Employment Standards TRIBUNAL

An appeal

- by -

IBM Canada Limited – IBM Canada Limitee
("IBM")

- 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.: 2014A/108

DATE OF DECISION: November 17, 2014

DECISION

SUBMISSIONS

Lorene Novakowski — counsel for IBM Canada Limited – IBM Canada Limitee

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the *"Act"*) IBM Canada Limited – IBM Canada Limitee ("IBM") has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on July 18, 2014.

2. The Determination found that IBM had contravened Part 7, sections 57 and 58 of the *Act* in respect of the employment of Brett R. Barlow ("Mr. Barlow") and ordered IBM to pay wages to Mr. Barlow in the amount of $12,194.59 and to pay administrative penalties in the amount of $1,000.00. The total amount of the Determination is $13,194.59.

3. IBM appeals on the grounds the Director erred in law and failed to observe principles of natural justice in making the Determination.

4. On August 27, 2014, the Tribunal acknowledged to the parties that an appeal had been received from IBM, requested production of the section 112(5) "record" from the Director and notified the parties, among other things, that no submissions were being sought from the other parties pending review of the appeal by the Tribunal and that following such review all, or part, of the appeal might be dismissed.

5. The section 112(5) "record" was provided by the Director to the Tribunal and a copy was sent to IBM. There was some objection to the completeness of the section 112(5) "record" that has been resolved. The Tribunal is satisfied the section 112(5) "record" is complete.

6. Consistent with the August 27 2014, notice, I have reviewed the appeal, including the reasons for appeal submitted by IBM in the August 25, 2014, submission filed on its behalf, and the section 112(5) "record".

7. I have decided this appeal is an appropriate case for consideration under section 114 of the *Act*. At this stage, I am assessing this appeal based solely on the Determination, the appeal and my review of the section 112(5) "record" that was before the Director when the Determination was being made. Under section 114 of the *Act*, the Tribunal has discretion to dismiss all or part of an appeal, without a hearing of any kind, for any of the reasons listed in subsection 114(1), which states:

> ***114*** *(1) At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of the appeal if the tribunal determines that any of the following apply:*
>
> *(a) the appeal is not within the jurisdiction of the tribunal;*
>
> *(b) the appeal was not filed within the applicable time limit;*
>
> *(c) the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process;*
>
> *(d) the appeal was made in bad faith or filed for an improper purpose or motive;*
>
> *(e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;*
>
> *(f) there is no reasonable prospect the appeal will succeed;*

(g) the substance of the appeal has been appropriately dealt with in another proceeding;

(h) one or more of the requirements of section 112(2) have not been met.

8. If satisfied the appeal or a part of it has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, Mr. Barlow will, and the Director may, be invited to file further submissions. On the other hand, if it is found the appeal is not meritorious, it will be dismissed under section 114(1) of the *Act*.

ISSUE

9. The issue at this stage of the appeal is whether there is any reasonable prospect the appeal will succeed.

THE FACTS

10. IBM operates a high technology hardware, software, services and consulting company. Mr. Barlow was employed by IBM at an office in Victoria. Mr. Barlow gave notice of resignation on June 17, 2013. IBM terminated his employment June 21, 2013, and paid compensation in lieu of the working notice he gave.

11. Following his termination, Mr. Barlow claimed unpaid regular wages and annual vacation pay. The former claim was resolved during the complaint process, the latter was not. On termination, Mr. Barlow was paid for 5.5 vacation days; he claimed he was entitled to annual vacation pay equivalent to 20.5 days.

12. At the time of his termination, Mr. Barlow was an associate partner and earned $186,636.00 a year. IBM and Mr. Barlow agreed one day's wages equalled $716.00.

13. The Director conducted a complaint hearing on the claim for annual vacation pay. The Director heard evidence from Mr. Barlow, on his own behalf and from Joanne Moore, described in the Determination as the senior benefits manager for IBM, and Wade Schreder, Senior Human Resource Partner for IBM, on behalf of IBM. IBM does not take issue with the summaries in the Determination of the evidence given by the three witnesses during the complaint hearing.

