Employment Standards TRIBUNAL

Citation: RL7 Mechanical Ltd. (Re)
2019 BCEST 107

An appeal

- by -

RL7 Mechanical Ltd.
(the "Appellant")

- 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: James F. Maxwell

FILE NO.: 2019/67

DATE OF DECISION: October 4, 2019

DECISION

SUBMISSIONS

Lori Whittingham	on behalf of RL7 Mechanical Ltd.
Sonja Walk	on her own behalf
Jeff Bailey	on behalf of the Director of Employment Standards

OVERVIEW

1. On September 11, 2018, Sonja Walk (the "Employee") filed a complaint with the Employment Standards Branch as against RL7 Mechanical Ltd. ("the "Appellant""). The Employee alleged that the Appellant, with whom she had previously been employed, had failed to pay her amounts for compensation for length of service and for retroactive salary. The Employee alleged that she was owed $10,084.15.

2. On May 30, 2019, a delegate of the Director of Employment Standards (the "Director") issued a determination (the "Determination") pursuant to the *Employment Standards Act* (the "*ESA*") in which the Director held that the Appellant was liable to pay to the Employee sums as compensation for length of service, and for unpaid annual vacation pay, together with accrued interest thereon. In addition, the Director assessed an administrative penalty in the sum of $500.00. The Director concluded that the total amount payable by the Appellant to the Employee was $11,120.07.

3. On June 11, 2019, the Appellant filed an appeal of the Determination.

4. In its appeal, the Appellant requests that the Tribunal cancel the Determination, pursuant to section 112 of the *ESA*, on the grounds that the Director erred in law, and that the Director failed to observe the principles of natural justice, in making the Determination.

5. Having reviewed the Determination, the Appellant's appeal submissions, and the record of proceedings provided by the Director, I conclude that this appeal must be dismissed, and the Determination confirmed, pursuant to section115 of the *ESA*. My reasons follow.

ISSUES

6. The issues to be determined in this matter is whether the Director erred in law, or failed to observe the principles of natural justice, in issuing the Determination.

FACTS

7. The Employee commenced work for the Appellant in March 2007, as an accounts payable clerk and project administrator. Her employment with the Appellant came to an end August 16, 2018.

8. The employee filed a complaint with the Employment Standards Branch on September 11, 2018, within the time period contemplated by the *ESA* for doing so. In her complaint, the Employee sought payment

for compensation for length of service, and payment for salary that had been reduced with retroactive effect.

9. The Director requested and received from the Appellant all records related to the Employee's employment. On May 14, 2019, the Director conducted a formal hearing into the Employee's complaint. Testimony was provided by the Employee and by Lori Whittingham, a representative of the Appellant.

10. The Employee testified that on August 16, 2018, she was approached by Ms. Whittingham, who advised the Employee that her salary had been reduced, effective July 29, 2018, from $30.40 per hour to $27.40 per hour. The reason the Employee was given for the reduction in her salary was that she had made mistakes in the performance of her work. The Employee refused to accept the reduction in her salary, advised the Appellant that she quit, and left the workplace.

11. Ms. Whittingham testified that she had indeed advised the Employee that her salary had been reduced as described, and that the Employee had refused to accept the reduction. Ms. Whittingham testified that the Employee quit her employment. Ms. Whittingham denied that she had terminated the Employee.

12. On May 30, 2019, the Director issued a Determination. The Director assessed and weighed the evidence provided by the witnesses, and examined all relevant documents tendered by the parties. The Director cited section 66 of the *ESA*, which provides that the Director may, in appropriate circumstances, determine that an employee's employment has been terminated. In the event that the Director determines, pursuant to section 66, that employment has been terminated, the provisions of section 63 of the *ESA* require the employer to pay compensation for length of service.

13. The Director held that the Appellant unilaterally imposed a substantial reduction in the Employee's wages on August 16, 2018. The Director held that this action amounted to a termination of the Employee's employment, triggering the obligation to pay compensation for length of service.

14. In the Determination, the Director held that the Appellant had breached the *ESA* by failing to pay to the Employee compensation for length of service. The Director ordered the Appellant to pay the sum of $9,728.00 as compensation for length of service, $583.68 for vacation pay payable thereon, and accrued interest in the sum of $308.39. In addition, the Director imposed upon the Appellant an administrative penalty in the sum of $500.00.

15. On June 11, 2019, the Appellant filed the within appeal with the Tribunal.

ANALYSIS

16. Section 112(1) of the *ESA* provides that a person may appeal a determination on one or more of 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.

17. The burden is on an appellant to persuade this Tribunal that there is justification to interfere with a determination on any one of these statutory grounds.

18. In the present case, the Appellant contends that the Director erred in law, and failed to observe the principles of natural justice in making the Determination and argues that for this reason the Determination should be varied.

Did the Director err in law in making the Determination?

19. This 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.

20. The Appellant, in its appeal submissions, states that:

> The employee quit, if it truly is a termination, by the findings of [the] Determination then this termination was justified by RL7 Mechanical Ltd. on the basis of:
>
> 1. Dishonesty …
> 2. Insolence and insubordination …
> 3. Breach of trust and/or the duty of fidelity …
> 4. Serious incompetence …
>
> …
>
> …and so the sudden lowering of wage was justified, in which case she quit, but as a termination, this is a justified termination and no severance pay should be payable. [errors in original]

21. This argument appears to re-assert that the Employee quit her position on August 16, 2018, or, in the alternative, that the Appellant was justified in terminating the Employee for just cause. I interpret this argument to be an assertion that, in finding that the Appellant was liable for compensation for length of service, the Director misinterpreted or misapplied a section of the applicable legislation, or that the Director misapplied a principle of general law.

22. In the Determination, the Director considered the operation of section 66 of the *ESA*, which states that:

> If a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated.

23. In *Isle Three Holdings Ltd.,* BC EST # D084/08 (confirmed on reconsideration, BC EST # RD124/08), the Tribunal provided an overview of the operation of section 66 of the *ESA*. The Tribunal made the following observations, at paras. 27 – 31:

> An accurate summary of the elements of this statutory provision is found in *Bogie and Bacall Hair Design Inc.*, BC EST # D062/08, at para 41:
>
> > Section 66 of the *Act* provides that if a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated. There must be a finding that there is a change in the conditions of employment, that the change is substantial and that the change constitutes termination.
>
> Conditions of employment is defined in Section 1 of the *Act* to mean all matters and circumstances that in any way affect the employment relationship. The alteration must be substantial, or "sufficiently material that it could be described as being a fundamental change in the employment relationship": see *Helliker*, BC EST # D338/97, (Reconsideration of BC EST # D357/96). The focus of the examination in Section 66 is the employment relationship in place at the time of the alteration: *Helliker*, *supra*.
>
> The Tribunal has indicated that the test of what constitutes a substantial change is an objective one that includes a consideration of the following factors:
>
> a) the nature of the employment relationship;
>
> b) the conditions of employment;
>
> c) the alterations that have been made;
>
> d) the legitimate expectations of the parties; and
>
> e) whether there are any implied or express agreements or understandings.

24. The Director examined the circumstances of the changes to the Employee's conditions of employment. He found that the wage decrease, which was equivalent to almost 10% of the Employee's wage, was imposed without prior warning. In fact, the Appellant purported to impose the wage reduction to be effective more than 2 weeks prior to the employee being advised. The Director concluded that the magnitude of the wage reduction was substantial. The Employee testified that she had structured her personal finances in the expectation that her wage would remain unreduced.

25. The Director concluded that the actions of the Appellant in unilaterally imposing a substantial reduction in the Employee's wages amounted to a termination of the employment. The Director concluded that the Appellant was liable to pay the Employee compensation for length of service in accordance with section 63 of the *ESA*.

26. I find that the Director correctly applied the applicable legislation, correctly assessed the relevant factors to evaluate whether the change in the employment terms was substantial, and correctly concluded that the imposition of a wage reduction amounted to a termination of the Employee's employment. I find that the Director correctly concluded that this termination of employment engaged the requirement of section 63 of the *ESA* that the Appellant pay compensation for length of service.

27. The Appellant argued that the Employee quit upon learning of the wage reduction. The actions of the Employee after learning that her salary was to be reduced are irrelevant in this case. What is relevant is the action of the Appellant in unilaterally imposing a substantial change to the terms of the employment, and this amounted to a deemed termination.

28. The Appellant's alternative argument, that the Appellant was justified in terminating the Employee for poor performance, is without merit. At no time did the Appellant actually purport to dismiss the Employee. The termination of employment was deemed by the Director as a result of the employer's unilateral actions in reducing the Employee's salary.

29. In effect, section 66 of the *ESA* is a codification of the common law of constructive dismissal. The common law treats employment as a contractual relationship. The actions of an employer in unilaterally attempting to substantially alter the terms of the employment contract constitute a breach of that contract and may be treated as a termination of the employment relationship. Employers who attempt to deal with perceived shortcomings in employee performance through punitive measures, such as unilateral salary reductions, should be aware that they may face legal consequences.

30. The Director did not err in law in making the Determination, and I dismiss this ground of appeal.

Did the Director fail to observe the principles of natural justice in making the Determination?

31. In its appeal, the Appellant alleged that the Director failed to observe the principles of natural justice in making the Determination.

32. The Appellant tendered submissions with its appeal but presented no specific arguments as to how the Director allegedly failed to observe the principles of natural justice in making the Determination.

33. The onus is on the Appellant to show that the Director breached the principles of natural justice in making the Determination.

34. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, the Tribunal addressed the principles of natural justice that must be addressed by administrative bodies, as follows:

> Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the *Act*, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party. (see *BWI Business World Incorporated* BC EST #D050/96).

35. I do not find anything in the Appellant's submissions or in the Director's record that supports the argument that the Director failed to apply the principles of natural justice in reaching the Determination. I find that the Director afforded sufficient opportunities to the Appellant to know the case against it and the right to present its evidence. The Director conducted a hearing in which both the Employee and a representative

of the Appellant gave oral evidence and were afforded rights of cross-examination. The Director carefully weighed all of the evidence and applied the relevant legislative provisions.

36. The Appellant has presented no convincing evidence in support of its allegations that the Director failed to apply the principles of natural justice. On the contrary, I am satisfied that the Director observed the principles of natural justice in conducting the hearing, and in evaluating the testimony provided therein. For this reason, I dismiss this ground of appeal.

ORDER

37. I dismiss this appeal and, pursuant to section 115 of the *ESA,* I confirm the Determination.

James F. Maxwell
Member
Employment Standards Tribunal