Employment Standards TRIBUNAL

Citation: Beck Glass Inc. (Re)
2019 BCEST 28

An appeal

- by -

Beck Glass Inc.
(the "Employer" or "Beck")

- 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: Michelle F. Good

FILE NO.: 2019/6

DATE OF DECISION: March 25, 2019

DECISION

SUBMISSIONS

Tyler Staschuk — on behalf of Beck Glass Inc.

OVERVIEW

1. Pursuant to section 112(2) of the *Employment Standards Act* (the "*ESA*"), Beck Glass Inc. (the "Employer" or "Beck") has filed an appeal of a Determination (the "Determination") issued by Megan Roberts, a delegate (the "Delegate") of the Director of Employment Standards (the "Director"), on December 21, 2018. In that Determination, the Director found that the Employer had contravened section 63 of the *ESA* by failing to pay the employee, Kayla Justus (the "Employee"), compensation for length of service that she was entitled to as provided for in section 63 of the *ESA*. The Director further found that the Employer owed the Employee compensation for length of service in the amount of $1,264.00 and a further $50.56 in concomitant annual vacation pay.

2. Further, mandatory administrative penalties as required by section 98(1) of the *ESA*, as set out in section 29(1) of the *Employment Standards Regulation*, were ordered in the amount of $500.00 for each contravention.

ISSUES

3. Did the Director err in Law?

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

5. Is there new evidence that was not available at the time of the hearing?

ARGUMENT

6. The Employer argues that the Director erred in law by giving weight to any evidence from the Employee after finding that the Employee's evidence, with respect to whether or not she notified the Employer she would be absent on June 11, was unconvincing. The Employer further argues that the Director erred in law by misapplying section 17 of the *ESA* as it pertains to the pay raise granted the Employee. The Employer also argues that the Director erred in her calculation of the amount owing to the Employee for compensation for length of service. The Employer argues that these alleged errors in law amount to a failure to observe the principles of natural justice. Finally, the Employer argues that there is evidence now available that was not available at the time of the original hearing and asks that Mr. Merle Beck ("Mr. Beck") be permitted to testify.

THE FACTS

7. On June 6, 2018, the Employee gave written notice of resignation to Beck indicating her last day of work would be June 22, 2018. On June 8, 2018, the Employee sent an email to Mr. Beck and Tyler Staschuk

("Mr. Staschuk") requesting the payment of past due wages in which she also stated that she would not be working out her notice period if she did not receive payment of her previously approved salary increase by June 11, 2018. The Employee worked on June 7 and June 8, but not on June 11, 2018. On the morning of June 12, 2018, the Employee attended at work and was called into a meeting with Mr. Beck and Mr. Staschuk at which time she was told that she need not work out her notice period. She was immediately thereafter escorted to her desk to collect her belongings and was escorted out of the building. On June 12, 2018, the Employer sent an e-transfer to the Employee to fully compensate her for outstanding amounts pursuant to a wage increase that took effect April 30, 2018. The Employee received all wages for all hours worked and all vacation pay to which she was entitled. These facts were mutually agreed to as between the parties.

ANALYSIS

8. Did the Director err in law?

9. With respect to the right of the Director to consider the evidence of the Employee, the weighing of evidence is entirely within the jurisdiction of the Delegate hearing the matter. Accordingly, the Delegate weighed the *viva voce* evidence of the Employee as to whether or not she called in sick for June 11, 2018, and found that her assertion was not supportable. The fact that she rejected the evidence of the Employee on this one point does not neutralize the decision maker's jurisdiction to weigh in favour of other evidence proffered by the Employee. However, it should be noted that the decision of the Delegate was arrived at largely in response to the facts agreed upon by the parties and the documentary evidence before her.

10. With respect to the argument that the Delegate erred in her application of section 17, respectfully, this section only applies to the issue of the Employee's outstanding pay arising from her pay increase, not with respect to her compensation for length of service. Further, the Delegate is clear that the Employee did in fact receive by way of e-transfer the outstanding amount owed her with regard to her pay increase. The only sections of the *ESA* that are at play in this decision are section 63 which outlines an Employee's right to compensation for length of service; section 58 which addresses vacation pay which in this instance is the vacation pay concomitant with the length of service pay, and section 88 which addresses the matter of interest payable on amounts owing. The Delegate decided that the Employee was terminated by the Employer when she was told on June 12, 2018, that her services were not required, and she was escorted out of the office. Given that the Employee was terminated, the Employee was entitled to receive compensation for two-weeks pay for length of service.

11. With respect to the argument that the Delegate's calculation of amounts owing the Employee for length of service is "inflated", the *ESA* is specific that if terminated, an Employee is entitled to compensation for length of service. In this case, the Employee is entitled to the equivalent of two-weeks pay plus the holiday pay that would have been earned over those two weeks. The fact that the Employee did not work out her notice period does not have any bearing on the amount of compensation she is entitled to for length of service as she was subsequently terminated during her notice period, thus triggering the rights provided for in section 63 for length of service compensation.

12. In *Gemex Developments Corp., v. British Columbia (assessor of Area 12 – Coquitlam)* [1998] BCJ No. 2275 (BCCA), the British Columbia Court of Appeal defined "error of law". The Tribunal subsequently adopted that definition, as articulated below.

    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.

13. Unless the Director's decision raises an error of law, the Tribunal lacks the jurisdiction to reach factual conclusions that differ from those found by the Director. (see *Britco Structures Ltd.,* BC EST # D260/03).

14. The Delegate made no error of law in her determination of this matter, and thus, the Tribunal lacks jurisdiction to make factual conclusions that differ from those made by the Delegate in her Determination.

15. Likewise, having made no error of law, the Employer's argument that the Delegate did not observe the principles of natural justice must fail.

16. The Employer requests that Mr. Beck be permitted to give evidence and claims that this testimony amounts to new evidence that was not available at the time of hearing. Clearly Mr. Beck's evidence was available at the time of the hearing. His evidence, as it pertains to the matter, is not something new that has arisen subsequent to the hearing and thus does not meet the definition of new evidence.

17. On all grounds, I find that this appeal must fail.

ORDER

18. Pursuant to section 114(1) of the *ESA*, I hereby order that this appeal be dismissed and pursuant to section 115(1) of the *ESA*, I uphold the decision of the Director.

Michelle F. Good
Member
Employment Standards Tribunal