



An appeal

- by -

Colonies.Com Holdings Inc.
("Employer")

- 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: Sheldon Seigel

FILE No.: 2008A/70

DATE OF DECISION: September 2, 2008

9. By correspondence dated August 27, 2008, the Tribunal confirmed receipt of a final reply from the Employer dated August 26, 2008. The reply includes reasons why the final reply was late.
10. The final reply was dated approximately 19 days after the stated deadline for final reply. The reason for the late reply cited delivery of the July 24, 2008 correspondence from the Tribunal on July 28, 2008 when the package was delivered to The UPS Store which was moving its operations to a new premise. Allegedly the package was not actually in the hands of an authorized representative of the Employer until August 21, 2008.
11. The Employer sought to have this late final reply accepted. The representative of The UPS Store submitted that the parcel was misplaced during their relocation. There is no evidence to the contrary. I accept this evidence as factual. The final submission addresses the Director's response to the appeal and is therefore procedurally relevant.
12. I am satisfied that the final reply was submitted in a timely fashion once the invitation to provide it was actually communicated to the Employer. In the absence of submissions to the contrary, I find that a relevant final reply will be considered in the appeal notwithstanding that it was late due to circumstances out of the control of the Employer. The final reply will be considered as though it was produced on time.
13. That substantive reply consists of a one-page submission undated but marked sent August 27, 2008 along with two pages of attachments purporting to be email correspondence.

ISSUE

14. The issues in this appeal are:

1. Did the Director fail to observe the principles of natural justice?

Specifically:

- in not providing an oral hearing
- in choosing which evidence to consider and relying on one document
- in finding entitlement of 3 weeks vacation without documentation
- in disregarding a body of evidence provided by the Employer
- in disregarding letters requested of the Employer and so provided
- in distinguishing Employer from its subsidiary re: decision making authority
- in not calculating vacation pay independent of witness evidence of entitlement
- in basing his findings solely on a record of employment (ROE)

2. Did new evidence become available that was not available at the time of the Determination and if so, should that evidence change the outcome of the Determination?

Specifically:

- Resume and cover letter of Ms. Doerksen re: misrepresentation of qualifications
- Email with respect to Ms. Doerksen's actual qualifications
- Copy of complaint from Employer to CGA
- Quickbooks screenshot indicating Employee paid 52 weeks annually

ARGUMENT AND ANALYSIS

Natural justice

15. An oral hearing is not required in order to ensure a fair hearing. The duty of fairness is a flexible one to be assessed and observed based on the facts and circumstances (*Baker v. Canada* (Minister of Citizenship and Immigration, [1999] S.C.J. No 39). The *Act* does not require an oral hearing, nor in the current administrative environment is one customarily provided for appeals under the *Act*. The Tribunal has the right to determine its own process, within the constraints of the rules of Natural Justice. The appeal form allowed an opportunity for the Appellant to request a hearing. This request was denied by the administration. I find the opportunity to participate fully in a written appeal was provided to the Appellant and adequate to allow the right of the appellant to Natural Justice.
16. I have reviewed the entirety of the record, and all of the submissions made prior to and since the Determination. I find that the Director did consider and weigh all of the evidence provided. The Director was not obligated to rely on all of the evidence, but rather to consider the evidence and determine on that evidence as a whole what did and did not transpire. The conclusions reached in this manner certainly are consistent with some of the documentary evidence and inconsistent with other documentary evidence. This does not mean that the evidence not followed was not considered, but rather that it was not accepted as factual, relevant, or persuasive. There is no indication that relevant evidence was overlooked by the Director. Further, I find that the reasoning in the Determination is adequate in its discussion of the evidence, notwithstanding that it does not specifically refer to each document submitted.
17. The Director found the Employee entitled to three weeks vacation pay based on the written evidence and submissions. The Director made a finding of credibility with respect to conflicting evidence and supported that finding with reasons. There is no obligation for the Director to rely on a single document as superior to all of the other evidence to support those findings. The act of decision-making is more than simply picking the single preferred document from among those presented and relying on it. I find that the decision relating to the amount of vacation time owed to the Employee was reasoned and supportable.
18. I am not persuaded that the Director ignored a body of evidence provided by the Employer. As indicated above, I find that the Director considered all of the evidence and made findings based on that evidence. The mere fact that the Director neither endorsed nor followed the position indicated by the Employer's evidence is not sufficient to indicate that such evidence was not considered.

19. The uncontroverted evidence is that the Director sought specific documents from the Employer and the Employer provided them. There was no obligation on the Director to accept the factual underpinnings of those documents or to rely on those documents when making his findings. The Director is free to request production of documentary evidence that he believes is available and would be useful in making a determination. Such a request does not carry an undertaking to rely on those documents once provided. The absence of reference to those documents in the Determination does not in itself indicate that the Director failed to consider them. The Determination indicates that the Director considered all of the evidence before him. I find there is no persuasive evidence that the Director failed to consider the documents submitted in evidence.
20. The Determination explains the relevance of the authority issue adequately. The Director made findings of fact based on credibility when contrary evidence was presented as to the Employer's entitlement to vacation time. I find this portion of the Determination to be supported by the reasons.
21. The Determination considers evidence of entitlement to vacation pay. The conflicting evidence appears to have been weighed and the Director finds as a result of that process, the quantum of vacation time to which the Employer was entitled. There is no obligation for the Director to rely on a single document in making that finding.
22. The Director relied on the ROE for relevant facts. He considered the source of the ROE, the background and allegations against its author, and the evidentiary value of the document. After an analysis of credibility issues, the Director found the ROE reliable and used it in making his Determination. The Director was entitled to do so.

New Evidence

23. The evidence of Ms. Doerksen's qualifications or allegations of lack thereof was in issue prior to the Determination. The Employer had the opportunity to present any submissions and evidence in support of his position that he wished to have before the Director prior to the Determination. Further evidence in support of a party's position, pursued after an unfavourable Determination, cannot be the intent of the provision for the allowance of *new evidence*. If that were so, virtually all positions could be enhanced by such a pursuit. I find that the issue of Ms. Doerksen's credibility, and qualifications were in issue leading up to the Determination, and that the issue was considered in the Director's consideration of credibility with respect to the conflicting evidence. Further, Ms. Doerksen's cover letter and resume were available prior to the Determination (they were submitted to the Employer prior to her employment), and the emails provided are apparently already part of the Record and therefore were considered by the Director, when he considered all of the evidence before him.
24. I am not persuaded that the Quickbooks screenshot (indicating Employee was paid 52 weeks annually) is new, was not available at the time of the Determination, and has probative value. The Employer's submissions in this regard are vague. The onus on establishing the value and relevance of a document alleged to be *new* is on the party proffering the evidence. The Employer did not satisfy this onus.

25. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.* BC EST #D171/03, the Tribunal determined that four conditions should be met before new evidence, alleged to be unavailable at the time the Determination was made, will be considered. They are:
- The evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
 - The evidence must be relevant to a material issue arising from the complaint;
 - The evidence must be credible in the sense that it is reasonably capable of belief, and;
 - The evidence must have high probative value, in the sense that, if believed, it could on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.
26. I find that the documents provided b the Director after the Determination do not satisfy the four point test.
27. On careful examination of the Record and the Determination, I find that the Director did conduct an adequate and thorough investigation of this matter and properly weighed and assessed the evidence before him. Credibility was in issue and much of the evidence was contradictory. I find that the record is clear with respect to the claims put forth by the Employer, and that the Determination clearly sets out the Director's consideration of those claims and the careful evaluation and recounting of the evidence of the witnesses in that regard. Although not all of the evidence was addressed specifically in the Determination, the Director did address the relevant claims and made findings of credibility supported by his findings. He supported those findings with reasons, and in particular, reasons for preferring one view of the facts to another.
28. I find that the Director was in the best position to evaluate the credibility and consistency of the documentary evidence provided by the witnesses. I am satisfied by the text of the Determination that this process was done properly and I have no evidence before me that would cause me to disturb the results of that process, particularly with respect to assessing credibility.
29. I conclude that there is insufficient evidence to establish that the Director failed to observe the principles of natural justice, or that any new evidence is appropriate for consideration, probative, or would change the outcome of the Determination.

ORDER

30. Pursuant to section 115 of the Act, I confirm the Determination.

Sheldon Seigel
Member
Employment Standards Tribunal