

An appeal

- by -

Shelley Wells
("Ms. Wells")

- of Determinations 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.: 2010A/91 & 2010A/107

DATE OF DECISION: September 23, 2010

DECISION

SUBMISSIONS

Shelley Wells	on her own behalf
Kirsten D. Hume	Counsel for Quest Outreach Society
Lynn Ranger	on behalf of the Director of Employment Standards

OVERVIEW

1. This decision addresses two appeals filed by Shelley Wells (“Ms. Wells”) under Section 112 of the *Employment Standards Act* (the “*Act*”) from Determinations made by a delegate of the Director of Employment Standards (the “Director”) on May 25, 2010 (the “May Determination”) and June 14, 2010 (the “June Determination”).
2. The May Determination found that Ms. Wells’ employer, Quest Outreach Society (“Quest”) contravened Part 3, sections 17 and section 28 of the *Act* and ordered Quest to pay Ms. Wells \$6,475.10, an amount which included wages and interest.
3. The Director also imposed administrative penalties on Quest under Section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) in the amount of \$1000.00.
4. The total amount of the May Determination is \$7,475.10.
5. The June Determination found no contravention of the *Act* in respect of Ms. Wells’ claim for RRSP contributions from Quest and consequently decided no wages were owed on that claim.
6. Ms. Wells appeals that part of the May Determination that denied her claim for reimbursement of office expenses, alleging the Director erred in law and failed to observe principles of natural justice in making the Determination.
7. Ms. Wells appeals the June Determination denying her claim for RRSP contributions, alleging the Director failed to observe principles of natural justice by, among other things, making the Determination without providing her with an opportunity to present evidence on that claim, to make argument or to cross-examine the evidence provided by Quest in response to the claim.
8. None of the parties has requested an oral hearing on these appeals and while the Tribunal has a discretion whether to hold an oral hearing on any appeal (see Section 36 of the *Administrative Tribunals Act* (“*ATA*”), which is incorporated into the *Employment Standards Act* (s. 103), Rule 17 of the Tribunal’s Rules of Practice and Procedure and *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575), the Tribunal has decided an oral hearing is not necessary. The issues involved in these appeals can be decided from the submissions and the material on the section 112(5) Record.

ISSUE

9. The issues are whether the Director erred in law or failed to observe principles of natural justice in making the May Determination or failed to observe principles of natural justice in making the June Determination.

THE FACTS

10. I will only outline the facts relevant to the issues arising in each of the two appeals after setting out the background facts relating to the complaints filed by Ms. Wells.
11. Quest is a registered not-for-profit organization that redistributes non-marketable food acquired from food suppliers to local service agencies for distribution. Ms. Wells is employed as the Executive Director of Quest and is currently on medical leave. She is a manager as that term is defined in the *Regulation*.

The May Determination

12. The May Determination considered a number of claims made by Ms. Wells in a complaint to the Director, including claims for payment of banked overtime, vacation pay, a yearly bonus, car allowance and reimbursement of office expenses and a loan. The Director found there were regular wages owed to Ms. Wells for hours worked in excess of 40 in a week, but denied the balance of her claims. Ms. Wells only appeals the decision to deny her claim for reimbursement of office expenses.
13. Ms. Wells claimed office expenses covering a period from September 14 to November 9, 2008. The May Determination sets out the expenses claimed and the reasons for denying them.
14. Ms. Wells claimed reimbursement of \$51.45 for a luncheon meeting on September 23, 2008, which she said was with a potential donor to Quest and resulted in a donation to Quest in the amount of either \$3000.00 or \$3500.00; I say “either” because both amounts are used at various times by Ms. Wells in her submissions to the Director and in the information she provided to the Director during the complaint process.
15. Ms. Wells claimed reimbursement of \$106.36 for printing supplies – paper and printer cartridges – purchased on October 27, 2008, and of \$29.91 for a fax sent on November 3, 2008.
16. While not rejecting the fact Ms. Wells paid for the items, the Director denied these claims for reimbursement because, on an analysis of the material supporting the claims, the evidence did not show the amounts paid were Quest’s business costs or were costs incurred on behalf of Quest: see section 21(2) of the *Act*. The Determination indicates there was no proof the printing supplies were used to perform work for Quest, no evidence giving a reason for incurring the cost of a 30 page fax or indicating to whom and why it was sent and no evidence to support the validity or purpose of the cost of a lunch.

The June Determination

17. The June Determination considered Ms. Wells claim for RRSP contributions from Quest while she was on an unpaid medical leave. The period encompassed by the Determination was from February 2009 to May 2010. The Director considered the claim and concluded, on an assessment of terms in the employment agreement¹ advocated by Ms. Wells as being in effect, that the RRSP contributions claimed were not benefits but were part of her salary, were payable for work and/or services performed, but were not payable where no work was being performed. The Director concluded that section 26 of the *Act* was not engaged as the employment contract inferred the RRSP contributions would be paid when work was performed and Ms. Wells was no

¹ The Director noted the terms of the 2005 and 2007 employment agreements were in dispute, but used the language of the agreement Ms. Wells had argued applied to her. There is no suggestion in the Determination that the Director was confirming the 2007 agreement bound the parties to all of the terms Ms. Wells alleged were included in it.

longer performing work for Quest. The Director also found there was no basis in section 1 of the *Act* for finding the RRSP contributions were required to be paid as they did not meet the definition of wages.

ARGUMENT

The May Determination

18. Ms. Wells submits the Director erred in law by committing an error on the facts. She argues the Director failed to observe principles of natural justice on the same basis. She states her belief that the error arose because the delegate initially responsible for administering her complaint transferred the file to another delegate and the latter “overlooked and/or misplaced” some of Ms. Wells evidence. She identifies several elements of evidence which she alleges were provided and apparently overlooked, including:
 - 18 pages of “sample” e-mails provided to demonstrate she worked on grants, audits, administrative and operational issues pertaining to Quest during her sick leave;
 - her cell phone log, purportedly showing “the number of calls she was required to undertake involving her employer, employees, vendors and donors during her sick leave”;
 - Quest’s audit e-mails and support documents;
 - a donation receipt for \$3000.00; and
 - her cell phone log and e-mail evidence confirming a meeting took place on September 23, 2008.
19. Ms. Wells says she provided the name of the recipient of the fax to the first delegate administering her claim. As well, several documents are provided with her appeal submission purporting to verify the above assertions.
20. Ms. Wells expresses her disagreement with the suggestion that she was not performing work on behalf of Quest during her sick leave. She also disagrees with the statement in the Determination, at page R25, para. 4, that “correspondence through e-mail is not normally required to be printed” and says it was “unreasonable” for the Director to have assumed she could work at home for a four month period without paper or a working fax and printer.
21. Counsel for Quest has filed a response to the appeal on their behalf. She submits the appeal is without merit; that Ms. Wells has not shown the Director made an error of law in considering the facts; and that there is a rational basis for the findings of fact made by the Director on the three expense items which are the subject of the appeal.
22. Counsel says there is no reason for concluding the Director did not consider the evidence and, even if it is accepted the Director did not consider the documents, no reason to find this evidence would materially affect the Director’s conclusions. Counsel points out the Director’s conclusions on the expense claims were based on a lack of evidence justifying a finding that each of the claims were Quest’s business costs which Ms. Wells had incurred on their behalf.
23. Counsel says the sweeping statements made by Ms. Wells about what she was “required to do” do not assist in establishing that the Director failed to consider that evidence in deciding the validity of the expense claims. Finally, counsel notes that Ms. Wells, despite her assertion that evidence relating to the recipient of the 30 page fax was provided in submissions made to the Director in February 2009 and May 2009, does not state what this evidence was or where, in the mass of material given to the Director, it might be found.

24. The Director has also responded to the appeal, essentially restating the conclusion reached in the Determination. In doing so, the Director has provided a response to some of the assertions made by Ms. Wells.
25. First, the Director says, in response to Ms. Wells' argument based on the "18 sample" e-mails, that most of the e-mails are dated before the date of the purchase of the printing supplies and none of them contain a request or demand by Quest that she keep a paper copy of the e-mail correspondence.
26. Second, the Director says no cell phone records were received from Ms. Wells and there is nothing to indicate her cell phone was ever left with the Director as "evidence" on any matter relating to her claims. The Director notes Ms. Wells has not identified the submission in which her cell phone records might be located and when they were provided.
27. Third, the Director denies having received "a copy of the donor's donation receipt" or a cell phone log confirming a luncheon meeting took place.

The June Determination

28. Ms. Wells argues the Director failed to observe principles of natural justice in making the Determination by:
1. failing to indicate in the Determination that the RRSP contributions for January 2009 had been paid and were therefore no longer an issue;
 2. telling her the RRSP claims were outside of the jurisdiction of the Employment Standards Branch, agreeing to put that in writing and then issuing a Determination on the merits of the RRSP claim; and
 3. denying her the opportunity to submit evidence on her June 1, 2009 complaint, which she was asked to prepare a year earlier by the first delegate administering her claims, to argue her case and to cross-examine the evidence presented by the employer.
29. Counsel for Quest has filed a response. She submits the material on the file does not support the assertion by Ms. Wells that she was denied an opportunity to present her case on the RRSP claim and to respond to the position of Quest on that claim. Counsel also submits Ms. Wells has not stated what additional evidence she might have provided in respect of her RRSP claim that was not already before the Director when the Determination was made.
30. The Director has responded to this appeal. The Director relies on the Determination. In response to specific allegations of fact, the Director says Ms. Wells was not verbally told the RRSP claim was outside of the jurisdiction of the Branch or given a commitment to put anything of that nature in writing. The Director says Ms. Wells was told, just prior to the issuance of the June Determination and in response to a May 31, 2010, e-mail, that she had two options in respect of her RRSP claim: to continue her RRSP claim; or to withdraw it. As there was no withdrawal of the RRSP complaint, the Director issued the Determination.

ANALYSIS

31. As a result of amendments to the *Act* which came into effect on November 29, 2002, 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 made.

32. An appeal is not simply another opportunity to argue the merits of a claim to another decision maker. 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.

33. The *Act* does 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 they are without any rational foundation. The Tribunal has adopted the following definition of “error of law” set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):

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.

34. Ms. Wells alleges the Director erred on the facts in denying her claim for office expenses. As indicated above, the Tribunal’s authority to consider an appeal based on alleged errors of fact is limited to circumstances where the error of fact is shown to give rise to an error of law. Based on the arguments made in the appeal of the May Determination, the only potential error of law is that referred to in point four of the definition. Ms. Wells’ burden is to show the alleged error on the facts has occurred because the Director acted on a view of the facts which could not be reasonably entertained, that is, that the findings are “inconsistent with and contradictory to the evidence or they are without any rational foundation”. In assessing her arguments, I must respect the caution expressed by the Tribunal in *Jane Welch operating as Windy Willows Farm*, BC EST # D161/05, at paras. 40-43; to engage in a reassessment of findings of fact made by the Director in the context of an alleged error of law would be inconsistent with direction of the legislature in limiting the grounds of appeal to those set out in section 112 of the *Act*.

35. A party alleging a denial of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.

36. In respect of the appeal of the June Determination, the natural justice concerns which arise are those summarized by the Tribunal in *Imperial Limousine Service Ltd.*, BC EST # D014/05:

Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her

delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the Act, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party: see *BWT Business World Incorporated*, BC EST # D050/96.

The May Determination

37. I am not persuaded the Director erred in law in denying the expenses claims advanced by Ms. Wells and made the subject of this appeal.
38. Ms. Wells says she believes the error arose because the second delegate overlooked “numerous pieces of evidence” provided to the first delegate. Her expanded submission, which was filed as a “Final Reply” to the responses of Quest and the Director to the appeal, identifies several elements of “evidence” submitted during the complaint process which she alleges were “overlooked”, or not considered. Much of the evidence to which I am directed simply goes to the question of whether Ms. Wells performed any work for Quest during the four months of her paid sick leave. That was not, however, the question being considered by the Director in deciding the validity of her expense claims. The Director was considering whether the particular expenses being claimed were Quest’s business costs and incurred on their behalf. Re-arguing whether there was some evidence that she performed work for Quest during her paid sick leave does not answer the question which the Director was required by section 21 of the *Act* to answer or advance this appeal. The proof being sought by the Director from Ms. Wells and according to the Determination never provided – that the expense claims were related to work performed for Quest and not for some unrelated purpose – was both legitimate and necessary.
39. In that respect and on review of the material in the Record, I agree completely with the analysis and conclusion of the Director. I can find no “evidence” in the Record, whether it was provided before the second delegate assumed control of the file or later, that justifies a conclusion the claimed expenses were Quest’s business costs and were incurred on their behalf.
40. I can find no support for Ms. Wells’ belief the second delegate overlooked evidence that she had provided to the first delegate. The information which she says was provided to the first delegate – a donation receipt and cell phone log – which allegedly provide details relating to the luncheon meeting and to whom the 30 page fax was sent are not found in the Record. Ms. Wells says the former information was provided to the first delegate in a meeting April 21, 2009, and the latter information was provided in her February 2009 and May 2009 responses to the Branch. The only references I can find in the Record in April 2009 concerning those two matters are found in an e-mail from the first delegate to Ms. Wells dated April 7, 2009. The subject of the fax was “Fact Finding Session Thursday, April 23, 2009. In that e-mail, the first delegate asks:
- . . . could you please provide me with additional details concerning the following expenses submitted for reimbursement:
1. Dinner at Griffiths – Name of the potential donor? When was this lunch organized? What was discussed?
 2. Staples – 30 pages faxed? What was the nature of these faxes? To whom were they faxed and why?
41. It would follow that Ms. Wells had not, despite her submission, provided the required information concerning the 30 page fax to the first delegate in her February 2009 response. If so, there would be no reason for the first delegate to ask for it in April 2009.

42. There are some additional e-mails relating to the proposed fact finding meeting, in which Ms. Wells asks for additional time to complete her response, but says it will be done by April 23. Her extensive response, which was provided in late April or early May, does not answer the above questions. On May 19, 2009, the first delegate e-mailed Ms. Wells and her lawyer advising them the investigation file on Ms. Wells' complaints had been reassigned. In that e-mail, the first delegate says, in part: "I have extensively briefed Ms. Ranger on all file matters . . .". There is no evidence and no reason to believe the first delegate failed to fully brief the second delegate on all matters relating to Ms. Wells' claims including the basis for the expense claims and the paucity of information that had been provided to that date in support of them.
43. A complete review of the record does not show that Ms. Wells ever provided the information requested by the first delegate, referred to above. There is no evidentiary basis for her "belief" that the second delegate overlooked evidence relating to her expense claims that she had provided to the first delegate.
44. In sum, Ms. Wells has not met the burden on her in this appeal to show an error of law. The natural justice issue in this appeal is premised on the same assertions of fact as the error of law argument and fails for the same reasons. Accordingly, the appeal of the May Determination is dismissed.

The June Determination

45. Ms. Wells has taken a two pronged approach in arguing the natural justice issue relating to the June Determination. First, she says she was misled by the Director saying the RRSP claim was outside of the jurisdiction of the Branch and then issuing the Determination deciding the claim on its merits. Second, she says the Director denied her the opportunity to argue her case and to respond to the case submitted by Quest on this claim.
46. On the first matter raised in the appeal, I have no affidavit or statutory declaration from any party, including Ms. Wells, and therefore no evidence concerning the allegations made by her. I am not compelled to make any judgement based on allegations not supported by evidence. That comment applies to both Ms. Wells and the Director. There are, however, probabilities implicit in the circumstances that bear on this aspect of Ms. Wells' appeal to which I shall refer during my analysis. The burden lies with Ms. Wells to show a breach of natural justice. It is not a light burden.
47. There are a few elements of this appeal about which there is no dispute or no basis for dispute. Ms. Wells filed a complaint claiming RRSP contributions in June 2009 and filed an update on that claim in June 2010. The complaint was reviewed and investigated by the Director. Counsel for Quest filed a detailed response to that claim. Nowhere in that response does Quest argue the claim is outside of the jurisdiction of the *Act*. Section 76(3) (b) allows the Director to refuse to investigate or continue investigating a complaint which does not fall within the *Act*. There is no suggestion in any of the material in the Record, which is an accumulation of nearly a year and a half of investigation and submissions, that the Director was considering an exercise of that discretion. The suggestion from Ms. Wells that the Director indicated the RRSP claim does not fall within the jurisdiction of the Branch is one that comes "out of the blue", so to speak, and has no support in any part of the complaint process that occurred up to the issuance of the Determination. There is no evidence that at any time Ms. Wells sought to withdraw the RRSP claim or otherwise indicate she did not wish to have the Director complete the investigation on her claim and issue a decision.
48. It is unlikely the Director would need to be asked to "put the decision in writing". The circumstances dictated a Determination had to be issued. It is trite that a Determination must be in writing. Where the Director finds no contravention, the *Act* requires the Director to dismiss the complaint: see section 79(8). In

other words, the provisions of the statute dictated that the Director issue a written Determination on the complaint.

49. On the facts and the law, there is no basis on which the Director could have found the RRSP claim was outside of the jurisdiction of the *Act* or the Branch. Curiously, what this appeal does is challenge the decision of the Director not to have dismissed Ms. Wells' RRSP claim on jurisdictional grounds when such a result would clearly be wrong. I find the Director did exactly what was required in the circumstances – issue a Determination – and Ms. Wells allowed it to occur. She cannot complain after the fact because the Director found no contravention and dismissed her claim.
50. I do not accept there was any failure to observe principles of natural justice by the Director issuing the Determination.
51. In respect of the second natural justice matter raised in this appeal, the material in the Record and the Determination do not support the argument that Ms. Wells had no opportunity to know the position of Quest on her RRSP claim and to respond to it. Rather, the material indicates that in every respect Ms. Wells was provided with the opportunity required by section 77 of the *Act* and the principles of natural justice to know the case she had to meet, to present her position and to respond to the position presented by Quest. She was provided with all of the submissions filed on behalf of Quest with the Director, including the July 3, 2009, submission which clearly stated the position of Quest on the RRSP claim, and with copies of the affidavits of Mr. Brasso, dated August 20, 2009, and Ms. Leung, dated August 21, 2009. The Record shows she filed several submissions with the Director reiterating her basic position that the RRSP contributions were “benefits” which Quest was required by contract to continue for as long as she was employed. On that basis, I do not accept her assertion that she had no opportunity to submit evidence and make argument on her RRSP claim.
52. Procedural fairness in the circumstances of this case does not require Ms. Wells be provided the opportunity to “cross-examine” Quest on their response to her RRSP contribution claim. The Director processed all of the complaints by Ms. Wells by way of investigation, receiving information and submissions from the parties on the full panoply of claims. Within that process, Ms. Wells had the opportunity to present her case on her RRSP claim and to respond to the position submitted by Quest. There was nothing unfair in the process or in the way it was administered.
53. The Determination sets out the respective positions of the parties. Ms. Wells has not asserted the Determination does not accurately reflect her position on the claim for RRSP contributions. The evidence and argument ascribed to her in the Determination are consistent with the submissions and material found in the Record that were submitted by her on this claim.
54. Ms. Wells has not met the burden of showing a failure by the Director to observe principles of natural justice in making the Determination.
55. The appeal of the June Determination is also dismissed.

ORDER

56. Pursuant to section 115 of the *Act*, I order the Determinations dated May 25, 2010, and June 14, 2010, be confirmed.

David B. Stevenson
Member
Employment Standards Tribunal