Employment Standards TRIBUNAL

An appeal

- by -

Bradford Thomas Little

("Levitt")

- 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.: 2016A/84

DATE OF DECISION: August 18, 2016

DECISION

SUBMISSIONS

Bradford Little on his own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the *"Act"*), Bradford Thomas Little has filed an appeal of a Determination issued by a delegate (the "delegate") of the Director of Employment Standards (the "Director") on May 24, 2016.

2. Mr. Little filed a complaint alleging that his employer, Vancouver eFasteners Tools & Supply Ltd. ("the Employer") had contravened the *Act* by failing to pay his full commission wages and annual vacation pay, failing to reimburse his MSP premiums and making unauthorized deductions from his wages.

3. A delegate of the Director conducted a hearing into Mr. Little's complaint on October 14, 2015. Following that hearing, the delegate issued a Determination concluding that the cause of Mr. Little's complaint had been resolved and decided that no further action would be taken.

4. Mr. Little contends that the Director erred in law in making the Determination and failed to observe the principles of natural justice. Mr. Little also contended that evidence has become available that was not available at the time the Determination was being made.

5. These reasons are based on Mr. Little's written submissions, the section 112(5) "record" that was before the delegate at the time the decision was made and the Reasons for the Determination.

FACTS AND ARGUMENT

6. Mr. Little worked for the Employer, a wholesale distribution business for the construction, infrastructure and manufacturing industries as a sales manager and sales representative, from July 15, 2012, until March 20, 2015. Mr. Little was paid by way of salary and commissions. On February 20, 2015, Mr. Yang, the Employer's sole director and President, informed Mr. Little that his employment would soon be terminated. Mr. Yang emailed Mr. Little a written agreement documenting the terms of his dismissal (the Employment Transition Agreement" or "ETA") on March 5, 2015. Mr. Little signed the ETA after obtaining legal advice.

7. The ETA provided that Mr. Little's employment would terminate on March 13, 2015. Rather than providing a specific dollar figure as compensation, the Employer extended the term of employment to April 30, 2015, a period of notice longer than required under the *Act*. The ETA's terms included a clause in which Mr. Little would release the Employer from "…all claims that the Employee may have against the Company, including any claim for additional damages arising from the Employee's employment, claims under any employment standards legislation…" and Mr. Little's agreement "not to sue or otherwise commence any action in any forum or before any administrative body against [the Employer] for any matter connected to…" Mr. Little's employment. By signing the ETA, Mr. Little also agreed that he had been given fair opportunity to consult with legal counsel and was not coerced or under duress while signing the document.

8. By mutual agreement, Mr. Little continued to work for the Employer until March 20, 2015, and received an extra half-month salary as his transition period was extended to May 15, 2015. The employer deducted text messaging and data roaming charges for the period March 2014 to April 2015 from Mr. Little's final pay.

9. Mr. Little contended that, notwithstanding the ETA, he was owed commissions, vacation pay and wages for unauthorized deductions and failure to reimburse MSP premiums. Mr. Little said that he was underpaid commissions throughout his employment resulting from systemic errors in the Employer's records and the only way to calculate those commissions was by way of a forensic audit.

10. Mr. Little also contended that he was paid no commission wages for the period March 13 to March 20, 2015, and that he was entitled to outstanding vacation pay. The Employer denied that Mr. Little's commissions were withheld or that Mr. Little was owed any additional vacation pay.

11. Mr. Little agreed that he used a mobile phone provided by the Employer to send international text messages that were not work related, but contended that the Employer should not have waited for one year to address the charges. The Employer agreed that it did not have Mr. Little's written authorization to make deductions for the personal charges on Mr. Little's mobile phone.

12. Finally, Mr. Little said that the Employer had a practise of reimbursing him for his MSP premiums, but that it had not done so for February and March of 2015.

13. Mr. Little said that, although he obtained legal advice not to sign the ETA, he signed it anyway.

14. The Employer contended that the parties had settled their dispute. In the alternative, the Employer said that commissions were paid in full, and that any vacation pay owed is less than the money paid under the ETA.

15. The issue before the delegate was whether he should stop adjudicating the complaint because the ETA constituted a *bona fide* settlement agreement resolving the dispute. The delegate noted that the Director had the discretion to stop adjudicating complaints where the key dispute that caused the complaint was resolved.

16. The delegate found that the ETA was explicit in indicating that the parties intended the document to resolve all potential claims arising from Mr. Little's employment. The delegate noted that Mr. Little had not argued that he signed the agreement under duress, or that there was any undue influence, misrepresentation or fraud. The delegate also noted that Mr. Little sought and received legal advice before signing the agreement.

17. The delegate was satisfied that Mr. Little understood what he was giving up and receiving, and that he understood he was releasing the Employer from all claims under the *Act*. The delegate found none of the terms of the ETA, on their face, offended the *Act*.

18. The delegate found that the parties had concluded a *bona fide* settlement. He also noted that in *Re Alnor Services Ltd.*, BC EST # D199/99, the Tribunal had determined that there is a compelling public policy interest in the enforcement of *bona fide* settlement agreements:

> In my view, the entire scheme of the *Act* is undermined if *bona fide* settlements can be overridden simply because one party – with the benefit of hindsight – subsequently concludes that they made a bad (or at least not an optimal) bargain.

19. The delegate also considered the Employer's unauthorized deduction of cell phone charges from his final payment and found he had no remedy under the *Act*. The delegate noted that although section 21 of the *Act* prohibited the Employer from making any deductions from wages, the final payment to Mr. Little was not for

wages. He also determined that the deduction did not amount to non-compliance with a fundamental term of the settlement agreement.

20. Finally, the delegate found that Mr. Little received more money pursuant to the ETA than he would have otherwise have been entitled to under the *Act* and exercised his discretion to refuse to continue to adjudicate the complaint.

ISSUES

21. Whether a) the Director erred in law or failed to observe the principles of natural justice in making the Determination; and b) whether new evidence has become available that was not available at the time the Determination was being made.

ANALYSIS

22. Section 114(1) of the *Act* provides that 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 that 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.

Failure to comply with the principles of natural justice

23. Principles of natural justice are, in essence, procedural rights that ensure that parties know the case being made against them, the opportunity to reply, and the right to have their case heard by an impartial decision maker.

24. Mr. Little contends that he was "not given a chance" to question Mr. Yang about the evidence he gave regarding a sales bonus. It is not clear whether the delegate refused to allow Mr. Little to ask questions or whether he ruled that Mr. Little's questions were not relevant. Given that it appears Mr. Little had the opportunity to ask questions regarding all other aspects of Mr. Yang's evidence, I can only infer that Mr. Little failed to advise the delegate that he had further questions. As such, I conclude that, if Mr. Little was not given an opportunity to ask a question regarding a sales bonus, it was a matter of omission rather than a denial of natural justice. Certainly, Mr. Little had the opportunity to advance his case and I can only infer that he did not take the opportunity to ask any additional questions.

25. I find no merit to this ground of appeal.

26. Mr. Little's appeal sets out his employment history and makes arguments regarding his commissions, the Employer's failure to reimburse him for MSP premiums, the Employer's failure to pay all wages outstanding

within 48 hours of the end of his employment, the Employer's unauthorized deductions from his wages and his outstanding vacation pay. I infer that these are the same arguments made before the delegate.

27. As I understand Mr. Little's arguments, the delegate erred in failing to find that the Employer contravened that *Act* after the ETA was signed. He asserts that the ETA was not a *bona fide* agreement made in good faith.

28. Mr. Little's appeal submission does not address, in any substantial way, the issue faced by the delegate, which is whether the Director should cease or stop his adjudication once he is satisfied a *bona fide* settlement agreement exists between the parties. In *Bellman* (BC EST # D203/03), the Tribunal reviewed all of the cases in which settlement agreements were made and found that, provided the settlement agreement was entered into without duress, undue influence, misrepresentation or fraud or noncompliance with the agreement, the settlement agreement will be not be overturned. The Tribunal has also found that an agreement signed after the parties have received legal advice and where the effect of the settlement is to pay the complainant something more than the minimum entitlements provided for in the *Act* is not something the Tribunal will interfere with.

29. Mr. Little has not alleged that the delegate erred in concluding that he signed the ETA after receiving legal advice, without undue influence or fraud. I understand him to contend that the delegate erred in not finding that Employer failed to comply with the ETA.

30. The ETA is a *bona fide* agreement in which Mr. Little agreed not to pursue any claims that he may have against the Employer, "including any claim for additional damages arising from the Employee's employment" and any claims under any employment standards legislation. Mr. Little also agreed not to sue or otherwise commence any action in any forum or before any administrative body against [the Employer] for any matter connected to his employment. (my emphasis)

31. The delegate found that the ETA met or exceeded all minimum standards outlined in the *Act*, and decided to stop investigating the complaint under section 76 of the *Act*. I find no basis to conclude that he erred in law in this respect.

32. As the Tribunal has previously noted, having signed a *bona fide* settlement agreement that encompasses all past and future claims, Mr. Little cannot re-visit those issues through an appeal of the Determination.

New Evidence

33. Mr. Little submits, as new evidence, documents that he says he was unable to reproduce in time for the hearing due to computer and printer issues.

34. In *Re Merilus Technologies* (BC EST # D171/03) the Tribunal established the following four-part test for admitting new evidence on appeal:

> (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
>
> (b) the evidence must be relevant to a material issue arising from the complaint;
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> (c) the evidence must be credible in the sense that it is reasonably capable of belief; and

(d) the evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

35. It is clear that the "new evidence" Mr. Little has submitted on appeal was available at the time the delegate was hearing his complaint. As such, it does not meet the test for new evidence. There is no suggestion that Mr. Little informed the delegate that he had additional documents he wished to present, or that he sought an extension of time in which to obtain copies of the documents he now says were important for the hearing of his complaint.

36. Furthermore, I am not persuaded that any of the "new evidence" would have led the delegate to a different conclusion on the issue of whether or not he should have continued to adjudicate Mr. Little's complaint.

37. The appeal is denied.

ORDER

38. Pursuant to section 115 of the *Act*, I order the Determination dated May 24, 2016, be confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal