

An appeal

- by -

Scott J. K. Robertson

- 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.: 2009A/115

DATE OF DECISION: November 17, 2009

DECISION

SUBMISSIONS

Scott J. K. Robertson	on his own behalf
Wendy Wilde	on behalf of 0476350 B.C. Ltd. carrying on business as Whistler Audio Visual
Tyler Siegmann	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Scott Robertson, pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued July 29, 2009.
2. Mr. Robertson was employed as a sales and design representative by 0476350 B.C. Ltd. carrying on business as Whistler Audio Visual ("Whistler"). He resigned his employment on June 30, 2008.
3. On January 2, 2009, Mr. Robertson filed a complaint alleging that Whistler had made unauthorized deductions from his wages and had failed to pay vacation pay on those unauthorized deductions.
4. After investigating Mr. Robertson's complaint, the delegate determined that Mr. Robertson's complaint had not been filed within the statutory time limit. The delegate also decided to exercise his discretion to stop investigating Mr. Robertson's complaint.
5. Mr. Robertson alleges that the delegate erred in law and failed to observe principles of natural justice. He also alleges that evidence has become available that was not available at the time the Determination was being made.
6. Section 36 of the *Administrative Tribunals Act* ("*ATA*"), which is incorporated into the *Employment Standards Act* (s. 103), and Rule 17 of the Tribunal's *Rules of Practice and Procedure* provide that the Tribunal may hold any combination of written, electronic and oral hearings. (see also *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). This appeal is decided on the section 112(5) "record", the submissions of the parties, and the Reasons for the Determination.

ISSUES

7. Did the delegate err in law in determining that Mr. Robertson's complaint was filed beyond the statutory time limit?
8. Did the delegate err in law in improperly exercising his discretion not to allow the complaint?
9. Did the delegate fail to observe the principles of natural justice in making the Determination?
10. Is there new evidence that was not available at the time the Determination was being made?

FACTS AND ARGUMENT

11. The facts as set out by the delegate are as follows.
12. Mr. Robertson believed that Whistler was unlawfully making deductions from his wages and expressed those concerns to his employer. When he asked to be reimbursed for those deductions, Whistler refused. Consequently, on June 4, 2008, Mr. Robertson presented Whistler with written notice of his resignation effective June 17, 2008.
13. Mr. Robertson said that although his last date of employment was to be June 17, 2008, he continued conversations with Whistler after that date “to facilitate the transfer of information regarding pending contracts”. He expected that Whistler would pay him all outstanding wages, including commissions and provide him with a Record of Employment (ROE) shortly after June 30, 2008. However, Whistler continued to make commission payments to him for an additional five months. Mr. Robertson asserted that Whistler continued to make unauthorized deductions from these payments.
14. Mr. Robertson submitted that his employment relationship ended on November 18, 2008 because that was the day he received his final commission wages. He based his argument on a publication issued by Service Canada: “*Employment Insurance Guide: How to Complete the Record of Employment Form*”.
15. Mr. Robertson stated that he required all his commissionable earnings and his ROE before he could file his complaint. He also stated that he did not have the opportunity to file his complaint because of his family commitments over the holiday season.
16. Whistler disagreed only with one aspect of Mr. Robertson’s submission. It contended that Mr. Robertson stopped working on June 17, 2008, as indicated in his notice of termination. Whistler acknowledged that it continued to pay Mr. Robertson commission wages until November 18, 2009 based on a mutual agreement to pay him for jobs that had been started prior to his departure. Whistler paid Mr. Robertson once the job was complete and payment from the client was received.
17. The delegate noted that the Guide relied on by Mr. Robertson was a supplemental document to the *Employment Insurance Act*, legislation that has a purpose and statutory regime different from that of the *Employment Standards Act*.
18. The delegate considered the definitions of “Employee”, “Employer” and “Work” set out in s. 1(1) of the *Act* and determined that Mr. Robertson had resigned on June 17, 2008, and had not performed any work for Whistler after that day. The delegate found no evidence to support Mr. Robertson’s contention that he continued to work until June 30, 2008. The delegate determined that Mr. Robertson’s complaint, received January 2, 2009, was outside the six month time period prescribed by section 74(3) of the *Act*.
19. The delegate further found no reason to exercise his discretion to investigate Mr. Robertson’s complaint even though the time period for filing the complaint had passed. The delegate determined that although Mr. Robertson was aware in June 2008 that Whistler may have been contravening the *Act*, he waited five months until he received all money promised by Whistler and his ROE before filing the complaint. The delegate found that Mr. Robertson had one month to file his complaint after receiving his final pay and the ROE, but did not do so because of family commitments.
20. The delegate stopped investigating Mr. Robertson’s complaint on the grounds that it was outside the statutory time limit.

21. Mr. Robertson argues that the delegate erred in determining that his last day of work was June 17, 2008. He says that he continued to be an employee until he received his last payment for work performed for Whistler, which was November 18, 2009.
22. Mr. Robertson contends that even if the delegate was correct in finding that he ceased to be an employee on June 17, 2008, the Self Help kit misled him into believing that it was mandatory to proceed with the steps outlined in the Self Help kit before he could file his official complaint. He says that he initiated a request for payment using the Self Help kit on December 4, 2008, and that if he had known that he ought to have filed a complaint instead of, or at the same time as, the Self Help kit, his complaint would have been within the statutory time limit.
23. The delegate submits that the definition of employee is not, in and of itself, determinative of Mr. Robertson's employment status after June 17, 2008. He submits that the definition cannot be construed to mean that the employment relationship continues until all wages are paid to an employee. He contends that the definitions of "employee", "employer" and "work" must be read together to determine when an employment relationship ceases to exist.
24. The delegate says that, pursuant to section 17 and 18 of the *Act*, an employee is entitled to receive wages for work performed within 6 days after the employee terminates the employment. He submits that although Whistler and Mr. Robertson entered into a mutual agreement to pay commission wages once payment was obtained from a client after June 17, 2008, (which the delegate acknowledges was contrary to section 18(2) of the *Act*) that agreement did not operate to extend the employment relationship.
25. The delegate submits that Mr. Robertson was accorded natural justice.
26. Finally, the delegate submits that Mr. Robertson's evidence about relying on the Self Help kit was available prior to the hearing. The delegate says that if the Tribunal does consider this evidence, it should be noted that the Self Help kit clearly indicates that if the complainant is within 30 days of the end of the six month period, the complainant should file the complaint and then use the Self Help kit.

ANALYSIS

27. 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; or

evidence has become available that was not available at the time the determination was being made

28. The burden of establishing the grounds for an appeal rests with an Appellant. Mr. Robertson must show clear and persuasive reasons why the Tribunal should interfere with the delegate's decision on one of the three stated grounds of appeal. A disagreement with the result, in and of itself, is not a ground of appeal.

Error of Law

29. The Tribunal has adopted the factors set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)* (1998] B.C.J. (C.A.) as reviewable errors of law:

1. A misinterpretation or misapplication of a section of the 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 be reasonably entertained; and
 5. Exercising discretion in a fashion that is wrong in principle
30. Questions of fact alone are not reviewable by the Tribunal under section 112. In *Britco Structures Ltd.*, BC EST # D260/03, the Tribunal held that findings of fact were reviewable as errors of law if they were based on no evidence, or on a view of the facts which could not reasonably be entertained.

Did Mr. Robertson file his complaint within the statutory time period?

31. Section 1(1) of the *Act* defines “Employee” to include “a person, including a deceased person, receiving or entitled to wages for work performed for another”. Work is defined to mean “the labour or services an employee performs for an employer whether in the employee’s residence or elsewhere”.
32. I find no error in the delegate’s conclusion that Mr. Robertson ceased to be an employee of Whistler on June 17, 2008. There is no dispute that Mr. Robertson did not perform any labour or services for Whistler after that date.
33. Section 18 (2) of the *Act* requires an employer to pay all wages owing to an employee within 6 days after the employee terminates the employment. Whistler was obliged to pay Mr. Robertson all his outstanding wages by June 23, 2008. Mr. Robertson had a continuing claim for wages until they were all paid, which was November 18, 2008. (see *Orva* (BC EST # D003/09) However, Mr. Robertson’s complaint that Whistler had made unauthorized deductions from payments he received up to June 17, 2008 should have been made within six months of that date, or December 17, 2008.

Did the delegate improperly exercise his discretion not to investigate Mr. Robertson’s complaint?

34. The Tribunal will not interfere with the exercise of discretion by the Director unless it can be shown that the exercise was an abuse of power, the Director made a mistake in construing the limits of his authority, there was a procedural irregularity or the decision was unreasonable. (*Jody L. Goudreau* BC EST # D066/98) The Tribunal has adopted the following definition of unreasonableness:
- . . . a general description of things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting “unreasonably”. *Associated Provincial Picture Houses v. Wednesbury Corp.*, [1948] 1 K.B. 233 at 229
35. The delegate considered a number of factors similar to those considered by the Tribunal when deciding whether or not it should exercise its discretion under section 109(1)(b) of the *Act* to allow appeals even though the time period for seeking an appeal has expired. As outlined in *Niemisto* (BC EST # D099/96), the party seeking an extension must satisfy the Tribunal that:
- (1) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;

- (2) there has been a genuine, ongoing *bona fide* intention to appeal the determination;
- (3) the respondent party as well as the director has been made aware of this intention;
- (4) the respondent party will not be unduly prejudiced by the granting of an extension; and
- (5) there is a strong *prima facie* case in favour of the appellant.

36. I am not persuaded that the delegate abused his power or made a mistake in construing the limits of his authority. I find no evidence of a procedural irregularity. Finally, I am unable to conclude that the delegate's decision was unreasonable. He considered the fact that Mr. Robertson was aware of a possible breach of the *Act* well before he resigned from his employment. He considered the fact that Mr. Robertson was aware of the statutory time limit and that, although he could have filed the complaint within that period even after he received his ROE, he failed to do so.

37. I find no basis for the appeal on this ground.

Natural Justice

38. 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.

39. There is no evidence Mr. Robertson was denied the opportunity to fully present his case or to respond to that of the employer. I dismiss this ground of appeal.

New Evidence

40. The Tribunal has taken a stringent approach to what will be accepted as new evidence. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST # D 171/03, the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:

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;

the evidence must be relevant to a material issue arising from the complaint;

the evidence must be credible in the sense that it is reasonably capable of belief; and

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.

41. This ground of appeal is not intended to enable an unsatisfied party to provide additional evidence to supplement an appeal if that evidence could have been provided to the Director before the Determination was issued.

42. Mr. Robertson argues that the Self-Help kit constitutes new evidence. I find that this information does not meet the test of new evidence noted above. However, as the delegate notes, even if I were to consider this evidence, the Self Help kit clearly states that if the complainant is **within 30** days of the end of the statutory time limit, the complainant should file the complaint and **then** use the Self- Help kit. [emphasis in original]

43. I dismiss the appeal.

ORDER

44. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated July 29, 2009, be confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal