Employment Standards TRIBUNAL

An appeal

- by -

Waiward Steel GP Corp. carrying on business as Waiward Steel Ltd.
("Waiward Steel")

- 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.: 2017A/131

DATE OF DECISION: December 18, 2017

DECISION

SUBMISSIONS

Scott Drewicki	on behalf of Waiward Steel GP Corp. carrying on business as Waiward Steel Ltd.

OVERVIEW

1. On October 24, 2017, and following an oral hearing held on June 13, 2017, Colin Gelinas – a delegate of the Director of Employment Standards (the "delegate") – issued a Determination under section 79 of the *Employment Standards Act* (the "*ESA*"). By way of this Determination, the delegate ordered the present appellant, Waiward Steel GP Corp. carrying on business as Waiward Steel Ltd. ("Waiward Steel"), to pay its former employee, Emmeli Rosenberg Lassesen (the "complainant"), the total sum of $1,230.07 on account of unpaid wages and section 88 interest.

2. Further, and also by way of the Determination, the delegate levied a single $500 monetary penalty against Waiward Steel (see section 98) based on its contravention of section 18 of the *ESA*. Thus, the total amount payable under the Determination is $1,730.07.

3. Waiward Steel now appeals the Determination – and maintains that it should be cancelled – on the sole ground that the delegate erred in law (see subsection 112(1)(a) of the *ESA*). In particular, Waiward Steel says that, first, the delegate "failed to consider Section 14(2)(c) of the [*ESA*]" and, second, the delegate erred in finding that the complainant was entitled to a "bonus" as a form of "wages" payable under section 18 of the *ESA*.

4. In my view, this appeal must be dismissed on the ground that it has no reasonable prospect of succeeding (see subsection 114(1)(f) of the *ESA*). My reasons now follow.

FINDINGS AND ANALYSIS

5. As noted above, there are two elements to this appeal and I shall address each in turn.

Section 14(2)(c) of the ESA

6. In my view, Waiward Steel's argument on this score is fundamentally misconceived. The delegate did not inappropriately "fail to consider Section 14(2)(c)" because, very simply, this provision had absolutely no application to the case at hand. This latter provision concerns a "domestic", an employment status that the complainant did not hold.

7. A "domestic" is defined in subsection 1(1) of the *ESA* as someone who both resides, and is employed to provide cooking, cleaning and care services, at their employer's private residence. The complainant was employed as "a document control clerk/administrative assistant in the drafting department at Waiward's Langley BC office" (see "Reasons for the Determination" – the "delegate's reasons" – at page R2).

8. Section 14 of the *ESA* mandates that an employment contract for a "domestic" must be in writing and contain certain specified provisions. Although there is no general requirement for an employment contract to be in writing, Waiward Steel argues, incorrectly relying on section 14, that since the parties' written employment contract did not refer to any bonus scheme, the complainant was not entitled to claim the bonus as a form of "wages":

> Per section 14(2)(c) an employee's "wage" should be clearly stated in the employee's written employment contract. As evidenced in the fully executed employment contract [the complainant's] agreed upon "wage" was clearly stated to be $18.00 per hour worked. There is no mention in [the complainant's] employment contract of any additional "wages".

9. As previously noted, Waiward Steel has fundamentally misconstrued the scope of subsection 14(2)(c). An employment contact, in general, may be oral, written or partly oral and partly written. Although the complainant did have a written agreement setting out some of the terms of her employment, this agreement was not, *nor did it purport to be* (*i.e.*, there was no "entire agreement" provision) an exhaustive recitation of all of her separate employment terms and conditions (for example, it did not address such things as employee leaves and termination pay). The delegate's finding that the complainant was eligible for a performance bonus is not a finding that is inconsistent with the written agreement and, indeed, is entirely consistent with the evidence at the hearing, most of which was tendered by Waiward Steel.

The "Bonus" Question

10. This aspect of Waiward Steel's appeal turns on the subsection 1(1) definition of "wages" and, in particular, the following provisions:

> "wages" includes
>
> (a) salaries, commissions or money, paid or payable by an employer to an employee for work,
>
> (b) money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency,
>
> ...
>
> but does not include
>
> ...
>
> (g) money that is paid at the discretion of the employer and is not related to hours of work, production or efficiency...

11. The uncontroverted evidence before the delegate was that the complainant was paid an $18 per hour wage during the period from January 1 to April 7, 2017.

12. On or about March 31, 2016, the complainant was advised, by letter, that she would be receiving a bonus of $617.67 "based on both corporate and individual performance" during the period from July 13, 2015 (her original date of hire) to December 31, 2015. The letter indicated that the bonus would be paid by "no later than April 15, 2016" and, in fact, it was paid to her.

13. Approximately one year later, on March 24, 2017, the complainant tendered her resignation, effective April 7, 2017, and Waiward Steel accepted that resignation. The complainant continued working until her resignation date. On March 27, 2017, Waiward Steel informed most if not all of its employees at the Langley operation (the record is not clear in this regard) – but excluding the complainant – that a bonus payable in relation to 2016, would be paid out as of April 7, 2017.

14. Waiward's position before the delegate was, first, the complainant was "not entitled to a bonus because payment of the bonus is discretionary and although an employee received a bonus in the previous year it does not automatically entitle the employee to a bonus in the following years" (delegate's reasons, page R4); second, paying a bonus to an employee who had tendered a resignation would set "a negative precedent" (page R4); and third, "if [the complainant] had not submitted her resignation, her name would have been included on the list [of employees who qualified for and were notified of the pending bonus payment] and she would have received the bonus" (page R5) and, to the same effect, "[the complainant] would have received a bonus if she did not submit her resignation. However, as she did submit her resignation, there was no advantage to Waiward in giving her a bonus" (page R6).

15. The delegate first noted that there was no formal written policy in place regarding the payment of a bonus – a fact conceded by Waiward Steel. The delegate held that the bonus in question was not discretionary because payment was based on "specific evaluative criteria [that] Waiward has directly tied...to an employee's hours of work, production and efficiency" (page R7). The "evaluative criteria" included "an employee's reliability, responsibility, teamwork and attendance" (these factors were evaluated by way of a numerical performance appraisal scheme described at page R5).

16. The delegate also found that the bonus served as an "incentive" because it encouraged the complainant "to perform her duties at a level consistent with her performance the year before" (page R8) and that the complainant, having received a bonus in 2016 (for her 2015 performance), would have interpreted that payment as an incentive "to continue to perform well in anticipation of a future bonus" (page R8).

17. In addition to the "employee performance" criteria, Waiward's evidence at the hearing was that payment of the bonus was also conditional on the company meeting certain organizational profit targets (see pages R5 and R6).

18. Bonuses paid "at the discretion of the employer" fall outside the subsection 1(1) definition of "wages". In this regard, the delegate held that the bonus was not "discretionary". The delegate's analysis of this issue was as follows (page R7):

> Waiward asserts that the bonus is discretionary as it has only paid it in three of the last eight years. However, if failed to provide evidence to show which years the bonus was paid and it did not submit evidence to show if they had or had not met their corporate goals. The evidence presented at the hearing shows that the bonus can only be paid when the corporate goals are met and since the bonus was paid, I find it reasonable that the corporate goals were met.

19. Waiward Steel argued before the delegate "that continued or active employment was a necessary precondition to receiving the bonus" (delegate's reasons, page R8) but there was no evidence before the delegate to support this assertion (see, in particular, the delegate's reasons at page R9).

20. Waiward Steel's arguments on appeal essentially represent a challenge to the delegate's factual findings. Waiward Steel maintains that the bonus was "discretionary" and, in any event, was not "related to hours of work, production or efficiency". I should note that Waiward Steel does not challenge the delegate's *calculations* regarding the amount of the complainant's bonus entitlement, only the complainant's right to receive a bonus.

21. A finding of fact may constitute an error of law but only if the factual finding is tainted by a "palpable and overriding error" (see *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235). In my view, the delegate's findings that:

i) the bonus was designed to serve as an employee incentive;

ii) the bonus was based on both corporate and individual employee performance metrics and therefore was related to "production or efficiency"; and

iii) the bonus was not a "discretionary" payment,

were all findings amply supported by the evidentiary record before the delegate.

22. Ultimately, Waiward Steel's *only* justification for not paying the bonus to the complainant was that she had resigned effective the day that the bonus was to be paid out (April 7, 2017): "...if [the complainant] had not submitted her resignation, her name would have been included on the list and she would have received the bonus" (delegate's reasons, page R5); "[The complainant] would have received a bonus if she did not submit her resignation" (delegate's reasons, page R6). The delegate held this additional qualification regarding bonus entitlement was *not* a component of the bonus plan, and I am unable to conclude that the delegate made a "palpable and overriding error" in coming to that conclusion. Indeed, given the evidence before the delegate, this finding strikes me as being entirely correct.

23. To summarize, I see no merit whatsoever to any of the arguments advanced by Waiward Steel in this appeal and, as such, this appeal must be dismissed as having no reasonable prospect of succeeding.

ORDER

24. Pursuant to subsections 114(1)(f) and 115(1)(a) of the *ESA*, this appeal is dismissed and the Determination is confirmed as issued in the total amount of $1,730.07 together with whatever further interest that has accrued under section 88 of the *ESA* since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal