Employment Standards TRIBUNAL

An appeal

- by -

AMR Management Inc.
("Appellant")

- 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: Rajiv K. Gandhi

FILE No.: 2016A/68

DATE OF DECISION: August 31, 2016

DECISION

SUBMISSIONS

Mick Arora	on behalf of AMR Management Inc.
Megan Roberts	on behalf of the Director of Employment Standards

OVERVIEW

1. On April 20, 2016, a delegate of the Director of Employment Standards (the "Director") issued a determination (the "Determination") in which AMR Management Inc. (the "Appellant") was found to have contravened sections 18 and 63 of the *Employment Standards Act* (the "*Act*"). The Director ordered the Appellant to pay the aggregate sum of $10,494.98 to Yao (Lewis) Liu ("Mr. Liu"), the complainant, representing outstanding wages, compensation for length of service, vacation pay, and interest. The Appellant was also required to pay administrative penalties in the amount of $1,000.00.

2. In this appeal, the Appellant seeks to have the Determination varied or cancelled, on the basis that the Director:

   (a) erred in law; and

   (b) failed to observe the principle of natural justice,

   both permitted grounds for appeal according to section 112(1)(a) and 112(1)(b) of the *Act*.

3. My role, at this point, is to consider whether or not this appeal should be summarily dismissed according to section 114(1) of the *Act*. To that end, I have considered the Determination, the record submitted by the Director on June 10, 2016 (the "Record"), and submissions from the Appellant received by the Tribunal on May 30, 2016, and July 5, 2016. I do not yet have submissions from the Director or Mr. Liu.

FACTS AND ANALYSIS

The Record

4. On a preliminary basis, the Appellant objects to the completeness of the Record, which is some 481 pages in length.

5. According to the Appellant, the Record is missing a receipt from IKEA for $20.34, a reimbursement cheque issued by the Appellant to Mr. Liu in the same amount, copies of a brief exchange of electronic mail between one of the Appellant's current employees, Vivian Chu, and a former employee, Lydia Liu, and Ms. Liu's record of employment (collectively, the "Extra Materials"). The Appellant says that these materials were disclosed during the hearing conducted before the Director, but offers no argument or support for that claim.

6. The Director's somewhat terse response is to say that the Record, as submitted, is complete.

7. Documents delivered to the Tribunal by the Director pursuant to section 112(5) of the *Act* are presumed to constitute the complete record. It is the Appellant who bears the burden of establishing, *prima facie*, that the record is incomplete (see *Super Save Disposal Inc. and Actton Transport Ltd.,* BC EST # D100/04, at page 18).

8. I am not persuaded that the Appellant has satisfied that burden and, accordingly, I accept that the Record as submitted by the Director is complete.

9. That said, I have examined the Extra Materials, as is my right under section 109(1)(e) of the *Act*. I find that the facts to which these documents relate are collateral and therefore irrelevant to the issues that I am to determine. Nothing turns on these documents that, in my mind, would influence the outcome of this appeal.

Did the Director err in law?

10. An "error of law" exists where:

(a) a section of the Act has been misinterpreted or misapplied;

(b) an applicable principle of general law has been misapplied;

(c) the Director acts in the absence of evidence;

(d) the Director acts on a view of the facts which can not reasonably be entertained; or

(e) the Director adopts a method of assessment which is wrong in principle.

(see *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam),* [1998] B.C.J. No. 2275 (BCCA) at paragraph 9).

11. The Appellant's submissions are not entirely clear, but I understand it to argue two points that might be interpreted as errors in law.

12. Firstly, the Appellant says that the Director incorrectly calculated the amount of commission due and owing to Mr. Liu. Secondly, the Appellant submits that the Director was wrong to find the absence of just cause for dismissal.

(i) Calculation of Commissions

13. With respect to commissions, the Director made the following findings of fact:

(a) There was no written employment agreement between Mr. Liu and the Appellant.

(b) Commissions payable to Mr. Liu were calculated as one (1.0%) percent of net sales, earned when the sale is made, but conventionally not paid until payment for the sale was received.

(c) Deducted from commissions paid are the cost of goods sold, duty, freight, cost of temporary workers, gloves, shipping, packaging, credit card fees, and losses (including returns, price adjustments, and credit for defective items.)

(d) Commission payments and deductions from commission payments were made in arrears, but historically, deductions did not appear to be time limited. By way of example, Mr. Liu's December commission payment was calculated as November commissions less those deductions, not previously captured, attributable to any sale before November. Mr. Liu's November commission payment would have been calculated as October commissions less those deductions, not previously captured, attributable to any sale before October.

14. In this appeal, the Appellant says that commissions were not earned until payment was received from the customer. This is different from what the Director says was agreed by both parties. The factual conclusion drawn by the Director appears to me to be consistent with the manner in which commissions were

document, calculated, paid, and subject to adjustment. I am unable to say the Director has acted either in the absence of facts or on an unreasonable view of facts. There has not, in my estimation, been an error of law on the part of the Director with which I can interfere, and I accept that commissions were earned when the sale was made, even if not paid until a later date.

15. The Director went on to conclude that Mr. Liu was entitled to receive commissions earned to and including December 16, 2013, being his last day of work. That does not seem to be a point of contention between the parties. What is disputed, however, is the period to be used in calculating deductions.

16. The Appellant submits that the period for allowable deductions should continue indefinitely, notwithstanding the end of the employment relationship. Certainly, that did appear to be the nature of the arrangement between the parties.

17. At the hearing, Mr. Liu submitted that the right to calculate deductions should end on March 16, 2014, ninety days following termination of his employment. He felt that ninety days was reasonable considering the ninety day payment cycle of one of the Appellant's largest customers.

18. Rejecting both positions, the Director instead decided that, once concluded, the previous contractual relationship between the Appellant and Mr. Liu had been altered by reason of section 18(1) of the *Act*, which provides that "[an] employer must pay all wages owing to an employee within 48 hours after the employer terminates the employment."

19. The Appellant says that commissions are not wages. The Appellant is wrong. Commissions are expressly included in wages by virtue of section 1 of the *Act*.

20. I agree with the Determination - the effect of termination combined with section 18(1) is to draw a "line in the sand" beyond which commissions cannot be earned and new deductions cannot be charged, whatever the previous history of the parties.

21. I cannot fault the Director for rejecting the positions of both the Appellant and Mr. Liu, or for concluding instead that the verbal arrangement between the parties was altered.

22. That being the case, I am satisfied that once the employer-employee relationship is ended, section 18(1) of the *Act* requires this Appellant to pay to Mr. Liu all commissions due and owing, within forty-eight hours. For that reason, the Appellant was required to calculate gross commissions and allowable deductions as of December 16, 2013. I agree with the Director - any contractual right of the Appellant to apply future deductions against past commissions ended on termination of the Agreement. That may well put the Appellant at a slight financial disadvantage, but the *Act* is not so forgiving of creative arrangements between employer and employee. The Director cannot modify what the statute rigidly demands.

23. The Director's net calculation of commissions due is:

(a) $2,414.52, for which supporting documents are found in a package within the Record labelled "Schedule 1";

(b) $910.00, for which supporting documents are found in a package within the Record labelled "Schedule 2"; and

(c) $1,478.55 (being $1,376.68 United States Dollars), for which supporting documents are found in a package within the Record labelled "Schedule 3".

24. On my review of the Record, the Schedule 2 amount appears to be accurate, and supported by the Record.

25. The same is true of the Schedule 3 amount, and although the Appellant argues that the sum of $1,376.68 United States Dollars payable was already paid and should not have been added to the total, that is not how I read any version of the Sales Commission Statements included in the Record, and the Record itself contains no evidence confirming payment to Mr. Liu of either $1,478.55 Canadian or $1,376.68 United States Dollars.

26. Where I have some difficulty is the Director's reconciliation of amounts used to derive the Schedule 1 payment amount. According to the Director:

> *As Mr. Liu's commissions are paid monthly based on the net profit calculated on the prior month's deposits minus the previous month's expenses, I refer to AMR's Outstanding Commission Statement document, Schedule 1 to determine any December commission outstanding. Schedule 1 is itemized into five categories; (1) Cash Received "A-D"; minus (2) Cost of Goods Sold "E-H" equals (3) Gross profit x (4) commission rate 1% minus (5) "I" profit from October that AMR states Mr. Liu was not entitled to and "J" expenses that should not have been deducted equals (6) Net commission. The parties reviewed and agreed in Sections E, F and G of Schedule 1, COGS were applied to Mr. Liu's account, which were not his, therefore $1,930.49 (E), $1,026.77 + 1,112.06 = $2053.54 (F) and $2,934.18 (G) have been subtracted from his COGS total.*

27. With respect to item (F), $1,026.77 plus $1,112.06 does not equal $2,053.54, but $2,138.83. Moreover, the Director's adjustment to item (F) appears to have been neither $2,183.83 nor $2,053.54, but $4,069.32, which is $2,138.83 plus $1,930.49. However, Item (E) was already adjusted by $1,930.49 (United States Dollars). The Item (F) adjustment appears to me to include an inadvertent double counting.

28. My expectation is that any required adjustment to the Schedule 1 amount would be small. However, any such adjustment may also impact calculations with respect to vacation pay, interest, and the Appellant's section 63 liability and I do not believe that I am entitled to or otherwise should vary the amounts payable, however minimally, absent proper submissions from the Director.

(ii) Just Cause

29. According to sections 63(1) and 63(2)(a) of the *Act*, the Appellant would ordinarily be liable on termination to pay Mr. Liu an amount equal to three weeks' wages. Before the Director, the Appellant claimed that the requirement to pay compensation for length of service was discharged according to section 63(3)(c) of the *Act*, because Mr. Liu was dismissed with just cause.

30. The Appellant says that the Director was wrong to find that the Appellant did not have just cause.

31. Although the final determination rests with the Director, the onus to show just cause belongs to the Appellant (see *McCall Bros. Funeral Directors Ltd. v. Employment Standards et. al.* 2000 BCSC 1507 at paragraph 7). In the absence of sufficient evidence, Mr. Liu's termination is presumed to be without cause.

32. The Appellant argues just cause because Mr. Liu, in his capacity as a senior (but not management level) employee, lied to one employee. That is noted in the Appellant's letter to Mr. Liu, a copy of which is included in the Record, sent four days following Mr. Liu's termination on December 16, 2013. At the hearing, the Appellant also presented evidence suggesting that Mr. Liu encouraged another employee to quit, and that he was openly "defiant and disrespectful", making the jobs of others difficult.

33. In considering whether or not an employer is justified in dismissing an employee, the Director is charged with determining, firstly, whether the evidence establishes the employee's deceitful or other misconduct on a

balance of probabilities and, secondly, whether the nature and degree of the dishonesty warrants dismissal. (see *McKinley v. B.C. Tel*, 2001 SCJ 40 at paragraph 49).

34. In this case, the Director appeared to accept that Mr. Liu was generally a difficult individual and that he engaged in the conduct alleged by the Appellant, but concluded that his actions did not warrant immediate dismissal. That is, the Director tacitly answered the first question in the *McKinley* test affirmatively, and the second negatively.

35. Unfortunately for the Appellant, the Director's answers to the *McKinley* test are findings of fact that the Appellant can successfully challenge only if it can be shown that "no reasonable person, acting judicially and properly instructed as to the relevant law, could have come to that determination." (see *3 Sees Holdings Ltd.*, BC EST # D041/13 at paragraph 27).

36. I am not persuaded that the Director's conclusions are unreasonable. Mr. Liu's behaviour, absent interim corrective measures or warning about the security of his employment, does not constitute just cause. Even were I inclined to reach a different conclusion on the facts, I could not say that the Director's view of the facts was unreasonable. For that reason, I see no basis upon which I can interfere with the Director's finding that the Appellant lacked just cause. That Mr. Liu may not have been an exemplary employee in the days or months leading to his termination does not, in and of itself, justify dismissal without notice or pay *in lieu* of notice.

37. On this point, the appeal under section 112(1)(a) of the *Act* has no reasonable prospect of success.

Did the Director violate the principles of natural justice?

38. The Appellant also challenges the Determination on the basis that the Director has failed to observe the principles of natural justice.

39. Those principles require the Director, at all times, to act fairly, in good faith, and with a view to the public interest (*Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48 at paragraph 2). Fairness, in turn, means that all parties involved have the right to notice, the right to know the case to be met and the right to answer it, the right to cross-examine witnesses, the right to a decision on the evidence, and the right to counsel (*Tyler Wilbur operating Mainline Irrigation and Landscaping*, BC EST # D196/05 at paragraph 15).

40. I am unable to discern in the Appellant's submissions or in the Determination any argument or support for an argument that any one or more of these rights have somehow been violated.

41. I have no alternative but to reject the Appellant's challenge to the Determination under section 112(1)(b) of the Act.

Conclusion

42. For all of these reasons, and having reviewed the Determination, the Record, the Extra Materials, and the Appellant's submissions, I find that the bulk of this appeal has no reasonable prospect of success. As it relates to the Director's specific calculations of commissions payable, vacation pay, interest, and liability under section 63(1) of the *Act*, however, this appeal should proceed, and the Tribunal should have the benefit of a complete set of submissions.

ORDER

43. Except with respect to the Director's calculations of commissions payable, vacation pay, interest, and liability under section 63(1) of the *Act*, I dismiss this appeal under section 114(1)(f) of the *Act*.

Rajiv K. Gandhi
Member
Employment Standards Tribunal