Employment Standards TRIBUNAL

An appeal

- by -

B & L Brassworks Inc.
(the "Employer")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2012A/100

DATE OF DECISION: October 26, 2012

DECISION

SUBMISSIONS

Jeff Holmes — on behalf of B & L Brassworks Inc.

INTRODUCTION

1. On July 30, 2012, a delegate of the Director of Employment Standards (the "delegate") issued a Determination and accompanying "Reasons for the Determination" (the "delegate's reasons") under section 79 of the *Employment Standards Act* (the "*Act*"). By way of the Determination, the delegate ordered B & L Brassworks Inc. (the "Employer") to pay its former employee, William Bowes ("Bowes"), the sum of $11,309.94 on account of unpaid wages and section 88 interest. Further, and also by way of the Determination, the delegate levied four separate $500 monetary penalties against the employer (see *Act*, section 98). Thus, the total amount payable under the Determination is $13,309.94.

2. At this stage, I am adjudicating this appeal based solely on the Employer's written submissions and my review of the section 112(5) "record" that was before the delegate when he was making the Determination. If I am satisfied that the appeal has some presumptive merit, Mr. Bowes and the delegate will be invited to file further submissions. On the other hand, if the appeal is not meritorious, it will be dismissed under section 114 of the *Act*.

3. The Employer appeals the Determination on the ground that the delegate failed to observe the principles of natural justice in making the Determination (see subsection 112(1)(b)).

BACKGROUND FACTS

4. Mr. Bowes filed an unpaid wage complaint in which he alleged that he had been employed as the Employer's "general manager" from April 1, 2007, until about mid-June 2010. He claimed unpaid wages for the last month of his employment, annual vacation pay, statutory holiday pay and compensation for length of service. The delegate conducted an oral complaint hearing on November 18, 2010, but since he "required further information … [he] proceeded to investigate the matter" (delegate's reasons, page R2).

5. In the course of adjudicating Mr. Bowes' complaint the delegate addressed several issues. First, he concluded that Mr. Bowes was an "employee" as defined in section 1 of the *Act*. Second, the delegate determined that the Employer failed to pay Mr. Bowes for a number of days he worked in May and June 2010. This aspect of Mr. Bowes' claim totalled $2,688.46. Third, the delegate dismissed Mr. Bowes' statutory holiday claim since he determined that the employer paid statutory holiday pay as prescribed by the *Act*.

6. The fourth issue before the delegate concerned Mr. Bowes' claim for compensation for length of service. The uncontested evidence before the delegate was that for some time prior to June 2010, the Employer was attempting to renegotiate Mr. Bowes' compensation. This process culminated in a June 16, 2010, e-mail from the Employer to Mr. Bowes in which the Employer proposed new terms and gave Mr. Bowes until noon the next day to accept. "The position of B & L is that Mr. Bowed [sic] quit his job when he refused to agree to the new compensation package offered by the employer in an email to Mr. Bowes dated on June 16, 2010." (delegate's reasons, page R8). The delegate determined that the Employer's ultimatum did not lead to a legally valid resignation of employment but, rather, constituted a termination without proper notice.

Accordingly, and based on Mr. Bowes' tenure (just short of 4 years), he was entitled to 3 weeks' wages as compensation for length of service under section 63 of the *Act* ($3,240 including concomitant vacation pay).

7. The final issue before the delegate concerned Mr. Bowes' vacation pay entitlement since Mr. Bowes claimed that he not been paid any vacation pay during his entire period of employment. The delegate accepted this assertion noting that the Employer's payroll records did not indicate that vacation pay had ever been paid. After applying the "backpay" limitation set out in section 80 of the *Act*, the delegate calculated Mr. Bowes' unpaid vacation pay entitlement at $4,721.54.

REASONS FOR APPEAL

8. As previously noted, the Employer appeals the Determination on the ground that the delegate failed to observe the principles of natural justice in making the Determination. The Employer asks the Tribunal to cancel the Determination. The Employer's reasons for appeal are more fully particularized in a 3-page memorandum, dated September 6, 2012, that is appended to its Appeal Form. Based on my review of this document, it seems clear that the Employer's reasons for appeal have rather little to do with natural justice concerns. Rather, the Employer disagrees with certain of the delegate's findings of fact and, at least in part, asks the Tribunal to consider evidence that was not apparently before the delegate when the Determination was being made. I propose to address the Employer's several arguments in the same order that they are set out in its September 6 memorandum.

FINDINGS AND ANALYSIS

9. The Employer's first position is that Mr. Bowes was a "contracted employee" which I take to mean that he was an *independent contractor*. *All* employees have contracts of employment (whether written, oral or some combination of the two) and, in that sense, all employees are "contracted employees". An independent contractor, on the other hand, provides services to another party but not under an *employment* contact. For example, if one hires a plumber to fix a leaky toilet, there is no employment contract but rather an independent contract for services. The independent contractor is, in essence, a person who operates their own business using their own tools and equipment and servicing their own customer base. The independent contractor assumes a risk of loss if their fees do not cover their actual operating costs but, at the same time, can profit from their endeavours if their fees exceed their costs. The issue regarding Mr. Bowes' employment status was specifically addressed at pages R5 to R7 of the delegate's reasons and, in my view, the delegate correctly determined the issue. Indeed, I would go further and say that it would have been an error of law if the delegate had concluded that Mr. Bowes was an independent contractor. The evidence before the delegate was that Mr. Bowes was economically dependent on the Employer; utilized its tools and equipment servicing the Employer's customer base; and he had no real risk of loss or opportunity to profit. The Employer did not present any new evidence on appeal regarding this issue beyond that which was before the delegate. The evidence before the delegate overwhelmingly supported the delegate's conclusion that Mr. Bowes was an employee as defined by section 1 of the *Act*.

10. The next point raised by the Employer flows from its first argument. The record before me indicates that the Canada Revenue Agency investigated the matter of Mr. Bowes' status and, similarly, concluded that he was an employee for purposes of the *Income Tax Act* and other federal employment statutes such as the *Employment Insurance Act*. The Employer did not make the appropriate deductions and remittances required under these statutes and thus, apparently, had to pay $6,915.54 to the Canada Revenue Agency. The Employer seems to be suggesting that the delegate breached the principles of natural justice by failing to grant some sort of "set-off" on account of this latter liability. However, this situation does not constitute a breach of the rules of natural justice. There is nothing in the *Act* that would have obliged the delegate to order such a set-off and,

in my view, whatever rights the Employer may have as against Mr. Bowes regarding possible reimbursement will have to be pursued by way of a separate civil claim in the courts.

11. The Employer's third point concerns the vacation pay issue. The Employer asserts, as it did before the delegate, that Mr. Bowes received paid vacation leave. However, the Employer, as is noted at page R10 of the delegate's reasons, did not provide any evidence to corroborate that assertion (nor did it provide any further evidence on this appeal) and its own payroll records did not indicate that any vacation pay had ever been paid to Mr. Bowes. Mr. Bowes, for his part, stated that he had not received any paid vacation leave. Thus, the delegate had to make a finding of fact in the face of conflicting evidence. It was not an error of law, nor was it a breach of the rules of natural justice, for the delegate to have determined this issue in Mr. Bowes', rather than the Employer's, favour.

12. The Employer says that it has now obtained a Small Claims Court judgment against Mr. Bowes in the amount of $11,985.48 on account of certain monies that the Employer advanced to Mr. Bowes but that were not repaid as agreed. There is a copy of a default judgment in the record before me for this amount as well as a record of an unsuccessful application to have that default judgment set aside. Thus, for the moment, there are competing claims by each party against the other but that matter will have to be sorted out through the judgment enforcement process – it is not a matter that falls within the Tribunal's jurisdiction.

13. The final issue raised by the Employer in its memorandum is, similarly, not one that falls within the "natural justice" realm but, rather, is probably best characterized as an alleged error of law and it concerns the delegate's determination that Mr. Bowes was entitled to 3 weeks' wages as compensation for length of service. To a large degree, the Employer's argument on this point simply replicates the argument it advanced before the delegate, namely, that Mr. Bowes voluntarily resigned his employment and thus was not entitled to section 63 compensation (see subsection 63(3)(c)).

14. The Employer's position is that it was facing straitened finances and, accordingly, faced with exigent circumstances felt compelled "to restructure Mr. Bowes' compensation if he was to remain with the company". If Mr. Bowes refused to renegotiate his pay, he would then be "laid off" (which I take to mean he would be terminated). The Employer could have issued 3 week's written notice of termination to Mr. Bowes and, had it done so, it would not have had any liability to pay compensation for length of service under the *Act* (see subsection 63(3)(a)). However, there was (and for that matter still is) no evidence that the Employer ever issued written notice of termination. The Employer was simply not legally entitled to give Mr. Bowes a "take it or leave it" offer with one day to reply and thereby avoid its obligation to pay section 63 compensation. The only rational conclusion to be drawn, given the evidence before the delegate, was that Mr. Bowes did not voluntarily resign but, rather, was terminated without proper written notice and thus, in light of his tenure, was entitled to 3 weeks' wages as compensation for length of service. The delegate did not err in law nor did he breach the rules of natural justice in so concluding.

15. Having addressed each of the points that the Employer raised in its September 6 memorandum, I must conclude that this appeal wholly lacks merit. Accordingly, I will dismiss the appeal and confirm the Determination.

ORDER

16. Pursuant to subsection 114(1)(f) of the *Act*, this appeal is dismissed on the ground that there is no reasonable prospect that it will succeed. Accordingly, the Determination is confirmed as issued in the amount of $13,309.94 together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal