

An appeal

- by -

Cellular Baby Cell Phone Accessories Specialist Ltd. and B-Mobile
Telecommunication Inc.

(“Cellular Baby”)

- 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: Raewyn J. Brewer

FILE No.: 2012A/98

DATE OF DECISION: December 21, 2012

DECISION

SUBMISSIONS

Sandra Li-Seller

on behalf of Cellular Baby Cell Phone Accessories
Specialist Ltd. and B-Mobile Telecommunication Inc.

OVERVIEW

1. Between June 3, 2010, and March 28, 2011, seven former employees of Cellular Baby Cell Phone Accessories Specialist Ltd. and B-Mobile Telecommunication Inc. (“Cellular Baby”) filed complaints with the Director of Employment Standards (the “Director”). The employees alleged that Cellular Baby had contravened the *Employment Standards Act* (the “*Act*”) in failing to pay them regular wages; commissions and bonuses and vacation pay on those commissions; as well as overtime and statutory holiday pay. On July 25, 2012, a delegate (the “Delegate”) on behalf of the Director issued a determination (the “Determination”) ordering Cellular Baby to pay the employees a total of \$22,943.69, representing wages, vacation pay, withheld wages, overtime wages, statutory holiday pay and accrued interest. The Director also imposed seven administrative penalties in the total amount of \$3,500.00 for contraventions of sections 17, 18, 21, 40, 46, and 58 of the *Act* and section 46 of the *Employment Standards Regulation*, for a total amount payable of \$26,443.69.
2. Cellular Baby appealed the Determination on September 4, 2012, alleging the Director had erred in law and failed to observe the principles of natural justice. Cellular Baby requested that the Tribunal cancel the Determination or refer it back to the Director. Cellular Baby also requested a suspension of the Determination pursuant to section 113 of the *Act*. The suspension request was granted in a separate Tribunal decision on October 5, 2012 (*Cellular Baby*, BC EST # D106/12).
3. On November 21, 2012, after thoroughly reviewing Cellular Baby’s written submissions and the section 112(5) “record” that was before the Delegate when he was making the Determination, the Tribunal notified the parties that the appeal would not be summarily dismissed under section 114 of the *Act*, but that the Tribunal would consider whether the grounds of appeal have been met without seeking further submissions from the respondents or the Director.
4. On November 26, 2012, Cellular Baby requested a settlement meeting pursuant to Rule 13 of the Tribunal’s *Rules of Practice and Procedure*. The Tribunal canvassed the parties and there was no agreement among all the former employees to participate in a settlement meeting, nor did the Director wish to participate. While the parties chose not to participate in Cellular Baby’s preferred “single settlement meeting with all Respondents with the goal of resolving all issues in dispute”, the Tribunal did arrange for a settlement meeting for those employees who were interested on December 10, 2012. Mr. Paul Tai attended this meeting but a settlement was not reached. However, on December 8 or 9, 2012, Cellular Baby settled directly with Mr. William Shaw.

ISSUE

5. There are two issues before the Tribunal: (1) Did the Director err in law?; and, (2) Did the Director fail to observe the principles of natural justice?

FACTS

6. It is unnecessary to engage in a substantial recitation of the facts of this case. Cellular Baby's appeal is relatively limited in scope; therefore, I reference the analysis and findings of fact made by the Delegate that are relevant to the appeal before me in my analysis of the appeal.
7. The Delegate had before him the arguments and evidence of seven complainants, each a former employee of Cellular Baby. The Delegate identified four key issues from among the various individual allegations: (1) either the withholding, cancellation, stop payment or the claw-back of commissions and bonuses that resulted in the non-payment of earned wages to the complainants (the "Commissions Issue"); (2) the non-payment of vacation pay on previously paid commissions and bonuses; (3) the improper payment of overtime; and (4) the improper payment of statutory holiday pay.
8. Cellular Baby exchanged extensive written submissions with the Delegate throughout the investigative process and produced a considerable amount of documentary evidence. I have thoroughly reviewed the submissions and the evidence that was before the Delegate. Cellular Baby's legal counsel represented Cellular Baby throughout most of the investigation (including preparing all written submissions to the Delegate) and the entire appeal process.
9. Following a lengthy investigation, the Delegate concluded that Cellular Baby had failed to pay wages (commissions and bonuses), vacation pay on bonuses, overtime wages and vacation pay in the amount set out above. The Director also determined that Cellular Baby had failed to produce payroll records as required under the *Act*.

SUBMISSIONS OF CELLULAR BABY

10. The appellate jurisdiction of the Tribunal is set out in subsection 112(1) of the *Act*, which reads:
 - 112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:
 - (a) the director erred in law;
 - (b) the director failed to observe the principles of natural justice in making the determination;
 - (c) evidence has become available that was not available at the time the determination was being made.
11. Cellular Baby has requested that the Determination be cancelled or referred back to the Director on the first two grounds set out in section 112.
12. Cellular Baby makes two arguments that the Director erred in law. First, that the Director considered improper factors and evidence in assessing Cellular Baby's credibility. Second, that the Director erred in law when he did not request that Cellular Baby provide the calculations as to how it arrived at the amount of commissions payable to the former employees.
13. Cellular Baby's first argument is that the Director erred in law by considering improper factors and evidence in assessing Cellular Baby's credibility. Cellular Baby provides two specific instances as outlined below. Additionally to support this argument, Cellular Baby highlights for the Tribunal that: (1) credibility was a major issue in the dispute; (2) the Delegate's findings with respect to credibility had a significant effect on the

result, including dismissing Cellular Baby's position on the Commission Issue; and (3) in its view, the error resulted in serious prejudice to Cellular Baby.

14. First, Cellular Baby includes in their submissions to the Tribunal the following excerpt from the Determination to assert that the Delegate erred in law in making credibility findings against Cellular Baby based on evidence that was not accepted or ruled on one way or the other:

Adding to the negative assessment of the employer's credibility related to the dissemination of e-mails from head office or the owner, is the position of Messrs. Huang and Tai. They state categorically that some of the e-mails supplied to the Delegate were fabricated and not forwarded to them as alleged by the employer. Mr. Tai said that he was able to demonstrate this to the Board of Referees [, Employment Insurance] and he explained how he was able to recognize fraudulently produced e-mails by the characters stated in the heading of each e-mail... The Delegate does not have the technological background to rule one way or the other on these allegations... [emphasis added by the Tribunal]

15. Second, in Cellular Baby's view, when the Delegate refers to a conversation he had with legal counsel for Cellular Baby, "the implication is that the Director considers this conversation as having a negative effect on the Appellant's credibility." The conversation at issue is referenced in the Determination as follows:

As late as June 14, 2012, the Delegate contacted Mr. Tony Kwan ("Mr. Kwan"), the employer's legal counsel, to suggest a without prejudice meeting in order to review all matters and to determine whether settlements could be reached in whole or part. Mr. Kwan was in favour of the idea but he stated that he first had to contact his client for directions. He committed to call the Delegate the next day but no contact has been received from either Mr. Kwan or his client up to and including the drafting of this Determination.

16. Moreover, "to compound this error in law," Cellular Baby submits that the conversation as relayed by the Delegate is incorrect and that there must have been a miscommunication between the Delegate and Cellular Baby's legal counsel, Mr. Kwan. The submissions then set out that during the conversation Mr. Kwan advised the Delegate that he would be away for three weeks beginning June 22, 2012. As such, Mr. Kwan advised that someone from Cellular Baby would contact the Delegate directly to arrange a settlement meeting directly in his absence. According to the submissions, one of Cellular Baby's employees left several messages for the Delegate but before a settlement meeting could be arranged, the Determination was issued.

17. Cellular Baby's second main argument is that the Director erred in law because Cellular Baby was not asked to provide the calculations as to how it arrived at the amount of commissions payable to the former employees. Rather than asking for how Cellular Baby arrived at the commissions payable amounts, the Delegate calculated the commissions on his own and in some cases awarded amounts greater than those claimed by the complainants.

18. Cellular Baby's submissions that the Director failed to observe the principles of natural justice in making the Determination are twofold.

19. First, according to Cellular Baby, it was not afforded procedural fairness in that the process implemented by the Director in the circumstances did not sufficiently disclose the case to be met. Cellular Baby makes two arguments to support this submission: first, Cellular Baby did not receive a reasonable opportunity to respond with regards to evidence submitted by the complainants, particularly with respect to the allegations regarding the fabricated emails of which it was not advised. And second, Cellular Baby should have (a) been given the opportunity to meet with the Delegate to explain the records and documents or (b) be afforded an oral

hearing, because of the complexity of the case, the volume of documents and records that they were required to produce, and the technical nature of its business.

20. Cellular Baby makes one final natural justice argument. It argues that the Director breached the principles of natural justice in penalizing it for the without prejudice conversation because “[w]ithout prejudice conversations are just that – without prejudice – and they should not be relied on to penalize or benefit any party.”

ANALYSIS

21. The Tribunal has consistently indicated that the burden in an appeal is on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds.

Did the Director err in law?

22. The Tribunal has adopted the definition of “error of law” set out by the BC Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.) in a number of Tribunal decisions including: *J.C. Creations Ltd. (c.o.b.) Heavenly Bodies Sport*, BC EST # RD317/03. In the *Gemex* decision, the Court of Appeal outlined the following reviewable types of errors of law:

1. a misinterpretation or misapplication of a section of a statute;
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. exercising discretion in a manner which is wrong in principle.

23. Relevant to the appeal before me is that issues about the weight to be given to certain evidence and about credibility are questions of fact, not law (see *Gemex*). The *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law. An error of law relating to the facts might be demonstrated where a delegate has made findings of fact without any evidence or where the evidence does not provide any rational basis for the finding made; it is perverse or irrational. The occasions on which an alleged error of fact amounts to an error of law are few (see *Britco Structures Ltd.*, BC EST # D260/03).

24. The crux of Cellular Baby’s first “error of law” argument is that the Delegate erred in finding Cellular Baby’s credibility wanting during the investigation. I agree with Cellular Baby that credibility was a major issue in the dispute and impacted the results; however, I disagree that the factors and evidence that the Delegate considered in assessing Cellular Baby’s credibility amount to an error of law.

25. Cellular Baby includes in its submissions a lengthy excerpt from the Determination to support its assertion that the Delegate erred in law in making credibility findings against Cellular Baby based on evidence that was not accepted or ruled on one way or the other.

26. In my view, Cellular Baby’s submissions on this point neglect that the Delegate explicitly states the context for his comment regarding dissemination of emails from head office is broader than the positions of Messrs. Huang and Tai. The context of the excerpt reproduced above is the Delegate’s finding that Cellular Baby did not produce an employee/policy manual or single source document that included clear, current and transparent guidelines and directions to be followed in order to earn and receive payment for commissions

and bonuses, particularly in light of the admission by Cellular Baby that the policies were “very arbitrary” in nature and evidence that they were inconsistently applied. Moreover, the Delegate requested that Cellular Baby provide “proof that all affected complainants received e-mails related to the changes and alterations to the employer’s policies and commissions.” Cellular Baby responded to this request by stating that confidentiality concerns meant the emails sent did not disclose the recipients but they were willing to provide evidence on an individual basis. The challenge for the Delegate and the complainants with this response was that without an employee/policy manual or single source document, they were operating in the dark and did not know what to ask for. Several of the paragraph’s sentences that were left out of the excerpt in Cellular Baby’s submissions support this contextual reading:

Each of these [e-mails] is significant in its own right but collectively, if the complainants did not receive them, then fair treatment has not been extended to them. The Delegate does not have the technological background to rule one way or the other on these allegations but the consequences of not knowing much of their own compensation package and how it operated has been frequently relayed to the Delegate and places the employer’s credibility at risk.” [emphasis added]

27. The Delegate was obliged to and did consider, evaluate and weigh the evidence and arguments. As much of the evidence and arguments of the parties was in conflict, as the investigator of fact, the Delegate was obliged to make credibility findings. The Delegate arrived at his conclusions based on his review of the contradictory evidence of the parties and his assessment of the credibility and internal consistency of the evidence of the parties based on the criteria and direction set out by the British Columbia Court of Appeal in *Faryna v. Chorny* (1952) 2 D.L.R. 352. While Cellular Baby clearly disagrees with his conclusions, the Delegate provided a reasoned analysis for preferring the complainants’ evidence and arguments in the Determination and appear to be based on relevant considerations, including internal contradictions and inconsistencies in the evidence provided by Cellular Baby; evidence provided by Cellular Baby that lacked in detail; shifting and conflicting arguments made by Cellular Baby; clear evidence of violations of the *Act* by Cellular Baby; and repeated and unanswered requests for certain of Cellular Baby’s records.
28. Regarding the Delegate’s reference to his discussion with counsel regarding possibly settling the claims through voluntary settlement, there is also nothing in the Determination to suggest that this reference had a negative impact on the Delegate’s assessment of Cellular Baby’s credibility. I address this argument more fully in the natural justice analysis below.
29. Thus, I am not persuaded that the Delegate erred in law in reaching his conclusions. This is not a case where findings of fact were made by the Delegate without any evidence, or based on a view of the facts that could not reasonably be entertained based on the evidence. The Delegate received extensive submissions and documentary evidence from the parties, and made assessments of credibility, based on the principles in *Faryna v. Chorny*.
30. Nor am I persuaded that the Delegate erred in law when he calculated the commissions payable for the complainants, even in those cases where he made awards greater than those claimed by the complainants. The Delegate made repeated attempts to access Cellular Baby’s records to assist him in resolving the Commissions Issue, including “commission policies and practices, including the structure and payment schedule covering each of the employees in the time frames above. This includes the amounts paid, and the amount withheld and the dates of same for each complainant.” Cellular Baby is statutorily compelled to keep payroll records and produce those records when requested. It is entirely unconvincing for Cellular Baby to now argue before the Tribunal that because the Delegate did not ask them to provide the calculations for the amounts they claimed they owed employees, the Delegate erred in law. Cellular Baby had ample opportunity to provide calculations, rationale or records to support the amounts it eventually provided to the Delegate. The Director is given remedial powers under section 79 of the *Act* and in my view the Delegate exercised

these powers appropriately. I have reviewed in detail each calculation made by the Delegate and find them reasonable and supportable on the evidence before him.

Did the Director fail to observe the principles of natural justice?

31. Ground 112(b) of the *Act* requires the Director to observe the principles of natural justice in making the Determination. In *Re: 607730 B.C. Ltd. (c.o.b. English Inn & Resort)*, BC EST # D055/05, the Tribunal explained that principles of natural justice are, in essence, procedural rights ensuring the parties have an opportunity to know the case against them, the right to present their evidence, the right to receive reasons for the decision, and the right to be heard by an independent decision-maker. The burden to establish an infringement rests with the party asserting the breach of the principles of natural justice; in this case, Cellular Baby (See *Dusty Investments Inc. d.b.a. Honda North*, BC EST # D043/99 (Reconsideration of BC EST # D101/98), and *Imperial Limousine Services Ltd.*, BC EST # D014/05).
32. In essence, Cellular Baby argues that they were not given an opportunity to know the case against them nor to present their evidence.
33. A thorough review of the record shows that Cellular Baby had ample opportunity to know the case against it and present evidence in support of its position. Throughout the investigative process, the record supports that the Delegate made “meaningful disclosure of the details of the complaints in order to make the opportunity to respond reasonable and effective” (see *Cyberbc.Com AD & Host Services Inc. (c.o.b. 108 Temp and La Pizzaria)*, BC EST # RD344/02). The Delegate clearly and in detailed written correspondence made Cellular Baby aware of the issues and evidence in the various complaints. Additionally, the Delegate communicated his initial findings to Cellular Baby in a detailed letter of August 31, 2011, including his assessment of Cellular Baby’s credibility.
34. Moreover, regarding the assertion that Cellular Baby did not receive a reasonable opportunity to respond with regards to the evidence submitted by the complainants, again, the record supports the opposite conclusion. The following illustrate that Cellular Baby was given ample opportunity to respond to the complaints against it:
- Throughout the investigative process the Delegate gave repeated extensions to Cellular Baby to provide their submissions and evidence;
 - The Delegate sought all relevant information from Cellular Baby, including asking clarifying and pointed questions of it to illicit more information to assist him in his decision-making (i.e. “clear and dated evidence regarding policy changes”); and
 - Similarly, the Delegate made repeated demands for records, particularly focusing on the Commission Issue (i.e. policies, practices, amounts paid, amounts withheld etc).
35. With respect to Cellular Baby’s assertion that it did not have a reasonable opportunity to respond to the allegations regarding the emails, given my detailed assessment on this issue, I am not persuaded Cellular Baby has established that the Delegate breached the principles of natural justice in not advising Cellular Baby of this allegation.
36. In response to Cellular Baby’s argument that it should have been afforded an oral hearing, the Tribunal has consistently held that section 77 of the *Act* does not require an oral hearing to be held (see *Milan Holdings Ltd.*, BC EST # D313/98; *J.C. Creations*, supra). Once a complaint has been filed, the Director has both an investigative and an adjudicative role. When investigating a complaint, the Director is specifically directed to

give the “person under investigation” (most often the employer) “an opportunity to respond” (section 77). At the investigative stage, the Director must, subject to section 76(2), enquire into the complaint, receive submissions from the parties, and ultimately make a decision that affects the rights and interests of both the employer and the employee. This is the process that the Delegate followed and I am not persuaded that the Director breached the principles of natural justice by not holding an oral hearing.

37. In response to Cellular Baby’s argument that it should have been given the opportunity to meet with the Delegate to explain the records and documents, as outlined above, the Delegate gave Cellular Baby ample opportunity to produce the documents and materials and to clarify any technical or complex issues as it saw fit. Likewise, there are multiple references in the materials to telephone conversations between the Delegate and Cellular Baby; and the Delegate includes his phone number on the correspondence offering to discuss the *Act* or the issues with Cellular Baby. Instead, throughout the process Cellular Baby chose to respond to the complaints through a series of written correspondences from their legal counsel that, for the most part, refuted all allegations made by the former employees, even after the preliminary findings of the Delegate in August 2011.
38. Cellular Baby makes one final natural justice argument. It argues that reference to the conversation that the Delegate had with legal counsel regarding potential voluntary settlement breached the principles of natural justice. Cellular Baby states in its submissions on this issue that this conversation should not have been referenced because “[w]ithout prejudice conversations are just that – without prejudice – and they should not be relied on to penalize or benefit any party.”
39. Not only is the crux of Cellular Baby’s argument not clear to me, but I also find nothing in the submissions or record before me to support this natural justice argument. First, the Delegate is not disclosing in the Determination any matters discussed during a voluntary settlement, which the “without prejudice” would attach to, as a voluntary settlement conference prior to the Determination did not occur. Rather, the Delegate is simply stating the fact that throughout the process, he set out “the voluntary settlement route” as an option available to Cellular Baby, including immediately before issuing the Determination. The *Act* specifically contemplates that the Director may assist in settling a complaint (s. 78(1)), therefore the Delegate acted appropriately in this regard. I am sympathetic to Cellular Baby if in fact it was interested in exploring this option immediately prior to the issuance of the Determination and a miscommunication occurred. However, I also note that the timing of matters does not assist Cellular Baby in its argument. Between June 14, 2012, when the Delegate contacted Mr. Kwan and June 22, 2012, when Mr. Kwan began his holiday, there were five business days, which provided counsel with ample opportunity to follow-up with the Delegate or Cellular Baby. Similarly, there were seven business days between Mr. Kwan’s return from his holiday and the issuance of the Determination, in which counsel could have confirmed with the Delegate or his client the status of arranging a settlement meeting.
40. Second, if Cellular Baby’s argument is that the “implication” of this statement is that the Delegate was biased or prejudiced against Cellular Baby because Cellular Baby did not attempt to settle the complaints, there is no evidence – let alone clear evidence as the law requires – that would justify a conclusion that the Delegate had pre-judged Cellular Baby’s complaint (see *Dusty Investments*, supra; *A.B. Lumber Co. Ltd. and North Coast Forest Products Ltd. v. B. C. Labour Relations Board and another*, B.C.J. No. 1858, August 7, 1998, Vancouver Registry No. A980541). Actual bias or a reasonable apprehension of bias is not demonstrated by simply showing the Director did not accept the position of Cellular Baby and reached other conclusions on the facts (*Dusty Investments*, supra).
41. I find the burden on Cellular Baby has not been met; this ground of appeal is also dismissed.

ORDER

42. Pursuant to section 115(1) of the *Act*, I order that this appeal be dismissed and that the Determination dated July 25, 2012, be confirmed, together with any interest that has accrued under Section 88 of the *Act*.

Raewyn J. Brewer
Member
Employment Standards Tribunal