, assess a penalty against McMillen, require McMillen to repay the company the unforgiven portion of a pay advance, or, alternatively, refer the Determination back to the Director for further investigation and coincidently order that the the investigation be stopped under Section 76 of the *Act*.

In a reply submission on this appeal, the Director acknowledged that the final calculation of annual vacation pay owing should be adjusted downward by an amount equivalent to .5 of a day. Accordingly, there will, at least, be an order to vary the Determination by that amount.

ISSUE

The issue in this case is whether Celltech has shown an error in the Determination sufficient to justify the Tribunal cancelling the Determination or referring the matter back to the Director.

THE FACTS

The facts of this appeal are fairly complicated. The complication arises less from matters that flow from the *Act* than from the several interpersonal and legal issues that have divided the parties since McMillen was terminated from his employment with Celltech on June 13, 2002. The case has been difficult to adjudicate, primarily because the parties have been either unable or unwilling to separate issues that fall within the scope of the *Act* from those that do not. Both sides feel they have been 'had' by the other and the relatively small amount at issue in this appeal has, at least for the moment, become the battleground on which all their perceived grievances are being fought. A similar frustration has been expressed by the Director in replying to the appeal:

> Both parties informed me that they were using the authorities (police, bailiff) in relation to alleged theft or similar by the other. This and much more information pushed on me frequently by the parties was of no relevance to my jurisdiction, as I carefully tried to explain on each and every occasion.

The Determination provided the following background information:

> Celltech tests cellular phones prior to their distribution and sale, which is under the jurisdiction of the Act. McMillen worked from September 2, 1999 to June 13, 2002 as General Manager at a salary of $168,000.00 per annum. He was terminated by the employer midday on June 13, 2002.

McMillen had been absent on leave from May 17 to June 7, 2002. He returned to work on June 10, 2002 and worked until June 13, 2002, when he was terminated.

Celltech refused to pay McMillen any wages for the period June 10 to June 13, 2002. The Determination noted that initially Celltech took the position that they did not owe McMillen for the last 3.5 days because he had exceeded his vacation pay leave. When it became evident that was not the case, Celltech claimed McMillen should not be paid because during the last 3.5 days he was not performing work for Celletech, but was working against it. The Determination found that, as McMillen had reported for work and there was no evidence that he was not carrying out his regular duties, he was entitled to be paid wages for those days.

The Determination found that McMillen had accrued the equivalent of 19.62 days of annual vacation pay entitlement over a period from August 1, 2001 to June 13, 2002. There was no direct challenge to that finding in the appeal or appeal hearing, although that conclusion might be indirectly affected by the argument made by Celltech relating to the effect of a promissory note signed by McMillen in September 1999.

The Determination concluded it was appropriate to adjust the accrued annual vacation pay by scheduled and unscheduled absences that McMillen had taken during the period. The Determination found there were 11 days of 'scheduled' absences and 5.5 days of 'unscheduled' absences which were characterized as paid vacation, leaving an amount of annual vacation pay equivalent to 3.12 days wages owing.

The Determination converted McMillen's annual wage under the formula found in Section 1 of the *Act*, definition of *"regular wage"*, and found an amount owing of $4,600.59. That amount, however, was calculated on 7.12 days. When the number of days owing is adjusted according to the acknowledgement

made by the Director of the error in the final calculation, the amount owing would be calculated on 6.62 days and that converts to an amount of $4,277.51, plus interest according to Section 88 of the *Act*.

At the appeal hearing, I heard evidence from Mr. Jonathan Hughes, who is now the General Manager for Celltech and was the Project Manager under McMillen, Mr. Russell Pipe, Senior Compliance Engineer with Celltech, Mr. Ben Hewson, Controller for Celltech, and Mr. Bernie Penner, the President of Celltech. The objective of the evidence of Mr. Hughes and Mr. Pipe was to establish that from mid-April until his termination, McMillen was using company time for 'non-company' business and, to some extent, to provide some background for Celltech's argument that the Director should have exercised discretion under paragraph 76(3)(c) of the *Act* and ceased investigating McMillen's complaint without issuing a Determination.

ARGUMENT AND ANALYSIS

I shall address the arguments raised by Celltech in the following order: did the Director err in concluding McMillen was entitled to 3.5 days' wages for June 10 to 13, 2002 and annual vacation pay equivalent to 3.12 days' wages; was Celltech denied an opportunity to respond to the investigation; should the Director have ceased investigating the complaint, exercising discretion under paragraph 76(3)(c) and/or (f); and did the Director erred in finding the promissory note ceased to be effective as of August 21, 2001 and by not setting off the amounts owing under the promissory note against any liability of Celltech under the *Act*.

Wages and Annual Vacation Pay

Under the Act wages are payable to an employee for work. Work means, "*the labour or services an employee performs for an employer whether in the employee's residence or elsewhere*". Subsection 1(2) of the *Act* says:

> *(2) An employee is deemed to be at work while on call at a location designated by the employer unless the designated location is the employee's residence.*

The usual presumption, which is supported by the above provisions, is that an employee who comes to the workplace, as and when required (either by past practice or on instructions from the employer), and remains at the workplace for a period of time is 'at work' and entitled to be paid wages for that time. The Determination noted that Celltech had conceded McMillen was 'at work' on his last 3.5 days of employment. In the circumstances, the Director was entitled to rely on the usual presumption. If it is asserted the usual presumption should not apply, the onus is on the party making that assertion to rebut the presumption. Celltech has made that assertion.

Mr. Hughes and Mr. Pipe testified, among other things, on that point. Mr. Hughes had no specific recollection of McMillen's last 3.5 days of employment. Mr. Pipe testified that on the last ½ day, he saw McMillen working on a probe that he believed was unrelated to anything Celltech was testing at the time. Other than that, he could not say whether McMillen was, or was not, doing company related work during that week. In cross-examination, he conceded that he could not say McMillen had done no company related work in the last ½ day of his employment.

On the evidence provided, Celltech has not rebutted the presumption in respect of the 3 full days he was at work. In respect of those days, there is no evidence that McMillen was not carrying out his regular

duties. That being so, no error has been shown in the Determination. There was some evidence that during the last ½ day, McMillen was, for an unspecified period of time, not performing his regular duties for Celltech. However, the evidence is not sufficient to allow for a conclusion that he performed no work for Celltech on that day. As stated in Determination, albeit in another context:

> I'm satisfied that McMillen was at the workplace on Dec. 27/28 '01 and probably doing some productive work in the course of his time there, but there is no evidence to allow a specific calculation of worked hours to [sic] what portion of the workday was devoted to work. The same holds true for the 31st, when the lab was closed, but he says he was at work preparing for a visit from a client. McMillen is entitled to minimum daily pay (4 hrs. or 0.50 days) for work on those three days . . . .

Similarly, unless it was shown that McMillen performed no work for Celltech at all, he is entitled to minimum daily pay (see Section 34(2)) for June 13, 2002 - which would be 4 hrs. or .5 day. I am unable to conclude the Director erred in finding McMillen was entitled to receive wages for the last 3.5 days of employment.

No cogent evidence was provided showing the Director erred in concluding McMillen was entitled to annual vacation pay equivalent to 3.12 days' wages.

In the appeal, Celltech made submissions on each of the dates examined in the Determination relating to 'unscheduled' absences that were not accepted by the Director as vacation days. I heard evidence relating to three of the days, or periods, at issue: December 27 to 31, 2001; January 11, 2002 and January 17 and 18, 2002.

In the appeal, Celltech said they had 'direct and persuasive evidence' that refuted the assertions made by McMillen concerning the period in late December. At the hearing, only Mr. Pipe was asked about that. He was asked about the "lab schedule for Christmas" and replied that he understood John Jaillet had come in for a day or two to work on some projects. McMillen was not cross-examined about this period.

Mr. Penner gave evidence about how he believed McMillen came to be travelling on company business on January 11, 2002 (a work day) rather than travelling during a non-work period. In argument, Mr. Penner submitted Celltech should not be 'punished' to the full extent of the wage for that day, but that "at least a ½ day should be allowed to us". Celltech did not, however, show any error in the Determination on this point.

The Determination noted that McMillen had provided some evidence of work done on January 17, 2002 and was entitled to minimum daily pay on that day. The other 1½ days were characterized as vacation days. The only evidence I heard that related to this period was from Mr. Pipe, who said McMillen had told him he intended to rent a houseboat when he went to Florida, but there was no follow-up on that matter in any of the evidence.

One of the submissions made by Celltech on this ground of appeal was that the Tribunal should adjust the Determination: firstly, to account for periods where McMillen was not carrying out his regular duties, even though he was at the workplace and was paid his full wages; and, secondly, for instances when McMillen generated costs to the company by allegedly improperly placing personal expenses on the company credit card.

Mr. Hughes testified how McMillen, from about mid-April until he was terminated engaged him in discussion for about an hour every day about establishing his own testing laboratory in the event that Celltech was shut down and on some occasions would call meetings involving all the laboratory employees to discuss this. As well, he sometimes would go off site with McMillen to view potential locations for a new laboratory. Mr. Penner alleged that McMillen had spent an inordinate amount of company time developing a business plan related to establishing his own testing laboratory. Mr. Hewson testified about how McMillen 'misused' the company credit card and the cost impact of that on Celltech.

An employer is prohibited from 'clawing back' wages paid to an employee - even wages allegedly paid under a mistake. The Tribunal has accepted that credit card costs are a "business cost" within the meaning of subsection 21(2) (see *V.C.R. Print Co.*, BC EST #D498/00). The adjustment sought by Celltech would have the effect of allowing a 'claw back' of wages paid or a deduction from wages payable and would require McMillen to pay some of Celltech's business costs. The response to this submission is found in Section 21 of the *Act*, which operates to prohibit an employer from making any deductions, not authorized by law, from the employee's wages and from an employer requiring an employee to pay any part of the employer's business costs:

> *21. (1) Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.*
>
> *(2) An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations.*

In response to the suggestion that the Tribunal could make such an adjustment through an order, even though an employer may not be allowed to do it directly, the Tribunal will not order a result that indirectly accomplishes what the *Act* prohibits an employee from accomplishing directly.

In sum, apart from what was acknowledged by the Director, no error in the calculation of McMillen's wage and annual vacation entitlement has been shown. This aspect of the appeal is dismissed.

I have not addressed a submission by McMillen that no adjustment for December 27 and 28 should have been made, as no proper or timely appeal on that matter has been filed by him.

Denial of Opportunity to Respond

Celltech says:

> The Delegate was to have provided us with a draft of the Determination prior to issuing it. The Delegate did not do this nor did he in fact permit us the opportunity to present evidence as indicated in the Summary of Events section. Had he done this we would have been able to correct an error in the facts that first occurs here, and which appears to form the basis of conclusions, involving the balance of probabilities, and the assessment of days worked, made later relative to the Employee's contention as to his relationship with the former President Pick.

The Director denies indicating Celltech would be provided with a draft of the Determination. Regardless, the submission of the Director on this point outlines the progress of the investigation, including dates and subject matter of discussions and communications with representatives of Celltech. I am satisfied that Celltech was given more than a reasonable opportunity to respond to the complaint.

This aspect of the appeal is dismissed.

The Director Should have Ceased Investigating

Celltech says the Director should have exercised discretion under paragraph 76(3)(c) of the *Act*, ceased investigating and closed the file, because of McMillen's conduct leading up to his termination on June 13, 2002 and his conduct following that date, which, it is alleged, included filing the complaint, removing certain laboratory assets belonging to Celltech (theft), attempting to 'extort' technology assets from Celltech, making false statements to the RCMP and to the Director and launching legal action, in which he is seeking to title to certain technology he sold to a numbered company owned by Globus Wireless Ltd., a company related to Celltech.

Paragraph 76(3)(c) of the *Act* says:

> *76. (3) The director may refuse to accept, review, mediate, investigate or adjudicate a complaint of may stop or postpone reviewing, mediating, investigating or adjudicating a complaint if . . .*
>
> *(c) the complaint is frivolous, vexatious or trivial or is not made in good faith, . . .*

A primary element of this ground of appeal relates to the assertion by Celltech that certain evidence was not presented because of an ongoing police investigation and a concern that providing such evidence might compromise the investigation. In the appeal, Celltech says:

> At this point we as the employer, are not able to provide any further details regarding this matter, however, Constable Struthers has stated he is able to answer questions of the Tribunal, contingent in his assessment, as to how the answers may impact on the criminal matter.

The Tribunal communicated with the RCMP for the sole purpose of determining whether any aspect of their investigation related to the matters addressed in the Determination - whether McMillen was owed wages and annual vacation pay - and were assured it did not. As well, nothing in this appeal has indicated any relevance or relationship between the issues raised in this appeal and the RCMP investigation. Celltech seems to believe that if either the Director or the Tribunal had all the information from the RCMP investigation, the Director's investigation would have been stopped and/or the Determination cancelled. The Director was aware of the RCMP investigation and had heard most of the allegations - the legal action relating to the sale of the technology had not yet been commenced - but was not convinced that it had any bearing on the investigation of the complaint. In one submission, the Director states:

> Both parties continually wanted me to rule against the other based on alleged character and credibility defects, none of which I could see impinged on the central issue before me: whether wages were owed to the employee.

In addition to asserting the Director should not have continued investigating the complaint, Celltech has asked the Tribunal to "stop or postpone all proceedings in this matter, so as to uphold the integrity of Section 76(2)(e) (the appropriate reference should be 76(3)(f)) of the . . . *Act*". The Tribunal does not, however, have any such authority. The Tribunal's remedial authority in this matter is limited to those matter set out in Section 115. As for whether the Tribunal should conclude the Director ought to have exercised discretion under Section 76, ceased investigating the complaint and closed the file, there are two principles which bear on an answer to that question.

The first is found in *Provident Security and Event Management Corp.*, BC EST #D279/01, where the Tribunal said the following about the purpose of Section 76(3)(c):

> The purpose of Section 76(2)(c) [now 76(3)(c)] of the Act is not to refuse or discontinue investigation of valid employment standards claims. The purpose and objective of that provision is to allow the Director to prevent abuses of the legislation, where it is apparent that a complaint has been filed not for proper purposes, but as a means of vexation or oppression or for ulterior purposes, or, more simply, where the process is misused. In *Re Health Labour Relations Association of British Columbia et al v. Prins et al*, (1982) 140 D.L.R. (3d) 744 (BCSC), the Court stated, at page 748:
>
> > It would take the clearest kind of language to exclude the right of any citizen to the direct remedy furnished by this [the Act] legislation.
>
> The same considerations would apply in Section 76(2)(c) [now 76(3)(c)]. It would take the clearest kind of circumstances to deny an employee the basic standards of compensation and conditions of employment provided by the Act.

In this case, the remedy being sought by McMillen when he filed the complaint - payment of wages and annual vacation pay - is exactly the sort of remedy for which the *Act* was intended.

The second principle is that the Tribunal will not interfere with the exercise of discretion unless it can be shown the exercise was an abuse of power, the Director made a mistake in construing the limits of her authority, there was a procedural irregularity or the decision was unreasonable, meaning, generally, that the Director has failed to exercise her discretion within well established legal principles and for bona fide reasons, has acted arbitrarily or has based the Determination on irrelevant considerations (see *Takarabe and others*, BC EST #D160/98).

McMillen complained to the Director that he was owed wages and annual vacation pay, both of which clearly relate to basic standards of compensation and conditions of employment provided by the *Act*. With knowledge of the most of the extra-curricular activity that was going on between McMillen and Celltech, the Director considered the possible affect those matters might have on the complaint and found that none of those matters "impinged on the central issue" under the *Act*. In the circumstances, there was no reason for the Director to consider Section 76(3)(c) should be applied.

Nothing in the material or in this appeal demonstrates circumstances that ought to have compelled the Director to conclude the complaint was "*frivolous, vexatious or trivial or . . . not made in good faith*". There is no basis for the Tribunal to interfere with the decision of the Director to continue investigating and issue a Determination.

Celltech has also raised, in a similar context, the application of Section 76(3)(f), but there is no indication that any proceeding has been commenced before a court, tribunal, arbitrator or mediator relating to the subject matter of the complaint - unpaid wages and annual vacation pay - and that point is rejected.

The Promissory Note

On, or about, September 2, 1999, McMillen and Celltech signed an Employment Services Agreement (the "first agreement"). The first agreement appointed McMillen as General Manager for an indefinite term, with an initial three year period guaranteed by Celltech. The first agreement contained, among other

things, provision for a starting bonus for McMillen. That provision was included in the section entitled "Compensation". The starting bonus was advanced to McMillen on the first day he reported for work (September 2, 1999) and was structured in the first agreement as a forgivable loan, for which McMillen was to sign a promissory note before the funds were advanced (Section III.2.iii). The loan was to be forgiven over the first 36 months of his employment in four equal installments, the first on December 31, 1999 and the other three falling on the first, second and third anniversary of McMillen's employment. McMillen signed a promissory note for the 'loan'. The following terms are contained in that document:

> I . . . agree that should I leave the employ of Celltech Research Inc., or any of its affiliated companies prior to the complete forgiveness of the outstanding debt, that the entire outstanding amount of the loan becomes due . . . .
>
> Further, I agree that the Company is authorized to withhold outstanding wages, vacation pay and expenses as partial settlement of the outstanding amount, . . .

The first agreement contained provisions relating to the respective rights of the parties in the event McMillen was dismissed, with and without cause, or if the first agreement was terminated. It is fair to say, when the provisions relating to the terms and conditions of employment and compensation are read together with the terms in the promissory note, the parties intended the promissory note to apply only to the circumstance where McMillen chose to resign his employment during the initial guaranteed three year period of employment.

In August 2001, McMillen and Celltech signed another Employment Services Agreement (the "second agreement"). The second agreement contained the following provisions:

> WHEREAS:
>
> . . .
>
> B. . . . the terms of [McMillen's] employment from September, 1999 until July 31, 2001 were governed by an Employment Services Agreement . . . dated September 2, 1999 . . . (. . . the "**Former Agreement**"), and
>
> C. . . . the parties wish to terminate the Former Agreement and to enter into this Agreement to set forth the terms and conditions of the continued employment of the Employee . . .
>
> . . .
>
> 2.8 Upon execution of this Agreement by the Employee, the Former Agreement will terminate as of the effective date hereof, except that the provisions of Sections II.4 and IV.4 of the Employment Services Agreement forming part of the Former Agreement will continue . . . .

The continuing provisions were unrelated to the 'loan'. There was no specific reference in the second agreement to the promissory note. The effective date of the second agreement was August 1, 2001.

The second agreement contained a signing bonus, payable in full on August 1, 2001. The T4 that McMillen received for 2001 included his salary for 2001, the signing bonus related to the second agreement and the amount forgiven on the 'loan' on the second anniversary of his employment.

Section 9 of the second agreement contains extensive provisions relating to the respective rights of McMillen and Celltech to terminate the second agreement.

Section 9.3 says McMillen has no right to terminate the second agreement except for cause or 'good reason' - which is defined in the provision. In sections 9.1 and 9.2, Celltech has the right, to terminate the second agreement with or without cause. In the event of termination for cause, ". . . the Employee will not be entitled to receive any severance pay notice, payment in lieu of notice or damages of any kind and will not be entitled to receive any further amounts (except for amounts, if any, accrued under this Agreement up to the date of termination and unpaid at the date of such termination) . . .". If McMillen terminates the second agreement for 'cause' or 'good reason' or Celltech terminates the second agreement 'without cause', McMillen is entitled to payment of an amount equal to six, nine or twelve months' Fees, depending on when the termination occurs. There is no reference, direct or indirect, to a requirement for McMillen to repay the 'loan'.

Celltech has argued in this appeal that since McMillen was terminated before the completion of his first 36 months of employment, there is an outstanding indebtedness on the 'loan' which Celltech may recover from the wages and vacation pay found owing.

The Determination found that the second agreement had "resolved all outstanding issues between the parties" as of August 1, 2001. Presumptively, this finding included any matters outstanding on the 'loan'. In reply to the appeal, the Director noted that it was Celltech's position "that all contract terms and conditions of the employee's employment were superceded by a contract for August 1, 2001", adding, "If I was mistaken to conclude that the parties started with a fresh slate on this date, then the vacation amount is also in error in favour of the employer."

There was little evidence provided to me relating to this aspect of the appeal. McMillen said that except for the two continuing obligations he understood the first agreement ceased to be effective for all purposes, including the promissory note, when the second agreement was signed.

I agree with the Director and McMillen on this point. I can find nothing in either the first or second agreement that suggests the 'loan' obligation survived the first agreement. When the first agreement is examined, it is apparent the 'loan' was designed to be a disincentive to McMillen choosing to leave his employment with Celltech, without cause, in the first three years. That particular form of disincentive was replaced in the second agreement with a prohibition against McMillen terminating his employment without cause or good reason. The purpose of the loan arrangement no longer existed.

In the second agreement, in circumstances where 'Fees' would be payable to McMillen on termination, the payment of those 'Fees' is not qualified or limited in Section 9 of the second agreement by any perceived outstanding obligation on the 'loan', even though the second agreement clearly contemplates it can be terminated by McMillen with cause or good reason prior to his third anniversary of employment with Celltech.

On my reading of the two agreements, I find the first agreement, and any obligation created by it (except those specifically carried forward to the second agreement), was brought to an end by the second agreement and specifically reject the argument that there was any residual, or continuing, obligation to repay any portion of the 'loan'. It follows that I do not need to address the issue of whether unused annual vacation entitlement from the first agreement was also carried forward into second agreement or whether the 'unpaid' amount of the 'loan' was $12,500.00 as alleged by Celltech, or some lesser amount.

In sum, except for the matter of the adjustment to the calculations done by the Director on the wages owing, the appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated October 16, 2002 be varied to show amount owing of $4,277.51, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal