

An appeal

- by -

Dr. Michael Nikolakis, Inc.  
(“Nikolakis Inc.”)

- 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.:** 2014A/76

**DATE OF DECISION:** August 21, 2014

## DECISION

### SUBMISSIONS

Dr. Michael Nikolakis

on behalf of Dr. Michael Nikolakis, Inc.

### OVERVIEW

1. This decision addresses an appeal filed under section 112 of the *Employment Standards Act* (the “*Act*”) by Dr. Michael Nikolakis, Inc. (“Nikolakis Inc.”) of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on May 15, 2014.
2. The Determination found that Nikolakis Inc. had contravened Part 3, sections 17, 18, 21 and 27, Part 7, section 58 and Part 8, section 63 of the *Act* in respect of the employment of Shelley Nohels (“Ms. Nohels”) and ordered Nikolakis Inc. to pay Ms. Nohels wages in the amount of \$1,281.73 and to pay administrative penalties under section 29 of the *Employment Standards Regulation* (the “*Regulation*”) in the amount of \$3,000.00. The total amount of the Determination is \$4,281.73.
3. This appeal alleges the Director erred in law in making the Determination.
4. In correspondence dated June 25, 2014, the Tribunal notified the parties, among other things, that no submissions were being sought from any other party pending review of the appeal by the Tribunal Member and that following such review all, or part, of the appeal might be dismissed.
5. The section 112(5) “record” has been provided to the Tribunal by the Director and a copy has been delivered to Nikolakis Inc., who has been given the opportunity to object to its completeness. There has been no objection and, accordingly, the Tribunal accepts the section 112(5) “record” provided by the Director as complete.
6. 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, the written submission filed with the appeal by Nikolakis Inc. and my review of the material 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.*

7. 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*, Ms. Nohels 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. In this case, I am looking at whether there is a reasonable prospect the appeal will succeed.

## ISSUE

8. The issue to be considered at this stage of the proceeding is whether the appeal should be dismissed under section 114 of the *Act*.

## ARGUMENT

9. Dr. Nikolakis, on behalf of Nikolakis Inc., submits the Director erred in law in several respects in the Determination. I shall summarize each of the areas where Nikolakis Inc. asserts an error of law was made.
10. First, it is submitted the Director erred in finding Ms. Nohels, at the request of the employer, went shopping for one hour on Wednesday April 17, 2013. Nikolakis Inc. argues that no evidence was provided that Ms. Nohels was asked to work on that day – a day she was not scheduled to work. Nikolakis Inc. has submitted time sheets which, it argues, shows the days on which Ms. Nohels worked for Nikolakis Inc. and does not include the day in question. Other documents have also been submitted with the appeal on this point. All of these documents are part of the section 112(5) “record”.
11. Second, Nikolakis Inc. says the Director erred in finding they had contravened section 21 of the *Act* by failing to reimburse Ms. Nohels for items purchased for the employer’s business. Nikolakis Inc. submits these items were not purchased for its business and argues there was no evidence that any of the items were ever used in the business.
12. Third, Nikolakis Inc. argues the Director erred in finding section 58 of the *Act* was contravened. Nikolakis Inc. says Ms. Nohels took substantially more paid time off days than what she was entitled to as annual vacation pay and annual vacation leave.
13. Fourth, Nikolakis Inc. submits the Director erred in finding Ms. Nohels was entitled to length of service compensation, contending her conduct leading to her termination was “dishonest”, a breach of duty and a serious undermining of the employer’s corporate culture, which together provided just cause for terminating her employment.

## ANALYSIS

14. When considering whether the appeal has any reasonable prospect of succeeding, the Tribunal looks at the 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.
15. 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.*

16. 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 of the *Act*. This burden requires the appellant to provide, demonstrate or establish a cogent evidentiary basis for the appeal.
17. 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.
18. The Tribunal has adopted the following 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] BCJ. No. 2275 (B.C.C.A.):
  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.
19. 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.
20. This appeal is comprised almost entirely of challenges to findings of fact made by the Director in the Determination. The only aspect of the appeal that alludes to a question of law is the matter of Ms. Nohels’ annual vacation pay entitlement.
21. Considering each of the arguments made, I initially find, contrary to the assertions made in the appeal, that there was evidence relating to both Ms. Nohels performing work on April 17, 2013, and her purchasing items for the business for which she was not reimbursed.
22. On the first matter, the Director found Ms. Nohels had been requested by a representative of the employer, Jeanne Wood, Dr. Nikolakis’ medical office assistant, to purchase office supplies for the business on April 17, 2013. There was evidence, which is recited in the Determination, for this finding. The Director found this activity fell within the definition of work and wages were required to be paid for it. Accordingly, I do not accept there was “no evidence” this activity took place. I do accept the conclusion by the Director that, having taken place, it was work and wages owed in respect of it.
23. I find there was also evidence, set out in the Determination and contained in both the verbal evidence given by Ms. Nohels and the section 112(5) “record” that Ms. Nohels purchased items for the office – not for her personal use – for which she was not reimbursed. The argument on this point is not supported by reference to the material on the file.

24. The arguments made in this appeal on the above matters are identical to those made to, and rejected by, the Director during the complaint process. Nothing in this appeal demonstrates those findings and the conclusions based on those findings amount to an error of law. They simply represent an insistence by Nikolakis Inc. not to accept those findings and to seek to have this Tribunal alter them.
25. The issue of vacation pay is a matter of mixed fact and law. As a matter of fact, the Director found no evidence that any of the days off with pay provided to Ms. Nohels had been requested by her as annual vacation time or had been recorded as annual vacation time by Nikolakis Inc. (as required in section 28 of the *Act*). There was evidence to support that finding. As a matter of law, the Director found the circumstances under which Ms. Nohels took some of the paid time off were covered by the prohibition found in section 59 of the *Act* which does not allow a reduction of an employee's annual vacation entitlement because of other benefits provided. I do not find there was an error of law in the Director's interpretation or application of section 59 to the circumstances as established by the evidence. The Director also found the \$1,000.00 payment made to Ms. Nohels on December 20, 2012, was in the nature of a bonus and was not annual vacation pay.
26. I am not persuaded by anything in the appeal that there was any error of law in the findings concerning Ms. Nohels' annual vacation pay entitlement under the *Act*.
27. The last matter relates to a disagreement by Nikolakis Inc. about whether there was just cause to terminate Ms. Nohels' employment. The examination of this issue by the Director is found at pages R11 to R13 in the Determination. While a question of whether there is just cause for termination does include questions of law, it is predominantly fact driven. As a matter of law, the Tribunal has identified and consistently applied several principles to questions of just cause for dismissal under the *Act*. This appeal does not engage in a challenge of any of those principles. Rather the substance of this appeal is a disagreement with the characterization of the facts by the Director in the context of just cause principles. Nikolakis Inc. seeks to have the Tribunal characterize those facts differently and to find there was just cause to terminate Ms. Nohels. I do not find the Director made an error of law in finding Nikolakis Inc. had failed to establish there was just cause. The findings made by the Director were based on a view of the facts that was not unreasonable; the resulting findings of fact were not perverse or inexplicable; there was evidence to support them; and they were not inconsistent with or contradictory to the evidence or without any rational foundation.
28. The appeal does not show the Director made any error of law in the Determination. As indicated above, the Tribunal has no authority to accept appeals based on challenges to findings of fact unless the facts challenged raise an error of law. Nikolakis Inc. has not shown any error of law in the challenged facts and the Tribunal cannot address this appeal. As such, the appeal has no merit and it is appropriate to dismiss it at this stage.
29. In sum, an assessment of this appeal shows it has no prospect of succeeding. The purposes and objects of the *Act* would not be served by requiring the other parties to respond to it.
30. I dismiss the appeal and confirm the Determination

**ORDER**

31. Pursuant to section 115 of the *Act*, I order the Determination dated May 15, 2014, be confirmed in the amount of \$4,281.73, together with any interest that has accrued under section 88 of the *Act*.

---

**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**