

An appeal

- by -

Oracle Management and Marketing Consultants Ltd.
(“Oracle”)

- 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: Robert C.P. Walker

FILE No.: 2012A/49

DATE OF DECISION: August 23, 2012

DECISION

SUBMISSIONS

Nitai Chand Goswami	on behalf of Oracle Management and Marketing Consultants Ltd.
Harpreet Dhaliwal	on her own behalf
Emily K. Yao	on behalf of the Director of Employment Standards

INTRODUCTION:

1. Oracle Management and Marketing Consultants Ltd. (“Oracle”) appeals, pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination of the Director of Employment Standards issued March 30, 2012, together with accompanying Reasons for Determination of the same date. The Determination requires Oracle to pay Harpreet Dhaliwal (the “Respondent”) the sum of \$1,095.83 for statutory holiday pay, annual vacation pay, compensation for length of service and accrued interest. It also imposes first time mandatory administrative penalties for Oracle’s breaches of sections 46, 63 and 28 of the *Act* totalling \$1,500.
2. Each of the parties has made one or more written submissions on the Appeal. I have determined that this matter may be decided based upon those written submissions and the record accompanying the submission filed by the Director on this appeal.
3. Oracle’s Appeal Form dated May 5, 2012, states its grounds of appeal as the Director erred in law, failed to observe the principles of natural justice and that evidence has become available that was not available at the time the Determination was made. The details of Oracle’s written argument do not follow those headings. But, consistent with the Tribunal’s decision in *Triple S Transmission Inc.* (BC EST # D141/03) I will endeavour to identify and consider all relevant arguments in the appellant’s material as they may relate to the three statutory grounds of appeal.

BACKGROUND FACTS

4. The Respondent commenced employment with Oracle on March 29, 2010. Her final day of work was April 8, 2011. She originally earned \$10 per hour but her wage increased to \$12 per hour upon passing a licensing course. As part of her complaint the Respondent also argued unsuccessfully that she was to receive a further increase to \$15. In early April 2011 her regular 40 hours per week was unilaterally cut to 24 hours per week; and her days off were changed. She left her employment shortly thereafter. In spite of Oracle’s argument that the Respondent had voluntarily quit, the Director found she had been constructively terminated because of the substantial change to her work hours and days off. Hence she was entitled to compensation for length of service. The Respondent had also been directed to work on Remembrance Day 2010 but was not paid statutory holiday wages. Further, often her wages were not paid on time; and did not include vacation pay.
5. The Director made a formal Demand for Employer Records from Oracle on January 19, 2012, but appropriate records were not produced. The Director held a Mediation and a Complaint Hearing prior to making the Determination.

THE FACTS AND ANALYSIS

6. Section 112(1) of the *Act* sets out the grounds upon which an appeal may be made to the Tribunal from a Determination of the Director. 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; and
 - (c) evidence has become available that was not available at the time the determination was being made.

NEW EVIDENCE

7. Section 112(1)(c) of the *Act* has been considered by the Tribunal on many occasions. The Tribunal has set out four conditions that must be met before new evidence will be considered. *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc*, BC EST # D171/03; and *Alano Club of Chillimack operating as Alano Club Coffee Bar*, BC EST # D094/05.
8. The Appellant (Oracle) must establish that:
- (i) 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 a Determination being made.
 - (ii) the evidence must be relevant to a material issue arising from the complaint.
 - (iii) the evidence must be credible in the sense that it is reasonably capable of belief.
 - (iv) the evidence must have high potential 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.
9. What Oracle appears to write in its submission in relation to wages payable is to revisit issues originally placed before the Director during the Complaint Hearing; in essence re-arguing its case. Restating its case cannot be the introduction of “new evidence”. Those issues include the argument that the Respondent was overpaid on occasion during her tenure; and hence Oracle should not be liable for certain administrative fines. They also include the argument that the Respondent was also working for an associated corporation on commission; and Oracle should not be responsible for certain aspects of the Determination.
10. In my respectful opinion Oracle has not met its onus in specifically indicating and arguing what the evidence is that has now been discovered; let alone how it may be relevant and credible or, if believed, could have led the Director to a different conclusion. As a result I decline to exercise my discretion to admit new evidence.

NATURAL JUSTICE and ERROR OF LAW

11. The natural justice and error of law submissions made by Oracle focus on what the Director reviewed and how the evidence at the hearing was interpreted when making the Decision. Again, Oracle repeats many arguments previously made and that were mentioned and considered by the Director prior to issuing the Determination and associated Reasons.

12. In my opinion it is clear from the materials that Oracle and the Respondent were making opposing legal arguments and giving evidence inconsistent with the other party's legal positions. The Director is obliged to, and did, thoroughly canvass and consider the legal issues, weighed the evidence, made findings of credibility and committed the Determination to writing. Having regard to Oracle's submissions I could not find any evidentiary or legal basis to interfere with the Determination; including the legal issue of whether the Respondent was terminated, or she quit. Nor is there any indication that Oracle was denied a full opportunity to be heard or to present evidence.
13. Oracle has made a number of arguments as to why administrative penalties should not be imposed. The key to its position appears to be that the Respondent was paid regularly as if she worked 40 hour weeks when in fact she did not always do so. If one carefully reviewed the payments to the Respondent, the pay she received for hours not worked would more than cover the so-called shortfall of vacation pay and holiday pay.
14. The Director is obliged to impose monetary penalties under section 98 of the *Act* if requirements are made under section 79. Those requirements related to one penalty for failing to have proper payroll records. Oracle did not provide the proper documentation in spite of an earlier formal demand. Another penalty was for failing to pay statutory holiday pay for working on Remembrance Day. There was clear evidence confirming that failure to pay. Finally, if an employee is terminated after three months service then service compensation must be paid. Oracle did not make any payment regarding service compensation. I can find no legal basis to overturn the Director's penalty requirements.
15. Section 115(1) of the *Act* provides the Tribunal authority to confirm, vary or cancel the Determination under appeal; or refer the matter back to the Director. I intend to confirm the Determination.

ORDER

16. I Order that the Determination under appeal be confirmed pursuant to section 115(1)(a) of the *Act*.

Robert C.P. Walker
Member
Employment Standards Tribunal