Employment Standards TRIBUNAL

An appeal

- by -

Kackaamin Family Development Centre Association
("Kackaamin")

- 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/115

DATE OF DECISION: November 17, 2014

DECISION

SUBMISSIONS

Sadie Margaret Greenaway — on behalf of Kackaamin Family Development Centre Association

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the *"Act"*) Kackaamin Family Development Centre Association ("Kackaamin") has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on August 1, 2014.

2. The Determination found Kackaamin had contravened Part 3, section 18 of the *Act* in respect of the employment of Nickolas J. Cherwinski ("Mr. Cherwinski") and ordered Kackaamin to pay wages to Mr. Cherwinski in the amount of $4,798.79, including interest under section 88 of the *Act*, and to pay an administrative penalty in the amount of $500.00. The total amount of the Determination is $5,298.79.

3. Kackaamin has filed an appeal of the Determination on the ground of evidence coming available that was not available when the Determination was being made.

4. In correspondence dated September 9, 2014, the Tribunal 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" has been provided to the Tribunal by the Director and a copy has been delivered to Kackaamin, who has been given the opportunity to object to the completeness of the section 112(5) "record". An objection has been raised to the accuracy of the section 112(5) "record" by Kackaamin. That objection was part of the general challenge to the evidence presented on behalf of Mr. Cherwinski. It does not dispute the "completeness" of the section 112(5) "record" and, accepting there is a dispute about its correctness and that this appeal is seeking to have other material added to the record, the Tribunal accepts the section 112(5) "record" in this case as being complete.

6. 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 written submission made on behalf of Kackaamin and my review of the section 112(5) "record" that was before the Director when the Determination was being made. Under section 114(1) 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 that subsection, 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.*

7. 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. Cherwinski will, and the Director may, be invited to file further submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1) of the *Act*, it will be dismissed. In this case, I am looking at the prospect of the appeal succeeding.

ISSUE

8. The issue being considered at this stage of the proceedings is whether there is any reasonable prospect the appeal can succeed.

THE FACTS

9. Kackaamin is a society incorporated under the laws of the province of British Columbia in 1978. It operates an alcohol and drug treatment centre for families in Port Alberni. Mr. Cherwinski was employed by Kackaamin from January 5, 2009, to November 29, 2013. On, or around, April 1, 2012, Mr. Cherwinski became the Director of Operations for Kackaamin, earning an annual salary of $58,240.00, based on 35 hours a week. The parties agreed Mr. Cherwinski was, at all material times, a manager under the *Act*. The parties also agreed Mr. Cherwinski's regular wage rate was $32.00 an hour and his annual vacation pay was earned at a rate of 6% of his total wages.

10. In December 2013, Mr. Cherwinski filed a complaint with the Director alleging Kackaamin had contravened the *Act* by failing to pay wages for banked time. More particularly, he claimed wages were owed to him for time banked in recognition of hours worked in addition to the hours covered by his salary. He claimed wages equivalent to 138.67 hours were owed to him.

11. The Director conducted a complaint hearing. Mr. Cherwinski attended and gave evidence on his own behalf. Sadie Margaret Greenaway ("Ms. Greenaway"), Kackaamin's Executive Director, attended and gave evidence on behalf of Kackaamin.

12. The Director found Kackaamin owed Mr. Cherwinski the equivalent of 138.67 hours in wages. In doing so, the Director accepted the evidence of Mr. Cherwinski that he and Ms. Greenaway had agreed to bank, and pay out to Mr. Cherwinski at his request, one month's worth of in lieu hours in recognition of work Mr. Cherwinski performed outside of the terms and conditions of his employment. The Director found this agreement included in lieu hours from 2011, 2012, and 2013 and that section 80 did not limit the recovery these hours to the last six months of Mr. Cherwinski's employment as the arrangement was that time in lieu was available to be taken, and paid, on an on-going basis. The Director found that while the wages for time in lieu was not *earned* in the last six months of employment, it was *payable* during that time and consequently was due on termination.

13. The Director was provided with a considerable amount of payroll and time sheet evidence at the complaint hearing, including records of Kackaamin's bookkeeper. Findings were made on this evidence which are set out in detail in the Determination and need not be repeated here.

ARGUMENT

14. Kackaamin's argument in this appeal is captured in the first sentence of their appeal submission:

> When Mr. Cherwinski and I met with the Adjudicator and he had stated his case, I did not realize I should have challenged his case at that time.

15. Kackaamin's appeal submission goes on to indicate the basis for the position that was advanced by Kackaamin at the complaint hearing, and states:

> However, after reviewing the Determination and realizing my error, I am willing to challenge the case.

16. The appeal submission proceeds to challenge several of the findings made by the Director, including whether Ms. Greenaway engaged in a conversation with Mr. Cherwinski regarding in lieu hours on a ferry trip to Vancouver in 2012, the number of in lieu hours earned over a four year period, from 2010 to 2013 and Mr. Cherwinski's hourly rate. Other elements of the appeal submission seek to alter or add commentary to facts or conclusions made in the Determination.

17. The appeal submission includes calculations made by Ms. Greenaway of "Lieu Time Earned and Lieu Time Off", which were prepared after the Determination was made and for the specific purpose of an appeal. The appeal also includes time sheets and time cards that have been adjusted by Ms. Greenaway and used in her calculations. Kackaamin submits the time cards have been reviewed "with diligence" and every 15 minutes of in lieu time attached to Mr. Cherwinski's daily work is recorded. As I read the argument, Kackaamin submits that based on these calculations Mr. Cherwinski was paid for all but 2.5 in lieu hours.

ANALYSIS

18. 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.

19. 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.*

20. 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.

21. 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.

22. Kackaamin has grounded this appeal in "new evidence" becoming available, although at its core, the appeal challenges nearly every key finding of fact made in the Determination.

23. The Tribunal is given discretion to accept or refuse new or additional evidence. The Tribunal has taken a relatively strict approach to the exercise of this discretion and tests the proposed evidence against several considerations, including whether such evidence was reasonably available and could have been provided during the complaint process, whether the evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it be reasonably capable of belief, and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination: see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03. New or additional evidence which does not satisfy any of these conditions will rarely be accepted. This ground of appeal is not intended to give a person dissatisfied with the result of a Determination the opportunity to submit evidence that, in the circumstances, should have been provided to the Director before the Determination was made: *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03. The approach of the Tribunal is grounded in the statutory purposes and objectives of fairness, finality and efficiency: see section 2(b) and (d) of the *Act*.

24. It is apparent the "new" material sought to be submitted with the appeal was reasonably available at the time the Determination was being made and could have been provided to the Director during the complaint process. On that basis alone it cannot be accepted or considered. As well, I am not satisfied the material that is Ms. Greenaway's calculations and summary is sufficiently probative to be accepted and considered. It simply provides another point of view on the calculation of in lieu hours that has not been critically examined or tested against other evidence.

25. There are other aspects of the appeal that bear no relation to the ground of appeal relied on by Kackaamin. The administrative penalty was imposed for contravention of section 18 of the *Act*. I am not certain what to make of the allegation that part of the Determination was based on "ageism", as there is certainly no attempt made in the appeal to demonstrate this was the case or that it should affect the Determination in any way. As "new" evidence, I find this comment could have been raised during the complaint process and generally lacks credibility. The commentary on that penalty is entirely unrelated to the reason for imposing it. Finally, the assertion that Ms. Greenaway signed a letter on November 28, 2013, indicating agreement with Mr. Cherwinski's proposal, was signed "under duress" is not supported by anything in the Determination or the section 112(5) "record" and in any event would have no effect on the final result.

26. This appeal has no merit; it is appropriate to dismiss it at this stage.

27. In sum, an assessment of this appeal shows it has no prospect of succeeding. The purposes and objects of the *Act* would not be served by requiring the other parties to respond to it.

28. I dismiss the appeal and confirm the Determination.

ORDER

29. Pursuant to section 115 of the *Act*, I order the Determination dated August 1, 2014, be confirmed in the amount of $5,298.79, together with any interest that has accrued under section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal