

An appeal

- by -

Scott C. Krakiwsky
(“Mr. Krakiwsky”)

- 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.: 2015A/97

DATE OF DECISION: October 29, 2015

DECISION

SUBMISSIONS

Scott C. Krakiwsky	on his own behalf
Megan Roberts	on behalf of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “Act”), Scott C. Krakiwsky (“Mr. Krakiwsky”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on June 5, 2015.
2. The Determination dismissed the complaint of Mr. Krakiwsky against his former employer, Angus One Professional Recruitment Ltd. (“Angus One”).
3. This appeal alleges the Director erred in law and failed to observe principles of natural justice in making the Determination.
4. On July 15, 2015, the Tribunal notified the parties that an appeal had been received from Mr. Krakiwsky, requested production of the section 112(5) record (the “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 “record” was provided by the Director to the Tribunal and a copy was sent to Mr. Krakiwsky, who was advised of his right to object to the completeness of the “record”. On July 31, 2015, the Tribunal received e-mail correspondence from Mr. Krakiwsky asserting the “record” provided by the Director was “not representative of the complete record that was available to the Delegate of the Director at the Adjudication”. Mr. Krakiwsky says only 29 of 723 pages of his document submission were included in the “record” provided to the Tribunal. He submits “the Adjudicator severely and narrowly restricted what constituted allowable evidence during the Adjudication”. He says:

In order to be allowed to proceed, I was ordered at the onset to substantially and hastily cull my document submission and to limit it only to direct evidence of violations by Angus One of section 83 of the Employment Standards Act.
6. Mr. Krakiwsky argues this action violated principles of natural justice, “as it made demands to cull my 723 pages of evidence in an unreasonable amount of time and that it hindered demonstrating the conditions of my employment.” He says that subsequently the Adjudicator relied on his failure to provide certain evidence, “evidence which was of a nature outside of the scope of limited permitted evidence”. He has attached documents to his correspondence exemplifying his point.
7. Responding to that correspondence, the Director says:

The Record provided to the Employment Standards Tribunal on July 16, 2015 is that which was relied upon for the Determination issued on June 5, 2015. As set out on pages 3 and 4 of the Determination, during the hearing Mr. Krakiwsky specifically identified and confirmed that evidence he wished to rely

upon as relevant to the issues to be determined. Accordingly he withdrew the balance of the evidence which he identified as not relevant or pertaining to the outstanding issues and such was not considered.

8. I will not decide the objection of Mr. Krakiwsky to the completeness of the “record” at this time.
9. 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 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.*

10. At this stage, I am considering this appeal under section 114 of the *Act*. Such an assessment is based solely on the Determination, the appeal and written appeal submission made by Mr. Krakiwsky and my review of the “record” provided by the Director. In this case, it is appropriate to also take into account the question of the “record” raised by Mr. Krakiwsky.
11. 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*, Angus One and the Director will 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.

ISSUE

12. The issue to be considered at this stage of the proceedings is whether the appeal should be allowed to proceed or should be dismissed under section 114 of the *Act*.

THE FACTS

13. Angus One operates a temporary and permanent placement agency in Metro Vancouver. Mr. Krakiwsky was employed by Angus One as an “Administration Clerk”. He commenced his employment on May 9, 2012; his last day worked was September 30, 2014. During his period of employment, Mr. Krakiwsky was placed by Angus One in a continuous series of temporary assignments with DB Schenker, which ended coincidentally, with his last day worked.
14. Mr. Krakiwsky filed a complaint with the Director alleging Angus One had contravened the *Act* by denying his entitlement to annual vacation time off, interfering with his right to annual vacation time off, making false representations; failing to pay statutory holiday pay for the Labour Day and Thanksgiving statutory holidays and terminating his employment without cause, notice or payment in lieu of notice.

15. The Director conducted a complaint hearing. At the hearing, Mr. Krakiwsky introduced a claim that Angus One had also contravened section 83 of the *Act* by mistreating him and terminating his employment after he took annual vacation time off.
16. The reasons for Determination notes Angus One “voluntarily and on a without prejudice basis” paid Mr. Krakiwsky compensation for length of service, statutory holiday pay for the Labour Day statutory holiday and concomitant vacation pay in the amounts claimed by him.
17. The reasons for Determination also notes Mr. Krakiwsky acknowledged his claim of “false representations – section 8 of the *Act* – was out of time and withdrew this aspect of his complaint.
18. Mr. Krakiwsky had submitted extensive documentation and submissions to the Director in support of his claims. He was instructed by the Director to identify those portions of his evidence package that were “relevant to the outstanding issues of Angus One’s alleged contravention of section 83 of the *Act*”: reasons for Determination page 4. The reasons for Determination indicate Mr. Krakiwsky identified those parts of his material he felt were relevant to that matter and upon which he wished to rely.
19. The complaint hearing proceeded on two issues:
 1. “Did Angus One fail to allow Mr. Krakiwsky to take vacation time as set out under section 57 of the *Act*?”
 2. Did Angus One contravene section 83 of the *Act*? If so, what if any remedy is Mr. Krakiwsky entitled to?”
20. The Director found Mr. Krakiwsky had not established Angus One had contravened the *Act* and dismissed his complaint.
21. On the section 57 issue, the reasons for Determination state:

. . . the evidence does not convince me Angus One denied or interfered with Mr. Krakiwsky’s opportunity to take vacation time. . . I find Mr. Krakiwsky took two weeks’ vacation time, as requested by him, starting on October 1st. Accordingly, I find there is not enough evidence to prove this portion of Mr. Krakiwsky’s complaint.
22. On the section 83 issue, the Director similarly found Mr. Krakiwsky had not provided evidence showing he was sanctioned by Angus One for enforcing his right to take annual vacation time off or for delivering the Self-Help Kit to them on September 30. The Director also found Angus One had not interfered with his continuing engagement by DB Schenker and had not failed to make provision for or support his right to annual vacation time off within his engagement by DB Schenker.

ARGUMENT

23. Mr. Krakiwsky relies on the error of law and “natural justice” grounds in this appeal.
24. He submits the process and the effect of requiring him to “cull” his supporting documents and submissions denied him a fair hearing. In respect of the process for doing the culling, he indicates he was told by the Director he would have to “exempt” documents relating to matters Angus One had opted to make payment for and was allowed approximately five minutes at the beginning of the complaint hearing to do so. In respect of the effect, he asserts he was barred during the complaint hearing from subsequently referring to,

submitting or relying on any of the documents he had initially exempted from his material, even though the Director made a “no evidence” finding concerning facts that were included in this material.

25. On the section 57 issue, Mr. Krakiwsky argues the Director violated principles of natural justice and erred in law. He submits the Director barred him from questioning representatives of Angus One regarding vacation entitlement because they had acknowledged an error in not providing vacation time off. Mr. Krakiwsky argues this decision by the Director prevented him from asking any questions where the content of those questions “overlapped vacation entitlement” even if the purpose in asking them was applicable to other aspect of his complaint.
26. Mr. Krakiwsky submits the Director erred in law on the section 57 issue by asking the wrong question, which was whether Angus One failed to allow him to take vacation time off, when the correct question ought to have been whether Angus One had contravened section 57 of the *Act*. Mr. Krakiwsky say the effect of this error was to place an irrelevant, and onerous, precondition to his demonstrating section 57 had been contravened.
27. He also submits the Director erred in law in finding he was taking vacation time off in the period from October 1 to October 16, 2014. He says if that were so, he would have been entitled to statutory holiday pay for the Thanksgiving statutory holiday, when the Director found he was not. He argues there cannot be vacation time off under the *Act* when Angus One neither granted vacation time off nor acknowledged his right to take it. He also notes Angus One ignored his use of the Self-Help Kit requesting they acknowledge his right to vacation time off. It was not until the complaint hearing that they acknowledged any error in respect of vacation time off.
28. Mr. Krakiwsky argues there was a violation of natural justice principles occurred in the handling by the Director of the section 8 complaint.
29. Mr. Krakiwsky argues the was an error of law and a violation of principles of natural justice in the Director refusing to hear or consider submissions that Angus One was operating in contravention of its obligations as an “employment agency” licensed under the *Act*.
30. In respect of the section 83 issue, Mr. Krakiwsky submits the Director erred in law and violated principles of natural justice by failing to appreciate the relationship between the ongoing violation of section 57 and the contravention of section 83 of the *Act*. He submits the response of Angus One to his Self-Help request, which includes their view of his statutory right to vacation time off, and their subsequent termination of his employment is consistent with his allegation. In his argument, he states:

. . . I was not allowed to question whether they had attempted to arrange my vacation, and place a temp employee for the next two weeks to cover me. The adjudicator also prevented my questions regarding whether any temp employees have ever been able to return to any existing ongoing assignment.

31. Mr. Krakiwsky makes several other arguments relating to the handling of the evidence by the Director.

ANALYSIS

32. The question in considering the appeal at this stage is whether it has any reasonable prospect of succeeding. In doing so, the Tribunal looks at relative merits of the 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.

33. 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.*

34. 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 of the *Act*. This burden requires the appellant to provide, demonstrate or establish a cogent evidentiary basis for the appeal. More particularly, a party alleging a breach of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. d.b.a. Honda North*, BC EST # D043/99.

35. 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.

36. Mr. Krakiwsky has grounded this appeal in an allegation that the Director committed an error of law and failed to observe principles of natural justice in making the Determination. 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.

37. The Tribunal has also recognized that a failure to observe principles of natural justice is a species of error of law: see *J.C. Creations Ltd. o/a Heavenly Bodies Sport*, BC EST # RD317/03.

38. At this stage I am not able to find Mr. Krakiwsky’s appeal has no reasonable prospect of succeeding. The appeal raises significant questions about the scope of the “record” in this case, whether Mr. Krakiwsky was given a fair hearing and whether the Director erred in law. The appeal identifies important issues of law that invoke concerns about what the Director decided and what the Director failed to consider.

39. In result, Angus One and the Director are asked to file submissions in response to the appeal. I make no formal order at this time.

David B. Stevenson
Member
Employment Standards Tribunal