Employment Standards TRIBUNAL

Citation: James Noble (Re)
2019 BCEST 62

An appeal

- by -

James Noble
("Mr. Noble")

- 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.: 2019/35

DATE OF DECISION: July 8, 2019

DECISION

SUBMISSIONS

James Noble	on his own behalf
Colin Gelinas	delegate of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*ESA*"), James Noble ("Mr. Noble") has filed an appeal of a Determination (the "Determination") issued by the Director of Employment Standards (the "Director") on March 1, 2019.

2. Mr. Noble filed a complaint with the Director of Employment Standards alleging that Valley Lube Holdings Ltd. ("Valley Lube") contravened the *ESA* in failing to pay him compensation for length of service.

3. Following a hearing, a delegate of the Director concluded that Valley Lube had contravened sections 58 and 63 of the *ESA* in failing to pay Mr. Noble compensation for length of service and annual vacation pay. The delegate ordered Valley Lube to pay $5,336.40 in wages, compensation for length of service, and interest. The delegate also imposed an administrative penalty of $500 on Valley Lube, for a total order of $5,836.40.

4. Mr. Noble contends that the Director erred in law in calculating his entitlement to compensation for length of service.

5. After reviewing the appeal submissions, I sought submissions from the delegate on his calculation of the quantum of Mr. Noble's compensation entitlement. In a submission dated May 31, 2019, the delegate agreed that the amount owed to Mr. Noble should be varied.

6. Neither Mr. Noble nor Valley Lube responded to the Tribunal's request for reply submissions on the delegate's May 31, 2019 submission.

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

ISSUE

8. Whether or not Mr. Noble has established any basis to interfere with the Director's determination.

FACTS

9. Mr. Noble was employed by Valley Lube from April 30, 2006, until May 11, 2018. A dedicated employee, he was promoted to assistant manager in September 2016. In January 2018, Mr. Noble sustained a head injury in a motor vehicle accident ("MVA"). He resumed his employment in March 2018, working modified duties. He was working those modified duties at the time his employment ended.

10. At the hearing, the parties agreed that, if the delegate determined that Mr. Noble's employment had been wrongfully terminated, compensation for length of service would be calculated based on the wages he earned during the eight weeks prior to his MVA.

11. The delegate found that Mr. Noble was entitled to compensation for length of service, and that his entitlement, based on his twelve years of employment, was equivalent to eight weeks wages. The delegate determined that Mr. Noble's wages amounted to $4,891.75, based on his wages for the eight weeks prior to his MVA. The delegate noted that the parties agreed those eight weeks were an accurate reflection of his normal or average hours.

ARGUMENT

12. Given that the Employer did not appeal the delegate's determination that Mr. Noble's employment was wrongfully terminated, I have not reviewed the facts and evidence supporting that conclusion.

13. Mr. Noble contends that, in the eight weeks prior to his MVA, he earned wages of $7,935.75, with the difference between this amount and the amount determined by the delegate to reflect a bonus.

14. Mr. Noble argues that this bonus, which he says was paid to all long-term employees on a monthly basis, should be calculated into his compensation.

15. Following my request for submissions from the delegate, the delegate agreed that the Determination ought to be varied to reflect the inclusion of a bonus in the calculation of compensation for length of service. The delegate agreed that the bonus was based on Mr. Noble's hours of work, productivity and efficiency, and thus constituted wages under section 1 of the *ESA*. The delegate also noted that because the bonus was paid in each pay period, it formed a part of Mr. Noble's normal earnings.

16. However, the delegate disagreed with the method used by Mr. Noble to calculate the bonus and used the bonus amounts paid in the eight weeks between November 26, 2017, and January 20, 2018, as the regular wage to determine the compensation owed. The delegate calculated the amount owed to Mr. Noble to be $7,834.19.

17. The delegate also noted that the Employer had already paid $5,336.40, which was the amount of the original Determination, and those funds had been released to Mr. Noble. The delegate calculated the difference owing to Mr. Noble to be $2,497.79.

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. An appellant has the burden of demonstrating there is a basis for interfering with the delegate's decision.

Error of law

21. 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.

22. I find that the delegate erred in law, which he conceded in his submission.

23. Wages are defined in the *ESA* to include:

(a) salaries, commissions or money, paid or payable by an employer to an employee for work,

(b) money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency,

…

but does not include

….

(g) money that is paid at the discretion of the employer and is not related to hours of work, production or efficiency,

24. The Director has agreed that his initial calculation of Mr. Noble's entitlement to compensation for length of service was erroneous and that his bonus payment ought to have been included in the calculations. I agree with the delegate's assessment of Mr. Noble's entitlement and find no error in his calculation of the amount owed.

25. I therefore confirm the delegate's re-calculation of Mr. Noble's entitlement for compensation for length of service.

ORDER

26. Pursuant to section 115 of the *ESA,* I order that the Determination dated March 1, 2019, be varied. Mr. Noble's entitlement is $7,834.19; $5,336.40 of which has been paid out to Mr. Noble. The balance, being as follows, is confirmed in the amount of $2,497.79, together with whatever further interest that has accrued under section 88 of the *ESA* since the date of re-calculation, being May 31, 2019.

Carol L. Roberts
Member
Employment Standards Tribunal