

An appeal

- by -

Fraser Valley Community College Inc.
(“FVCC”)

- 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.: 2014A/116

DATE OF DECISION: November 28, 2014

DECISION

SUBMISSIONS

Sunanda Kikla

on behalf of Fraser Valley Community College Inc.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Fraser Valley Community College Inc. (“FVCC”) has filed an appeal of a Determination issued by the Director of Employment Standards (the “Director”) on July 29, 2014. In that Determination, the Director found that FVCC had contravened sections 18, 40, 45 and 58 of the *Act* in failing to pay its former employee Harpreet Thind \$5,913.77 in wages and interest. The Director also imposed two administrative penalties in the total amount of \$1,000 for FVCC’s contravention of sections 17 and 18 of the *Act*, for a total amount payable of \$6,913.77.
2. FVCC appeals the Determination contending that the delegate erred in law and failed to observe the principles of natural justice in making the Determination. FVCC also says that evidence has become available that was not available at the time the determination was being made. FVCC seeks to have the matter referred back to the Director.
3. The appeal was filed late as a copy of the Director’s written reasons for the Corporate Determination was delivered to the Tribunal outside of the statutory period for filing the appeal. FVCC has requested an extension of time for filing their appeal. Any delay would allow the Tribunal to dismiss the appeal under section 114(1)(b) of the *Act*, but I choose to address the appeal under section 114(1)(f).
4. These reasons are based on FVCC’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. If I am satisfied that the appeal, or part of it, has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, the Respondent and the delegate may be invited to file further submissions. If the appeal is not meritorious, it will be dismissed.

FACTS AND ARGUMENT

5. FVCC, a company incorporated in British Columbia in November 2009, operates a private career school. Sunanda Dinesh Kikla and Nitai Chand Goswami are the directors and officers of FVCC.
6. The facts as determined by the delegate are as follows.
7. Ms. Thind was employed by FVCC as an assistant accountant on May 21, 2013, and worked in the FVCC office Monday to Friday with few exceptions. She was paid wages for the months of May and June, but not for July, August or for twenty days in September, after which time she left her employment because of her pregnancy.
8. Ms. Kikla left Vancouver in July and did not return until September. On her return, she paid all staff wages except, as I understand, Ms. Thind and two other people. When Ms. Thind questioned Ms. Kikla about this, she was told she had not been paid because she had not completed her work properly.

9. Ms. Thind filed a complaint with the Employment Standards Branch on October 15, 2013, alleging that she had not been paid all wages owed. In support of her claim, she provided the delegate with, among other things, a copy of her employment contract, a daily record of her hours of work including start and end times as well as email correspondence between herself and co-workers.
10. The delegate contacted Ms. Kikla about Ms. Thind's complaint on November 15, 2013, and offered FVCC the opportunity to mediate the complaint. Upon being informed of the complaint, Ms. Kikla's response, among other things, was that Ms. Thind was unable to perform her duties due to her pregnancy so she was "relieved from active duty" and asked to complete "pending work that she had not completed while she was employed" from home.
11. Although Ms. Kikla agreed to participate in mediation, her frequent absences from Canada led to her inability to participate. Dates were changed on several occasions and the delegate ultimately set April 8, 2014, for the mediation, notifying Ms. Kikla of this date by email. Ms. Kikla did not confirm her attendance and did not participate in the mediation.
12. On June 6, 2014, the delegate notified Ms. Kikla by email that she would decide the complaint by way of investigation. Ms. Kikla did not respond. The delegate sent FVCC a letter outlining her preliminary findings and offered Ms. Kikla the opportunity to respond, with a deadline of July 21, 2014, for any response. Canada Post confirmed delivery of the letter on July 11, 2014. FVCC did not respond to the delegate's preliminary findings.
13. In the absence of any response from FVCC, the delegate relied on Ms. Thind's record of her hours of work in calculating wages owed.
14. FVCC argues that the Determination was issued without giving the employer the opportunity to present the facts. FVCC's submission constitutes, in large measure, a repetition of its response to the delegate to Ms. Thind's complaint. Ms. Kikla also contends that she repeatedly asked for documents Ms. Thind has filed in support of her claim so she could respond, and that the delegate did not provide them until June. Thereafter, Ms. Kikla asserts, the delegate offered FVCC no opportunity to question Ms. Thind on the documents or present its side of the story.
15. FVCC says that Ms. Thind was hired on contract and that she did not disclose the fact that she was six months pregnant when she took the position. FVCC also says that, within four weeks of starting her employment, Ms. Thind's doctor advised her against sitting for long periods of time. Ms. Kikla says that FVCC allowed Ms. Thind to work from home due to this medical advice, but that, for some reason, Ms. Thind did not complete the work assigned to her.

ANALYSIS

16. Section 114 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.
17. Having reviewed the section 112 record and FVCC's submissions, I dismiss the appeal.
18. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
- the director erred in law;
 - the director failed to observe the principles of natural justice in making the determination;
 - evidence has become available that was not available at the time the determination was being made.
19. The Tribunal has consistently said that the burden is on an appellant to persuade the Tribunal that there is an error in the Determination on one of the statutory grounds.
20. I find that FVCC has not met that burden.
- Natural Justice
21. The first and most critical ground of FVCC's appeal is that the delegate failed to observe the principles of natural justice. Natural justice is a procedural right which includes the right to know the case being made, the right to respond and the right to be heard by an unbiased decision maker. There is nothing in the appeal submission that establishes, or suggests how FVCC was denied natural justice.
22. The record discloses that FVCC was offered a number of opportunities to participate in a mediation of the complaint. For a number of reasons that are not critical to this decision, Ms. Kikla was unable to attend. However, the records suggest that she was too busy to attend to the complaint and did not feel it necessary to delegate that responsibility to any other FVCC representative.
23. The record confirms that on June 6, 2014, the delegate emailed Ms. Thind's allegations and supporting documentation to Ms. Kikla and invited her to respond to the complaint by June 16, 2014. As Ms. Kikla attached the email to her appeal submission, there is no question that she received a copy of the complaint and was offered an opportunity to respond. The June 6, 2014, email further notified Ms. Kikla that a failure to provide a response would result in a determination being made without hearing FVCC's side of the story. The email further notified Ms. Kikla that, as a director of FVCC, she was facing potential personal liability for unpaid wages and monetary penalties for any contraventions of the *Act*. The documentation was also sent by registered mail to FVCC on July 3, 2014, with the preliminary findings letter, which again cautioned Ms. Kikla about her potential liability. FVCC was asked to provide any response to the preliminary findings letter no later than July 21, 2014. Canada Post records confirm that the mail was successfully delivered. The delegate received no response.
24. The Tribunal has often said that an appeal is not an opportunity to fail or refuse to respond to the investigation of a complaint and present arguments on appeal that ought to have been presented to the delegate during the investigation. (see *Tri West Tractor Ltd.*, BC EST # D268/96, and *Kaiser Stables Ltd.*, BC EST # D058/97) Having failed to participate in the investigation in any meaningful way despite having knowledge of the opportunity to do so, it is not now open to FVCC to present its case, in essence, for the first time on appeal.

25. I am not persuaded the Director failed to comply with natural justice.

Error of Law

26. The Tribunal as 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] BCJ. No. 2275 (BCCA):

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.

27. FVCC argues that the documents Ms. Thind submitted in support of her complaint were fraudulent and that FVCC needed to examine those documents. I find that the Determination was one that could rationally be arrived at in light of the documentary evidence. There is no basis for concluding that the delegate erred in law.

New Evidence

28. 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;
- (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.

29. FVCC submitted no “new evidence” on appeal. Attached as part of the appeal submissions were copies of emails from the delegate (which are part of the record) and a T4 issued to Ms. Thind. Not only do these documents fail to demonstrate that they would have led the Director to a different conclusion, they were available at the time of the investigation and ought to have been provided at that time.

30. I find no grounds for the appeal.

ORDER

31. Pursuant to section 114(1)(f) of the *Act*, I dismiss the appeal. Accordingly, pursuant to section 115(1)(a) of the *Act*, the Determination, dated July 29, 2014, is confirmed in the amount of \$6,913.77, together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal