Employment Standards TRIBUNAL

An appeal

- by -

Manila Cargo Express Vancouver Inc.
("MCEVI")

- 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.: 2006A/79

DATE OF DECISION: September 20, 2006

DECISION

SUBMISSIONS

Kenneth Armstrong, Esq.	on behalf of Manila Cargo Express Vancouver Inc.
Ken Mclean	on behalf of the Director

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by Manila Cargo Express Vancouver Inc. ("MCEVI.") of a Determination that was issued on May 19, 2006 by a delegate of the Director of Employment Standards (the "delegate"). The Determination found that MCEVI had contravened Sections 21, 58 and 63 of the *Act* in respect of the employment of Antonia M. Igonia ("Igonia") and ordered MCEVI to pay Igonia an amount of $8,100.74, an amount which included wages and interest.

2. An administrative penalty was imposed on B.C.C.E. under Section 29(1) of the E*mployment Standards Regulation* (the *"Regulations"*) in the amount of $1000.00.

3. The total amount of the Determination is $9,100.74.

4. MCEVI says the delegate erred in law by finding Igonia was not a fiduciary of MCEVI and by not finding MCEVI had cause to terminate Igonia and the delegate failed to observe principles of natural justice in making the Determination by failing to take into account all of the evidence before him. The appeal requests that the Tribunal vary the Determination by setting aside that part of the Determination awarding Igonia length of service compensation.

5. The Tribunal has reviewed the appeal and the materials and has decided an oral hearing is not necessary in order to decide this appeal.

ISSUE

6. The issues are whether the delegate committed an error of law and/or failed to observe principles of natural justice in making the Determination.

THE FACTS

7. The following background information is provided in the Determination:

> Manila incorporated in 1985 [and] operates a courier/expediter business which falls within the jurisdiction of the Act. A Record of Employment Form issued to the complainant indicated he was employed as a Cargo Operations Manager from July 1, 1998 to December 23, 2004. The employer's payroll records indicate that Igonia's rate of pay was $18.31 an hour.

8. Among other things, Igonia claimed he was entitled to length of service compensation because of his dismissal by MCEVI without cause, notice or compensation in lieu of notice.

9. During the complaint process, MCEVI argued that Igonia was a fiduciary, had placed himself in a conflict of interest and had, for those reasons, given MCEVI cause to terminate his employment without notice.

10. The delegate found Igonia was not a fiduciary or a key employee and that MCEVI had not proven he was in an actual conflict of interest.

11. The delegate concluded MCEVI had not proven just cause for terminating Igonia.

ARGUMENT AND ANALYSIS

12. MCEVI has the burden, as the appellant, of persuading the Tribunal there is a reviewable error in the Determination. The grounds upon which an appeal may be made are 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 made.*

13. An appeal is an error correction process with the burden of showing the error being on the appellant. It is not simply an opportunity to re-argue one's case, hoping the Tribunal will reach a different conclusion. The Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings amount to an error of law.

Error of law

14. MCEVI argues that the delegate erred in law by failing to find Igonia was a fiduciary, or alternatively, by failing to find there was just cause for his termination.

15. I shall first address the argument about whether Igonia was a fiduciary. The Determination contains the following statement on the question of whether Igonia was a fiduciary of MCEVI:

> A key characteristic of a fiduciary relationship, and which is relevant in this case, is that of dependency or vulnerability see *Air Products Canada Ltd.*. BC EST #D523/01 ("*Air Products*") applying *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 (SCC)). The evidence reveals that the complainant did not work in a highly independent manner without input from his superiors. I find the complainant was not in a highly sensitive position with Manila.

16. MCEVI submits the delegate identified the correct test for determining whether an individual can be considered a fiduciary, but disagrees with the conclusion. MCEVI says the delegate should have reached

a different conclusion from the evidence provided by Igonia, who conceded he was senior management, described himself as Operations Manager and acted independently in traveling to Toronto and other points on behalf of MCEVI.

17. The difficulty for MCEVI in making that submission is twofold. First, none of the above factual references go to the one feature which is considered to be indispensable to the existence of a fiduciary relationship and which is described in the following comment from the Court in *Lac Minerals Ltd., supra*:

> It is possible for a fiduciary relationship to be found although not all of these characteristics are present, nor will the presence of these ingredients invariably identify the existence of a fiduciary relationship.
>
> The one feature, however, which is considered to be indispensable to the existence of the relationship, and which is most relevant in this case is that of dependency or vulnerability.

18. The Court also made it quite clear in *Lac Minerals Ltd.* that it is the nature of the relationship and not the specific category of actor involved that gives rise to the fiduciary duty. In that sense, it is not determinative that Igonia considered himself to be "senior management" and was described as "Operations Manager".

19. Second, the argument would require me to ignore or alter specific findings of fact made by the delegate without any legal reason being provided by MCEVI allowing me to do so. The delegate found on the evidence that "the complainant did not have access to confidential of proprietary information and was not in a position to use any confidential information to the detriment of the employer" (p. 21). As indicated above, the Tribunal has no authority to entertain appeals based on alleged factual errors unless such errors amount to errors of law. MCEVI has not identified any error of law in the findings made by the delegate on this point.

20. Consequently, I find no reviewable error in the conclusion of the delegate that Igonia was not a fiduciary.

21. MCEVI says, in any event, the delegate erred in law by failing to find just cause for dismissal. MCEVI says at least part of the error lies in the statement by the delegate that an employer must demonstrate an employee is a fiduciary in order to justify summary dismissal for conflict of interest. I agree with the position of MCEVI that it is not only a fiduciary that can be summarily dismissed for conflict of interest. The law is clear that a key employee and a "mere employee" can be summarily dismissed for conflict of interest and the delegate erred in law by requiring MCEVI, as a precondition to summarily dismissing Igonia for conflict of interest, to demonstrate he was a fiduciary.

22. That does not, however, determine the appeal. The question is whether this error by the delegate justifies the intervention of the Tribunal to vary the result on the just cause issue. That will depend on a review of the findings of fact made by the delegate and an application of those facts within the correct legal analysis.

23. A decision about whether there is just cause for dismissal is predominantly fact driven. As a matter of law, the Tribunal has identified and consistently applied several principles to questions of just cause for dismissal (see *Randy Chamberlin and Sandy Chamberlin operating as Super Save Gas*, BC EST #D374/97). MCEVI bears the burden of establishing just cause for dismissal.

24. In *IBM Canada Limited IBM Canada Limitée*, BCEST #D119/05, the Tribunal has summarized the principles that have emerged from Tribunal decisions on dismissal for conflict of interest in circumstances where an employee enters into an employment relationship with a competitor. They are as follows:

- There is no general proposition that an employee who enters into an employment contract with a competitor provides just cause for dismissal.
- In order to justify dismissal without notice for conflict of interest, an employer must establish that the employee either:
  a) is a fiduciary and has entered into an employment contract with a competitor firm;
  b) is a key employee with an implied duty of fidelity and faithfulness because of their status and has created a reasonable risk of harm to the employer by working for a competitor in a similar position in the same marketplace, or
  c) is a "mere" employee and an actual conflict of interest has been established.

25. I reiterate that the above principles apply to circumstances where an employee has entered into employment with a competitor. The facts are somewhat different here. In this case, Igonia had discussions with another company about setting up and managing a cargo remittance business with that company, but the discussions did not result in him setting up that business or taking employment with that company.

26. Without deciding if all of the above principles apply to the circumstances of this case, I will consider the issue of just cause in this case against those principles.

27. The delegate found, on the evidence, that Igonia was not a fiduciary or key employee and was not employed in a highly sensitive position with MCEVI. I have already addressed the ground of appeal which challenges the conclusion of the delegate that Igonia was not a fiduciary. Similarly, I can find no basis in the evidence for rejecting the conclusion that Igonia was not a key employee. That leaves only the conclusion that Igonia was a "mere employee" and that conclusion requires MCEVI to show an actual conflict of interest in order to justify summary dismissal.

Failure to observe principles of natural justice

28. In addressing the this burden, I need to consider the argument that the delegate failed to observe principles of natural justice by failing to take account of the evidence that Igonia had disclosed confidential client lists to the company with whom he was discussing employment. In fact, the delegate did not fail to take account of such evidence, but stated the evidence to be to that Igonia had not disclosed any MCEVI customer lists to the other company. That evidence was provided by Ms. Nelita Vandt, the owner of the company with whom Igonia was discussing employment.

29. In reply to the appeal, the delegate confirmed his clear recollection of that evidence. MCEVI says the employer representative, and counsel for the employer, have a different recollection of Ms. Vandt's evidence and submits that if the different recollections prove determinative of the appeal, an oral examination of Ms. Vandt should be conducted by the Tribunal.

30. The problem with this aspect of the appeal from the Tribunal's perspective is that while the appeal is framed as a failure to observe principles of natural justice, it actually represents a challenge to a finding of fact made by the delegate. The Tribunal has no authority to consider appeals based on challenges to

findings of fact unless those findings amount to an error of law. The burden is on MCEVI to demonstrate the Tribunal has authority to consider this aspect of the appeal and that there is an error in the Determination. More specifically, the onus of proof to demonstrate a breach of natural justice is on the MCEVI. That burden is not met by asserting a "recollection" that simply flies in the face of findings made by the delegate. In *J.C. Creations Ltd.*, BCEST #RD317/03, the Tribunal was provided with a statutory declaration from the employer outlining the specifics of the breach of natural justice alleged.

31. I note that Ms. Vandt was called by MCEVI to give evidence to the delegate at the complaint hearing. There is no suggestion she was an adverse or uncooperative witness. It is her evidence that is being contested. At a minimum, MCEVI should have sought her position on the challenged evidence and, if she agreed with the recollection asserted by MCEVI, she should been asked to depose to that effect in a statutory declaration.

32. Generally speaking, it would be quite inconsistent with the statutory objectives of efficiency and finality in the appeal process for the Tribunal to engage in oral examination of persons providing evidence during the complaint hearing because one of the parties asserts a different "recollection" of relevant evidence that what is found in the Determination.

33. I am unable to find a failure to observe principles of natural justice in the finding by the delegate that Igonia had not provided MCEVI customer lists to Ms. Vandt.

34. There is nothing else in the evidence or in the findings made by the delegate that would allow for a conclusion that Igonia was in an actual conflict of interest as a result of the discussions he had with Ms. Vandt. Accordingly, MCEVI has failed to meet its burden and Igonia's summary dismissal was not justified. In reaching this conclusion, I have applied the above principles concerning dismissal for conflict of interest and other considerations that have been derived from Tribunal decisions considering circumstances where an employee is dismissed for alleged conflict of interest, all of which are referred to and cited in the *IBM Canada Limited IBM Canada Limitée* decision.

35. The appeal is dismissed.

ORDER

36. Pursuant to Section 115 of the *Act*, I order the Determination dated may 19, 2006 be confirmed in the amount of $9,100.74, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal