Employment Standards TRIBUNAL

Citation: Katrina Jensen (Re)
2019 BCEST 100

An appeal

- by -

Katrina Jensen

- 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.: 2019/73

DATE OF DECISION: September 23, 2019

DECISION

SUBMISSIONS

Katrina Jensen — on her own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*ESA*"), Katrina Jensen ("Ms. Jensen" or the "Employee") has filed an appeal of a determination (the "Determination") issued by Reena Sharma, a delegate (the "Delegate") of the Director of Employment Standards (the "Director"), on May 9, 2019.

2. On September 25, 2017, Ms. Jensen filed a complaint with the Director alleging that Cambridge Floors Ltd. ("Cambridge" or the "Employer") contravened the *ESA* in failing to pay her regular wages, commissions, compensation for length of service, and expenses.

3. The Delegate concluded that Cambridge had contravened sections 18, 58, and 21 of the *ESA* in failing to pay Ms. Jensen wages, annual vacation pay, and expenses. The Delegate ordered Cambridge to pay $3,884.76 in wages and interest. The Delegate also imposed three administrative penalties on the Employer in the total amount of $1,500, for a total order of $5,384.76.

4. Ms. Jensen contends that the Director erred in law in making the Determination.

5. These reasons are based on the Employee's written submissions, the section 112(5) "record" that was before the Director at the time the Determination was made, and the Reasons for the Determination.

ISSUE

6. Whether or not Ms. Jensen has established any basis to interfere with the Director's Determination.

FACTS

7. Cambridge operates a flooring business. Alex Mende is its sole officer and director. Ms. Jensen was employed by Cambridge as a sales representative from December 1, 2015, until July 18, 2017.

8. On December 1, 2015, the parties entered into a "Sales Representation Agreement" outlining Ms. Jensen's work duties and compensation package (the "employment agreement").

9. The employment agreement provided that Ms. Jensen would receive a salary for a period of three months, after which she was to receive only commission wages. The agreement further provided for the method by which those commissions would be calculated and paid. Ms. Jensen was to receive a 33% commission after any sale based on a profit margin of a 30% minimum. Commissions were payable within 30 days after job completion and after the payment was collected in full.

10. The agreement also provided that Ms. Jensen would be reimbursed up to a monthly maximum amount for certain expenses including gas, cellular telephone, vehicle, and marketing.

11. Despite the terms of the agreement, the Employer never paid Ms. Jensen commission wages; rather, she was paid a consistent salary throughout the employment relationship. Further, the Employer did not reconcile commissions earned and advances paid during the employment relationship, although attempts were made to do so after Ms. Jensen's employment ended.

12. On July 17, 2017, the Employer issued a memo to all sales representatives, informing them that they were to spend at least two hours per day at the office during business hours to ensure paperwork and other tasks were completed; to complete and submit call sheets on a weekly basis; and that they were required to answer all cellular telephone calls or return calls within two hours during regular office hours.

13. Mr. Mende and Ms. Jensen met to discuss the memo on July 18, 2017. Although the evidence of the parties diverged on precisely what occurred during the meeting, there is no dispute that there was a dispute resulting in police attendance and that Ms. Jensen's employment did not continue after that date.

14. The Employer stopped payment on cheques issued to Ms. Jensen for her final week's wages as well as for her expense reimbursement. Mr. Mendes stated that Ms. Jensen had refused to provide him with the password to the business laptop and he believed that she had taken materials from Cambridge that she had not paid for. Mr. Mendes also believed that Ms. Jensen did not work 40 hours during the last pay period based on data recovered from his business laptop that indicated Ms. Jensen was establishing a second business during that time she was paid to be working for Cambridge. Specifically, the Employer contended that Ms. Jensen was not in the office on July 13, 14, and 17, 2017.

15. A delegate of the Director conducted a hearing over two days in December 2017 and March 2018. That delegate went on leave some time after the hearing and before issuing a Determination, and a second delegate, Delegate Sharma (the "Delegate"), was assigned to investigate the complaint. After assuming conduct of the file, the Delegate held a fact-finding meeting by teleconference on September 27, 2018, to "seek clarification" on information obtained by the first delegate and to review the documentary evidence submitted by each party. Although Ms. Jensen was initially present at the teleconference, the Delegate noted that she "refused to participate in any meaningful way" and left the meeting. The meeting continued with the other parties, including Mr. Mendes and the Employer's legal counsel.

16. The Delegate noted that because Ms. Jensen left the meeting, the parties were given an opportunity to make written submissions. The Delegate also noted that both parties had attempted to resolve the dispute but were unsuccessful in doing so. In noting that the parties had the opportunity to clarify evidence and exchange written submissions, the Delegate was satisfied that they had the opportunity to present their positions.

17. The Delegate considered the parties' evidence regarding Ms. Jensen's entitlement to commission wages and expenses as well as her entitlement for compensation for length of service. The Delegate also considered the evidence of three witnesses for the Employer – Cambridge's office administrator, materials coordinator and office manager.

18. The Delegate noted that there was no dispute that Ms. Jensen was to be paid a monthly salary for the first three months of employment, following which she was to be paid solely by commission. She noted that, despite the terms of the agreement, commissions had never been reconciled at any time during the employment period even though the parties made attempts to do so during the hearing and the

investigation. The Delegate further noted that Ms. Jensen received a lump sum amount each pay period recorded as an "advance on commissions." The Delegate noted that this arrangement had been followed for the entire 18 months of Ms. Jensen's employment despite the terms of the agreement and Ms. Jensen's occasional request to be paid her commission earnings.

19. The Delegate concluded that the Employer

> …effectively changed the terms of Ms. Jensen's compensation after her third month of employment when it continued to pay her a set sum as opposed to her earned commissions, and that Ms. Jensen accepted this change by continuing to work for the Employer for 1.5 years under the changed terms of employment. In this circumstance, I find it is not reasonable to enforce the Agreement in relation to commissionable earnings since the parties never put the compensation clause of the Agreement in force, operating instead under a *de facto* salary compensation scheme.

20. The Delegate continued:

> Section 8 of the Act provides that an employer must not induce, influence or persuade an employee to work by misrepresenting the conditions of employment, including the wage. If the terms and conditions are substantially different from those initially agreed to by the employer and employee as they were in this case, Ms. Jensen could have made her objections known to the Director of Employment Standards within six months of the date of contravention. … No complaint was made to the Director, and now this issue initiated by her complaint, dated September 25, 2017, is clearly outside the six-month time limit for filing a complaint that the Employer contravened section 8 of the Act. I further add there is no compelling evidence that would justify a special circumstance that would cause the Director to exercise discretion to accept this complaint issue despite it being out-of-time.

21. The Delegate concluded that Ms. Jensen's rate of pay was a salary as reflected in her wage statements. The Delegate then considered whether Ms. Jensen was paid at least the minimum requirements of the *ESA*. The Delegate noted that neither party maintained a record of Ms. Jensen's daily hours of work. The Delegate rejected Ms. Jensen's contention that she worked 60 or more hours of work, noting that Ms. Jensen did not deny the Employer's contention, based on emails sent by Ms. Jensen from the company's email account, that at the time she was to be working for the Employer, Ms. Jensen was actively setting up another company. In the absence of any records, the Delegate determined that, at most, Ms. Jensen worked 40 hours per week.

22. The Delegate determined that Ms. Jensen was paid more than the statutory minimum wage requirement under the *ESA*.

23. The Delegate then considered whether Ms. Jensen was paid for any statutory holidays in the last six months of her employment. Given that neither party maintained a contemporaneous record of the daily hours of work, the Delegate was unable to determine if Ms. Jensen actually worked on any statutory holidays during the last six months of her employment. The Delegate nevertheless concluded that because Ms. Jensen had been paid a fixed amount each pay period, there had been no contravention of section 45 the *ESA*.

24. The Delegate determined that the Employer contravened section 21 of the *ESA* in withholding Ms. Jensen's final pay and awarded Ms. Jensen $3,124.15 plus vacation pay for her final two weeks of work.

25. The Employer contended that Ms. Jensen had abandoned her employment and damaged the employment relationship beyond repair. Alternatively, the Employer argued that Ms. Jensen's actions after the meeting were inconsistent with the continuation of the employment, giving the Employer just cause to terminate without compensation for length of service. Ms. Jensen's position was that her employment was terminated during the July 18, 2017 meeting for a number of reasons, including giving the Employer a reason not to pay outstanding commissions and because she objected to the additional conditions outlined in the July 17 memo.

26. The Delegate concluded that the Employer had not met its burden in proving that Ms. Jensen had quit her employment. She also found that there was no evidence Ms. Jensen subjectively and objectively intended to quit her employment during the July 18, 2017 meeting. The Delegate also determined that the Employer had not terminated Ms. Jensen's employment during the same meeting, given that Ms. Jensen sought medical leave after that time.

27. However, the Delegate found that Ms. Jensen's conduct after leaving the Employer's office following the July 18 meeting was inconsistent with the continuation of her employment and as such, the Employer had just cause to terminate her. Specifically, the Delegate found that Ms. Jensen refused to provide Mr. Mende with either client contact information or the password to her work computer, a computer which contained crucial business information. Ms. Jensen informed Mr. Mende that she would withhold business information from Mr. Mende until he granted her medical leave. The Delegate wrote:

> In behaving this way, not only did Ms. Jensen fail to carry out her core duties, she actively impeded the Employer's ability to carry on its business. Such actions destroy the root of the employment contract and cause irreparable damage to the employment relationship. As such, a reasonable employee ought to have known that such actions would result in dismissal.

28. The Delegate concluded that Ms. Jensen's actions were inconsistent with the continuation of her employment and that the Employer had just cause to terminate her employment. The Delegate found that Ms. Jensen was not entitled to compensation for length of service.

ARGUMENT

29. Ms. Jensen seeks to have the matter referred back to the Director to undergo "a full adjudication". She contends that she did not receive the "proper process" to which she is entitled.

30. Ms. Jensen contends that the Delegate erred in determining that the commission agreement is unenforceable; deciding instead that wages ought to be paid by a "de facto salary compensation scheme."

31. Ms. Jensen contends that she did not agree to be paid, in effect, $10.85 per hour, and argues that she ought to be paid according to the commission scheme set out in the commission agreement. She argues that she submitted numerous messages to the Employer demanding her commission wages which demonstrated that she did not agree to an alternative compensation scheme.

32. Ms. Jensen also contends that the Delegate erred in concluding that the Employer had just cause to terminate her employment. She submits that the Employer took the position that she quit her employment, both in the hearing and indicated as such in her Record of Employment. Ms. Jensen contends that the Delegate arrived at the conclusion that her employment had been terminated for cause based on nothing more than her own "misguided opinion."

ANALYSIS

33. 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.

34. 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.

35. An appellant has the burden of demonstrating there is a basis for interfering with the delegate's decision.

Failure to observe the principles of natural justice

36. Natural justice is a procedural right which includes the right to know the case being made, the right to respond and the right to be heard by an unbiased decision maker.

37. There is no doubt that Ms. Jensen's complaint was not resolved in a timely fashion. However, the circumstances were, in my view, both unusual and exceptional. After the second day of hearing in March 2018, the delegated adjudicator took an unforeseen leave of absence, without having issued a written decision.

38. On August 9, 2018, the Regional Manager of the Fraser Valley Employment Standards Branch contacted the parties to notify them of the circumstances and to establish "a process and timeframe" for completing

the decision. The Manager noted that the delay was of concern to the parties and suggested that, while she could assign a new officer to complete the matter, the initial delegate was expected to return to work shortly. In light of the amount of material that had been submitted to date, the Manager was of the view that the initial delegate could complete a decision in as timely a fashion as any new delegate. The Manager indicated that the initial delegate would have a decision issued by September 30, 2018, but if that was not possible, a new delegate would be assigned to conclude the matter. If a second delegate were to be assigned, the Manager indicted that the complaint would be determined based on an investigation, rather than another oral hearing.

39. In fact, another delegate was assigned, and a fact-finding hearing was conducted on September 27, 2018. When Ms. Jensen did not appear at the fact-finding hearing, the Delegate sought clarification and an explanation for some issues that had previously arisen. The Delegate also informed Ms. Jensen that she would be provided with a preliminary findings letter in advance of the Determination, to which she could respond.

40. Facing unusual circumstances, the Branch gave Ms. Jensen every opportunity to participate and advance her position. In fact, after receiving the Delegate's letter following the September 27 fact-finding hearing, Ms. Jensen replied in a five-page letter with attachments, expanding on her claim for commissions, compensation for length of service, and expenses.

41. I am also not persuaded that the delay between the filing of the complaint and the date of the Determination (approximately 20 months) constitute sufficient grounds to cancel the Determination.

42. The leading case on the issue of delay in the administrative context is that of *Blencoe v. British Columbia (Human Rights Commission),* [2000] 2 S.C.R. 307. In that case, the Human Rights Tribunal heard complaints against Mr. Blencoe approximately 32 months after they were originally filed. Mr. Blencoe contended that the tribunal had lost jurisdiction due to an unreasonable delay in processing the complaints and that the delay had caused him serious prejudice. The Supreme Court of Canada held that in an administrative context, to constitute an abuse of process, any delay must be so "unacceptable to the point of being so oppressive as to taint the proceedings," (*Blencoe* para. 121) and there must be evidence of prejudice flowing from that delay.

43. In *Tung*, BC EST # D511/01, the Tribunal said:

> "To constitute a breach of the duty of fairness, the delay must have been unreasonable or inordinate. There is no abuse of process by delay *per se*. [It] must [be] demonstrate[d] that the delay was unacceptable to the point of being so oppressive as to taint the proceedings" (*Blencoe* at para. 121). While I am of the view that the delay in this case was inordinate (this was not a complicated matter and it ought to have been dealt with considerably more expeditiously), I cannot conclude that this delay "tainted" the proceedings.

44. Furthermore, Ms. Jensen has not identified any specific prejudice, apart from not receiving wages to which she was entitled, as a result of the delay in the adjudication process. The Tribunal has refused to cancel determinations where there was a delay of 20 months between the filing of the complaint and the issuance of the determination, (*Westhawk Enterprises Inc.*, BC EST # D302/98) of 39 months, (*Ecco Il Pane Bakery Inc.*, BC EST # D396/00), and over 4 years (*Tung, supra*) because of the absence of demonstrated serious prejudice.

45. I am not persuaded that the Determination should be cancelled because of delay.

Error of law

46. 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.

Wages

47. I am not persuaded that the Delegate erred in law in her conclusion that Ms. Jensen had not established a claim for wages.

48. There is no dispute that despite the terms of the employment agreement which provided that Ms. Jensen was to be paid by commissions, Ms. Jensen did not challenge the Employer's continued practise of paying her a fixed salary every two weeks. She was not misled or coerced by the Employer in any way. Although Ms. Jensen submits, on appeal, that she consistently asked for her commission wages, the record discloses that she raised the issue on one occasion, that is on June 8, 2017, stating that she wanted to be "paid out for 2016." That was, as the Delegate notes, approximately 18 months from the date of the employment agreement.

49. When one party to an agreement does not comply with its terms and the other party does not act on that party's failure to do so, they are considered to have acquiesced to the new terms. Ms. Jensen took no steps to enforce the agreement until her employment ended. Ms. Jensen cannot resurrect the terms of the initial agreement through the appeal process.

50. However, even if I am incorrect in concluding that, through their actions, the parties amended the terms of the employment agreement, I am not persuaded that Ms. Jensen demonstrated a claim for wages.

51. Throughout the process, the Employer took the position that Ms. Jensen had received more in salary than she had earned in commissions, and that had Ms. Jensen's wages been calculated according to the agreement, Ms. Jensen owed the Employer money. The parties disagreed both on the interpretation of the agreement (whether or not Ms. Jensen was to be compensated for sales with a less than 30% gross profit margin) as well as the actual completed commission sales.

52. In a letter dated September 28, 2018, to Ms. Jensen, I note that the Delegate referenced the Employer's excel spreadsheet describing commissions earned (which had been submitted during the second day of the oral hearing), noting that the amounts did not differ significantly from Ms. Jensen's handwritten

invoices and asking for comments. Ms. Jensen commented that the matter was "tricky," and suggested that the Employer had "confused their records" and that they could not be relied on. Other than contending that the Employer's records were "suspicious," Ms. Jensen did not specifically identify how the Employer's records were incorrect.

53. Overall, the record suggests that if Ms. Jensen had been compensated according to the employment agreement, her commission earnings would have been less than what she was paid in wages.

54. I also find that the Delegate correctly determined that Ms. Jensen had been paid more than the statutory minimum wage.

55. The evidence before the Delegate, which Ms. Jensen did not dispute, was that beginning in about February 2017 and up to the end of her employment, Ms. Jensen was actively involved in establishing a second business. That evidence was gathered through emails sent by Ms. Jensen from the company computer. In my view, the Delegate's determination of the number of hours worked by Ms. Jensen during the last six months of her employment was reasonable based on the evidence, and I find no error in her determination that Ms. Jensen was paid at least minimum wage for those hours.

Compensation for length of service

56. Ms. Jensen argues that her employment was terminated without cause and that the Delegate's determination that Ms. Jensen's conduct after her July meeting was incompatible with a continued employment relationship was neither argued nor based on any evidence.

57. The record discloses that the Employer did advance the argument that Ms. Jensen's actions in devoting time and effort in setting up her own business rather than attending to the business of the Employer irreparably damaged the employment relationship. The Employer also argued that after the July 18, 2017 meeting, Ms. Jensen did not seek to return to her employment or apologize; rather, in an "attempt to extort" the Employer, set out on a course of conduct with intent to cause the employer damage and loss.

58. I find that the Delegate did consider the facts and evidence. I also find that she acted on a view of the facts that was reasonable. Ms. Jensen's core duties included providing contact numbers for customers and assisting the company in obtaining relevant financial information regarding existing and potential customers. In a series of highly inflammatory and derogatory messages to Mr. Mende after she left the office on July 18, 2017, Ms. Jensen refused to provide this information until he approved her medical leave.

59. There was certainly evidence before the Delegate upon which she could have arrived at her conclusion that Ms. Jensen's actions were inconsistent with the continuation of her employment and I find no basis to interfere with her conclusion.

60. The appeal is denied.

ORDER

61. Pursuant to section 115 of the *ESA*, I order that the Determination, dated May 9, 2019, be confirmed in the amount of $5,384.76, together with whatever further interest may have accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal