

Appeals

- by -

The Right Fit Staffing Solutions Inc.

(“Right Fit”)

- and -

Jay Myshkowsky

a Director or Officer of The Right Fit Staffing Solutions Inc.

(“Myshkowsky”)

- and -

Karen Nighean McCloy

a Director or Officer of The Right Fit Staffing Solutions Inc.

(“McCloy”)

- of Determinations 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: Kenneth Wm. Thornicroft

FILE Nos.: 2013A/64, 2013A/65 & 2013A/66

DATE OF DECISION: October 22, 2013

DECISION

SUBMISSIONS

Karen McCloy & Jay Myshkowsky on their own behalf and on behalf of The Right Fit Staffing Solutions Inc.

INTRODUCTION & BACKGROUND FACTS

1. On July 26, 2013, a delegate of the Director of Employment Standards (the “delegate”) issued three separate determinations along with accompanying “Reasons for the Determination” pursuant to section 79 of the *Employment Standards Act* (the “*Act*”). All three determinations concerned an unpaid wage complaint filed by Ann Richardson (“Richardson”). The first determination was issued against Ms. Richardson’s former employer, “The Right Fit Staffing Solutions Inc.” (“Right Fit”), and the other two determinations were issued against Jay Myshkowsky (“Myshkowsky”) and Karen Nighean McCloy (“McCloy”), respectively, in their capacity as directors and officers of Right Fit (see section 96).
2. Right Fit (File No. 2013A/64), Mr. Myshkowsky (File No. 2013A/65) and Ms. McCloy (File No. 2013A/66) have each filed identical appeals relating to the Determinations issued against them. Right Fit, formerly carrying on business in Surrey, is a B.C. company that is no longer operating but it is not apparently in bankruptcy. The firm offered personnel placement services and employed Ms. Richardson from March 2011 to April 2012. Her compensation was based on a combination of a \$30,000 annual salary plus a bonus or commission arrangement. Ms. Richardson went on maternity leave on February 21, 2012, and while on leave, the firm essentially closed its doors and her employment was effectively terminated.
3. Mrs. Richardson filed an unpaid wage complaint seeking two things: first, several commissions or bonuses that she claimed crystallized while she was on leave; second, compensation for length of service (see section 63). The delegate investigated her complaint and ultimately determined that one of her commission/bonus claims was sufficiently proven and thus awarded Mr. Richardson \$2,338.87 on this account. Further, the delegate awarded Ms. Richardson 2 weeks’ wages as compensation for length of service (\$1,738.56). The total wage award, including 4% vacation pay and section 88 interest, was \$4,408.19 and all three appellants were ordered to pay this latter amount by way of separate determinations. In addition, and only as against Right Fit, the delegate levied two separate \$500 monetary penalties based on Right Fit’s contraventions of sections 18 (timely payment of wages following termination of employment) and 63 (compensation for length of service) of the *Act*. Thus, the total amount payable by Right Fit is \$5,408.19.
4. As noted above, Right Fit, Mr. Myshkowsky, and Ms. McCloy have each appealed the Determination issued against them and, in each case, filed identical appeal submissions. All three appellants concede that the section 63 award was properly issued but assert that the delegate erred in law in issuing the Determinations upholding Ms. Richardson’s bonus/commission claim.
5. At this juncture, I am adjudicating this appeal based on the appellants’ submissions and, in addition, I have reviewed the subsection 112(5) “record” that was before the delegate when she issued the Determinations. I am presently assessing the appeals to determine if they should be dismissed under subsection 114(1)(f) as having no reasonable prospect of success. If these appeals pass this threshold, the respondent parties will be invited to provide their submissions in response to the appellants’ material.
6. I now turn to the appellants’ reason for appeal.

FINDINGS AND ANALYSIS

7. The appellants have advanced a common ground of appeal. As previously noted, they only contest the Determinations as they relate to Ms. Richardson's wage claim in regard to the commission/bonus award. Ms. Richardson's employment as "regional sales manager" was governed by a written agreement entered into on March 15, 2011, that provided for the following compensation: "Your gross annual salary of \$30,000" plus "45% of all profits from Permanent Placements that come directly from your sales activities" and "25% of all profits from Temporary Placements that come directly from your sales activities". These latter commissions were to be paid "in full, the payroll following receipt of final payment from the client".
8. Ms. Richardson went on maternity leave as of February 21, 2012, and, while she was on leave, Right Fit ceased business operations. Prior to going on maternity leave, Ms. Richardson made some inquiries regarding how her earned commissions would be paid during her leave. Mr. Myshkowsky replied to her on February 21, 2012, by e-mail regarding this issue (reproduced in full, below):

Hi Ann

It is probably best if at the end of March we come up with one lump sum bonus amount for you rather than periodic payments throughout the month...they say it wont [sic] affect the regularity of your pay but it will eliminate multiple "Amended ROE's" we will fill out and you would need to submit.

All the best,

Jay Myshkowsky

9. Ms. Richardson agreed to proceed on this basis but on April 2, 2012, Mr. Myshkowsky sent an unsettling e-mail to Ms. Richardson – the subject line read "Sorry" and the body read as follows:

CRA [which I take to mean the Canada Revenue Agency] has shut us down, we are allowed to operate until CAT wraps up at the end of April, but they are taking all of our payments. They have a list of all receivables and we have to report all payments and send them the funds from each.

On our end we have to sell our home to meet the debt obligation. Bottom line is that any monies owed to you or anyone else are now taken by CRA.

Sorry

Jay

10. At this point, Ms. Richardson made repeated, but fruitless, efforts to contact Mr. Myshkowsky but did eventually receive a short communication from him on May 24, 2012, wherein he indicated he and his wife (the appellant Ms. McCloy who processed Right Fit's payroll) were planning to relocate to Winnipeg.
11. Ms. Richardson filed an unpaid wage complaint on July 16, 2012 (the complaint is dated June 26, 2012). Since Ms. Richardson was on maternity leave and with the business having been abandoned, she was unable to provide complete documentation regarding her commission claims but she did prepare for the delegate's consideration a memo setting out her knowledge regarding several separate commission claims. On December 24, 2012, the delegate forwarded, by registered mail, a letter to Right Fit and Mr. Myshkowsky c/o his new employer's office in Winnipeg – the record before me shows that this letter was delivered on December 28, 2012. In her letter, the delegate set out the nature of Ms. Richardson's claims and the delegate requested a written response by no later than January 4, 2013. Mr. Myshkowsky replied by way of an undated letter that was not received at the delegate's office until March 1, 2013. The entire body of Mr. Myshkowsky's letter is reproduced, below:

Please be advised that Mrs. Ann Richardson was paid in full, salary and commissions, due up to and including her date of maternity leave. Attached is her final record of pay.

The Right Fit Staffing Solutions has ceased business operations as of April 2012 and we can no longer provide employment for Mrs. Richardson. We will agree to pay her 2 week's [sic] severance, if this is in accordance with the BC Employment Standards Act. Please advise.

12. Upon receipt of Mr. Myshkowsky's above letter, the delegate reviewed the matter with Ms. Richardson who advised, in writing (an e-mail dated March 6, 2013) that while, Mr. Myshkowsky's letter was literally correct – she was paid in full up to the date she went on maternity leave – her unpaid wage claim related to commissions that crystallized while she was on leave and that Right Fit had already agreed to pay by the end of March 2012 (see Mr. Myshkowsky's February 21, 2012, e-mail, above). With this response in hand, the delegate wrote a letter, dated April 19, 2012 [sic, "2013" was the correct date], to Mr. Myshkowsky in which she reiterated Ms. Richardson's position that she was entitled to further commissions that crystallized after she went on maternity leave and requested that Mr. Myshkowsky "provide a response to Ms. Richardson's claim for bonuses in writing...on or before May 15, 2013". No further reply was ever submitted to the delegate.
13. In the absence of any evidence or argument from the appellants, the delegate, as she indicated in her reasons (page R4), had to "make my decision based on the best evidence available". Ms. Richardson provided some details regarding several separate commission claims but the delegate only allowed her claim with respect to one particular matter, namely, the "Prospera Credit Union" account. With respect to this one claim, the delegate concluded (at page R4):

[Ms. Richardson] has been able to provide a detailed account of the individuals involved, the duration of the contract and the wage rate to be paid to the placement. I find these details were sufficient to justify her calculations.
14. The appellants have predicated their appeal on an alleged error of law and a finding of fact can constitute an error of law but only if there is no credible basis for the finding in question. In this instance, as the delegate noted in her reasons, Ms. Richardson provided a fairly detailed account regarding the "Prospera Credit Union" claim and, although given an opportunity to respond to Ms. Richardson's evidence on this particular matter, the appellants did not respond in any way. I fail to see how the delegate erred in law in awarding a commission claim that was quite well supported by wholly uncontroverted evidence. The appellants now assert: "There is no contract or written evidence that concludes Ms. Richardson is owed any compensation beyond what she was paid on February 22, 2012" and "There is no agreement to pay further commissions". However, these assertions stand in marked contrast to the details Ms. Richardson provided to the delegate regarding the "Prospera Credit Union" commission claim – details that were, in turn, provided to the appellants who decided not to provide any sort of rebuttal. I would have thought it a simple matter for the appellants to have obtained from their client a simple reply refuting the details set out in Ms. Richardson's material if, in fact, there was no legitimate basis for her claim. In my view, it is appropriate to draw an adverse inference (in this case, against the appellants) where particular information could have been rebutted, but was not.
15. I might also add that the appellants' present position is quite at odds with the position Mr. Myshkowsky set out in his February 21, 2012, e-mail to Ms. Richardson where he suggested that she be paid "one lump sum bonus rather than periodic payments throughout the month" which sum was to be paid at the end of March 2012. Further, his April 2, 2012, e-mail to Ms. Richardson states that she could not expect to receive "any monies owed to you" since the Canada Revenue Agency had "taken" all of Right Fit's available funds.

16. In sum, I am satisfied that there is no merit whatsoever to the appellants' position that the delegate erred in law in awarding Ms. Richardson a commission relating to the "Prospera Credit Union" account and it follows that Right Fit's appeal must be dismissed under subsection 114(1)(f) of the *Act*.
17. The two determinations issued against Mr. Myshkowsky and Ms. McCloy were issued under subsection 96(1) of the *Act*: "A person who was a director or officer of a corporation at the time wages of an employee of the corporation were earned or should have been paid is personally liable for up to 2 months' unpaid wages for each employee." Both Mr. Myshkowsky and Ms. McCloy concede that they were directors and officers when Ms. Richardson's unpaid wage claim crystallized. Although they both contest her right to any unpaid wages, I have now dismissed Right Fit's appeal relating to her unpaid wage claim and the amount in question falls within the 2-month statutory ceiling. In light of those findings, the two section 96 determinations must also be confirmed since there is no legal basis for either one to be cancelled.

ORDER

18. Pursuant to subsection 114(1)(f) of the *Act*, these appeals are dismissed as having no reasonable prospect of success. Pursuant to subsection 115(1)(a) of the *Act*, the Determinations are all confirmed as issued in the following amounts: \$5,408.19 (against Right Fit) and \$4,408.19 (against each of Mr. Myshkowsky and Ms. McCloy) together with whatever additional interest that has accrued under section 88 of the *Act* since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal