Employment Standards TRIBUNAL

Citation: Shelley Lynn Fisher
2018 BCEST 62

An appeal

- by -

Shelley Lynn Fisher
("Ms. Fisher")

- of a Determination issued by -

The Director of Employment Standards

pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

PANEL: Carol L. Roberts

FILE NO.: 2018A/22

DATE OF DECISION: May 30, 2018

DECISION

SUBMISSIONS

Shelley Fisher	on her own behalf
Chantal Webb	delegate of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Shelley Fisher ("Ms. Fisher") pursuant to section 112 of the *Employment Standards Act* (the "*ESA*"), against a Determination of the Director of Employment Standards (the "Director") issued January 19, 2018. In that Determination, Shelley Chrest, a delegate ("Delegate Chrest") of the Director found that Jonathan Morgan & Company ("JMC") had contravened section 40 of the *ESA* in failing to pay Ms. Fisher overtime wages. The Director ordered JMC to pay the amount of $6,657.23, representing overtime wages and interest. The Director also imposed an administrative penalty of $500 on JMC for the contravention.

2. Ms. Fisher appeals the Determination contending that the Director erred in law in making the Determination.

3. After reviewing the appeal submissions, I sought a submission from the Director on the sole issue of how the Director's delegate calculated "the employee's entitlement to overtime wages for the two distinct periods", namely February 16, 2017, to April 17, 2017 ("Period One") and April 18, 2017, to June 30, 2017 ("Period Two").

4. Chantal Webb, a delegate ("Delegate Webb") of the Director, responded to my request on May 11, 2018, and stated the following regarding Period One: "Since there was agreement on the total number of overtime hours, the Delegate simply used that number to calculate the overtime at the rate of time and a half in order to determine the wages owed."

5. Regarding Period Two, Delegate Webb stated that the overtime wages were calculated "by listing the daily hours and their applicable overtime rate. My review of the records for that period shows no discrepancy in those overtime wages."

6. In the submission, Delegate Webb advised that she performed a recalculation of Ms. Fisher's overtime wage entitlement for Period One using "the overtime rates of 1.5 and 2.0 times the daily wage rate where appropriate". After the recalculation, Delegate Webb determined that Ms. Fisher was entitled to $6,894.56 in overtime for Period One rather than the $5,970.80 determined by Delegate Chrest.

7. This decision is based on Ms. Fisher's written submissions, the section 112(5) "record" that was before the delegate at the time the decision was made, the Reasons for the Determination (the "Reasons"), and the May 11, 2018, submission of Delegate Webb.

FACTS AND ARGUMENT

8. Ms. Fisher filed a complaint alleging that JMC had contravened the *ESA* in failing to pay her vacation pay, overtime wages, and compensation for length of service. Delegate Chrest held a hearing into Ms. Fisher's allegations on October 24, 2017. Jonathan Morgan Green ("Mr. Green"), a Director of JMC, appeared by telephone, Ms. Fisher appeared in person with the consent of the employer.

9. Following the hearing, Delegate Chrest issued the Determination concurrently with the Reasons. The nineteen-page Reasons set out the allegations and evidence, along with the delegate's analysis.

10. Briefly, the evidence is as follows.

11. JMC is a commercial design company. It employed Ms. Fisher as a sales representative/receptionist from February 3, 2017, until June 30, 2017, at which time Ms. Fisher went on leave to care for her mother. Ms. Fisher did not return to work.

12. As a preliminary matter, Ms. Fisher contacted the Employment Standards Branch to complain that JMC was "interfering" with her witnesses. Mr. Green denied that he had attempted to influence any of the witnesses, including current and former JMC employees, regarding their evidence. In the absence of any evidence in support of Ms. Fisher's serious allegations, the delegate found Mr. Morgan's denial to be credible.

13. JMC issued a cheque to Ms. Fisher representing vacation pay prior to the hearing date. After considering the employment agreement between the parties, which provided that Ms. Fisher was entitled to three weeks holiday per year, as well as the length of Ms. Fisher's employment, Delegate Chrest determined that the payment covered all vacation pay owed.

14. After hearing from the parties, Delegate Chrest determined that the parties had agreed that, at some point in her employment, Ms. Fisher would need to take time off to care for her mother. Although Ms. Fisher contended that JMC agreed she could "bank" overtime to take time off in the future, the parties did not have a written agreement regarding banking overtime as required by the *ESA*. Delegate Chrest also determined that JMC was aware Ms. Fisher was working overtime, but was not aware of the extent of that overtime. Delegate Chrest determined that JMC did not question the extent or nature of the work or overtime work performed by Ms. Fisher and did not maintain any record of Mr. Fisher's hours of work. In the absence of any evidence to refute Ms. Fisher's record of hours, Delegate Chrest determined that Ms. Fisher was entitled to payment for 184 hours of overtime between February 16, 2017, and April 17, 2017, and calculated her overtime wages to be $5,970.80. In response to my request for a submission from the Director on how overtime was calculated in the Determination, Delegate Webb recalculated the overtime and determined that the overtime wages owing for this period should have been $6,894.56.

15. In early May, Ms. Fisher notified Mr. Green of the overtime hours she had worked until April 17, 2017. Mr. Green instructed Ms. Fisher not to work unauthorized overtime. Despite this, Ms. Fisher continued to work overtime hours in an effort to bank hours so she could care for her mother in the future.

16. Delegate Chrest found Ms. Fisher's records of her overtime hours for this period to be contradictory and lacking details. Delegate Chrest also found the hours Ms. Fisher asserted she worked to be implausible. Delegate Chrest determined that Ms. Fisher was entitled to 18 hours of overtime for the period April 18, 2017, to June 30, 2017, which she calculated to be $584.10. Delegate Webb confirmed this calculation in her May 11, 2018 submission to the Tribunal.

17. In her complaint, Ms. Fisher also contended that JMC changed the terms of her employment by reneging on the parties' agreement regarding overtime and vacation pay, which constituted a fundamental breach of her employment agreement. As a consequence, Ms. Fisher claimed she was entitled to compensation for length of service. On July 7, 2017, after Ms. Fisher had spent some time with her mother, Mr. Green sent Ms. Fisher an email including JMC's overtime policy and information on her vacation entitlement. Mr. Green said that his intention was to come to some form of agreement with Ms. Fisher regarding her overtime claim. On July 10, 2017, Ms. Fisher's lawyer demanded payment of her overtime wages within 15 days, failing which Ms. Fisher would treat her employment as being at an end. Although Mr. Green concluded that Ms. Fisher viewed her employment as having ended, JMC nevertheless kept Ms. Fisher's position open in the event she changed her mind. Aware that Ms. Fisher was going through a difficult time due to her mother's illness, on July 14, 2017, Mr. Green sent Ms. Fisher an email asking if she could indicate when she might return to work. JMC hired and trained a temporary employee and did not fill Ms. Fisher's position on a full-time basis until October 1, 2017.

18. Delegate Chrest concluded that the roles proposed by JMC during the course of Ms. Fisher's employment did not amount to a substantial alteration of the conditions of her employment as they did not come to fruition. Delegate Chrest also noted that Ms. Fisher was an active and voluntary participant in discussions about potential changes to her position in any event.

19. Delegate Chrest determined that as there was no formal agreement indicating that Ms. Fisher could bank her overtime and that there was no agreement between the parties that Ms. Fisher could take off any extra hours she had worked. Delegate Chrest determined that JMC viewed Ms. Fisher as being on personal leave from which she could return, as evidenced from its hire of a temporary staff member after Ms. Fisher went on leave. Delegate Chrest further noted a July 14, 2017, email from Ms. Fisher to JMC indicating that she did not know if or when she would be returning to work. Delegate Chrest determined that Ms. Fisher's failure to provide JMC with a return date despite JMC's request for her to do so supported a finding that Ms. Fisher viewed her employment as being at an end, and that Ms. Fisher either quit or abandoned her employment. Delegate Chrest concluded that Ms. Fisher was not entitled to compensation for length of service.

20. Ms. Fisher argues that the Director erred in calculating her overtime entitlement, not only missing hours but also calculating the overtime rate incorrectly. She also argues that the Director erred in determining that her overtime hours lacked reliability, and erred in finding that she was not entitled to compensation for length of service because she had quit her employment. Ms. Fisher also argues that the Director erred in calculating her vacation pay entitlement, which she contends was 6% based on her employment contract. Finally, Ms. Fisher argues that the Director erred in law in concluding that she had not been constructively dismissed.

21. Attached to Ms. Fisher's appeal are a number of documents including an email, a "field history report," and LinkedIn screen shots of individuals she says she asked to be witnesses.

ANALYSIS

22. Section 114 of the *ESA* provides that at any time after an appeal is filed and without a hearing of any kind the Tribunal may dismiss all or part of the appeal if the Tribunal determines that any of the following apply:

(a) the appeal is not within the jurisdiction of the tribunal;

(b) the appeal was not filed within the applicable time limit;

(c) the appeal is frivolous, vexatious, trivial or gives rise to an abuse of process;

(d) the appeal was made in bad faith or filed for an improper purpose or motive;

(e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;

(f) there is no reasonable prospect the appeal will succeed;

(g) the substance of the appeal has been appropriately dealt with in another proceeding;

(h) one or more of the requirements of Section 112(2) have not been met.

23. Section 112(1) of the *ESA* provides that a person may appeal a determination on the following grounds:

- the director erred in law;
- the director failed to observe the principles of natural justice in making the determination;
- evidence has become available that was not available at the time the determination was being made.

24. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with the decision. I have concluded that the delegate erred in calculating Ms. Fisher's wages. I find that Ms. Fisher has not demonstrated any other ground of appeal.

New Evidence

25. Ms. Fisher appeals on the ground that evidence has become available that was not available at the time the Determination was made. Ms. Fisher has submitted documents that were not before the delegate during the hearing in support of her appeal. She argues that the email from a witness, which she contends would have supported her evidence that she worked overtime and that the employer was disorganized, was not submitted at the hearing because the witness was too busy to appear during the course of the hearing. Ms. Fisher also contends that a document titled "Opportunity Field History Report" was inadvertently left out of the hearing package due to the stress she was experiencing and that she did not realize pertinent details were omitted from her submission. She says that the report would show that the employer could "manipulate his reports to say many different things when it's in his best interests to do so". Finally, Ms. Fisher submitted LinkedIn screen shots of witnesses she argues the employer pressured not to appear, contending that they left the employment of JMC because of that pressure.

26. In *Re Merilus Technologies* (BC EST # D171/03) the Tribunal established the following four-part test for admitting new evidence on appeal:

(a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;

(b) the evidence must be relevant to a material issue arising from the complaint;

(c) the evidence must be credible in the sense that it is reasonably capable of belief; and

(d) the evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

27. I find that Ms. Fisher's "new evidence" does not meet the test for new evidence. While I appreciate Ms. Fisher was under some stress at the hearing as a result of a number of issues she was facing at that time, the documents she attempts to submit on appeal were available at the time of the hearing and ought to have been presented during that hearing. I also find that none of the "new evidence" would have persuaded the Director to arrive at a different conclusion on the material issues in dispute; that is, whether or not she was entitled to overtime wages or whether or not she had been constructively dismissed.

Error of law

28. The Tribunal has adopted the following definition of "error of law" set out by the British Columbia 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.):

1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
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. adopting a method of assessment which is wrong in principle.

29. I am not persuaded that the Director erred in evaluating Ms. Fisher's records of her hours of work. Delegate Chrest reviewed them along with all of the other information before her, including the fact that JMC had not maintained any records. While Ms. Fisher continues to believe she is entitled to additional wages, I find no error of law in Delegate Chrest's decision regarding the number of hours Ms. Fisher worked.

30. After reviewing Ms. Fisher's appeal submission, I sought an explanation from the Director regarding the calculation of Ms. Fisher's overtime wages. As noted earlier, Delegate Webb reviewed the calculations of the original delegate and arrived at a revised overtime wage entitlement owing of $6,689.07 for Period One ($6,894.56 less $205.49 paid at straight time) rather than the $5,970.80 as calculated by

Delegate Chrest. I have reviewed Delegate Webb's calculations and find no error of law in the recalculation of the amount of overtime wages owed. I confirm the total revised amount of overtime wages owing for Periods One and Two to be $7,273.17.

31. Delegate Chrest noted the parties' agreement that Ms. Fisher would be paid three weeks' vacation and considered the fact that Ms. Fisher was employed for five months. I find no error in Delegate Chrest's calculation of Ms. Fisher's vacation pay.

32. I also find no error in Delegate Chrest's analysis of whether or not Ms. Fisher had been constructively dismissed. There was no evidence JMC substantially changed the conditions of Ms. Fisher's employment. As noted by Delegate Chrest, although there were some discussions between the parties regarding potential changes, Ms. Fisher appeared to agree with those changes, which ultimately never came to fruition.

33. Delegate Chrest noted that Ms. Fisher took indefinite personal leave with JMC's agreement to care for her mother, and that while on leave, the parties had discussions regarding her overtime and vacation pay. During her leave, Ms. Fisher's lawyer demanded payment of overtime, stating that if the overtime wages were not received within a certain time frame, Ms. Fisher would treat the employment as being terminated. Ms. Fisher also communicated with JMC regarding her uncertainty about returning to work. While I note Ms. Fisher's contention that she did not trust her employer during this period, Delegate Chrest also considered the fact that employees could file complaints under the *ESA* without affecting their employment status and there was no evidence JMC retaliated against her in any way after receiving her complaint. Although JMC asked Ms. Fisher when she would return, she did not respond. JMC was very aware of Ms. Fisher's personal circumstances, and did not hire a permanent replacement for her until October 2017. I find no error in Delegate Chrest's conclusion that Ms. Fisher had not established she was constructively dismissed.

ORDER

34. Pursuant to section 115 of the *ESA*, I Order that the Determination, dated January 19, 2018, be confirmed in the amended amount of $7,875.50 together with whatever further interest that has accrued under section 88 of the *ESA* since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal