

Citation: Focus Flows Enterprises Ltd. (Re)
2020 BCEST 24

An appeal

- by -

Focus Flows Enterprises Ltd.
("Focus Flows")

- 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: Maia Tsurumi

FILE No.: 2019/200

DATE OF DECISION: March 17, 2020

DECISION

SUBMISSIONS

Avinder Sidhu

on behalf of Focus Flows Enterprises Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA” or “Act”), Focus Flows Enterprises Ltd. (“Focus Flows”) has filed an appeal of a determination (the “Determination”) issued by Mitchell Dermer, a delegate (the “Delegate”) of the Director of Employment Standards, on October 25, 2019. In the Determination, the Delegate found Focus Flows contravened sections 18, 58 and 63 of the *ESA*. In the result, he ordered Focus Flows to pay \$3,706.93 to Christopher Danroth (the “Complainant”) and \$1,500 in administrative penalties.
2. Focus Flows appeals the Determination on the grounds that evidence has become available that was not available at the time the Determination was made. Focus Flows is also seeking an extension to the statutory appeal period.
3. I have decided this appeal is appropriate for consideration under sub-section 114(1) of the *ESA*. Under sub-section 114(1), the Tribunal has the discretion to dismiss all or part of an appeal, without hearing, for any of the following reasons:
 - 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 or 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 that 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.
4. Pursuant to sub-section 114(1)(f), I dismiss the appeal and confirm the Delegate’s Determination.
5. This decision is based on the submissions made by Focus Flows in its Appeal Form, the sub-section 112(5) record (the “Record”), the Determination, and the Reasons for the Determination (the “Reasons”).

ISSUE

6. The issues before the Employment Standards Tribunal are whether: (1) the time period for filing the appeal should be extended pursuant to sub-section 109(1)(b) of the *ESA*; and (2) all or part of this appeal should be allowed to proceed or be dismissed under sub-section 114(1) of the *ESA*.

ARGUMENT

7. Focus Flows submits new evidence has become available that was not available at the time the Determination was made. Specifically, Focus Flows says that:
 - a. because of time constraints it did not have the time to go through the 28 boxes of paperwork from the business's previous owner;
 - b. on November 29, 2019, it found the Complainant's employment application, which states he understood his employment was voluntary and at mutual will and that he may be terminated at any time with or without prior notice;
 - c. under Focus Flows' previous owner, the Complainant was made aware that he would be provided the best opportunity for employment and would stay with the company as long as he was able to reasonably perform his duties; and
 - d. during the week leading to the termination of employment, the Complainant made himself unavailable for a series of shifts.
8. Focus Flows provided the Complainant's employment application form with its Appeal Form.
9. Focus Flows asked for an extension of time to file its appeal (to December 13, 2019) because it wanted an opportunity to consult a lawyer, but the appeal deadline was at a very busy time of year for its business and its sole director had an unexpected medical issue.

THE FACTS AND ANALYSIS

Background

10. The Complainant filed a complaint (the "Complaint") under section 74 of the Act, alleging Focus Flows failed or refused to pay compensation for length of service pursuant to the *ESA*.
11. The Delegate held a hearing on October 17, 2019, and issued his Determination on October 25, 2019.
12. Focus Flows is a British Columbia incorporated company. It was registered on March 23, 2009. Ms. Avinder Sidhu is listed as its sole director. Both the Complainant and Ms. Sidhu gave evidence that Ms. Sidhu bought Focus Flows on or about July 1, 2018. Focus Flows is a retail business selling video games and repairing cellular telephones.
13. The Complainant was employed as a cellular phone repair person from May 27, 2013 to December 18, 2018. From or about July 1, 2018, until termination, he was paid \$15.00 per hour. He filed his complaint on May 23, 2019.

Issues Before the Delegate

14. The issues before the Delegate were: (1) was the Complainant entitled to compensation for length of service; and (2) was the Complainant entitled to vacation pay?

Evidence and Submissions at the Hearing

15. There was no dispute about the hours worked by the Complainant or his typical schedule. Payroll and scheduling documentation provided by Focus Flows supported the Delegate's finding that the Complainant's hours and wages for his last eight full weeks of work were as follows:
 - a. October 21 – 27, 2018: 40 regular hours, 2 overtime hours and total wages of \$645.00;
 - b. October 28 – November 3, 2018: 40 regular hours, 1.75 overtime hours and total wages of \$639.38
 - c. November 4 – 10, 2018: 40 regular hours, 1.75 overtime hours and total wages of \$639.38
 - d. November 11 – 17, 2018: 40 regular hours, 0.25 overtime hours and total wages of \$605.63;
 - e. November 18 – 24, 2018: 40 regular hours, 3.75 overtime hours and total wages of \$684.38;
 - f. November 25 – December 1, 2018: 40 regular hours, 1 overtime hour and total wages of \$622.50
 - g. December 2 – 8, 2018: 40 regular hours, 2.5 overtime hours and total wages of \$656.25; and
 - h. December 9 – 15, 2018: 40 regular hours, 4.5 overtime hours and total wages of \$701.25.
16. There was no issue with payment of all regular and overtime wages.
17. The parties also agreed that prior to the incidents described in the Determination, Focus Flows never took issue with the Complainant's attendance at work and he was never disciplined in relation to this. Focus Flows said the Complainant was an attentive, conscientious and reliable worker during the employment period.
18. At the hearing, the Complainant told the Delegate he was quite ill on December 17 and 18, 2018, and was essentially bedridden. He said his telephone conversation with Ms. Sidhu on December 17, 2018, was unremarkable and Ms. Sidhu accepted that he would not be able to work.
19. Regarding the events of December 18, 2018, the Complainant testified that during the first telephone call with Ms. Sidhu he told her he was still sick and could not work and she said that was fine. He said that not long after the first call, Ms. Sidhu called him back and told him he could come into work or find another job. He responded with an expletive and hung up. He said he considered himself terminated at this point.
20. At the hearing, Focus Flows did not materially dispute the Complainant's description of the phone conversations on December 18, 2018. Focus Flows said it was a particularly busy time at its store because it was close to the holidays and Ms. Sidhu felt under a good deal of pressure from certain customers who wanted their phones repaired. Because of her small child, she was unable to attend at the store herself.
21. Ms. Sidhu said in her statement that the Complainant could either go to work or find another job was only meant to "*light a fire*" under the Complainant; it was not meant literally. She further explained that in the following days she made several attempts to reach an accommodation with the Complainant, including offering him a raise if he returned to work. The Complainant did not accept her offer.

Delegate's Findings and Analysis

Compensation for length of service

22. The Delegate identified the issue as whether the Complainant quit or was fired. He stated the onus for proving an employer is relieved from having to give written notice or compensation for length of service is on the employer asserting it.
23. The Delegate found the Complainant was scheduled to work on December 17 and 18, 2018. (Note: the Determination says "2019", but my review of the Reasons and the Record indicates the dates were December 17 and 18, 2018.) On December 17, 2018, the Complainant contacted Ms. Sidhu and told her he was sick and could not work. On December 18, 2018, he told her he was still sick. In a telephone call that day, Ms. Sidhu said it was alright that the Complainant would miss work that day. This was followed by another telephone call about 15 minutes later in which Ms. Sidhu told the Complainant to either go to work or find another job.
24. Based on the agreed upon material facts, which the Delegate accepted, he concluded Ms. Sidhu's statement that the Complainant should go to work or find another job triggered the termination of the employment relationship. He found Ms. Sidhu's ultimatum was a statement of termination given the Complainant had already told her he was too sick to work. The Delegate rejected Focus Flows' characterization of the statement as meaning the Complainant had the option of either going to work or losing his job and because he did not show up, he quit. There was no evidence the Complainant had a subjective intention to quit his employment when he did not work on December 18, 2018.
25. Ms. Sidhu's intent regarding what she meant by her statement to the Complainant about coming into work or finding another job was irrelevant. The question was whether a reasonable person would have understood Focus Flows' statement to have meant. The Delegate accepted the Complainant's evidence that he understood that Focus Flows had terminated him.
26. Next, the Delegate turned to whether Focus Flows had just cause to dismiss the Complainant because he missed his shift on December 18, 2018. The Delegate noted an employer can fire an employee with just cause if they commit a single act that could be categorized as major misconduct (e.g., if an employee steals, commits fraud, acts dishonestly, assaults or harasses others). The Delegate concluded the Complainant's missing a day of work after providing notice of illness did not constitute major misconduct that could be just cause for his termination. Further, there was no evidence the Complainant was anything but a conscientious worker and there was no progressive discipline regarding his attendance at work.
27. Given his conclusions about the termination, the Delegate found the Complainant was entitled to compensation for length of service under section 63 of the *ESA*. Under section 63, an employee who has been employed for more than five years, but less than six years, is entitled to five weeks' wages upon termination. Based on the Complainant's average of 42.2 hours of work per week during his last 8 weeks at Focus Flows, the Delegate determined the Complainant was entitled to \$3,000 (40 hours x \$15/hour x 5 weeks), plus 6% vacation pay on this amount (\$180).
28. Focus Flows contravention of section 63 of the *ESA* for failing to pay compensation for length of service was subject to a mandatory \$500 administrative penalty.

Vacation pay

29. The Delegate stated that after five years of employment an employee is entitled to 6% vacation pay on gross wages earned: *ESA*, section 58. The Complainant completed his fifth year of service on May 27, 2018; however, the payroll records indicated Focus Flows continued to pay him 4% vacation pay until his termination. Therefore, he was entitled to vacation pay of 6% from May 27, 2018, until termination. Between May 27, 2018, and December 18, 2018, the Complainant earned \$20,308.75 in gross wages and was paid 4% vacation pay equal to \$812.35. He was therefore entitled to further vacation pay of \$406.18.
30. Focus Flows contravention of section 58 of the *ESA* for failing to pay vacation pay was subject to a mandatory \$500 administrative penalty.

Accrued interest

31. The Complainant was entitled to \$120.75 in interest pursuant to section 88 of the *ESA*.

Penalty under section 18 of the Act

32. Because Focus Flows did not pay the Complainant compensation for length of service and the additional 2% in vacation pay owing on his wages from May 27, 2018, Focus Flows violated section 18 of the *ESA*, which requires an employer to pay all wages within 48 hours of termination of the employee by the employer. Focus Flows' contravention of section 18 was subject to a mandatory \$500 administrative penalty.

ANALYSIS

Issue 1: Should the Time for Filing the Appeal Be Extended?

33. The Determination was issued on October 25, 2019, and the statutory appeal period ended on December 2, 2019.
34. In its Appeal Form and in a written submission made to the Tribunal on December 2, 2019, Focus Flows asked for an extension to the appeal deadline to December 5, 2019. The reasons for the initial request for an extension were that Focus Flows believed it was unadvisable for them to file its appeal without the assistance of counsel and they wanted additional time to consult a lawyer due to the deadline falling at a very busy time of year for their business. On December 4, 2019, Focus Flows requested additional time to December 13, 2019, in order to seek legal counsel as an unexpected medical issue had arisen.
35. However, Focus Flows did not make any additional appeal submissions after the statutory deadline of December 2, 2019. Therefore, its appeal is not out of time and there is no need for an extension to the appeal period.

Issue 2: Should the Appeal Be Allowed or Dismissed?

36. To reiterate Focus Flows' position on this appeal, it argues that new evidence shows the Complainant agreed to termination without notice and/or that the Complainant agreed to a term of employment that allowed him to be terminated if he could not reasonably perform his duties. Specifically, Focus Flows says that:

- a. because of time constraints it did not have the time to go through the 28 boxes of paperwork from the business's previous owner;
- b. on November 29, 2019, it found the Complainant's employment application, which states he understood his employment was voluntary and at mutual will and that he may be terminated at any time with or without prior notice;
- c. under the previous owner of Focus Flows the Complainant was made aware he would be provided the best opportunity for employment and would stay with the company as long as he was able to reasonably perform his duties; and
- d. during the week leading to the termination of employment, the Complainant made himself unavailable for a series of shifts.

37. For the reasons below, I dismiss this appeal under sub-section 114(1)(f) of the *ESA*.

38. An appeal is not a re-hearing of the matter and is not another opportunity to give one's version of the facts. Sub-section 112(1) of the *ESA* provides that a person may appeal a determination on the following grounds:

- 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.

39. I first consider the ground raised by Focus Flows (new evidence) and then consider whether the Delegate made an error of law.

New evidence

40. In its Appeal Form, Focus Flows relies on the Complainant's employment application form to say he understood he was not entitled to notice of termination. Focus Flows says it had not yet found this document by the time of the hearing before the Delegate.

41. An appeal is decided on the record before the Delegate. The only exception to this is if there is new evidence available that was not available at the time the Determination was being decided: *ESA*, sub-section 112(1)(c).

42. The decision in *Bruce Davies et al.* provides guidance on how the Tribunal applies sub-section 112(1)(c):

This ground is not intended to allow a person dissatisfied with the result of a Determination to simply seek out more evidence to supplement what was already provided to, or acquired by, the Director during the complaint process if, in the circumstances, that evidence could have been provided to the Director before the Determination was made. The key aspect of paragraph 112(1)(c) in this regard is that the fresh evidence being provided on appeal was not available at the time the Determination was made. In all cases, the Tribunal retains a discretion whether to accept fresh evidence... [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;
- (b) the evidence must be relevant to a material issue arising from the complaint;
- (c) the evidence must be credible in the sense that it is reasonably culpable 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:

Bruce Davies et al., BC EST # D171/03 at p. 3.

43. The Complainant's employment application form does not meet the Tribunal's test for admitting fresh evidence.

44. First, with the exercise of due diligence, the application form could have been discovered and presented to the Delegate before he made his Determination. I am sympathetic to Ms. Sidhu's position that because of constraints on her time she did not have the time to go through the many boxes of paperwork from the business's previous owner to find the employment application form. Unfortunately, this does not make the document "unavailable". Due diligence means time must be spent in looking for evidence before a Delegate makes a determination and is considered in relation only to that task of finding evidence. Due diligence is not considered in relation to the broader context, such as the many demands on the time and energy of a party involved in a complaint.

45. Second, even if it were admitted into evidence in this Appeal, the Complainant's employment application form has no potential probative value. The application form is not an employment contract – something that is made explicit in the form itself. In any event, a person cannot contract out of his or her right to notice under the *ESA*. Section 4 of the *ESA* says the requirements of the *ESA* cannot be waived or circumvented by agreement.

46. It is not clear to me from the Appeal Form whether Focus Flows intended its submission - that the Complainant was made aware he would be provided the best opportunity for employment and he would stay with the company as long as he was able to reasonably perform his duties, but he made himself unavailable for "*a series of shifts*" before his termination - to be new evidence or not. As this is a submission and not evidence, I will deal with it below, where I consider whether the Delegate made an error of law.

Error of law

47. Even though Focus Flows did not rely on an error in law in this appeal, I have considered whether there was any error.

48. In *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, 1998 CanLII 6466 (BC CA), the British Columbia Court of Appeal defined a question of law in the context of an appeal of a tribunal's determination. In this context, an error of law occurs in the following situations:

- a. a misinterpretation or misapplication by the decision-maker of a section of its governing legislation;
- b. a misapplication by the decision-maker of an applicable principle of general law;
- c. where a decision-maker acts without any evidence;
- d. where a decision-maker acts on a view of the facts that could not reasonably be entertained; and/or
- e. where the decision-maker is wrong in principle.

49. The Tribunal has adopted this definition: see e.g., *Re: C. Keay Investments Ltd. (Re)*, 2018 BCEST 5 at para. 36.

50. For the reasons that follow, I find that the Delegate did not err in law in determining that the Complainant was entitled to compensation for length of service and 6% vacation pay.

51. There is no dispute about the facts of the Complaint. The material facts were uncontested before the Delegate and his Determination was supported by the evidence as described in his Reasons.

52. The Delegate also did not err in principle, in his application of legal principles or in his application of the *ESA*.

53. The Delegate identified the relevant provisions as sections 58 (amount of vacation pay) and 63 (compensation for length of service). The issue about vacation pay is not disputed on appeal and I will not review it. As the Delegate stated, section 63 applies to an employer's liability resulting from length of service. The Delegate did not err in determining the issue was whether the Complainant quit or was fired. He also did not err when he stated the onus for proving an employer does not have to give written notice or compensation for length of service is on the employer asserting it.

54. I find no error in the Delegate's conclusion that the Complainant was terminated by Focus Flows. In light of the evidence, the Delegate's decision was reasonable. The Complainant and Focus Flows agreed the Complainant was told that if he did not go to work on December 18, 2018, he was fired even though he told the employer he was too sick to work. The employer had accepted his report of sickness on December 17, 2018 and in the first telephone call on December 18, 2018.

55. Regarding Focus Flows' submission that the Complainant was aware that he would be provided the best opportunity for employment and he would stay with the company as long as he was able to reasonably perform his duties, but he made himself unavailable for a "series of shifts", this appears to be an argument that Focus Flows had just cause to terminate the Complainant.

56. The Delegate considered this argument in his Determination. He did not error in determining the Appellant did not have just cause to terminate the Complainant because he missed his shift on December 18, 2018, or any other day.

57. The Delegate correctly noted an employer can fire an employee with just cause if they commit a single act that could be categorized as major misconduct (e.g., if an employee steals, commits fraud, acts dishonestly, assaults or harasses others). The Delegate reasonably found the Complainant's missing a day of work because of illness, which he told the employer about, was not major misconduct that could be

just cause for his termination. Furthermore, his conclusion that the Complainant's missing work on December 17 and 18, 2018, was not just cause was reasonable. The evidence was that prior to December 17, 2018, Focus Flows had no issue with the Complainant's attendance at work and there was no progressive discipline in relation to this. Indeed, Focus Flows said the Complainant was an attentive, conscientious and reliable worker.

Summary

58. In summary, I find Focus Flows' appeal has no reasonable prospect of succeeding and therefore I dismiss it under sub-section 114(1)(f) of the *ESA*.

ORDER

59. Pursuant to sub-section 115(1)(a) of the *ESA*, I order the Determination, dated October 25, 2019, confirmed in the amount of \$5,206.93, together with any interest that has accrued under section 88 of the *ESA*.

Maia Tsurumi
Member
Employment Standards Tribunal