Employment Standards TRIBUNAL

An appeal

- by -

Vox Logic Technologies Inc.
("VTI")

- 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.: 2007A/126

DATE OF DECISION: December 11, 2007

DECISION

SUBMISSIONS

Robin Hutchison (appeal submissions) and Michael Hutchison Q.C. (reply submissions)	on behalf of VoxLogic Technologies
Chantal Martel	on behalf of the Director of Employment Standards
Wie Lin	on his own behalf
Lianrong Chen	on his own behalf

OVERVIEW

1. This is an appeal by VoxLogic Technologies Inc., ("VTI"), pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued September 7, 2007.

2. Wei Lin and Lianrong Chen worked as software developers for a series of companies, ultimately working for VTI. Mr. Lin worked from October 1999 until May 15, 2006, Mr. Chen from March 2000 until May 15, 2006. They filed complaints alleging that they were owed wages, annual vacation pay and compensation for length of service.

3. Following an investigation of the complaints, the Director's delegate concluded that VTI was a successor company to earlier companies and had contravened Sections 17, 58 and 63 of the *Employment Standards Act* in failing to pay Mr. Lin and Mr. Chen wages, vacation pay and compensation for length of service. She determined that their total wage entitlement, with interest, was $27,814.81. The delegate also imposed a $2,000 penalty on VTI for the contraventions of the Act, pursuant to section 29(1) of the *Employment Standards Regulations.*

4. VTI contends that the delegate erred in law in finding VTI a successor company to the earlier companies that Mr. Chen and Mr. Lin were employed with. VTI also contends that the delegate failed to observe the principles of natural justice as it did not afford it a hearing.

5. Section 36 of the *Administrative Tribunals Act* ("*ATA*"), which is incorporated into the *Employment Standards Act* (s. 103), and Rule 16 of the Tribunal's Rules of Practise 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). Although VTI sought an oral hearing, I conclude that this appeal can be adjudicated on the section 112(5) "record", the written submissions of the parties and the Reasons for the Determination. This appeal is whether the delegate erred in law, an issue which does not turn on the credibility of the parties or whether additional evidence needs to be considered. There is also no need to hear *viva voce* evidence on the issue of whether there is a denial of natural justice.

ISSUES

6. Did the delegate err in law in finding that VTI was a successor company?

7. Did the delegate err in law in calculating the claimants' vacation pay entitlement and compensation for length of service?

8. Did the delegate fail to observe the principles of natural justice in not holding an oral hearing into the complaints?

THE FACTS

9. The facts as found by the delegate are as follows.

10. Mr. Chen and Mr. Lin (the "complainants") filed separate complaints against VTI in the fall of 2006. They alleged that VTI had failed to pay them wages, vacation pay and compensation for length of service. They submitted evidence indicating that they had originally begun work with GTG Technologies ("GTG"). When GTG experienced financial difficulties, the complainants went to work for Via Vis Mobile Solutions ("Via Vis") which had assumed GTG's operations. In March, 2005, Free DA Connection Services ("Free DA") purchased Via Vis. All of the staff except one continued to work for Free DA. Free DA then changed its name to VTI. Free DA/VTI carried out the same business as Via Vis using all the same physical assets at the premises and using technology developed by Via Vis. The delegate noted that VTI's website indicated that VTI was "formed to merge the technical assets of Via Vis Technologies Inc., and underlying IP into a US based public company".

11. On March 15, 2005, the complainants entered into a written employment contract with VTI. Robin Hutchison was the authorized signing party for VTI. The contracts set out the rights of the parties, including the complainants' salary and vacation entitlement.

12. On May 15, 2006, VTI announced that it would be laying off the complainants due to financial difficulties. The complainants did not receive written notice of the layoff nor did they receive any compensation for length of service. The complainants contended, and provided documentary evidence, that they had sought payment for wages from Mr. Hutchison for some time after that and that he promised to pay once certain financing arrangements had come through.

13. On October 11, 2006, the delegate wrote to Mr. Hutchison, the sole Director and Officer of VTI, advising him of the allegations and seeking his response. She requested that he provide his response, along with payroll records, by October 25, 2006. Mr. Hutchison responded on October 25. He stated that VTI did not acquire the business of Mr. Lin and Mr. Chen's previous employer and was not its successor in business. He said that "a limited acquisition of assets took place and some staff were offered new positions with [VTI]". He further asserted that VTI agreed to pay Mr. Lin's previous employer for his services "while he remained an employee of that company at his own request" and that although Mr. Lin was paid by VTI as "a matter of convenience", he remained an employee of the previous company.

14. Mr. Hutchison further asserted that the complainants did not become employees of VTI until September 2005 and that VTI had paid all wages they were entitled to. He contended that the complainants had taken all the vacation time to which they were entitled. Although Mr. Hutchison agreed that the complainants had been laid off on March 15, 2006 due to "a lack of work", he asserted that during the

layoff they had taken other work and were no longer available to work for VTI. Mr. Hutchison said that, having resigned, the complainants were not entitled to compensation for length of service. With respect to Mr. Chen's claim for wages, Mr. Hutchison acknowledged that he had received a number of emails from Mr. Chen inquiring whether he had been successful in raising funds but indicated that, at no time did he guarantee Mr. Chen payment.

15. On May 18, 2007, the delegate again wrote to VTI and issued a Demand for Records. She attached documents from the complainants setting out their claims and suggested that, under section 97 of the *Act*, their employment could be deemed continuous and uninterrupted by the disposition of GTC to ViaVis and then to Free DA. She asked Mr. Hutchison to submit any evidence if he disputed any of their allegations. In a May 22 letter to the delegate, Mr. Hutchison wrote that VTI had previously submitted records requested. He indicated that VTI "stands by its prior communication to you" and noted that in a previous claim by another employee the Branch had determined that VTI was not a successor company to Via Vis.

16. Mr. Hutchison provided the delegate with the complainants' payroll records from August 31, 2005 until May 15, 2006,

17. On July 17, 2007, the delegate contacted Jacqueline Casilio, the former Controller of VTI by telephone. Ms. Casilio advised her that she worked as the part time bookkeeper from 2001 until May 2006 and completed all Records of Employment (ROE's) with Mr. Hutchison's approval. She agreed that the complainants' first day of work was recorded as August 16, 2005 because that was the first day they were paid using VTI's cheques, but believed that during a transition period during which VTI did not have a Canadian account the complainants were paid by Via Vis. She further stated that all the employees remained at the Via Vis worksite using their computers before moving to new premises. Ms. Casilio also advised the delegate that Mr. Hutchison told the employees that VTI would honour Via Vis' vacation days.

18. After reviewing all of the evidence, the delegate found Mr. Hutchison's assertion that VTI paid the complainants while they worked for another company as a matter of convenience to lack credibility. She found that VTI was the complainant's employer before September 2005. She accepted the complainants' Employment Contracts as reliable and determined that their first day of employment with VTI was March 15, 2005. She determined the complainants' wage entitlement based on that date.

19. The delegate noted that although she had issued a Demand for Employer Records, VTI had not submitted any documentation about the complainants' vacation dates. She therefore accepted the complainants' evidence about their vacation entitlement.

20. The delegate rejected Mr. Hutchison's assertions that because the complainants had obtained other jobs during their layoff period and were thus unavailable for work that they had therefore resigned. She noted that the employer had the burden of demonstrating that the complainants were recalled and refused to work. She concluded that, simply because an employee had found other work during the recall period did not establish he had rejected the recall. She found both complainants entitled to compensation for length of service.

21. The delegate also rejected Mr. Hutchison's assertions that VTI was not a successor company. She noted that section 97 of the *Act* referred to the "disposition" of a business and that the *Interpretation Act* defined disposal broadly. She found that VTI had acquired a substantial part of Via Vis' assets. She noted that

while Mr. Hutchison asserted that VTI had acquired only limited assets, he did not provide particulars, nor how many staff were not offered new positions. She accepted the complainants and Ms. Castilio's evidence that VTI acquired Via Vis' intellectual property and all of its hardware. She had before her an October 16, 2006 email from Mr. Hutchison to Mr. Chen in which he said "Free DA bought only the assets of VV and did not assume it (sic) liabilities". She concluded that section 97 applied and determined that the complainants' employment to be continuous and uninterrupted by the disposition. She also found no evidence there had been a prior contrary Determination made by the Branch. Although there had been a previous complaint against VTI, it had been withdrawn by the complainant.

ARGUMENT AND ANALYSIS

22. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

(a) the director erred in law

(b) the director failed to observe the principles of natural justice in making the determination; or

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

23. The burden of establishing the grounds for an appeal rests with an Appellant. VTI must provide persuasive and compelling evidence that there were errors of law in the Determination, as alleged, or that the delegate failed to observe the principles of natural justice.

24. I will address the second ground of appeal first.

Natural Justice

25. 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.

26. Robin Hutchison says that he received notice of the complaints in October 2006, which he responded to. He acknowledges receipt of a Demand for Records and says that he provided documentation, including ROE's. He says that he heard nothing from the delegate until he received the Determination on September 21, 2007. He says that VTI was "shocked that it did not have the opportunity to present it (sic) case in a hearing." He says that a similar complaint had been filed in 2005 and that during a hearing the Director "dismissed the employee's claim completely". Mr. Hutchison said that "the company assumed, as it heard nothing for months, that the Lin & Chen complaint, as it followed the same premis as the 2005 complaint, was simply abandoned in light of the Directors earlier decision". (Reproduced as written)

27. The delegate says that the Director is authorized to resolve complaints made under the *Act* by utilizing a number of possible processes including investigations, mediation and adjudication. She says that the delegate chose to conduct an investigation, advised VTI of that and VTI acknowledged this procedure. She says that, contrary to Mr. Hutchison's assertions, the previous complaint against VTI did not proceed as the complainant withdrew his complaint.

28. In reply, Michael Hutchison submits that the delegate made “decisions of credibly on the basis of written submissions, without the opportunity for witnesses to be examined and cross examined, fundamental to determining the substance of evidence given and in particular, the credibility”. (Reproduced as written) He submits that an oral hearing is required because significant documents have not been produced and because a significant portion of the interaction between the complainants and Robin Hutchison were conducted orally. He argues that the oral dealings “may substantially alter and affect the written documentation, particularly with respect to the employment contracts relied upon so fundamentally by the Delegate”.

29. Michael Hutchison also asserts that at a hearing involving the complaint in 2005 at which Robin Hutchison attended, the complainant withdrew his complaint because the delegate advised him he had not valid claim. He submits that on matters of legal interpretation, the Director should take a consistent position for each claimant and that the current complainants are essentially the same as the previous employee.

30. I am unable to find that the delegate failed to observe the principles of natural justice. As the Tribunal stated in its reconsideration of JC Creations Ltd. o/a Heavenly Bodies Sport (BC EST #RD317/03):

> Section 77 of the Act requires that the Director "…make reasonable efforts to give a person under investigation an opportunity to respond". Section 77 is thus a legislated, minimum procedural fairness requirement. It is consistent with the purposes of the Act "to promote the fair treatment of employees and employers" and "to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act" (Sections 2(b) and (d) of the Act). The issue here is whether the Director's Delegate made "reasonable efforts" to give the Employer an opportunity to respond to the investigation being conducted by the Delegate.
>
> The requirement under Section 77 of the Act in no way requires that an oral hearing be held. That is recognized by the Tribunal in the already cited *BWI Business World* decision. It is also reflected in the following comments by the Tribunal in *Milan Holdings Ltd.*, supra, at para. 30:
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> An investigation is, by its nature, different from a proceeding conducted in the cool detachment of a quasi-judicial hearing where all the parties are present and procedural niceties are attended to. Investigations are a dynamic process, in which information is collected from different persons in different circumstances over time. At different points during the investigation, the investigator may hold different perspectives or viewpoints that lead him or her in one direction or another. A proper investigation cannot be run like a quasi-judicial hearing. Investigations necessarily operate in much more informal, flexible and dynamic fashion. All this is reinforced by s. 77, which requires only that "If an investigation is conducted, the director must make reasonable efforts to a give a person under investigation an opportunity to respond".

31. Robin Hutchison was provided with the details of the allegations in writing. He received notice and was given numerous opportunities to respond to the allegations, which he did. The delegate advised him in writing of her view that section 97 could apply to the complaints and sought his reply. At no time did Mr. Hutchison advise the delegate that the contracts required an oral “explanation”, deny their validity or raise issues with respect to the credibility of the complainants. Furthermore, it does not appear that he attempted to explain his position to the delegate either in person or by telephone. Presumably, if he had raised issues with respect to the credibility of the witnesses the delegate may have considered an oral hearing. He did not.

32. Furthermore, there is no evidence, other than Mr. Hutchison's assertions, that the previous employee's complaint was withdrawn because the delegate said he had no valid claim. That is entirely hearsay. However, even if Mr. Hutchison's assertions are correct, it may be that the delegate advised the employee that the complaint was not valid for reasons other than a section 97 issue. I decline to infer that the complaint was withdrawn because a delegate found no evidence that VTI was a successor company to Via Vis.

33. I find no basis for this ground of appeal.

Error of Law

34. 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

35. 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.

36. The Tribunal must defer to the factual findings of a delegate unless the appellant can demonstrate that the delegate made a palpable or overriding error.

37. In his reasons for appeal, Mr. Hutchison argues that VTI is not a successor company to Via Vis. He contends that the delegate "did not request the contractual agreement between Via Vis & VoxLogic, which clearly provides the information that shows that VoxLogic is not in any way responsible for Via Vis obligations". Attached to the appeal form are two documents. The first is an unsigned and undated document entitled "IP Purchase and Sale Agreement – Free DA" and appears to be an agreement between Via Vis and Free DA. The second is a document entitled "Stock Exchange Agreement" between the same parties. It is also unsigned. As these documents are not part of the record, they constitute 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.

38. Both documents were available during the delegate's investigation and were not provided to the delegate at any time. The delegate has no obligation to request a specific document particularly if she cannot know of the existence of that document. She sought any and all relevant documents on at least two separate occasions during the investigation and in particular, advised Mr. Hutchison that she was considering VTI to be a successor company. Mr. Hutchison ought to have produced the documents at that time if he considered them relevant to her investigation. Given that the documents are unsigned, they are of limited probative value. For these reasons I have not considered the documents or attached any merit to them.

Was VTI liable for accumulated notice and vacation liability

39. Section 97 of the *Act* provides that if all or part of a business, or a substantial part of the entire assets of a business is disposed of, the employment of an employee of the business is deemed, for the purposes of this Act, to be continuous and uninterrupted by the disposition.

40. In *Lari Mitchell and others* BC EST # D314/97, Reconsidered #RD107/98), the Tribunal considered the term "disposed of" in section 97. The panel concluded that the term was to be interpreted broadly, and incorporated the definition in the *Interpretation Act:*

> "dispose" means to transfer by any method and includes assign, give, sell, grant, charge, convey, bequeath, devise, lease, divest, release and agree to do any of those things;

41. Robin Hutchison's October 25, 2006 reply to the delegate acknowledged that VTI acquired "limited assets" including many staff, from Via Vis. When the delegate sought his response to the allegation that VTI "bought the business from the previous owner", Mr. Hutchison merely reiterated his previous assertions without providing any contrary evidence. The delegate relied on evidence supplied by the complainants and Ms. Castilio and representations made on VTI's website that it used technology developed by Via Vis. I find no error of law in the delegate's conclusions that there was a disposition of a substantial part of the entire assets of Via Vis' business to VTI.

42. In a reply submission, Michael Hutchison contends that the evidence "amply shows that the employer of the complainants was not the company from which substantial assets were acquired by Free DA Connection Services Inc. (now VoxLogic Technologies Inc.). As the documentation demonstrates, the assets acquired, which were not all of the assets in any event, were essentially certain intellectual property rights, and they were acquired from a company Via Vis Technologies Inc." He also asserts that the complainants were never employees of Via Vis Technologies Inc. but Via Vis Mobile Solutions Inc. as correctly noted by the delegate. He says that GTG changed its name to Via Vis Mobile Solutions Inc. and that company entered into no agreement to sell assets to Free Da or transfer any business to Free DA at any time. He further submits that in March 2005, VTI purchased certain assets from Via Vis and Via Vis continued in business. He says that the delegate improperly dismissed evidence that the complainants were not paid by VTI until August 15, 2005, instead relying on employment contracts dated March 2005. He says there was a good reason why the complainants remained employed by Via Vis and that was an actual contractual relationship, which continued. He said that the Free DA contracted with Via Vis at the express request of the complainants to retain the benefits they had from Via Vis and made payment to Via Vis. He argues that, even with the broad language of section 97, there was no evidence to support a finding that Free DA is liable for length of service payments or accumulated right of notice on severance.

43. As noted above, these assertions appear to be based, in part, on documents that were not before the delegate during the investigation. For the reasons set out above, I find no basis to conclude that the delegate acted on a view of the facts that could not reasonably be entertained.

Vacation pay

44. With respect to the delegate's conclusion on VTI's liability for vacation pay, Michael Hutchison asserts that Robin Hutchison closed the offices between December 23 and January 8 and that the complainants could have worked during that period. Therefore, he says the delegate erred in not taking into account this period of "vacation". I note that Robin Hutchison did not provide this information to the delegate during the investigation and thus is not admissible on appeal, for the same reasons as noted above. Further, VTI provided no record of vacation taken by the complainants in response to the delegate's Demand for Records. The delegate properly, in my view, relied on the evidence she had available and I find no error of law in her conclusions.

Compensation for length of service

45. Under the *Act*, an employer is entitled to give notice of temporary layoff in which case the employee is not considered to be terminated. However, if the layoff exceeds 13 weeks the employee is deemed to be terminated as of the original "temporary" lay off date. There is no evidence the complainants were recalled. Although VTI asserted that the complainants obtained alternate employment, there is no evidence that VTI contacted them with an unequivocal offer to return them to their former positions under the same terms and conditions. I note that the complainants continued to contact Mr. Hutchison by email long after they were let go, and in Mr. Chen's case, there were statements that he would like to return to work for Free DA.

46. The employer has the burden of proving that it should be relieved of the need to give notice or compensation for length of service. Robin Hutchison provided no evidence that the complainants were given an unequivocal offer to return to work for VTI. He also provided no evidence that they resigned, an act which must be clear, not assumed.

47. Section 63 establishes a statutory liability on an employer for length of service compensation to a qualifying employee. The amount of compensation increases as the employee's length of service increases. It is a statutory entitlement distinct from the concept of damages for failure to give proper notice. As such, I reject Michael Hutchison's assertion, in his reply submission, that the entitlement represents a "windfall" to the employee.

ORDER

48. I Order, pursuant to Section 115 of the Act, that the Determination, dated September 7, 2007, be confirmed, together with whatever interest may have accrued since the date of issuance.

Carol L. Roberts

Member
Employment Standards Tribunal