Citation: Creative Advantage Childcare Inc. (Re)
2019 BCEST 42

An appeal

- by -

Creative Advantage Childcare Inc.
(the "Company")

- 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: Allison Tremblay

FILE NO.: 2019/9

DATE OF DECISION: April 30, 2019

DECISION

SUBMISSIONS

Jennifer Kennedy — on behalf of Creative Advantage Childcare Inc.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*ESA*"), Creative Advantage Childcare Inc. (the "Company") filed an appeal of the January 15, 2019, determination (the "Determination") of Carrie H. Manarin, a delegate (the "Delegate") of the Director of Employment Standards (the "Director"). In the Determination, the Delegate found that the Company contravened sections 40 (overtime), 58 (annual vacation pay), and 63 (compensation for length of service) of the *ESA* with respect to its employee Doriane Tasker ("Tasker"), and ordered it to pay $1,706.99 in wages and interest and $1,500 in administrative penalties under section 29(1) of the *Employment Standards Regulation* (the "*Regulation*") for violations of sections 40, 63, and 28 (payroll records) of the *ESA*.

2. The Company seeks to cancel or vary the Determination based on an error of law, failure to observe the principles of natural justice, and newly available evidence.

3. The Director provided the section 112(5) record (the "Record") to the Tribunal. The parties received copies of the Record and were given an opportunity to make submissions on the Record's completeness. The Tribunal received no objection to the Record's completeness. Accordingly, I accept the Record as complete.

4. Under section 114(1) of the *ESA*, the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed:

> 114 (1) 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:
>
> …
>
> (f) there is no reasonable prospect that the appeal will succeed;

5. I am satisfied that I can determine this appeal under section 114(1) based on the material before me, namely, the Determination, Reasons for the Determination, the appeal form, submissions filed by Jennifer Kennedy ("Ms. Kennedy"), and the Record provided to the Tribunal.

ISSUE

6. Is there a reasonable prospect that the appeal will succeed?

ARGUMENT

7. The Company alleges several "errors of law":

   a) determining that Tasker was not provided reasonable alternate employment on June 13, 2018, because she was terminated on June 12, 2018;

   b) preferring Tasker's evidence over the Company's with respect to her start date; and

   c) relying on circumstantial documentary evidence with respect to the start date.

8. The Company further argues that the Delegate failed to observe natural justice by finding the Company failed to keep payroll records. The Company does not set out any circumstances that would give rise to a breach of natural justice. I will treat this ground of appeal as another alleged error of law.

9. Finally, the Company provides work schedules and copies of pages from a notebook and submits that these are supplementary payroll records. The Company says these should be accepted as new evidence because it did not think that it was required to provide them in the hearing before the Delegate.

THE FACTS AND ANALYSIS

10. On December 14, 2018, the Delegate held a hearing by teleconference into Tasker's complaint regarding alleged breaches of the *ESA*.

11. It was undisputed that the Company employed Tasker as an Early Childhood Educator at one of the Company's childcare facilities. On June 12, 2018, Tasker submitted two weeks' notice of her resignation such that her last day would be June 28, 2018. Later on June 12 and also on June 13, 2018, in a series of text messages, the Company informed Tasker that she was not permitted to return to her place of employment, was "laid off" and that she would not be paid for the two weeks' notice period.

12. After the Company told Tasker that she was laid off, it offered, again by text on June 13, 2018, to keep her "on call" for two weeks with no guarantee of hours. Still later, the Company attempted to retract its earlier statements, said she was not yet terminated, and could work the notice period at another of the Company's facilities. Tasker did not reply to these last two text messages.

13. Tasker testified during the hearing that she believed she had been terminated on June 12, 2018.

14. In its submission, the Company argues that it required some time to gain an understanding of its obligations under the *ESA* and then it provided an offer of reasonable alternate employment within a reasonable period.

15. The Company and Tasker also disputed the employment start date. Tasker testified that she started work on June 12, 2017. She provided, as evidence of her start date, documents including a bank statement showing food purchases at a restaurant next to the employment location, a deposit of $2000 cash on July 6, 2017, an email from the Company stating her start date as June 12, 2017, a schedule listing her start date as June 12, 2017 and a wage statement showing she was paid statutory holiday pay for July 1, 2017. Tasker testified that she worked beginning June 12, 2017 and was paid in cash because she started work in June but the wage subsidy program under which she was hired did not start until July 2017.

16. In contrast, Ms. Kennedy, on behalf of the Company, testified that Tasker's first day of employment was July 7, 2017, and that the Company paid the July 1, 2017 statutory holiday gratuitously. Ms. Kennedy said she had no time sheets for Tasker the period June 12 to July 6, 2017. She denied paying Tasker in cash.

17. Tasker's start date is relevant if the Company owes Tasker compensation for length of service. Pursuant to section 63(3)(a) of the *ESA*, she would be owed either one week or two weeks' wages depending on whether she worked for at least 12 consecutive months.

18. The Company does not dispute the Delegate's determination with respect to sections 40 and 58 of the *ESA*.

19. I will first address the Company's application to admit new evidence. The test used by the Tribunal on applications to admit new evidence is set out in *Re: Bruce Davies*, BC EST # D171/03. The evidence must meet four conditions:

> (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
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> (b) the evidence must be relevant to a material issue arising from the complaint;
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> (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
>
> (d) the evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

20. In this case, the new evidence submitted to the Tribunal could have been presented at the hearing. The Company's argument that it "could not reasonably have known that it was necessary to provide" the evidence is untenable in light of the clear demand on the Demand for Employer Records that the Company must provide "any and all payroll records relating to…hours of work…". I refuse to admit the new evidence.

21. I turn now to the Company's other grounds of appeal.

22. It is the task of the Delegate to review the evidence and make factual findings. The Tribunal cannot overturn a finding of fact unless the finding was irrational, perverse or inexplicable and so amounts to an error of law: *Gemex Developments Corp. v. B.C. (Assessor of Area #12 – Coquitlam*, [1998] BCJ No 2275.

23. The Company does not dispute that it purported to terminate Tasker's employment on June 12, 2018. It points to its June 13, 2018, offer of employment at its other location as being an offer of reasonable alternate employment.

24. The Delegate reviewed the relevant evidence on this point, in particular, the text message exchange between Tasker and the Company. It was open to the Delegate to conclude, based on that evidence, that the Company terminated Tasker on June 12, 2018. It is the termination that triggers the obligation to pay compensation for length of service under section 63 of the *ESA*. I find the Company has no reasonable chance of success on this ground.

25. The Company next complains that the Delegate ought not have preferred Tasker's testimony and documentary evidence regarding her start date. This was not a case where there was significant conflict in the evidence. Tasker provided documentary evidence and testified that she started work on June 12, 2017. The Company provided no contradictory documentary evidence. Ms. Kennedy's evidence on behalf of the Company was that she did not recall the first week of July 2017, but that since the Company had no time sheets for Tasker until July 7, 2017, she must not have worked before July 7, 2017. It was open to the Delegate to prefer Tasker's evidence on this point. The Delegate's findings were not irrational, perverse, or inexplicable. I find the Company has no reasonable chance of success on this ground.

26. Given the Delegate's finding that Tasker's employment started on June 12, 2017, and the lack of payroll records for the period June 12, 2017, to July 6, 2017, it was open to the Delegate to make a finding that the Company contravened section 28 of the *ESA*. It was also open to the Delegate to find a breach of that section with respect to time sheets for January 1, 2018 to January 15, 2018, and June 1, 2018 to June 12, 2018, that the Company created months after the fact for the purpose of the hearing. I find this ground of appeal has no reasonable chance of success.

27. Finally, the Company asserts that the Delegate's finding that the Company paid Tasker in cash from June 12, 2017 to July 6, 2017, was a finding of criminal activity that was outside of the jurisdiction of the Delegate to make. The Company is incorrect. The *ESA* authorizes the payment of wages in cash in section 20(a).

28. Pursuant to section 114(1)(f) of the *ESA*, I dismiss the appeal as it has no reasonable chance of success.

ORDER

29. Pursuant to section 115 of the *ESA*, I confirm the Determination together with any interest that has accrued under section 88 of the *ESA*.

Allison Tremblay
Member
Employment Standards Tribunal