Employment Standards TRIBUNAL

An appeal

- by -

Convergent Media Network Ltd., Convergent Media Network Ltd. carrying on business as CMaeON Connected Market Enterprise on Demand, and 1To1Real Process Technology Ltd.

(the "Appellants")

- 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: Rajiv K. Gandhi

FILE No.: 2016A/83

DATE OF DECISION: October 19, 2016

DECISION

SUBMISSIONS

Tim Vasko	on behalf of the Appellants
Carrie Manarin	on behalf of the Director of Employment Standards

OVERVIEW

1. On May 18, 2016, a delegate of the Director of Employment Standards (the "Director") issued a determination (the "Determination") in which Convergent Media Network Ltd. and 1To1Real Process Technology Ltd. (the "Appellants") were deemed to be associated employers under section 95 of the *Employment Standards Act* (the "*Act*"), and found to have contravened sections 17, 18, 27, 28, and 63 of the Act, as well as section 46 of the *Employment Standards Regulation*.

2. The Director ordered the Appellants to pay the aggregate sum of $12,283.53 to Julius Epman, the Complainant, representing outstanding wages, compensation for length of service, vacation pay, and interest. The Appellant was also required to pay $3,000.00 in administrative penalties.

3. In this appeal, the Appellants seek to have the Determination varied or cancelled on the basis that the Director:

    (a) erred in law; and

    (b) failed to observe the principles of natural justice,

    both permitted grounds for appeal according to section 112(1)(a) and 112(1)(b) of the *Act*.

4. The Appellants do not dispute in any meaningful way the finding that they are associated under section 95 of the *Act*. However, it is fair to say that virtually everything else in the Determination is hotly contested. The Appellants dispute various findings of fact, the monetary award, and each administrative penalty.

5. At this point, my role is to consider whether or not this appeal should be summarily dismissed according to section 114(1) of the *Act*. To that end, I have considered:

    (a) the Determination;

    (b) the record received from the Director on July 6, 2016 (the "Record");

    (c) submissions received from the Appellants on July 21, August 2, and September 7, 2016; and

    (d) submissions received from the Director on August 8, 2016.

6. Except with respect to the Director's calculation of vacation pay owing to the Complainant, in respect of which some clarification is necessary, I am of the opinion that, for the reasons that follow, this appeal has no reasonable prospect of success.

FACTS AND ANALYSIS

The Record

7. On a preliminary basis, the Appellants object to the completeness of the Record. They appear to say that the accuracy of the Record must be questioned, because one of the Appellants' documents was not included in materials distributed to the parties in advance of what was ultimately a pre-hearing conference held on April 12, 2016.

8. The Director says that the omission, while admitted, was inadvertent and, once discovered, was rectified without delay. The omitted document was available at the hearing and is included in the Record, together with three other documents adduced by the Appellants on the actual day of hearing.

9. Documents delivered to the Tribunal by the Director pursuant to section 112(5) of the *Act* are presumed to constitute the complete record. It is the Appellants who bear the burden of establishing, *prima facie*, that the record is incomplete (see *Super Save Disposal Inc. and Actton Transport Ltd.,* BC EST # D100/04, at page 18).

10. The Appellants do not elaborate, either generally or specifically, on what might be missing from the Record, and I am not persuaded that this burden has been satisfied. Perceived gaps in pre-hearing procedure are not relevant to issues relating to the completeness of the Record placed before this Tribunal.

11. I therefore accept that the Record, as submitted by the Director, is complete.

Garnishment Proceedings

12. The Appellants also complain about steps taken by the Director to garnish funds in satisfaction of the monetary award and penalty amounts. They seek the return of garnished monies, together with costs and damages.

13. The Appellants did not apply to suspend the Determination and, to my knowledge, it has not been suspended. There is nothing in the materials before me to suggest that the Director acted improperly or capriciously. Even if I were inclined to intervene, I do not interpret section 113 of the *Act* to say that I can order the Director to return funds that were properly garnished. Accordingly, I decline to make the orders that the Appellants seek.

In making the Determination, did the Director err in law?

14. An "error of law" exists where:

(a) a section of the *Act* has been misinterpreted or misapplied;

(b) an applicable principle of general law has been misapplied;

(c) the Director acts in the absence of evidence;

(d) the Director acts on a view of the facts which can not reasonably be entertained; or

(e) the Director adopts a method of assessment which is wrong in principle.

(see *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam),* [1998] B.C.J. No. 2275 (BCCA) at paragraph 9).

15. The Appellants' submissions are a robust seventeen pages in length, much of it a meandering argument about hearsay, the Director's interpretation of the evidence, and the Director's failure to accept only what the Appellants describe as the "best evidence". While they claim error of law, the submissions clearly focus on errors in fact.

16. Oft repeated by this Tribunal, an appeal is not a *trial de novo*. It is not my function to make findings of fact in place of, or in addition to, findings made by the Director, irrespective of whether or not I agree with them. My ability to upset the Director's factual conclusions is limited to circumstances where there has been a palpable and overriding error. In other words, the Appellants must show that "a reasonable person, acting judicially and properly instructed as to the relevant law…" would not have reached the same conclusion (see *3 Sees Holdings Ltd.*, BC EST # D041/13, at paragraph 27).

17. In that light, I will attempt to address the issues raised by the Appellants.

Employee vs Independent Contractor

18. The relationship between the Appellants and the Complainant can be divided into three distinct periods:

(a) September 2, 2014, to November 9, 2014;

(b) November 10, 2014, to May 11, 2015; and

(c) May 12, 2015, to October 21, 2015.

19. Neither party contests the Complainant's status as independent contractor between September 2, 2014, and November 9, 2014. Similarly, it is common ground that the Complainant was an employee between November 10, 2014, and May 11, 2015, and as such entitled to the protections afforded under the *Act*.

20. However, the Appellants say that the Complainant agreed to become an independent contractor, and argue that the Director was wrong to conclude otherwise.

21. In support of their position, the Appellants point to a Skype session between the Complainant and the Appellants' chief executive officer, Mr. Vasko, involving an exchange of messages between 8:19 AM and 2:39 P.M. on May 11, 2015 (the "Skype Conversation").

22. At 8:46 A.M., Mr. Vasko advised the Complainant that:

> "… *I think this has to be solved, I can't pay you as an employee, lets revert back to contractor basis – project by project, as of today*…."

23. The Appellants say that the Complainant "obviously" agreed when, at 2:39 P.M., he responded with the statement "I agree, will figure it out."

24. What the Appellants conveniently ignore is that the intervening exchange between Mr. Vasko and the Complainant, occurring over the course of approximately six hours, has nothing to do with changing from an "employer - employee" relationship to one of "company - independent contractor". Rather, it involves a discussion about specific technical matters, and project management. The statement "I agree, will figure it out" is a direct response to Mr. Vasko's suggestion that the Complainant address specific technical issues with two other employees.

25. In my opinion, there is nothing unreasonable in the Director's conclusion that the Complainant did not agree to become an independent contractor.

26. Next, the Appellants argue that Mr. Vasko terminated the Complainant's employment when, at 8:54 A.M. on the day of the Skype Conversation, he told the Complainant to "take a break."

27. That discussion (with typographical errors intact), follows:

> *8:34:24 Julius Epman: need to embed calculators on 1to1real today*
>
> *8:34:50 Tim Vasko: those are pretty low priority – I doubt I will demo …*
>
> *8:34:59 Tim Vasko: Is that what you've completed ?*
>
> *8:35:38 Julius Epman: I had calculators and login tasks assigned to me*
>
> *8:36:18 Julius Epman: for login I talked with Andrew and he asked me to contact Peter to address security issues*
>
> *8:37:23 Julius Epman: Iwas in contact with peter but he didn't provide an architectural design yet Umbraco and 1to1real run in two different processes*
>
> *8:42:51 Tim Vasko: well I thought Ian had provided you our prior SSO ?*
>
> *8:44:26 Tim Vasko: We are just not in sync Julius - Peter is buried, Ian is buried - I have a hard time talking to you long-distance …*
>
> *8:46:14 Tim Vasko: I have talked to Peter - he said you didn't reach out to him to set up a meeting Julius … I think this has to be solved, I can't pay you as an employee, lets revert back to contractor basis - project by project, as of today …*
>
> *8:47:17 Tim Vasko: All it takes to do our version of SSO, is a 10 minute Skype meeting with Ian, Peter and you*
>
> *8:54:05 Tim Vasko: Take a break - Ill work on thought and send you an email later tonight, tomorrow - I'm travelling and can't get you caught up today - that's what I needed to talk to you Friday … what needed to be done to support Ian and the team in getting Finaeos done Julius … this just isn't working out this way …*
>
> *8:54:41 Tim Vasko: I'll see if I can figure out a way to manage project work - but that won't happen until Thursday or Friday as I have to focus on launching Finaeos*
>
> *8:55:01 Tim Vasko: Design, UI/UX is hard to do remotely - we have a team in Victoria to do most of this …*
>
> *9:03:59 Julius Epman: There are security questions concerns with previous sso as the username and passwor are sent in plaintext over string query,. I asked 'Peter to review on backend side*
>
> *9:05:49 Julius Epman: Please let me know your thoughts as to how you see would work best*

28. Taken in context, I have considerable difficulty accepting that "take a break" should be interpreted as a clear and unambiguous termination of employment. In fact, when taken as a whole, there is nothing in this exchange that would lead me to conclude that the Complainant had been, or would know that he had been, terminated. From my perspective, "take a break" is little more than direction to the Complainant to wait for further instructions from Mr. Vasko, before addressing user authentication (SSO) issues.

29. There is nothing in the conversation reproduced above which leads me to believe that the Director erred or was otherwise unreasonable in concluding that the Complainant did not cease to be an employee on May 11, 2015.

30. Having so found, and in light of the fact that the Complainant actually continued to work for the Appellants after May 11, it would be logical to conclude that the Complainant remained an employee within the meaning of the *Act* until his departure in October 2015 unless, between May 11 and October 21 of that year, it could be shown that the Complainant in some way agreed, in writing or otherwise, to become an independent contractor.

31. Absent evidence of either:

(a) a new agreement between the Appellants and the Complainant, written or otherwise, setting out the terms by which the Complainant would provide services as an independent contractor; or

(b) an express agreement between the Appellants and the Complainant, written or otherwise, to reinstate the previously terminated independent contractor agreement in effect between September 2, 2014, and November 9, 2014,

there is no basis to say that the Complainant at any time consented to become an independent contractor and to forego, after May 11, 2015, the protections afforded by the *Act*.

32. The Appellants assert, but I do not accept, that the Skype Conversation is evidence of either.

33. Having reviewed the evidence, I see no basis to conclude that the Complainant's approach to his relationship with the Appellants changed in any material way when comparing the period from March 2015 (when the Complainant's pay was, by agreement, reduced forty percent) to May 11, 2015, with the period after May 11, 2015. The nature of work, manner in which services were provided, method of communication between the Complainant and other employees of the Appellants, authority, and level of supervision all appear to have remained the same.

34. I do not accept as relevant any changes in the manner, frequency, or quantum of payments made by the Appellants to the Complainant. An employer ought not to be permitted to impose unilateral changes on an employment relationship and then use those changes as a shield to escape liability under the *Act*.

35. Accordingly, there is nothing in the Determination relating to the question of employee versus independent contract that I can properly say constitutes an error of law.

Regular Wage Calculations

36. Having concluded that the Complainant continued to be an employee after May 11, 2015, the Director went on to calculate the Complainant's entitlement to wages, compensation for length of service, and vacation pay. The Appellants object to all three.

37. The employment agreement between the Complainant and the Appellants provided for the payment of an annual salary of $90,000, or, $7,500 per month. In March 2015, the Complainant agreed to a forty percent reduction in his hours of work and wages. In the absence of evidence suggesting a further reduction of wages (either by way of agreement, notice, or pay in lieu of notice, none of which appear to exist), there is nothing unreasonable in the Director's conclusion that the monthly rate of pay for the months of June to October 2015, was $4,500, being sixty percent of $7,500.

38. The Complainant received wages equal to $11,470 between June 1 and October 15, 2015, the period for which the Complainant sought to recover outstanding wages. At $4,500 per month, the Complainant in that

time frame should have been paid $20,250. The difference, being $8,780, is what is owed. The math appears straightforward, and I cannot fault the Director's calculation.

Compensation for Length of Service

39. The Complainant commenced employment with the Appellants on November 9, 2014. That employment was terminated on or about October 21, 2015.

40. Section 63(1) of the *Act* establishes that, on termination, the Appellants become liable to pay an amount equal to one week's wages, as compensation for length of service, unless the liability is discharged for one of the reasons listed in section 63(3).

41. There is no evidence that the Complaint received one week's notice, or that he quit, retired, or was dismissed for cause.

42. That being the case, I see no reason to upset the Director's finding that the Complainant is entitled to one week's wages, and I find that the Director's calculation of that amount is both reasonable, and mathematically correct.

Vacation Pay

43. Vacation pay, according to the Director, is calculated as four percent of wages earned from November 10, 2014, to October 15, 2015, plus four percent of the amount awarded as compensation for length of service.

44. My arithmetic differs from the Director's arithmetic.

45. The Director calculates total wages for the period November 10, 2014, to May 31, 2015, to be $47,132.86.

46. Relying on the Complainant's payroll summary for the period January 1 to May 31, 2015, and (as the only source of information that I could find) the Appellants' payroll summary for the period November 10, 2014, to December 31, 2014, I arrive at the slightly higher amount of $47,232.86.

47. For the period June 1 to October 15, 2015, the Director says that wages earned are $8,780.00. Given the Director's previous findings, I believe that wages in that period should be $20,250.00.

48. Compensation for length of service is $1,038.46.

49. The total wages on which vacation pay is calculated should be $68,521.32. Vacation pay should be $2,740.85.

50. That said, I do not believe that I am entitled to or otherwise should vary the vacation pay payable, absent proper submissions from the parties on that point.

Administrative Penalties

51. The evidence is clear that, after June 1, 2015, the Appellants:

(a) failed to pay wages within the time periods stipulated in sections 17(1) and 18 of the *Act;*

(b) failed to provide the wage statements or keep adequate payroll records required under sections 27 and 28(1); and

(c) failed to pay compensation for length of service according to section 63.

52. Moreover, the Appellants failure to produce payroll records to October 15, 2015, constitutes a contravention of section 46 of the *Employment Standards Regulation*.

53. I see no error of law arising out of the Director's determination that each of these sections has been breached, and no basis to set aside the resulting, mandatory, administrative penalties.

54. In the absence of a palpable and overriding error with respect to any finding of fact, I find no error of law, and except as noted below, I conclude that the bulk of the Appellants' appeal under section 112(1)(a) of the *Act* has no reasonable prospect of success.

Did the Director violate the principles of natural justice?

55. The Appellants also challenge the Determination on the basis that the Director has failed to observe the principles of natural justice.

56. Those principles require the Director, at all times, to act fairly, in good faith, and with a view to the public interest (*Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48 at paragraph 2). Fairness, in turn, means that all parties involved have the right to notice, the right to know the case to be met and the right to answer it, the right to cross-examine witnesses, the right to a decision on the evidence, and the right to counsel (*Tyler Wilbur operating Mainline Irrigation and Landscaping*, BC EST # D196/05, at paragraph 15).

57. Issues raised in the context of the Appellants' objection to the Record with respect to the conduct of the pre-hearing conference do not amount to a breach of natural justice, and I am otherwise unable to discern in the Appellants' submissions or the Determination any argument or support for an argument that any one or more of the Appellants' rights have somehow been violated.

58. I therefore reject the appeal under section 112(1)(b) of the *Act*.

Conclusion

59. For all of these reasons, I find that the bulk of this appeal has no reasonable prospect of success. As it relates to the Director's specific calculation of vacation pay payable, however, the Tribunal should have the benefit of further submissions. In the event that the Tribunal does not receive submissions, my intention will be to vary the Determination to increase the Director's calculation of vacation pay payable to $2,740.85.

ORDER

60. Except with respect to the Director's calculation of vacation pay, I dismiss this appeal under section 114(1)(f) of the *Act*.

Rajiv K. Gandhi
Member
Employment Standards Tribunal