Employment Standards TRIBUNAL

An appeal

- by -

Daily Media Inc.
("DMI")

- 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: Shafik Bhalloo

FILE No.: 2013A/74

DATE OF DECISION: November 1, 2013

DECISION

SUBMISSIONS

Brian Lovig on behalf of Daily Media Inc.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), Daily Media Inc. ("DMI") has filed an appeal of the determination issued by a delegate of the Director of Employment Standards (the "Director") on August 19, 2013 (the "Determination").

2. The Determination concluded that DMI had contravened Part 3, s. 18; Part 7, s. 58; and Part 8, s. 63 of the *Act* in respect of the employment of Vlad Forgac ("Mr. Forgac"), and ordered DMI to pay Mr. Forgac wages and interest in the amount of $15,620.21 and to pay three (3) administrative penalties of $500.00 each for contraventions of section 46 of the *Employment Standards Regulation* (the "*Regulation*") and sections 18 and 63 of the *Act*. The total amount of the Determination is $17,120.21.

3. DMI has appealed the Determination, alleging that the Director erred in law and failed to observe the principles of natural justice in making the Determination. DMI seeks to have the Determination varied or, alternatively, cancelled.

4. The Employment Standards Tribunal (the "Tribunal"), after receiving DMI's appeal dated September 20, 2013, requested the Director to provide the Tribunal with the section 112(5) "record" (the "Record") that was before the Director at the time the Determination was made. On September 30, 2013, the Director's delegate responded to the said request and provided the Record, which was then sent to DMI on October 4, 2013 by e-mail. Brian Lovig ("Mr. Lovig"), the sole Director of DMI, responded to the Tribunal's e-mail confirming receipt of the Record, although he claimed not to have opened the attachments in the e-mail which contained the Record.

5. DMI was asked to provide any objections to the completeness of the Record by October 21, 2013, but did not. Subsequently, on October 24, 2013, the Tribunal sent all of the parties a letter via e-mail advising that no objection to the completeness of the Record was received by the Tribunal and that the appeal would be reviewed by a Tribunal Member who, without seeking submissions from the parties, may dismiss all or part of the appeal and/or confirm all or part of the Determination. Thereafter, on October 25, 2013, Mr. Lovig sent an e-mail to the Tribunal admitting that he "forgot about the timeline" for submitting his objection to the completeness of the Record. In his e-mail, Mr. Lovig indicates that it is not clear to him what completeness of the Record refers to, and that he has no way of knowing that, particularly since he "did not attend much of the phone hearing", but he assumes "that the records to be complete are those used in the hearing". He does note that "there is a lot of information that is not shown, e-mails and other items from [his] side". However, Mr. Lovig does not specifically identify any e-mails or items he is referring to, nor does he produce them, nor indicate the content of the purported e-mails and items. In the circumstances, I do not find there to be a meritorious challenge to the correctness of the Record by Mr. Lovig or DMI.

6. Having said this, the Tribunal has decided this appeal is an appropriate case for consideration under section 114 of the *Act*. At this stage, I will assess this appeal based solely on the Reasons for the Determination (the "Reasons"), the Appeal Form, what appears to be some written submissions made by DMI on a copy of the Determination, and my review of the Record that was before the Director when the Determination was being

made. If I am satisfied that the appeal, or a part of it, has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, Mr. Forgac and the Director may be invited to file further submissions. Conversely, if it is found that the appeal is not meritorious, it will be dismissed under section 114(1) of the *Act*.

ISSUE

7. Did the Director err in law or fail to observe the principles of natural justice in making the Determination?

BACKGROUND

8. DMI is an online company incorporated under the laws of British Columbia and has entertainment webcasts as part of the content on its local website. Mr. Lovig is its sole Director.

9. DMI employed Mr. Forgac from September 2008 until June 30, 2012. In his position with DMI, Mr. Forgac was responsible for producing an online webcast, which included filming and editing video, video post-production, uploading the videos to the internet, web design, organizing the office and hiring any staff needed.

10. After Mr. Forgac's employment with DMI terminated on June 30, 2012, on September 3, 2012, he filed a complaint against DMI, alleging that the latter contravened the *Act* by failing to pay him all wages owing (the "Complaint"). The delegate of the Director conducted a hearing of Mr. Forgac's complaint on January 28, 2013 (the "Hearing"). The Hearing was conducted by telephone, and Mr. Lovig attended part of the Hearing on behalf of DMI, and Mr. Forgac attended on his own behalf. At the Hearing and in the Determination, the delegate dealt with two (2) questions; namely, whether the Complaint was within the jurisdiction of the *Act* and, if the answer was in the affirmative, whether Mr. Forgac was owed any wages and in what amount. With respect to the matter of whether the Complaint was within the jurisdiction of the *Act*, the delegate notes, in the Determination, that prior to the Hearing, DMI raised the issue of the jurisdiction of the Director to deal with the Complaint but at the Hearing, Mr. Lovig, or DMI, no longer took issue with jurisdiction. Nevertheless, the delegate, in the Determination, reviewed the question of jurisdiction carefully and correctly relied on the Supreme Court of Canada's decision in *Tessier Ltée v. Quebec (Commission de la santé et de la securite du travail)*, 2012 SCC 23, which decision, in part, asserts that despite the provincial presumptive interest in the regulation of labour relations, the federal government has jurisdiction to regulate labour relations in two (2) circumstances: 1) the employment relates to a work, undertaking or business that is within the legislative authority of Parliament; or 2) when it is an integral part of a federally-regulated undertaking, which is referred to as derivative jurisdiction.

11. The delegate also considered section 2 of the Canada *Labour Code* (the "*Code*") and the definition of "federal work, undertaking or business" in the *Code*. The delegate concluded that while DMI was an online company with an entertainment webcast as part of the content on its local website, it was not involved in any activity that could be characterized as "federal work or undertaking or business" within the meaning of the *Code*. In particular, the delegate found that DMI was not a radio broadcasting station, nor was it involved in a matter of national concern, which would have brought it within the definition of federal undertaking. Instead, the delegate found that DMI was mainly involved in web design, filming, editing, and uploading videos for viewing on websites, which are provincially-regulated activities. DMI was only involved in television production as an ancillary part of its business. Therefore, the delegate concluded that DMI was within the jurisdiction of the *Act*.

12. Having determined that the *Act* applied to DMI, the delegate then went on to review Mr. Forgac's claim for regular wages and in concluding that DMI owed Mr. Forgac total wages of $10,944.19, the delegate reasoned as follows:

> There was no dispute between the parties that the Complainant is owed wages for work performed from January 1, 2012 to June 30, 2012. The Employer provided a calculation which indicated the Employer owes the Complainant $7,237.00 in wages payable during the recovery period. The Employer deducted the amounts paid in 2012 from the wages payable in last six months [*sic*]. The Complainant argued the $15,055.82 paid by the Employer during 2012 should be attributed to offsetting the accumulated debt between the two parties, and should not be deducted from wages payable in the last six months.
>
> However, the Complainant provided email evidence that the parties were trying to work out an agreement as to the amount and the repayment of the entire past debt. It was the Complainant's evidence that no agreement existed between the parties on retiring the entire debt. The Complainant's testimony was supported by the email evidence he provided that no agreement was finalized between the parties. Based on the evidence provided, I accept the Complainant's position and find there was no agreement between the parties on how the amount or how the debt would be paid.
>
> The Complainant invited me to consider all of the payments made by the Employer during 2012 as repayment of the outstanding wages earned prior to 2012 and ignore the Employer's evidence that the wages paid in 2012 were intended to cover wages earned and payable in the last six months. However, the Complainant has not provided any evidence that the wages paid by the Employer in 2012 were for anything but wages earned in 2012. Absent a clear agreement between the parties as to the repayment of entire debt, I cannot arbitrarily decide to apply wages to an outstanding debt prior to January 1, 2012. It would be unreasonable for me to redirect wages to a time period beyond the recovery period set out in section 80. On that basis, I find the Complainant is owed $10,944.18 in regular wages calculated as follows:
>
> January 1, 2012 to June 30, 2012
>
> | | |
> |---|---|
> | 26 weeks X $1,000.00 per week: | $26,000.00 |
> | Less $15,055.83 paid: | (15,055.82) |
> | Total Wages Owing: | $10,944.18 |

13. The delegate also examined, in the Reasons, whether Mr. Forgac was entitled to compensation for length of service, although Mr. Forgac did not specifically seek compensation for length of service in his Complaint. The delegate noted that section 63 of the *Act* delineates the liability of an employer after an employee has worked for three (3) consecutive months of employment. He noted that an employer is not required to pay compensation or to provide written working notice of termination if an employee quits, retires or is terminated for cause. In this case, the delegate found that Mr. Forgac did not return to work with DMI only because DMI was unable to pay his wages. In these circumstances, the delegate concluded that Mr. Forgac's employment with DMI was deemed terminated under section 66 of the *Act*, and reasoned as follows:

> Section 66 of the Act states that the director can deem a termination of employment occurred if an employer substantially alters a condition of employment. The Complainant testified he agreed to a lay off [*sic*] during the summer of 2012. At the time of the layoff, he had the expectation he would return to work with the Employer in the fall of 2012. However, when it was time for the Complainant to return to work, the Employer advised that he would not be able to pay his full wage. The Complainant did not return to his employment due to the Employer's inability to pay wages. The Employer acknowledged the Complainant was let go because of the Employer's inability to pay wages. Therefore, I find the failure of the Employer to continue to pay wages to the Complainant to be a fundamental change in a condition of the Complainant's employment which resulted in a deemed termination under section 66 of the Act. I further find that the Complainant was not given written notice or compensation in lieu of notice and is entitled to receive three weeks' termination pay in accordance with section 63 of the Act.

14. Based on the delegate's finding that Mr. Forgac earned $1,000.00 per week, the delegate awarded him $3,000.00 in wages for compensation for length of service. The delegate also levied an administrative penalty of $500.00 against DMI for contravention of section 63 of the *Act* for failing to pay compensation for length of service.

15. The delegate also noted in the Reasons that Mr. Forgac asserted he was not paid vacation on his earnings during the last six (6) months of his employment, and DMI so acknowledged. As a result, the delegate ordered DMI to pay Mr. Forgac 4 percent vacation on his total earnings from January 1, 2012, to June 30, 2012, totalling $1,162.00. The delegate also ordered DMI to pay interest on all outstanding wages for a total of $514.03. The delegate also levied a further administrative penalty of $500.00 against DMI for contravention of section 18 of the *Act* for failing to pay all wages owed to Mr. Forgac within 48 hours of the termination of his employment.

16. Finally, the delegate levied a third administrative penalty against DMI for breach of section 46 of the *Regulation* for DMI's failure to produce Employer Records required by the Director.

SUBMISSIONS OF DMI

17. As indicated previously, Mr. Lovig, a director of DMI, filed an appeal of the Determination, and checked off two (2) grounds of appeal; namely, error of law and breach of the principles of natural justice. His submissions on behalf of DMI are very brief or short comments, jotted down on a copy of the Determination, primarily disputing the delegate's findings of fact. Starting with the first page of the Reasons, Mr. Lovig has highlighted the date of the Hearing and the date of the Determination, and commented on both the first and last pages of the Reasons, that it took seven (7) months from the date of the Hearing to obtain a decision which is "full of lies and wrong information and [contains] errors in law".

18. In the pages following the first page of the Reasons, I have counted at least 15 cases where Mr. Lovig has highlighted, or circled, portions of the Reasons, and noted simply that it is "not true" or "not accurate". I do not find it necessary to set out each instance specifically here. There are other passages in the Reasons where Mr. Lovig has gone beyond his usual response "not true" and added a sentence or two contradicting the facts found by the delegate. Again, I do not find it necessary to set out specifically those brief submissions here.

19. I also note that on the last page of the Reasons, Mr. Lovig, in his handwritten note, indicates that he requires an "offset" of any monies owed to Mr. Forgac against alleged stolen equipment belonging to DMI. He has also threatened to lay charges of theft against Mr. Forgac.

20. With respect to the delegate's analysis and conclusion that DMI's business is provincially regulated and not a "federal work, undertaking or business", Mr. Lovig simply contends that this is "not true" and that this conclusion is a "wrong decision" because "case law shows [it] is federal". However, he does not provide any legal authority or argument challenging the basis of the delegate's analysis on this subject.

ANALYSIS

21. Section 112 of the *Act* delineates only three (3) grounds upon which an individual may appeal a determination. It provides:

> 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.

22. In this case, DMI has appealed on the basis of the "error of law" and "natural justice" grounds of appeal. I will deal with each ground of appeal under separate headings below.

Error of Law

23. The often-quoted decision of the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Accessor of Area #12 – Coquitlam),* [1998] B.C.J. No. 2275 (BCCA) describes the following elements as constituting an error of law:

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.

24. The definition of error of law expounded in *Gemex*, *supra,* should not be applied so broadly as to include errors which are not in fact errors of law, such as errors of fact alone, or errors of mixed law and fact which do not contain extricable errors of law (see *Britco Structures Ltd.,* BC EST # D260/03).

25. Further, it should be noted that the Tribunal does not have jurisdiction over questions of fact unless, of course, the matter involves errors on findings of fact, which may amount to an error of law (see *Re Pro-Serv Investigations Ltd.,* BC EST # D059/05; *Re Koivisto (c.o.b. Finn Custom Aluminum),* BC EST # D006/05. In *Re Funk,* BC EST # D195/04, the Tribunal expounded on the latter point stating that the appellant would have to show that the fact finder made a "palpable and over-riding error" or that the finding of fact was "clearly wrong" to establish error of law.

26. In the case at hand, I note that Mr. Lovig, on behalf of DMI, disputes the delegate's analysis and conclusion that DMI's business is provincially regulated and not a "federal work or undertaking or business". Mr. Lovig does not go beyond his bare disagreement. In my view, the delegate has properly relied upon the Supreme Court of Canada's decision in *Tessier, supra,* and also properly relied upon section 2 of the *Code* in context of the facts in this case and concluded that DMI is not a federal work or undertaking or business. I have no basis to interfere with that conclusion of law. To the contrary, I find the delegate's reasoning persuasive.

27. Having said this, I am also not persuaded that the delegate made any palpable or over-riding error or reached a clearly wrong conclusion of fact or acted without any evidence or on a view of evidence that could not reasonably be entertained in this case. I find the delegate's findings of fact on all relevant issues to be based on a view of evidence that could reasonably be entertained and supported in evidence. Mr. Lovig's submissions in the form of short notes made on the Reasons, in my view, are meant to challenge the delegate's findings of fact and are an attempt to simply re-argue the matters that were before the delegate during the Hearing of the Complaint. This is inappropriate and impermissible on appeal of a determination, and contrary to the stated objective of the *Act* in section 2(d), namely, to provide fair and efficient procedures

for resolving disputes over the application and interpretation of the *Act*. In the result, I find there is no meritorious basis for the error of law ground of appeal of DMI.

Natural Justice

28. DMI has also advanced the natural justice ground of appeal. The principles of natural justice are essentially procedural rights that ensure that all parties are provided an opportunity to learn the case against them, afforded the opportunity to present their case and challenge the case of the opposing party, and the right to be heard by an independent decision-maker. Having said this, I do not find there to be any basis for a finding that the delegate violated any principles of natural justice in making the Determination. Therefore, I find this ground of appeal without any merit as well.

Request to Offset the Award

29. As for Mr. Lovig's request on behalf of DMI that the award made in favour of Mr. Forgac in the Determination should be offset against the value of DMI's equipment allegedly stolen by Mr. Forgac, this is not a matter for this Tribunal to resolve. DMI has the option of bringing a civil proceeding against Mr. Forgac in this regard, if it so desires. It is not for this Tribunal to determine on appeal of the Determination the veracity of DMI's allegation of theft.

30. In the result, I do not find DMI's appeal has a reasonable prospect of success.

ORDER

31. Pursuant to subsection 114(1)(f) of the *Act*, I am dismissing this appeal on the ground that it has no reasonable prospect that it will succeed, and in accordance with subsection 115(1)(a) of the *Act*, I order that the Determination be confirmed as issued.

Shafik Bhalloo
Member
Employment Standards Tribunal