Employment Standards TRIBUNAL

Citation: Mitrux Services Ltd. (Re)
2019 BCEST 113

An appeal

- by -

Mitrux Services Ltd.
("Mitrux")

- 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.: 2019/158

DATE OF DECISION: October 24, 2019

DECISION

SUBMISSIONS

Caroline Campbell — on behalf of Mitrux Services Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*ESA*"), Mitrux Services Ltd. ("Mitrux" or the "Employer") has filed an appeal of a determination issued by the Director of Employment Standards (the "Director") on August 2, 2019 (the "Determination").

2. On November 26, 2018, a former Employee of Mitrux filed a complaint with the Director of Employment Standards alleging that the Employer contravened the *ESA* in failing to pay regular and overtime wages, vacation and statutory holiday pay, and compensation for length of service, in requiring the Employee to pay its business costs, and in misrepresenting the conditions of employment.

3. Following an investigation, a delegate of the Director concluded that Mitrux had contravened sections 17, 18, 40, 45, 46, and 58 of the *ESA* in failing to pay the Employee regular and overtime wages, statutory holiday pay, and annual vacation pay. The delegate ordered the Employer to pay $11,447.68 in respect of wages and accrued interest.

4. The delegate also imposed seven administrative penalties on Mitrux for contraventions of the *ESA* in the total amount of $3,500, for a total amount payable of $14,947.68.

5. Mitrux appeals on the grounds that the Director erred in law in making the Determination.

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

ISSUE

7. Whether or not Mitrux has established any basis to interfere with the Director's determination.

FACTS

8. Briefly, the facts relevant to this appeal are as follows.

9. Mitrux operates a truck storage and parking yard in Abbotsford, B.C. The Employee was employed as an on-site night security guard until September 2018 at the Employer's Iron Mills yard, which was the storage and parking yard. Her duties were to count trucks, record their plate numbers and verify whether they were authorized to park in the yard. The Employer's main office was located at another address.

10. At the time of her hire in early May 2018, an agent of the Employer informed the Employee that she could park her fifth-wheel trailer at the Iron Mills yard, but that there were no amenities such as water or electricity connected to the yard at that time. The Employee was told that these amenities were

forthcoming and that service connections would be installed in June or July 2018. On May 10, 2018, the Employer's agent offered the Employee the opportunity to live/work at the Iron Mills site. The Employee accepted and moved her trailer to the site on May 18, 2018.

11. The Employee worked every night of the week, creating a logbook of the plate numbers of each truck parked in the yard. The logbook also recorded the dates and hours of work performed by the Employee. The Employee dropped the logbook off at the office each morning after her shift and picked it up each evening before starting her shift. She also installed lights in the yard in order to assist her in performing her work, and paid for gas to operate a generator, which powered both her trailer as well as the yard lights.

12. The Employee signed a Job Offer setting out her hours of work and rate of pay. She contended that she never received a copy of the Job Offer after signing, despite requests to receive one. Her pay was increased from $1,400 to $2,000 per month effective July 15, 2018, in response to her request for a pay increase due to the cost of gas to operate the generator.

13. The Employee recorded her hours of work in her personal calendar that she said were identical to the hours she recorded in the logbook.

14. At the beginning of September, the Employee recorded in the logbook that she was not being paid enough to live and cover the expenses of lighting Iron Mills and would be seeking alternative employment. The Employee worked her regular schedule until September 16, 2018, and ultimately resigned on September 18, 2018.

15. The Employer argued that the Employee was only required to work three nights per week, Friday to Sunday, from 2100 to 0500, and that she was paid $1,400 per month for those three nights. That salary was revised to $2,000 effective July 15, 2018, which was to be inclusive of all benefits and vacation pay. The delegate found that the Job Offer letter established the Employee's wage rate, which started at $1,400 per month, and increased to $2,000 per month, for three nights per week. Although the wage statements issued by the Employer did not record the Employee's hours of work, the wages were consistent with the Job Offer letter.

16. The delegate determined that the Employee's work commenced May 15, 2018, a conclusion not disputed by the Employer in its appeal.

17. Noting that the Employer had not maintained a record of the Employee's hours of work as required under section 27 of the ESA, the delegate determined that the Employee worked the hours she recorded in her personal calendar. The delegate placed little weight on the evidence of the Employer's witnesses regarding the Employee's hours of work on the basis that they did not observe the complainant since they worked during the day, and those witnesses who did go to the site at night were there for only a short time. The delegate also noted that while the Employer and all of its witnesses denied ever seeing the Employee's logbook recording her hours of work, the employer submitted a photocopy of one of the pages of the logbook as part of its documentary evidence. The delegate found the Employee's evidence more credible and reliable than that of Mitrux employees.

18. The delegate found that the Employer was aware of what hours the Employee was working and permitted her to work those hours despite the wording of the Job Offer letter.

19. The delegate determined that the wages paid to the Employee for nine hours per night was below minimum wage for the entire employment period and that the Employee was entitled to be paid minimum wage for all hours worked, in accordance with section 16 of the *ESA*. The delegate also found that the Employee was entitled to be paid overtime for hours worked in excess of eight hours per day and 40 hours per week.

20. Finally, the delegate found that, despite the wording of the Job Offer letter, the Employee's wages did not include statutory holiday pay and vacation pay and concluded that the Employee was entitled to statutory holiday pay as well as vacation pay.

21. The delegate determined that the Employee was not entitled to be reimbursed for her gas expenses. She also found that the Employee quit her employment on September 18, 2018, on her own volition and was not entitled to compensation for length of service. Finally, the delegate determined that Mitrux did not misrepresent the conditions of employment.

ARGUMENT

22. Mitrux contends that the delegate erred in failing to consider the written employment agreement as an assignment of wages to rent. Mitrux argues that the agreement provided for wages in the amount of $2,000 for 96 hours per month, or a rate of $20.83 per hour (although this is expressed as $20.83 per month in the appeal, I infer that was in error). Mitrux says that the employment agreement also provided for free parking for the Employee's mobile home and utilities.

23. Mitrux argues that if an employee wishes to have a portion of their wages to be contributed towards other purposes such as rent, there must be a clear written agreement to do so. Mitrux argues that the written agreement between the parties providing free accommodation was a valid written assignment of wages.

ANALYSIS

24. Section 114(1) 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.

25. 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.

26. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with the decision. I am not persuaded that Mitrux has met that burden.

27. The Employer does not dispute any of the factual findings of the delegate, nor her analysis of the start date of the Employee's employment, her wage rate, hours of work or entitlement to overtime, vacation pay or statutory holiday pay. The sole ground of appeal is that the delegate erred in failing to consider the Job Offer letter as an assignment of wages.

28. I find no basis for the Employer's ground of appeal.

29. It cannot be said that the delegate erred in law in her analysis of the employer's position, as it was never argued before her. There is nothing in the record or the Determination to suggest that the Employer ever raised the argument that the Employee was to pay rent.

30. Furthermore, there is no basis in law or fact for this argument. The Job Offer letter says nothing about rent or any assignment of wages. The full text of the June 1, 2018 letter is as follows:

> *We're delighted to extend this Job Offer of employment for the position Security, living on site in your 5th Wheel, with Ameri-can Freight Systems Inc., starting on June 1, 2018.*
>
> *Responsibilities:*
>
> - *Security Duties, watch all equipment and vehicles on site at 2200 Iron Mills Court*
> - *Keep track of trucks coming and going, tracking license plates, ensuring that equipment should be parking on premises*
> - *Keep track of which units are noticed littering on site.*
>
> *Hours:*
>
> - *9PM to 5AM three days a week*
>
> *Salary:*
>
> - *$1400 per month, the two [pay] period ending dates are the 15th and end of the month. Payments will be made 3 days after the [pay] period ending dates.*
>
> *As discussed, one month written notice of resignation or termination must be given by either Employee or Employer upon dismissal.*
>
> *Welcome to our team!*

31. The second Job Offer letter is even briefer, containing no references to hours of work. It refers only to a change in salary "from $1400 per month to a flat $2000 per month including everything, holiday pay etc."

32. Section 22(4)(c) of the *ESA* provides that an Employer may honour an employee's written assignment of wages to meet certain credit obligations including "an outstanding balance in respect of the personal use of real and personal property of the employer by the employee."

33. There is no evidence the Employee assigned her wages to the Employer for any reason. The Job Offer letter does not set out what the amount of any "rent" was to be. There was no evidence before the delegate that the Employee was expected to pay rent. Furthermore, the Employer's appeal submission states that the Employee was entitled to park her trailer for "free."

34. I find the appeal to border on the frivolous and conclude there is no reasonable prospect that the appeal will succeed.

35. Pursuant to section 114(1)(f), the appeal is dismissed.

ORDER

36. Pursuant to section 115 of the *ESA*, I order that the August 2, 2019 Determination be confirmed in the amount of $14,947.68, 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