



An appeal

- by -

501546 B.C. Ltd. carrying on business as Labour Unlimited Temporary Services
(“Labour Unlimited”)

- 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.: 2013A/62

DATE OF DECISION: October 29, 2013

DECISION

SUBMISSIONS

Peter Huber

on behalf of 501546 B.C. Ltd. carrying on business as
Labour Unlimited Temporary Services

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) 501546 B.C. Ltd. carrying on business as Labour Unlimited Temporary Services (“Labour Unlimited”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on July 19, 2013.
2. The Determination concluded that Labour Unlimited had contravened Part 7, section 58 and Part 8, section 63 of the *Act* in respect of the employment of Devin Crowder (“Crowder”) and ordered Labour Unlimited to pay to Crowder wages and interest in the amount of \$5,325.40 and to pay administrative penalties in the amount of \$1,000.00. The total amount of the Determination is \$6,325.40
3. Labour Unlimited has appealed the Determination on all three grounds listed in subsection 112(1) of the *Act* and seeks to have the Determination varied to a lesser amount.
4. The Tribunal has 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 and written submission made by Labour Unlimited and my review of the section 112(5) “record” that was before the Director when the Determination was being made. Under section 114(1), 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.*
5. If satisfied the appeal or a part of it has some presumptive merit and should not be dismissed under section 114(1), Crowder 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.

ISSUE

6. In the context of this appeal, the issue at this stage is whether there is any reasonable prospect the appeal will succeed.

BACKGROUND

7. Labour Unlimited operates a temporary employment agency. Crowder was employed by Labour Unlimited as the sales manager of their Victoria office from May 8, 2006, to November 16, 2012. On November 16, 2012, Crowder submitted a letter of resignation to Labour Unlimited, providing them with two weeks' notice. Upon receiving the resignation letter, Labour Unlimited asked Crowder to turn in his office keys and had his company cell phone account altered to restrict his access to it. Crowder filed a complaint on January 8, 2013, claiming regular wages, unpaid commissions, length of service compensation and annual vacation pay.
8. The Director conducted a complaint hearing on Crowder's claims, receiving evidence from Crowder and from Peter Huber ("Huber") acting on behalf of Labour Unlimited. The parties also presented witnesses in support of aspects of their respective cases.
9. The Determination sets out several matters on which the parties had agreed, including that Crowder's bi-weekly salary was \$1,538.46 (gross) plus 1.5% commission on net sales completed by him and that Crowder was entitled to vacation pay at a rate of 6% on wages earned from May 8, 2011, until he ceased performing work for Labour Unlimited.
10. The Determination sets out 4 issues to be decided: whether Crowder was entitled to regular wages for the period November 11 to November 16, 2012; whether he was owed any commissions; whether he was owed length of service compensation; and whether he was owed vacation pay.
11. The Director denied Crowder's claims for regular wages and found he had not shown he was owed any commissions.
12. The Director accepted Crowder's claim for length of service compensation, finding the actions taken by Labour Unlimited following receipt of Crowder's letter of resignation (which provided two weeks' notice) amounted to a "substantial alteration" of Crowder's conditions of employment and, under section 66 of the *Act*, justified a conclusion that he had been terminated. The Director considered Labour Unlimited's argument there was cause to terminate Crowder, and simply noted that "while Mr. Huber [one of the principals of Labour Unlimited] argues he intended to terminate Mr. Crowder for cause, he agrees he did not terminate him for such".
13. The Director found Crowder was entitled to annual vacation pay in the amount of \$3,737.46. In reaching this finding, the Director determined that Crowder's claim period for unpaid wages, including annual vacation pay, was from May 16, 2012, to November 16, 2012, that the "capture period" for annual vacation pay was from May 8, 2011, to the end of his employment, that, with the exception of an amount of \$96.74, Labour Unlimited had not paid Crowder any vacation pay on his October 28 to November 24, 2012, wage statement, and that Labour Unlimited's calculation of Crowder's annual vacation entitlement during the capture period was flawed. The last part of the finding was based on a review of payroll records and the record of vacation pay taken by Crowder that had been provided to the Director by Labour Unlimited. On this matter, the Director concluded Labour Unlimited had credited Crowder with having been paid annual vacation pay in an amount greater than what was actually paid. Based on the information provided by Labour Unlimited, the Director calculated the difference between what had actually been paid to Crowder and what he was

entitlement to under the *Act*, concluding Labour Unlimited owed him an additional \$1,664.32 over the capture period for the flawed vacation pay calculation.

REASONS FOR THE APPEAL

14. Labour Unlimited argues the Director erred in law in three respects: first, in applying section 66 of the *Act* to find Crowder was terminated by the actions of Labour Unlimited; second, in finding Crowder was entitled to annual vacation pay for the “flawed” calculation by Labour Unlimited, including not providing any opportunity to Labour Unlimited to defend their calculation; and third, in finding Labour Unlimited could not apply vacation pay entitlement to the amounts paid to Crowder for days he was absent from work without authorization.
15. On the first argument, Labour Unlimited submits the Director misunderstood or misconstrued the facts and failed to properly, and correctly, attribute Crowder’s absences during November 2012 to reasons that were personal, not business related, were negligent, insubordinate and damaging to the business. Labour Unlimited submits key evidence – in the form of telephone records and a statement from a competitor – were ignored or not heard. Finally, Labour Unlimited asserts the Determination misstates evidence relating to the job of sales manager.
16. On the second argument, Labour Unlimited says the Director made findings relating to the “flawed” annual vacation calculation without seeking any input from them.
17. On the last argument, Labour Unlimited simply says they were correct to use the amount of \$1,984.12 for annual vacation pay as payment for eight days of unauthorized absence by Crowder in the last two pay periods before the end of his employment.
18. Labour Unlimited argues the Director failed to observe principles of natural justice by not providing an opportunity to make submissions concerning what the Director perceived was a “flawed” annual vacation calculation and by not hearing evidence of the serious breach by Crowder of the “strict ethic” as a senior manager with Labour Unlimited.
19. On the latter point, Labour Unlimited makes several factual assertions which they contend demonstrate a serious breach of Crowder’s fiduciary responsibilities to Labour Unlimited and which ought to have been found by the Director to have justified their actions after receiving the resignation letter.

ANALYSIS

20. 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. 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.*

21. It is well established that the grounds of appeal listed above do 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. 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 that they are without any rational foundation. Unless an error of law is shown, the Tribunal must defer to the findings of fact made by the Director. An appeal is 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.
22. I shall first address the matter of “new evidence”, which Labour Unlimited has advanced as one of the grounds of appeal although the appeal and the supporting submission do not identify what evidence is being submitted under this ground.
23. As a general statement of principle, an appeal to the Tribunal under section 112(1) (c) is not intended to simply provide an opportunity for a person dissatisfied with the result of a Determination to re-argue the effect of evidence that was provided during the complaint process or to seek out evidence to supplement what was already provided to, or acquired by, the Director during the complaint process with the objective of having the Tribunal review and re-weigh the evidence and reach a different conclusion if, in the circumstances, that evidence could have been provided at the time the Determination was made.
24. While the admission of evidence on appeal has a discretionary aspect, the Tribunal takes a principled approach to that task; one which is based on well established criteria: see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03. The evidence sought to be introduced must satisfy the criteria identified in that case and, as with any other aspect of an appeal, the burden is on Labour Unlimited to show that evidence meets that criteria. New evidence in an appeal is statutorily limited to evidence that was not available when the Determination was being made. This statutory limitation, and the approach of the Tribunal generally to evidence presented in an appeal that is neither “new” nor in the “record”, is firmly grounded in the objective of fairness, efficiency and finality in the decision making process: see section 2(d).
25. The failure of Labour Unlimited to identify what evidence is being advanced under this ground and to demonstrate such evidence ought to be admitted makes it impossible to assess whether such evidence satisfies the established criteria and that it is appropriate to allow such evidence. Notwithstanding, there are aspects of the appeal submission that appear to be introducing new assertions of fact, but there is no indication that such assertions of fact are “new evidence” in the sense that they did not exist at the time the Determination was being made or, if they did exist at that time, they could not reasonably have been presented during the complaint process. In any event, after a careful review of the appeal submission, I am satisfied this is not a case where there was no evidence provided to the Director in the areas Labour Unlimited challenges in this appeal or that the apparently new assertions of fact would have any effect on the Determination. I find Labour Unlimited has not shown there is any basis to this ground of appeal and as a result this appeal will be decided on the facts as found in the section 112(5) “record” and the Determination.
26. In this appeal, Labour Unlimited says the Director made an error of law in applying section 66 of the *Act*. However, this ground of appeal does nothing more than ask the Tribunal to re-visit the factual elements of this issue and reach a different conclusion than that reached by the Director. The submissions made by Labour Unlimited in this part of the appeal only re-visit the argument made to the Director, which were addressed and rejected in the Determination, that there was cause to terminate Crowder and Labour Unlimited intended to take that step.

27. Simply put, the Determination finds Labour Unlimited did not terminate Crowder for cause and the Director found no evidence they intended to. It appears to have been viewed by the Director, like much of Labour Unlimited's response to Crowder's claims, as having been fashioned *ex post facto* to avoid potential liability under the *Act*.
28. The Director committed no error of law in responding to Crowder's claim for length of service compensation from the perspective of an employee who was denied the opportunity to work out his notice period by the actions of his employer. There is no reasonable prospect the appeal can succeed on this argument.
29. In response to what is alleged by Labour Unlimited to be a misstatement of evidence by the Director relating to the requirements of the sales manager's job, I find that, even if that were so, I am not persuaded by anything in the appeal that such misstatement would have had any relevance to the decision made by the Director under section 66; Labour Unlimited has certainly not met the burden of showing one.
30. A decision under section 66 of the *Act* is a discretionary one. The Tribunal's authority over an exercise of discretion by the Director is limited: see *Jody L. Goudreau and Barbara E. Desmarais, employees of Peace Arch Community Medical Clinic Ltd.*, BC EST # D066/98. In my opinion, there were facts, identified in the Determination, on which the Director properly exercised discretion under section 66 and I do not find, and have not been shown by Labour Unlimited, there is any basis for fettering that exercise of discretion.
31. I shall address the argument concerning the additional vacation pay found to be owed when considering the natural justice ground of appeal. It suffices to say at this point, that if there was an error of law, it would flow from a contravention of principles of natural justice. The Director commits no error of law by ensuring an employee receives all of the amounts to which they are statutorily entitled under the *Act*. Where the Director, during a complaint investigation, finds a contravention of the *Act* not appreciated by the employee when the complaint was filed, there is a statutory obligation, flowing through section 76, particularly subsection 76(2), and section 79, to address and, if allowable, rectify that contravention.
32. The Director made no error of law in refusing to accept the \$1,984.12 paid to Crowder as wages for October 28 to November 24 as vacation pay. The analysis done by the Director on that argument, at pages R11 – R12, is completely consistent with the facts as found in the Determination and with the provisions and requirements of the *Act*. I note particularly, and agree entirely with, the comments of the Director concerning the prohibition found in section 21 of the *Act* precluding an employer from attempting to recover wages already paid to an employee or seeking to apply them to some other statutory obligation: see, for example, *Independent Electric and Controls Ltd.*, BC EST # D105/10.
33. Labour Unlimited argues the Director failed to observe principles of natural justice by failing to provide them with an opportunity to make submissions concerning what the Director perceived was a "flawed" annual vacation calculation. As suggested earlier, this type of argument has elements of both error of law and natural justice: see *D. Kendall & Son Contracting Ltd.*, BC EST # D107/09. In advancing this argument, Labour Unlimited is required to provide some evidence to support their argument: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99. They have not done so.
34. The central factual findings made by the Director on the "flawed" annual vacation calculation were that Crowder received no more than base salary for each vacation day and that, "Mr. Crowder did not receive vacation pay payable on his commissions during those pay periods where he took vacation despite Labour Unlimited's records to the contrary". Those findings are based on material provided to the Director by Labour Unlimited and that material speaks clearly. I do not find, in the circumstances, that the Director was required to seek submissions from Labour Unlimited on documents which represent the record required by

section 28 of the *Act* to be kept by them, which were provided by them to the Director and which so clearly support the findings made in respect of them. The response in the appeal by Labour Unlimited to the findings, which relies on the bald assertion that, “commissions are not earned during periods of vacation by the employees”, is completely inconsistent with the material in the record, the findings of fact made by the Director and with the requirements of the *Act* relating to annual vacation pay.

35. There is no basis to this ground of appeal.
36. The balance of the natural justice ground of appeal does nothing more than re-visit the section 66 decision, advancing once again arguments that require the Tribunal to reject a finding by the Director – that Labour Unlimited did not purport to terminate Crowder for cause. The misconception, and fatal flaw, in this argument is that whether Labour Unlimited might have had cause to terminate Crowder is not relevant in light of that finding and what was actually found by the Director to have occurred. Labour Unlimited has not shown the Director erred in respect of the relevant findings or how those findings were used in the context of the provisions of the *Act*.
37. This is the type of appeal the Tribunal has consistently denied, as it is directed at having the Tribunal review and alter findings and conclusions of fact without showing those findings and conclusions raise a reviewable error. Accordingly, after a careful review of the Determination, the section 112(5) “record” and the appeal, and applying well established principles which operate in the context of appeals to the Tribunal, I find the appeal as a whole lacks any presumptive merit; the purposes and objects of the *Act* would not be served by requiring the other parties to respond to it. Accordingly, I dismiss the appeal and confirm the Determination.
38. Since there is no basis for varying any part of the Determination, there is no basis for considering any alteration of the administrative penalties imposed on Labour Unlimited for the contraventions of the *Act* found in the Determination. Administrative penalties are mandatory once the Director finds a contravention of the *Act* and makes a Determination and imposes a requirement in respect of it: see section 98 of the *Act* and *Marana Management Services Ltd. operating as Brother’s Restaurant*, BC EST # D160/04.

ORDER

39. Pursuant to subsection 114(1) of the *Act*, this appeal is dismissed on the ground that there is no reasonable prospect that it will succeed. Accordingly, pursuant to section 115 of the *Act*, the Determination is confirmed as issued in the amount of \$6,325.40 together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

David B. Stevenson
Member
Employment Standards Tribunal