14. The Director found the wage recovery period was limited to wages earned during the period December 22, 2012, and June 21, 2013. The Director determined the annual vacation pay earned during the recovery period comprised annual vacation pay earned between January 1, 2011, and June 21, 2013, and, in result, Mr. Barlow was entitled to be paid the monetary equivalent of 15 days for annual vacation pay earned in that period as well as an additional $1,073.10 annual vacation pay on the amount paid by IBM in lieu of working out the four weeks' notice period Mr. Barlow gave to them.

15. The Director also found IBM had contravened section 57 of the *Act*.

ARGUMENT

16. Counsel for IBM submits the Director committed five errors in making the Determination:

1. acting on a view of the facts that could not reasonably be entertained;
2. misinterpreting section 57 of the *Act*;
3. misinterpreting section 58 of the *Act*;
4. not correctly applying section 80 of the *Act* in calculating the amount owing; and

5. failing to observe principles of natural justice regarding the calculation of vacation pay on the final pay received by Mr. Barlow.

17. Counsel argues the first error arises from the Director finding IBM had not obtained Mr. Barlow's written permission for the payment of vacation pay on each paycheque. Counsel submits his confirmation of receipt of IBM's human resources policies in December 2002 and his acknowledgement of the receipt of IBM's "Transition Package" in January 2003 reflects both his knowledge and consent to all of the terms contained in all of the documents.

18. Counsel argues, for the several reasons outlined in the appeal submission, that the Director erred in how section 57 of the *Act* was applied in the circumstances. Counsel relies on, and resubmits, the arguments made to the Director at the complaint hearing and adds a submission that the Director erred by failing to give adequate consideration to the different factual circumstances of this case in applying the Tribunal's decision *Metropolitan Fine Printers Inc.*, BC EST # RD022/13 (Reconsideration of BC EST # D113/12).

19. Counsel argues the Director misinterpreted section 58 of the *Act*, relying on the arguments submitted at the complaint hearing, adding that, in any event, the Director's finding IBM had not acquired Mr. Barlow's written permission to pay annual vacation pay on each paycheque, a finding which is challenged in the appeal as being wrong, impugns any conclusion based on that factual finding.

20. Counsel submits the Director erred in how section 80 of the *Act* was applied in deciding any unpaid vacation earned between January 1, 2011, and June 21, 2013, was recoverable. Counsel argues the reasons for this part of the Determination are not sufficient as they do not make it clear that the Director considered all of the relevant and factual issues in reaching a conclusion on this point.

21. Counsel for IBM says, in any event, the Director erred in applying section 80 to the circumstances of this case, arguing the Director's application of section 80 failed to give effect to the provision of the vacation policy where Mr. Barlow took his vacation and received his annual vacation pay in the year it was earned. Counsel says such a provision provides vacation entitlement greater than the minimum standard and should have been be given effect. If it were given effect, argues counsel, when Mr. Barlow terminated, his only annual vacation pay entitlement was that earned in the year in which he was terminated, *vis.* 2013.

22. Finally counsel argues the Director failed to observe principles of natural justice by considering whether Mr. Barlow was entitled to vacation pay on the severance payment without notifying the parties this would be done and without allowing for evidence and argument on that matter.

ANALYSIS

23. When considering whether the appeal has any reasonable prospect of succeeding, the Tribunal looks at the relative merits of an appeal, examining the statutory grounds of appeal chosen and considering those against well established principles which operate in the context of appeals generally and, more particularly, to the specific matters raised in the appeal.

24. 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 being made.*

25. The Tribunal has established that an appeal under the *Act* is intended to be 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 of review identified in section 112. This burden requires the appellant to provide, demonstrate or establish a cogent evidentiary basis for the appeal. An appeal to the Tribunal under section 112 is not intended simply as an opportunity to resubmit the evidence and argument that was before the Director in the complaint process, hoping to have the Tribunal review and re-weigh the issues and reach different conclusions.

26. 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.

27. 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.

28. This appeal alleges the Director committed several errors of law. Generally, 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.

29. As noted earlier, this appeal is grounded in arguments asserting the Director erred in law and failed to observe principles of natural justice in making the Determination. The former ground is based on an alleged error of law by the Director in making findings of fact, an alleged failure to provide adequate reasons and committing errors in interpreting and/or applying three sections of the *Act*. The latter ground is based on an alleged failure to give notice to the parties, and provide an opportunity to be heard, on a matter that was considered by the Director in making the Determination.

30. The first argument made by counsel for IBM cannot succeed. There are two points in response to this argument. The first is that an appeal is, as noted above, "an error correction process", with the burden of demonstrating the error, "on a cogent evidentiary basis", being on the appellant, in this case IBM. It is insufficient simply to say Mr. Barlow's acknowledgement of IBM's "Transition Package" constitutes an agreement in writing, as that concept is understood and applied in section 58 of the *Act*, between him and IBM. Counsel has failed to reference any part of the "Transition Package" that could even remotely be considered such an agreement. On its face, the correspondence providing Mr. Barlow with the "Transition Package" does nothing more than provide Mr. Barlow with information on what his various terms of his

employment will be. It does not ask for his written agreement on any of them, merely his acknowledgement that he received them and understands them. The second point is that the finding being challenged was not based on presence of facts, but on the absence of facts. The default vacation pay requirement is found in subsection 58(2)(a); the *Act* allows for an alternative method of payment if agreed between the employee and the employer in writing. There is a burden on the party relying on this alternate method of payment to show the requirements of the *Act* are met. In this case, if IBM was asserting an entitlement to pay on each paycheque, it was required to produce a written agreement. In its absence, the Director was perfectly entitled to apply the default vacation pay requirement.

31. Even in this appeal, IBM has not pointed to any written agreement allowing the alternative method of paying annual vacation pay.

32. The next three arguments submit there are errors of law in the Director's interpretation and application sections 57, 58 and 80 of the *Act*. I find the Director's decisions on these three provisions to be both correct and compelling. The possibility of minor factual differences in the vacation policy in the case here and the *Metropolitan Fine Printers Inc.* case is irrelevant to the final result. Moreover, while counsel for IBM has submitted that "a careful review of the reasoning in *Metropolitan Fine Printers* [*sic*] as compared to the reasoning in the Determination does not lead to the conclusion the that the result should be the same", she has not shown what elements of the reasoning in the Determination have led to a wrong result. I reiterate that an appeal is an error correction process with the appellant bearing the burden of demonstrating an error. Simply alleging there is one that can be uncovered by a "careful reading" does not satisfy that burden.

33. The final argument, alleging a denial of natural justice, appears to have failed to appreciate that the inclusion of annual vacation pay on the severance payment is not a matter that is equivocal; there is a clear statutory obligation on an employer, which is conversely a statutory entitlement to an employee, to pay annual vacation pay on an employee's total wages. Additionally, the Director has a statutory obligation to ensure, in the context of a complaint, an employee receives all the benefits to which they are entitled under the *Act*. The Director was applying a statutory entitlement and fulfilling the Director's statutory mandate by including annual vacation pay on the severance package. In the circumstances, the matter did not require notice, evidence or submissions from the parties. There could have been no change in result. There was no denial of natural justice in not notifying the parties of those obligations or in not seeking their input.

34. Even if the parties should have been provided with an opportunity to comment to the Director on the inclusion of annual vacation pay on the severance payment, it is noteworthy, in my view, that counsel for IBM, while professing that lack of opportunity, makes no attempt to provide any submission on that matter in this appeal. This matter is clearly one where, if there were a breach of natural justice, the Tribunal has the ability to cure that breach; the question involves a mechanical application of provisions of the *Act* operating in the context of the Director's statutory mandate. There is no argument IBM, or any party, could make that would alter the result.

35. In sum, on an assessment of this appeal I am satisfied it has no presumptive merit and has no prospect, reasonable or otherwise, of succeeding. The purposes and objects of the *Act* would not be served by requiring the other parties to respond to it.

36. The appeal is dismissed.

ORDER

37. Pursuant to section 115 of the *Act*, I order the Determination dated July 18, 2014, be confirmed in the amount of $13,194.59, together with any interest that has accrued under section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal