Employment Standards TRIBUNAL

Citation: Shirley Jones (Re)
2018 BCEST 75

An Application for Reconsideration

- by -

Shirley Jones
(the "Applicant")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

PANEL: Kenneth Wm. Thornicroft

FILE No.: 2018A/81

DATE OF DECISION: August 2, 2018

DECISION

SUBMISSIONS

Shirley Jones — on her own behalf

OVERVIEW

1. Shirley Jones (the "Applicant") applies under section 116 of the *Employment Standards Act* (the "*ESA*") for reconsideration of 2018 BCEST 65 (the "Appeal Decision"). In my view, this application does not pass the first stage of the *Milan Holdings* test (see *Director of Employment Standards*, BC EST # D313/98) and, accordingly, the application must be dismissed. My reasons now follow.

BACKGROUND FACTS

2. The Applicant filed an unpaid wage complaint against her former employer. This complaint was investigated by Rachael Larson, a delegate of the Director of Employment Standards (the "delegate"). On January 26, 2018, the delegate issued a Determination dismissing the complaint because "I have determined that the [*ESA*] has not been contravened and no wages are outstanding". The delegate concurrently issued "Reasons for the Determination" (the "delegate's reasons") in which she set out her findings in greater detail.

3. In short, the Applicant alleged that her employer's "time clock" records were inaccurate and that she had been underpaid – the delegate rejected that submission. The Applicant believed that the employer's "time clock" – employees punch in and punch out each shift – constantly malfunctioned, but she presented no evidence to corroborate her belief.

4. The Applicant appealed the Determination, alleging that the delegate failed to observe the principles of natural justice in making the Determination (subsection 112(1)(b) of the *ESA*). By way of the Appeal Decision, Tribunal Member Roberts (the "Tribunal Member") rejected the Applicant's assertion that there had been a breach of the principles of natural justice (see Appeal Decision, paras. 25 – 26). The Appeal Decision also briefly addressed some other matters, not germane to natural justice, that the Applicant raised in her appeal documents and, in each case, found these matters had no legal merit.

THE APPLICATION FOR RECONSIDERATION

5. In her Application for Reconsideration, the Applicant states: "It is not my contention that the Director failed to observe the principles of natural justice in making the Determination it is more that hours of work are based on the numbers generated by a time clock and the computing of numbers calculated through software on computers and input" [*sic*]…The time clock punch times do not calculate accurately…my calculations clearly show the time clock gives different amounts of time worked…In the case of any overpayment(s) from [my employer] in hours worked should not negate or avoid investigations of time clock, computer, software or extraneous other to give different results in calculations of actual time worked" [*sic*].

6. Although the Applicant now says that she did not seek to appeal on natural justice grounds, that ground of appeal was the only ground she noted on her Appeal Form. However, I also think it fair to say that her appeal documents raised an alleged "error of law" in that the delegate's finding that she was not owed any wages was incorrect.

7. A finding of fact can only amount to an error of law if that factual finding is wholly devoid of any evidentiary foundation. In this case, the delegate was very much alive to the Applicant's concern regarding whether her wages had been correctly calculated. The delegate noted that the Applicant "provided no evidence to support her claim that the time clock system had malfunctioned" (delegate's reasons, page 6). The delegate's reasons continued (pages 6 – 7):

> [The Applicant's] records generally show the hours she was scheduled to work while the Employer's records show her exact start and finish times. [The Applicant's] own evidence of her pay period by pay period earnings show that, in many cases, she worked and was paid for more hours that what she was scheduled…
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> …
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> I find it reasonable that the Employer paid [the Applicant] according to the hours she actually worked, as reflected in her punch in and punch out times and that this accounts for the discrepancies between [the Applicant's] records of what she felt she should have been paid and what she was actually paid. There is simply no evidence that the Employer's time clock system of reporting hours had malfunctioned. [The Applicant] does not dispute that the Employer paid her for every minute that she worked according to her punch in and punch out times, rather she alleges that some of her punch in and punch out times were wrong. Without any evidence that the punch in and punch out times were wrong, I do not accept that they were incorrect.
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> I find that [the Applicant] is not entitled to any further regular or overtime wages.

8. The Applicant specifically challenged these latter findings in her appeal submission: "I have found total differences when adding punch times throughout the days on many occurrences. These time differences add up to actual pay amount owing to me". The problem, of course, was that the Applicant was unable to provide any evidence to support her assertion that there were, in fact, time clock errors that resulted in her being paid less wages than she was entitled to receive.

9. In the Appeal Decision, the Tribunal Member noted that the Applicant's claim for additional unpaid wages was fundamentally the same claim that was considered – and properly rejected – by the delegate (para. 29):

> In essence, Ms. Jones' argument is that the delegate erred in concluding that she was paid all wages she was statutorily entitled to. I find that the delegate fairly reviewed all of the evidence before her and came to a reasoned conclusion on that evidence. While Ms. Jones alleged various computer errors, some of which Dollarama acknowledged, the delegate determined that there was insufficient evidence to support a conclusion that those errors materially affected what Ms. Jones was paid.

10. The present reconsideration application is simply an unvarnished attempt to revisit the wage entitlement issue – an issue that was addressed in the Determination and once again on appeal. I see no basis for reopening this matter in the absence of any credible evidence that the whatever errors that may have occurred resulted in the Applicant being paid less than she was entitled to be paid. Indeed, to

the extent that there may have been some relatively trivial errors, the evidence before the delegate was that these quite minor errors generally resulted in very modest wage overpayments.

ORDER

11. Pursuant to section 116(1)(b) of the *ESA*, the application for reconsideration of the Appeal Decision is refused and the Appeal Decision is confirmed as issued.

Kenneth Wm. Thornicroft
Panel
Employment Standards Tribunal