Employment Standards TRIBUNAL

Citation: Fresh Now Nutrition Inc. (Re)
2019 BCEST 108

An appeal

- by -

Fresh Now Nutrition Inc.
("Fresh Now")

- 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)

PANEL: Carol L. Roberts

FILE NO.: 2019/152

DATE OF DECISION: October 8, 2019

DECISION

SUBMISSIONS

Donna Haely Lindau — on behalf of Fresh Now Nutrition Inc.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*ESA*"), Fresh Now Nutrition Inc. ("Fresh Now" or the "Employer") has filed an appeal of a determination (the "Determination") issued by a delegate of the Director of Employment Standards (the "Director") on July 12, 2019.

2. A former employee (the "Employee") of Fresh Now filed a complaint alleging that the Employer failed to pay him regular wages, overtime, profit shares, and misrepresented his wage rate. Following a hearing, the delegate concluded that the Employer had contravened sections 17, 18, 40, 45, 46, and 58 of the *ESA* and that the Employee was entitled to $4,293.65 in wages and interest. The delegate also imposed five administrative penalties in the total amount of $2,500, for a total amount payable of $6,793.65.

3. The Employer appeals the Determination on the basis that the Director failed to observe the principles of natural justice in making the Determination.

4. This decision is based on the written submissions of the Employer and the section 112(5) "record" that was before the Director at the time the decision was made (the "Record").

FACTS AND ARGUMENT

5. Fresh Now supplied food for sale in vending machines and cafes and catered events in Vancouver. Donna Haely Lindau ("Ms. Lindau") is its sole Director. The Employee was employed as the kitchen manager from May 15, 2017, until November 17, 2017. The employment agreement provided for a basic salary as well as 30% of Fresh Now's profits.

6. The delegate heard evidence from the Employee about his responsibilities, hours of work, and circumstances of his termination, which, he asserted, was made without warning and without notice. The delegate also heard from a witness on behalf of the Employee. The Employer paid the Employee compensation for length of service on his final pay.

7. The delegate heard evidence from Ms. Lindau about the tasks the Employee was expected to perform as well as the terms of the employment agreement. The delegate also heard from two witnesses on behalf of the Employer and considered a significant number of text messages between the parties.

8. At issue before the delegate was whether the Employee was a manager and therefore entitled to overtime wages, whether he was owed commission wages, and whether or not his position was misrepresented.

9. The delegate concluded that the Employee was not a manager. Although she found that he did perform some manager duties, she concluded, based on the content of the text messages, that he did not have a

high level of decision-making autonomy or independence and that his primary duties were to prepare food. She further noted that there was no evidence the Employee completed any strategic planning, budgeting, project management or evaluation, nor was there any evidence he was responsible for financial outcomes.

10. Fresh Now acknowledged that it maintained no record of the Employee's hours, which the delegate found was a contravention of section 28 of the *ESA*. The delegate considered the Employee's own record of his hours, which he acknowledged was not completely accurate, and noted that in numerous respects, it was inconsistent with the text messages. For these and other reasons, the delegate found the Employee's records not credible and did not rely on them. The delegate, instead, found that the most credible evidence was contained in the text messages, which were made contemporaneously, and the evidence of the witnesses.

11. The delegate carefully considered all of the evidence and made decisions about the hours the Employee worked based on that evidence. From those hours, the delegate determined the Employee's hourly wage rate, overtime entitlement, vacation, and holiday pay.

12. The delegate noted that the evidence regarding the Employee's entitlement to profit share was uncontradicted, and based on that evidence, determined that the Employee was entitled to 30% profit share for May. She concluded that because the company did not make a profit in any subsequent months, he was not entitled to any additional compensation.

13. The delegate found no evidence that the terms and conditions of the Employee's employment were misrepresented.

ARGUMENT

14. The Employer advanced a number of arguments on appeal regarding the delegate's findings of fact. The Employer argues that the findings regarding the Employee's hours of work were not supported by the evidence, in particular, the text messages. Ms. Lindau referred to a number of text messages in support of her argument.

15. The Employer also argues that the Employee's hours of work were fraudulent and challenges the delegate's factual findings about the Employee's working hours. The Employer contends that the delegate erred in imposing an administrative penalty for the contravention of section 48, in essence, because she "was not responsible for [the Employee's] work schedule."

16. The Employer further contends that the profit-sharing agreement was that the Employee would get 30% of the profits calculated on an annual basis, paid quarterly, and the delegate erred in calculating the profits on a monthly basis.

17. Finally, the Employer argues that the delegate erred in concluding that the Employee was not a manager and thus entitled to overtime wages. The Employer submits that the delegate erred in assessing the credibility of the parties and ought to have preferred the evidence of the Employer.

ANALYSIS

18. 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.

19. 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.

20. Although the Employer advanced only one ground of appeal, given that she is self-represented, I have taken a liberal view of the grounds of appeal (see *Triple S Transmission*, BC EST # D141/03).

21. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with the decision of the Director. After considering the submissions of the parties, I conclude that the Employer has not met that burden and dismiss the appeal.

Failure to observe the principles of natural justice

22. 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. There is nothing in the appeal submission that establishes that the Employer was denied natural justice.

23. The delegate held the hearing over a period of two days. The Employer appeared, with witnesses, on those days and submitted a large amount of documentary evidence to support her position. There is nothing to persuade me that the Employer was not aware of the allegations and that she was denied an opportunity to present any evidence or to ask the Employee questions on his evidence.

24. I conclude that the delegate observed the principles of natural justice and find no basis for this ground of appeal.

Error of Law

25. 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.

26. An appellant must demonstrate that the delegate's analysis constitutes an error of law.

Hours of work

27. The Employer takes issue with the delegate's calculations of the Employee's hours of work. This is a factual matter, and I am only able to interfere with the Determination if the Employer can persuade me that the delegate acted on a view of the facts which could not be reasonably entertained or acted without any evidence.

28. Section 28(1)(d) of the *ESA* imposes an obligation on the Employer to maintain a record of the hours worked by an employee each day regardless of whether the employee is paid on an hourly or other basis. The Employer cannot discharge this obligation, as she appears to argue, by telling and trusting the Employee "to make his own schedule and ensure that he only worked 40 hours per week."

29. It is not clear from the Determination or the Record whether the Employer argued before the delegate that the Employee had falsified his hours. Had the Employer been of that view, she ought to have made that argument to the delegate. It is not for the Employer to make that argument for the first time on appeal without any evidence.

30. In light of the Employer's failure to comply with its section 28 obligations, the delegate was obliged to rely on the best available evidence to calculate the Employee's hours. She chose not to rely on the Employee's assertion of his own hours as she did not consider them credible; rather, she placed weight on the text messages and the evidence of witnesses. I find no error in the delegate's approach and find that her calculations were rationally supported on the evidence before her.

31. The Employer also argues that because the Employee "made his own schedule" and there was no need for him to work on Thanksgiving, the delegate erred in concluding that the Employer contravened section 48 when she failed to pay him statutory holiday pay for that day. I find no error in the delegate's conclusion. The Employer has the responsibility to manage the workplace, including the obligation to ensure compliance with the *ESA*. There is no evidence the delegate's determination is incorrect.

32. There is nothing in the appeal submissions that persuade me that the delegate erred in her analysis of the evidence.

Manager

33. As noted by the delegate, the *Employment Standards Regulation* defines who is a manager for the purposes of the *ESA*. The delegate analyzed the Employee's tasks, based both on the evidence and the text correspondence, and determined that while the Employee performed some management tasks, overall, he could not be considered to fall within that definition.

34. Introducing the Employee to other Employees as a manager, ordering product, talking to customers and making purchases for the kitchen does not raise the Employee to the level of a manager. The delegate noted that the Employee had limited decision-making autonomy or independence and no power to undertake any strategic planning, budgeting, project management or evaluation.

35. Having reviewed the delegate's analysis, I am unable to find a reviewable error.

Profit sharing

36. There was no written employment agreement between the parties. However, there is no dispute that the Employer agreed to share 30% of the profits with the Employee. The Employer now contends that was to be calculated on an annual, rather than a monthly, basis and the delegate erred in calculating it on a monthly basis.

37. There is no indication the Employer advanced this argument before the delegate. Furthermore, the Employer's submissions refer simply to commissions representing 30% of profit without any details on when that was to be calculated. In the absence of any demonstrated error in the Determination, I find no basis to interfere with the result.

38. In summary, I am not persuaded there are any errors of law. The Determination is based on factual findings which the delegate could reasonable make based on the evidence before her. I find no reasonable prospect the appeal will succeed and I dismiss the appeal.

ORDER

39. Pursuant to section 115 of the *ESA*, I order that the Determination dated July 12, 2019, be confirmed in the amount of $6,793.65, plus any interest that may have accrued since the date of issuance, pursuant to section 88 of the *ESA* since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal