Employment Standards TRIBUNAL

An appeal

- by -

Eyad Al Ali
("Ali")

- 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.: 2014A/149

DATE OF DECISION: December 23, 2014

DECISION

SUBMISSIONS

Eyad Al Ali — on his own behalf

INTRODUCTION

1. On October 1, 2014, a delegate of the Director of Employment Standards (the "delegate") issued a Determination under section 79 of the *Employment Standards Act* (the "*Act*"). By way of the Determination, the delegate dismissed the unpaid wage complaint filed by the present appellant, Eyad Al Ali ("Ali"). Mr. Ali now appeals the Determination on the grounds that the delegate erred in law and failed to observe the principles of natural justice in making the Determination (subsections 112(1)(a) and (b) of the *Act*).

2. At this juncture, I am considering whether this appeal should be summarily dismissed as having no reasonable prospect of succeeding (see subsection 114(1)(f)). In the event the appeal is not summarily dismissed, the respondent parties will be notified and the Tribunal will ask them to make written submissions with respect to the issues raised by this appeal.

3. In determining whether I should summarily dismiss this appeal, I have reviewed the Determination, the delegate's accompanying "Reasons for the Determination" (the "delegate's reasons") issued concurrently with the Determination, Mr. Ali's appeal submissions and the subsection 112(5) record that was before the delegate.

BACKGROUND FACTS

4. Mr. Ali worked as a "project manager" with Turnbull Construction Services Ltd. ("Turnbull Construction") from May 31, 2010, until December 20, 2013, when he, according to his complaint form, voluntarily quit. He subsequently claimed that he was entitled to $31,110 as "additional compensation for extra hours billable to the company's clients". This dispute was not resolved between the parties directly and was the subject of a complaint hearing before the delegate on August 20, 2014, at which Mr. Ali appeared on his own behalf and Turnbull Construction's president, Mr. Grant Turnbull, appeared on behalf the company.

5. The basis for Mr. Ali's claim has its genesis in an e-mail dated February 22, 2010, from Mr. Turnbull to Mr. Ali during the pre-employment phase of their relationship. Mr. Turnbull stated in this e-mail:

> I do not offer a bonus system as I find this to be more detrimental than beneficial. What we do in lieu of a bonus system is compensate all staff at a higher rate of pay (1.5 times base salary converted to an hourly rate) than base salary for any extra hours worked that are billable to the Client over and above the base level of hours. This system is beneficial to the PMs [project managers] and to the company. This is paid out once a year, usually in August, after our company year end which is at the end of July. The range of this additional compensation over the years has ranged from zero from some individuals to $25,000 for others, with the average being in the $5000 to $8000 range.

6. Turnbull Construction and Mr. Ali entered into a written "Employment Agreement" on April 28, 2010, that provided for Mr. Ali's start date on May 31, 2010. This agreement is quite detailed, comprising some 13 single-spaced pages, and includes a 6-month probationary period, conflict of interest and confidentiality provisions, various restrictive covenants and termination provisions. The most salient provisions, for purposes of this appeal, are as follows:

7. For the services required by the Employee as required by this Agreement [*sic*], the Employer will pay the Employee a salary of $95,000.00 Canadian per year. This compensation will be payable on the 15th of each month and the last day of each month while this Agreement is in force. The Employer is entitled to deduct from the Employee's Compensation any applicable deductions and remittances as required or permitted by law.

8. The Employee understands that the Employee's compensation as provided in this Agreement will constitute the full and exclusive monetary consideration and compensation for all services performed by the Employee and for the performance of all of the Employee's promises and obligations in this Agreement.

9. The Employee understands and agrees that any additional compensation to the Employee will rest in the sole discretion of the Employer and that the Employee will not earn or accrue any right to additional compensation by reason of the Employee's employment.

…

11. The Employer agrees to permit a reasonable degree of flexibility in work hours. In cases where extra time is worked in a day or a week, the Employee waives any right to overtime pay or to equivalent time off in place of overtime pay.

…

38. The time specified in the notice [of termination] by either the Employee or the Employer may expire on any day of the month and upon the date of termination the Employer will forthwith pay to the Employee any outstanding portion of the wage, accrued vacation, if any, calculated to the date of termination…

…

46. Any amendment or modification of this Agreement or additional obligation assumed by either party in connection with this Agreement will only be binding if evidenced in writing signed by each party or an authorized representative of each party.

…

50. Regular hours of work will be forty (40) hours per week from 8:00 a.m. to 5:00 p.m., Monday to Friday with a one-hour lunch break. The Employer will, within reason, be flexible in terms of actual daily start and finish times, as long as the minimum of forty (40) hours per week is achieved.

…

54. The Employee is expected to perform all duties efficiently such that a minimum of 1,650 Client billable hours are produced annually.

…

64. This Agreement constitutes the entire agreement between the parties and there are no further items or provisions, either oral or written. As of the effective date of this Agreement, this Agreement supersedes all other agreements between the parties. The parties to this Agreement stipulate that neither of them has made any representations with respect to the subject matter of this Agreement except such representations as are specifically set forth in this Agreement. Each of the parties acknowledges that it has relied on its own judgment in entering into this Agreement.

7. As recorded in the delegate's reasons, Turnbull Construction operated on a August 1 to July 31 fiscal year and Mr. Ali's billable hours and the supplementary compensation paid to him during his employment tenure was as follows:

Fiscal Year	Client Billable Hours	Hours > 1,650	Compensation Paid
May 31 (commencement date) – July 31, 2010	Not stated	0	$0
Aug. 1, 2010 – July 31, 2011	1871	221	$15,809.49
Aug. 1, 2011 – July 31, 2012	1604.75	0	$0
Aug. 1, 2012 – July 31, 2013	2028	378	$13,750
Aug. 1, 2013 – Dec. 20, 2013 (last day of employment)	775.5	0	$0

8. On February 8, 2014, Mr. Ali sent an e-mail to Mr. Turnbull requesting clarification regarding his supplementary compensation and setting out his position that he was entitled to additional pay. Mr. Turnbull responded by e-mail on March 4, 2014, setting out Turnbull Construction's position that no additional compensation was due. With respect to any additional compensation for the final (partial) fiscal year of employment, Mr. Turnbull stated:

> For the period August 1, 2013 to your last day on December 20, 2013, you will not be considered for any extra hours payment because of your resignation, and because the company fiscal year does not end for another 7+ months from your resignation date.

9. This dispute could not be resolved and, accordingly, ultimately was the subject of a complaint hearing before the delegate.

10. The delegate summarized Mr. Ali's position at the complaint hearing as follows (page 3):

> Mr. Ali's position is that his employment agreement with Turnbull was that he would be paid a base salary plus extra remuneration for hours worked in excess of 1650 billable hours per year. Mr. Ali's position is that all billable hours worked in excess of 1650 would be compensated by converting his annual salary to an hourly rate and then paying 1.5 times this hourly rate for the hours in excess of 1650.
>
> Mr. Ali did not work a full year since the last time he was paid for working additional billable hours. His position is that the amount of billable hours required to be worked to achieve the additional remuneration should be pro-rated to reflect the time period he worked. He states that if this is done he will reach the threshold and will be entitled to additional wages.

11. Turnbull Construction's position at the complaint hearing was that Mr. Ali was not entitled to any additional compensation because: i) he was a "manager" and thus exempted from the overtime pay provisions of the *Act* (see subsection 34(f), *Employment Standards Regulation*); ii) he was a "professional engineer" and thus exempted from the overtime pay provisions of the *Act* (see subsection 31(f), *Employment Standards Regulation*); and iii) that, in any event, Mr. Ali was not entitled to any further compensation.

12. The delegate did not determine whether or not Mr. Ali was a "manager" since this issue was "irrelevant" because Mr. Ali's claim was for "regular wages" rather than "overtime" wages. The delegate rejected Turnbull Construction's second argument because Mr. Ali was not, in fact, licenced under the relevant legislation. Finally, the delegate rejected Mr. Ali's position that he had a contractual entitlement to further compensation (at pages 5-6):

> Mr. Ali's employment period in the last fiscal year of employment was August 1, 2013 to December 20, 2013. In this period he worked a total of 775.5 billable hours, which is well short of the 1650 hour threshold. Mr. Ali's argument is that the threshold should be pro-rated to reflect the shorter period. There is no evidence to suggest that should happen. All the evidence before me confirms that extra remuneration is paid for billable hours in excess of 1650 in one fiscal year. Mr. Ali has not worked in excess of 1650 billable hours in last fiscal year of employment. [*sic*] I find that Mr. Ali is not entitled to any further wages under the Act.

FINDINGS AND ANALYSIS

13. Although Mr. Ali checked off the "natural justice" ground of appeal on his Appeal Form, his submissions do not raise any matters that could be fairly characterized as suggesting that the delegate failed to observe the principles of natural justice in making the Determination. In essence, Mr. Ali says that the delegate's alleged "error of law" also constitutes a failure to observe the principles of natural justice.

14. Mr. Ali says that the delegate erred in law in failing to conclude that he was entitled to be paid additional compensation for his final partial year of employment by pro-rating his hours worked against the 1650-hour threshold. He says that evidence corroborating his position is found in Mr. Turnbull's March 4, 2014, e-mail where he stated:

> Your start date was May 31, 2010. Your billable hours in June and July of 2010 were not sufficient such that if prorated over a 12 month period, the annual target of 1650 hours (as set out in the Employment Agreement) would not have been reached. This is normal during the first months of someone's employment during the probation period.

15. Mr. Ali submits that this statement "is clear evidence that should have been considered…[and that the delegate] should have applied the same principal [*sic*] to my last period of employment…from August 1, 2013 to December 20, 2014". [*sic* – Mr. Ali's employment ended, when he quit, on December 20, 2013].

16. I am not persuaded that this reference in an e-mail, written after the employment relationship ended and in response to an e-mail from Mr. Ali in regard to a disputed unpaid wage claim, constitutes clear evidence that supports Mr. Ali's view of his contractual entitlements.

17. First, I find that the statement is somewhat ambiguous in that it could equally be taken as a simple statement that Mr. Ali did not receive any supplementary compensation during his first partial fiscal year of employment because he fell short of the 1650-hour threshold.

18. Second, if some sort of non-discretionary bonus scheme was to be included as part of Mr. Ali's compensation arrangements, that scheme, under paragraph 46 of the employment contract had to be set out in a written agreement signed by the parties – there is no such agreement.

19. Third, the parties' detailed written employment contract clearly states that any supplementary compensation "will rest in the sole discretion of the Employer" and that the salary paid and other benefits provided for in the agreement "will constitute the full and exclusive monetary consideration and compensation for all services performed by the Employee". "Wages" are defined in section 1 of the *Act* as including "salaries…for work" but do not include "money that is *paid at the discretion of the employer* and is not related to hours of work, production or efficiency" (my *italics*). In other words, discretionary bonuses, even if consistently paid from one year to the next (and that is not the case here), are not recoverable as wages under the *Act*.

20. Fourth, the terms of Mr. Ali's compensation arrangements are set out in the written employment contract which "constitutes the entire agreement between the parties". Mr. Ali's position that he was entitled to a non-discretionary annual bonus based on representations he says were made to him before he was hired stands in marked contrast to the express terms of his employment agreement and, in particular, paragraphs 7, 8, 9, 46 and 64 of that agreement.

21. Fifth, it should be recalled that Mr. Ali voluntarily quit his employment thus triggering paragraph 38 of the Employment Agreement. Having quit, Turnbull Construction's obligation was to "forthwith pay to the Employee any *outstanding portion* of the wage, accrued vacation, if any, *calculated to the date of termination* (my *italics*). As of December 20, 2013, Mr. Ali did not have an *outstanding* entitlement (indeed, he had no *entitlement* at all) to be paid any additional compensation based on exceeding the 1650 billable hour annual (fiscal year) threshold.

22. In sum, I am not persuaded that the delegate misinterpreted or misapplied the parties' Employment Agreement in determining that Mr. Ali did not have a crystallized entitlement to any additional compensation when he quit his employment on December 20, 2013.

23. Mr. Ali's appeal documents also raise another issue, one that does not appear to have been squarely raised in his complaint filed April 24, 2014, or before the delegate at the complaint hearing. On that basis alone, this ground of appeal could be summarily dismissed. However, merely for the sake of completeness, I shall briefly address it.

24. Mr. Ali says that although he received, as noted in the above table, $13,750 as additional compensation for the fiscal year August 1, 2012 – July 31, 2013, he should have, in fact, been paid $29,722.14 for this period thus leaving a balance due of $15,972.14. Mr. Ali says that the full amount "became payable in July/August 2013". As previously discussed, any "additional compensation" is not payable under the parties' employment contract and does not constitute "wages" that are recoverable under the *Act*.

25. In my view, this appeal has no reasonable prospect of succeeding and, therefore, must be summarily dismissed.

ORDER

26. Pursuant to subsection 114(1)(f) of the *Act*, this appeal is dismissed and pursuant to subsection 115(1)(a) of the *Act* the Determination is confirmed as issued.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal