Citation: Family First Community Services Limited
2020 BCEST 146

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Family First Community Services Limited carrying on business as Alternatives Funeral & Cremation Services

("Family First")

- 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.: 2020/109

DATE OF DECISION: December 16, 2020

DECISION

SUBMISSIONS

Darren Schrader	on behalf of Family First Community Services Limited
Kim Nobert	on her own behalf
Leif Jensen	delegate of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*ESA*"), Family First Community Services Limited carrying on business as Alternatives Funeral & Cremation Services (the "Employer") has filed an appeal of a July 13, 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 17/18, 40 and 58 of the *ESA* in failing to pay a former Employee wages, including overtime wages, and vacation pay. The Director determined that the Employer owed wages and interest in the total amount of $6,360. 60. The Director also imposed four $500 administrative penalties on the Employer for the contraventions, for a total amount payable of $8,360.60.

3. The grounds for the appeal are that the Director erred in law and failed to comply with the principles of natural justice in making the Determination. After reviewing the appeal submissions, I decided I would not dismiss the appeal under section 114 of the *ESA* and sought submissions from the Director and the Employee.

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 parties, and the Reasons for the Determination.

FACTS

5. The Employer operated a funeral and cremation services franchise in Kamloops. The Franchisor cancelled the franchise effective June 30, 2019. After cancelling the franchise, the Franchisor opened a new location in Kamloops.

6. Kim Norbert (the "Employee") worked for the Employer from September 1, 2014, until June 26, 2019. After the Employer terminated the Employee's employment, the Employee was hired as a manager at the Franchisor's new location.

7. Although the parties disagreed about the precise details of the Employee's responsibilities, they agreed that her tasks included advertising the business, scheduling funerals and burials, and ordering caskets, cremation urns and other supplies.

8. The Employee was on-call every other week. In exchange for being on-call, she received every other Friday off, for which she was paid. There was no written agreement between the parties regarding this arrangement.

9. The Employee filed two complaints; the first related primarily to unpaid overtime, the second relating to the time she spent on-call.

10. The delegate determined that the Employee, whose job title was "funeral director" was not a manager. This finding is not disputed on appeal.

11. The Employee worked 40 hours per week, for which she was paid $55,000 per year. In April 2019, her hours were reduced by one hour per day.

12. The Employee contended that her salary was not intended to cover all her hours of work, as she had the ability to bank hours of work. She said that she worked approximately 122 hours of overtime in her last year of employment, including weekend funeral services, viewings and prayer services after work. The Employee based her estimate on the cumulative total on her timesheets which she said were completed on a regular basis and reviewed by the Employer. The Employer acknowledged that it did not closely supervise the business or the Employee.

13. The delegate found that the timesheets maintained by the Employee on an ongoing basis were an accurate record of her hours of work and determined that her overtime wage entitlement was $2,118.13. This amount is not in dispute.

14. The Employee also said that she was on-call every other week, and that she was not paid for this on-call time. She said that her activities were restricted when she was on-call because she was not able to drink alcohol, go to concerts or movie theatres, and because of limited cellular service in the area, was essentially confined to her residence. The Employee had no regular routine when she was on-call; some weeks she would not get a call at all, while other weeks she would get a call every day. She asserted that while she could call a third-party service to remove the body of a recently deceased person (a "removal"), she rarely did so because the third-party service refused to do so until the Employer had paid its bills.

15. The Employer contended that the Employee's duty was only to answer a cellular phone while on- call and that the Employee would almost always call the third-party service. The Employer said that the Employee was not required to be on-call, and that if she had informed the Employer at any time that she no longer wanted to be on-call, it would have switched to an answering service. The Employer's bookkeeper denied that the third-party service discontinued, or threatened to discontinue, providing service for non-payment of bills.

16. The Employer also disputed the Employee's estimate of calls she received while on-call.

17. The delegate found that while the Employee's activities were limited during the time she was on-call, she was entitled to compensation for work performed while on-call rather than all of the hours she was "on-call." The delegate concluded, based on the available evidence, that she received 113 calls while on-call and that approximately half of those calls required a removal. The delegate determined that these removals were spread evenly over the course of the year. The delegate found that the Employee was

entitled to unpaid wages in the amount of $1,828.44 in unpaid wages for those days she worked performing removals, and $3,368.85 for time spent on call.

18. The delegate further determined that although the Employee had been compensated for all recorded outstanding vacation days at the termination of her employment, she was entitled to 6% vacation pay for the 2019 year as that was the start of her sixth year of employment rather than the 5.7% the Employer had paid.

19. The delegate also found that the Employee had not been paid for time spent on-call and doing removals. The delegate calculated the Employee's total owed vacation pay to be $646.29.

20. Finally, the delegate found that the Employer had contravened section 17 of the *ESA* in not paying the Employee all wages owing within 8 days of the end of the pay period, and section 18 of the *ESA* in failing to pay all outstanding wages within 48 hours of termination.

ARGUMENT

21. The Employer argues that the delegate erred in determining that it had contravened sections 17, 18, 40 and 58 *ESA* because all wages and vacation pay had been paid on July 3 for the amounts owing. The Employer says that although the wages and vacation pay were not paid within 48 hours, given that the Employee's employment continued uninterrupted with the new Franchise holder, the Director ought not have found a contravention of these sections. Therefore, the Employer argues, the Director should have imposed only one penalty.

22. The Director says that, at the hearing, the Employer agreed that the Employee was terminated on June 26, 2019. The Director also notes that the Employer did not challenge the Director's findings that wages were not paid as required, and as such, the Director had no discretion but to impose the mandatory penalties.

23. Secondly, the Employer argued that the parties had an agreement that the Employee would be paid for 8 hours every Friday, a day that she would not work. Although this agreement was not in writing, the Employer contends that the delegate ought not have included these eight hours in calculating the amounts owing.

24. The Director says that such a compensation structure is not recognized in the *ESA.* The delegate says that "pretending" that the Employee worked on dates she did not would have led to results that are contrary to the legislative scheme.

25. The Director argues that the Employer essentially amended the Employee's work schedule, paying her a flat rate in exchange for the Employee being on-call every other week. Because the Employer did not maintain a record of the hours worked by the Employee, the Director relied on the best available evidence to determine the number of hours work while on-call. The Director argues that these findings of fact cannot be appealed.

26. The Director acknowledges that, in principle, an employer may be able to compensate an employee who is on-call with a flat-rate payment, provided that payment complies with the provisions of the *ESA*.

However, the Director says an employer must nevertheless maintain employer records, as required by section 28 of the *ESA*, and pay their employees for all hours worked.

27. The Director says that the Employee's evidence was that her on-call work varied considerably and that because of its varied nature, she was systematically paid incorrectly. The Director says that it is not contrary to the *ESA* for an employee to receive a flat-rate amount during a pay period even if they do not do any work during that pay period, but that it is contrary to the *ESA* for any such payments to be used to offset an underpayment in a subsequent pay period. The Director says that it was simply impossible, on the evidence presented, to determine when the Employee was overpaid and when she was underpaid. Given that the Employer failed to maintain records any finding on this issue would, in the Director's view, been speculative.

28. The Director argues that the Employer's suggestion that any overpayments in one pay period be dealt with by a reduction in a subsequent pay period is contrary to both the clear language of section 17 of the *ESA* as well as an employer's obligation under section 28 to maintain records. The Director further submits that to allow the Employer to collect overpayments made to the Employee in subsequent pay periods is prohibited under the *ESA*.

29. The Employer made secondary unsolicited submissions that I have not considered, largely because they addressed matters that are either not at issue in this appeal or of marginal relevance to those issues. Similarly, although the Employee made submissions, those submissions did not directly relate to the issues on appeal and I have not specifically referred to them.

ANALYSIS

Errors of law

30. 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;

(c) evidence has become available that was not available at the time the determination was being made.

31. 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.

32. I am unable to find that the Director erred in law in imposing administrative penalties on the Employer for its failure to pay the Employee wages in accordance with the *ESA*. Even though the Employee was hired by a new employer after her employment was terminated by the Employer, the Employer did not pay the Employee all wages owing within 8 days of the end of the pay period. There is also no dispute that the Employer did not pay the Employee all outstanding wages within 48 hours of termination. As such, the delegate correctly found contraventions of the *ESA*.

33. Section 98 of the *ESA* requires that the Director impose a monetary penalty, the amount of which is prescribed by regulation, for a contravention of the legislation. In other words, the penalty is mandatory once a contravention is found, and the Director has no ability to, in essence, "waive" that penalty even if, as in this case, the Employee finds new employment almost immediately.

34. Consequently, I find no error of law in the Director's decision to impose administrative penalties for the contraventions.

35. With respect to the second issue raised by the Employer, the fact is that the Employer did not maintain employer records as required under section 28 of the *ESA.* Consequently, the Director had no ability to determine either how many hours the Employee worked or whether she was compensated according to the legislation.

36. I am not persuaded that the Director's approach to the Employee's complaint was in error. In the absence of any reliable Employer records, the delegate was left to largely speculate about the Employee's compensation. The delegate, quite properly, relied on the best evidence available, and in the absence of any reliable records, found in the Employee's favor. There are no provisions of the *ESA* which permit an employer to offset overpayments or to not pay an employee in the absence of written *ESA*-compliant arrangements and clear records.

37. I find no basis for the appeal on this ground.

ORDER

38. Pursuant to section 115 of the *ESA*, I confirm the Determination in the amount of $8,360.60, together with whatever interest may have accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal