

An appeal

- by -

B.C. Collateral Loan Brokers Ltd.
("CLB")

- 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: Carol L. Roberts

FILE No.: 2007A/111

DATE OF DECISION: November 20, 2007

DECISION

SUBMISSIONS

C. Watson, Barrister & Solicitor	on behalf of B.C. Collateral Loan Brokers
M. Elaine Phillips	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by B.C. Collateral Loan Brokers Ltd., ("CLB"), pursuant to Section 112 of the *Employment Standards Act* ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued August 17, 2007.
2. Miguel A. Figueroa worked as a manager for CLB, a pawn broking business. He was employed by a previous owner from October 18, 2002, and by the current owner from May 28, 2004 until October 11, 2006. Mr. Figueroa filed a complaint alleging that he was owed regular wages, statutory holiday pay, one banked day and annual vacation pay.
3. The Director's delegate held a hearing into Mr. Figueroa's complaint on May 8, 2007. The employer was represented by Manuel da Silva, Mr. Figueroa represented himself.
4. The delegate determined that CLB had contravened Sections 18 and 58 of the *Employment Standards Act* in failing to pay Mr. Figueroa all wages owing within 6 days after he quit, wages for hours worked over 40 hours which were not paid and vacation pay for the period May 28, 2004 to October 11, 2006. She concluded that Mr. Figueroa was entitled to wages and interest in the total amount of \$10,369.81. The delegate also imposed two \$500 penalties on CLB for the contraventions of the Act, pursuant to section 29(1) of the *Employment Standards Regulations*.
5. The delegate was unable to find that Mr. Figueroa was entitled to statutory holiday pay or wages for banked days.
6. CLB contends that the delegate erred in law in finding that Mr. Figueroa was entitled to vacation pay in the amount of \$7,060.85. Counsel for CLB contended that the delegate erred in failing to deduct six days not worked by Mr. Figueroa from his vacation entitlement. CLB submits that the Determination should be varied to reduce Mr. Figueroa's vacation entitlement by \$1,384.62.
7. Section 36 of the *Administrative Tribunals Act* ("ATA"), which is incorporated into the *Employment Standards Act* (s. 103), and Rule 16 of the Tribunal's Rules of Practice and Procedure provide that the tribunal may hold any combination of written, electronic and oral hearings. (see also *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). CLB did not seek an oral hearing and I conclude that this appeal can be adjudicated on the section 112(5) "record", the submissions of the parties, and the Reasons for the Determination.

ISSUE

8. Did the delegate err in law in calculating Mr. Figuero's vacation pay entitlement?

ARGUMENT

9. Counsel for CLB says that Mr. Figueroa took six days away from work between August 1 and 7, 2006 and those days ought to have been deducted from Mr. Figueroa's vacation pay. He also submits that the delegate erred by allotting those banked days to Mr. Figueroa despite the fact that Mr. Figueroa was a manager. Counsel further submits that the delegate erred in this respect because she had previously concluded that there were no hours to bank.
10. The delegate says that the issues raised by CLB have been addressed in the Determination and made no further submissions.

THE FACTS AND ANALYSIS

11. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
- (a) the director erred in law
 - (b) the director failed to observe the principles of natural justice in making the determination; or
 - (c) evidence has become available that was not available at the time the determination was being made

Error of Law

12. The Tribunal has adopted the factors set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)* (1998] B.C.J. (C.A.) as reviewable errors of law:
- 1. A misinterpretation or misapplication of a section of the 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 be reasonably entertained; and
 - 5. Exercising discretion in a fashion that is wrong in principle
13. Questions of fact alone are not reviewable by the Tribunal under section 112. In *Britco Structures Ltd.*, BC EST #D260/03, the Tribunal held that findings of fact were reviewable as errors of law if they were based on no evidence, or on a view of the facts which could not reasonably be entertained.
14. The Tribunal must defer to the factual findings of a delegate unless the appellant can demonstrate that the delegate made a palpable or overriding error.

15. The evidence, as found by the delegate, on this issue is as follows. Mr. Figueroa worked six days per week for the previous owner of CLB. Mr. Figueroa and the previous owner agreed that if a statutory holiday fell on a Monday, he would bank the day and take the hours off at another time. When the current owner took it over he advised Mr. Figueroa that this arrangement would continue. The current owner then decided to close the store on Mondays and Mr. Figueroa's work week fell from six days per week to five. He continued to be paid his regular wages for statutory holidays even though the store was closed. Mr. Figueroa also produced a record of the days and hours he worked from June 1, 2004 until September 30, 2006. The time sheets contained a notation "Miguel banks holidays to take time on vacations". As CLB's agent was unable to refute Mr. Figueroa's evidence on this issue, the delegate concluded that Mr. Figueroa had such an agreement.
16. Mr. Figueroa alleged that he worked additional hours to a total of seven days, in addition to the statutory holiday days which he put into a time bank. He took six days off in August from these seven days leaving one day owing to him. The delegate concluded that the pay Mr. Figueroa received for the period August 1 – 7 came from his time bank based on his notations in the time sheets as well as an email he sent to the contractor who prepared the payroll for CLB. She arrived at this conclusion based on Mr. Figueroa's uncontradicted evidence. In my view, the conclusion was reasonably supported by the facts and I am unable to find that the delegate erred in this respect.
17. The delegate found that because Mr. Figueroa was a manager, he had no statutory entitlement to bank overtime. However, she found that he had an agreement to take off days in lieu of additional hours worked. She accepted that Mr. Figueroa took six days off in early August to reflect those banked hours. She then said
- Regarding whether or not the money he was paid for this period was vacation pay or came from his banked hours, I accept Figueroa's evidence the pay he received came from his time bank.
18. She determined that Mr. Figueroa had not been paid annual vacation from May 28, 2004 until October 11, 2006, including those banked days. I also find that this conclusion was reasonably supported by the evidence.
19. The employer has failed to demonstrate that the delegate erred in law. I dismiss the appeal.

ORDER

20. I Order, pursuant to Section 115 of the Act, that the Determination, dated August 17, 2007, be confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal