Citation: Kyah Development Corporation (Re)
2020 BCEST 112

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Kyah Development Corporation

- of a Determination issued by -

The Director of Employment Standards

pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

PANEL: Carol L. Roberts

FILE NO.: 2020/065

DATE OF DECISION: September 16, 2020

DECISION

SUBMISSIONS

Scott McCann and Erin S. White	counsel for Kyah Development Corporation
John Dafoe	delegate of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*ESA*"), Kyah Development Corporation carrying on business as Kyah Food and Fuel (the "Employer") has filed an appeal of a March 12, 2020, determination (the "Determination") issued by a delegate of the Director of Employment Standards (the "Director").

2. The Director found that the Employer had contravened sections 58 and 63 of the *ESA* in failing to pay a former Employee annual vacation pay and compensation for length of service. The Director determined that the Employer owed wages and interest in the total amount of $7,284.36. The Director also imposed a $500 administrative penalty on the Employer for the section 63 contravention, for a total amount payable of $7,784.36.

3. The grounds for the appeal are that the Director erred in law. After reviewing the appeal submissions, I decided I would not dismiss the appeal under section 114 and sought submissions from the other parties. Although the Director made submissions, the Employee did not.

4. This decision is based on the section 112(5) "record" that was before the delegate at the time the Determination was made, the submissions of the Employer and the Director, and the Reasons for the Determination.

FACTS

5. The Employer operates a convenience store and gas station in Witset, a Wet'suwet'en village in northern British Columbia. Corrina Mitchell (the "Employee" or "Ms. Mitchell") was employed as the manager starting in November 2004. On August 29, 2014, the Employee took medical leave due to ill health. She received short-term disability payments though the Employer's group benefits provider. In December 2016, the Employer's disability benefits provider informed the Employee that her long-term disability benefits would end on January 2, 2017.

6. The Employer continued to pay the Employee's health benefit premiums until on or about March 31, 2019.

7. At the Employer's request, the Employee provided the Employer with confirmation of her ongoing inability to work. However, the Employer did not respond to the Employee's inquiry as to whether or not her employment had been terminated. The Employee did not receive a record of employment ("ROE"), a termination letter, or any other communications from the Employer regarding the termination of her employment.

8. On July 23, 2019, the Employee filed a complaint alleging that the Employer had contravened the *ESA* in failing to pay her compensation for length of service.

9. At issue before the delegate was whether Ms. Mitchell's employment had been terminated, and if so, whether she was entitled to compensation for length of service.

10. At the hearing, the Employer argued that it had not terminated the Employee's employment. The Employer said that although it continued to pay the Employee's extended health benefits for five years after the Employee was unable to work, it was under no obligation to continue covering the Employee's benefits, and that the discontinuance of those benefits in March 2019 did not indicate a change in the Employee's employment status.

11. In the alternative, the Employer argued that if there was an end of the employment relationship because the Employee was unable to return to work for medical reasons, the employment contract had been frustrated.

12. The Employer did not dispute that it had not notified the Employee about its decision to cease paying her extended health benefits or about the fact that she could continue the benefits by paying the premiums herself.

13. The Director found that by terminating the Employee's extended health benefits without giving her an opportunity to make those payments herself, the Employer had significantly altered a condition of the Employee's employment. The Director wrote:

> While the Employer argues that they were not contractually obligated to pay Ms. Mitchell's benefit premiums while she was on leave, they also state that the policy was that benefits would be continued if the employee voluntarily paid the premium amounts themselves. Ms. Mitchell was given no notice by the Employer of their decision to cease her extended health benefits and was never given the opportunity to continue these benefits by paying the premiums herself. Even after she raised a question about her benefits being cut off, Ms. Mitchell was never told that she could continue the benefits by paying the premiums.

14. The Director determined that, in terminating the Employee's extended health benefits without giving her an opportunity to continue them by making the premium payments herself, the Employer substantially altered a condition of the employment. He further found that the alteration was sufficiently significant for him to determine that the Employer terminated the Employee's employment. The Director concluded that the Employee was entitled to compensation for length of service.

ARGUMENT

15. The Employer argues that the delegate erred as follows:

a) in incorrectly summarizing the evidence of the Employer's witness as to whether there was a "practice" or "policy" around the benefits;

b) incorrectly and without sufficient evidence concluded that there was a "practice" or "policy" around benefits which required the Employer to provide an opportunity to an employee to pay the premiums for their benefits; and

c) in incorrectly concluding that the Employer substantially altered a condition of the Employee's employment, even though there was no evidence that any workplace "practice" or "policy" of the Employer was a term of the Employee's employment.

16. The Employer contends that the delegate elicited a response from a witness that there was a "practice" of individuals paying their own premiums, but that this witness did not say that this was a policy nor was she making a legal conclusion that this was the Employer's "practice". Further, the Employer contends, the delegate did not ask questions about the content of the practice and did not seek further clarification.

17. The Employer says that the delegate's conclusions, based on this line of questioning, are incorrect. It says there was no "practice" for the Employer to provide employees with an opportunity to pay premiums to stay on the group benefits. While the Employer says it is possible for employees to make arrangements with the insurer to convert their group benefits to an individual plan when their group benefits cease, this is a private arrangement between the insurer and an individual employee, and the Employer is not involved in that arrangement.

18. The Employer further argues that even if there was a policy or practice, there was insufficient evidence about the content of such a practise or policy to make it legally binding. For example, the Employer argues that there was no evidence about which of the Employer's employees the practice or procedure applied to, which types of leaves this applied to, the mechanism for employees to pay the premiums, or how the policy or practice was communicated to employees.

19. The Director submits, among other things, that the Employer paid the Employee's benefits for the first 4.5 years of her leave, and that cancellation of those benefits, without notice, constituted a substantial alteration of conditions of her employment, as defined by section 1 of the *ESA*. The delegate submitted that "the Employer provided no evidence with respect to their benefits policy and no evidence from the benefits provider to establish what, if any, Ms. Mitchell's entitlement to coverage would have been."

20. In reply, the Employer argues that the delegate's submissions improperly cross the line into impermissible advocacy, that the delegate "refers to information that is not on the Record, seeks to add further justifications for the Determination, and comments on issues that were not raised in the appeal."

21. The Employer says that while the delegate argues that counsel for the Employer "could have asked further questions of the witness to clarify whether there was a policy or practice requiring the Employer to continue paying for the Complainant's benefits," not only was this not part of the record, the witness's response did not warrant further questioning because the responses did not establish that there was a workplace policy or practice requiring the Employer to continue benefits during a lengthy leave.

22. The Employer also argues that the delegate's submission that "if… there was no such policy in place, we are left with the cancellation of extended health benefits without notice," is in error. First, the Employer says, the delegate did not find that the Employer was required to continue the Employee's benefits during her leave. Secondly, the Employer says, the delegate suggests that regardless of whether there was a workplace policy requiring the Employer to continue the Employee's benefits during her leave, ceasing the benefits would constitute a breach. The Employer says that this statement is incorrect as it fails to acknowledge that his conclusion rests on a finding that there was such a policy.

23. The Employer argues that continuing the Employee's benefits during the extended leave was gratuitous, and the cancellation of a gratuitous benefit cannot constitute a constructive dismissal or substantial alteration of a term or condition of the employment contract.

24. Finally, the Employer says, in response to the delegate's observation that it could have submitted any additional records, that it did not submit documents relating to contracts, policies, and practices because none existed.

ANALYSIS

Errors of law

25. Section 112 of the *ESA* sets out the grounds for appealing a determination to the Tribunal as follows:

> (a) the director erred in law;
>
> (b) the director failed to observe the principles of natural justice in making the determination; and
>
> (c) evidence has become available that was not available at the time the determination was being made.

26. 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.

27. Section 66 of the *ESA* gives the Director discretion to determine that the employment of an employee has been terminated in circumstances where a condition of employment has been substantially altered.

28. In *Bogie and Bacall Hair Design Inc*., BC EST # D062/08, the Tribunal found that the essential elements of section 66 were a finding that there was a change in the conditions of employment, that the change was substantial, and that the change constituted a termination.

29. Section 1 of the *ESA* defines "conditions of employment" to mean all matters and circumstances that in any way affect the employment relationship of employers and employees." In *Helliker*, BC EST # D338/97, the Tribunal determined that in order to find a termination of employment under section 66, any alterations to these conditions must be "sufficiently material that it could be described as being a fundamental change in the employment relationship." In *Robert Craig*, BC EST # D052/10, reaffirmed in *Willis*, BC EST # D076/14, the Tribunal stated (my emphasis):

> ... the test of what constitutes a substantial change is an objective one that includes a consideration of the following factors:
>
> a) the nature of the employment relationship;
>
> b) the conditions of employment;
>
> c) the alterations that have been made;
>
> d) the legitimate expectations of the parties; and
>
> e) whether there are any implied or express agreements or understandings.

30. The Tribunal has also affirmed common law principles regarding constructive dismissal in determining whether an employer has substantially altered a condition of employment under section 66 (see, for example, *Short*, BC EST # D061/04). In that case, the Tribunal relied on the Supreme Court of Canada decision in *Farber v. Royal Trust Co.* [1997] 1 S.C.R. 846 in setting out the following steps a decision-maker must take:

- first identify the terms and conditions (both express and implied) of the parties' employment contract;
- second, determine whether the employer breached one or more terms of that contract by way of a unilateral change; and if so,
- third, determine if that breach was "substantial" (s. 66) or, in terms of the common law, "fundamental" or "repudiatory".

What were the terms and conditions of the Employment contract?

31. The Director found that the Employer had no contractual or statutory obligation to pay for the Employee's extended health benefits premiums during her leave. He nevertheless then determined that the Employer had substantially altered a condition of her employment by terminating those benefits without giving her an opportunity to continue them by paying for them herself.

32. In my view, the delegate erred in finding that it was either an implied term, or a policy or practice, of the employment relationship that the Employer had to offer the Employee an opportunity to pay the health premiums.

33. According to the Determination, the delegate, on his own initiative, asked the Employer's witness, the Assistant Executive Director and Human Resources Officer, what the "policy" was around benefits for employees on leave. The witness responded that the "practice" was for the individual employee to continue paying the premiums.

34. I agree with the Employer that not only was the witness's response that there was a "practice," not a legal conclusion that there was a practice, but the delegate asked no further questions about what the content of that practice was nor did he seek any further clarification about it.

35. Past practice does not form an implied term of a contract unless it is reliable; that is, the practice must have occurred regularly and consistently over a period of time, it must be certain in content, and both

parties must reasonably know of its existence. (Halsbury's Laws of Canada). Understandings, or implied terms, must meet stringent requirements of "custom" and "usage" to be implied into the employment contract; that is, it must be "certain, notorious and reasonable." (see *Aubrey v. Teck Highland Valley Copper Partnership*, 2017 BCCA 144)

36. I find that there was insufficient evidence regarding the payment of health benefit premiums for employees on long-term disability for the delegate to make a factual finding that there was a practice or policy requiring the Employer to provide an employee with the opportunity to pay their benefit premiums, or that such policy or practice constituted an implied term of the employment contract.

37. Furthermore, even if the delegate had an evidentiary basis to conclude that such a policy or practice formed an implied term of the contract of employment and the Employer altered a condition of employment by not providing the Employee with that opportunity, the delegate provides no explanation for concluding that the change was substantial. The Determination contains no analysis of any of the factors outlined in Tribunal's decision in *Craig, supra*.

38. I find that the Director erred in law, and I allow the appeal.

ORDER

39. Pursuant to section 115 of the *ESA*, I cancel the Determination and refer the matter back to the Director for reconsideration.

Carol L. Roberts
Member
Employment Standards Tribunal