



Citation: Larysa Hamilton (Re)  
2020 BCEST 4

An appeal

- by -

Larysa Hamilton

- 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  
David B. Stevenson  
Kenneth Wm. Thornicroft

**FILE No.:** 2019/170

**DATE OF DECISION:** January 7, 2020

## DECISION

### SUBMISSIONS

Steve Hamilton	on behalf of Larysa Hamilton
Julianne Yeager	counsel for R.S. Gem Connection Ltd.
Dan Armstrong	delegate of the Director of Employment Standards

### OVERVIEW

1. This is an appeal by Larysa Hamilton (the “Employee”) pursuant to section 112 of the *Employment Standards Act* (“the *ESA*”), against a Determination of the Director of Employment Standards (the “Director”) issued August 15, 2019. In that Determination, the Director found that Ms. Hamilton’s former Employer, R.S. Gem Connection Ltd. (the “Employer” or “Gem Connection”), contravened section 8 of the *ESA* by misrepresenting the nature of the employment position that the Employee was offered and accepted. By way of a “make whole” remedy under section 79(2) of the *ESA*, the Director awarded the Employee \$3,087.09 representing wages, vacation pay and interest. This award reflected wages lost (after accounting for mitigation) from the time that the Employee was dismissed and continuing to the end of the second week of a part-time position the Employee secured about two weeks after her dismissal. The Director also imposed an administrative penalty in the amount of \$500 for the contravention, for a total amount owing of \$3,587.09.
2. The Employee appeals the Determination contending that the Director erred in law in concluding that she was not entitled to wages after beginning a temporary part time position with another employer.
3. After reviewing the appeal submissions, the Panel sought submissions from the parties.
4. This decision is based on the appeal submissions, the submissions sought from 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.

### FACTS

5. Gem Connection operates a jewelry business in Vancouver. Praveen Shivhare is the sole director and officer of the Employer. Mr. Shivhare’s wife also worked for Gem Connection for 23 years.
6. Ms. Hamilton filed a complaint with the Director alleging that although she applied for, and was offered, the position of Office Manager, the position she assumed was that of a receptionist. She alleged that between the time she accepted the job offer and commenced working for the Employer, another employee had been given the position of Office Manager. The Employee complained that the Employer misrepresented the position and that, as a result, she experienced financial loss.

7. Dan Armstrong, a delegate of the Director (the “delegate”), investigated Ms. Hamilton’s complaint, receiving submissions and evidence from the parties, both of whom were represented by counsel. At issue before the delegate was whether the Employer had misrepresented a condition of Ms. Hamilton’s employment, and if so, what the appropriate remedy was.
8. Ms. Hamilton responded to an advertisement for a position as Gem Connection’s Office Manager. During her first interview with Mr. Shivhare, Ms. Hamilton was told she was qualified for the Office Manager position. During her second interview in mid-November, she was told by Mrs. Shivhare that she was the top candidate.
9. Ms. Hamilton was later offered the job of Office Manager and informed that the owner wanted to discuss salary expectations with her. After some negotiation, Ms. Hamilton accepted a reduced salary on the condition that she could leave work early on Fridays to attend to winding up a small business she had been operating. Ms. Hamilton was told that the Employer wanted her to start working immediately, as its current Office Manager was leaving at the end of December, and that she would be running the entire office. The Office Manager supervised two other employees, one of whom was the Administrative Assistant. Mrs. Shivhare told Ms. Hamilton that the Administrative Assistant, Ms. Chan, was also leaving her employment.
10. Ms. Hamilton was provided with the Office Manager’s job description and began working December 12, 2017. The tasks described in the job description were performed by the outgoing Office Manager during Ms. Hamilton’s first ten days of work. After the outgoing office manager left, the Office Manager’s tasks were performed by Ms. Chan. A few days after she began working, Ms. Hamilton became uneasy about what she was expected to do and approached the outgoing Office Manager with her concerns, suggesting that she was not doing the job she was hired to do. She said that the Office Manager became uncomfortable and said that there was “some shuffling in the company” but did not offer any further explanation.
11. When the outgoing Office Manager left the Employer at the end of December, Ms. Chan moved into the office of the Office Manager. Ms. Chan also gave Ms. Hamilton a new list of tasks and was told she would remain at the front desk. The new tasks were very different from the job she was hired to do. Ms. Hamilton became frustrated in her attempts to obtain additional direction or support and her duties continued to be associated with the front desk receptionist position. Shortly thereafter, Ms. Chan began introducing herself to customers as the Office Manager.
12. Ms. Hamilton eventually met with Mrs. Shivhare to discuss her concerns that she was not being trained as the Office Manager. Ms. Hamilton asked Mrs. Shivhare whether the Employer had given the Office Manager position to Ms. Chan, and Mrs. Shivhare acknowledged that it had.
13. A week later, Mr. Shivhare informed Ms. Hamilton that he had decided to let her go.
14. Ms. Hamilton found part-time contract employment with another jeweler, Van Yperen, within two weeks of her termination. She did not seek full time employment during this period as she felt that to do so would jeopardize her relationship with Van Yperen. However, after four weeks with Van Yperen, Ms. Hamilton was told that it could not sustain her employment.

15. Ms. Hamilton had difficulty finding employment after she lost her position with Van Yperen, eventually securing a permanent part-time job at the end of July 2018.
16. Prior to working for the Employer, Ms. Hamilton had worked on a part-time basis for another company in addition to running her own gemological equipment sales business. After her termination from Gem Connection, she did not earn any income from her equipment sales business as she had begun to wind it down after accepting the Office Manager position with the Employer.
17. The delegate concluded that although Ms. Hamilton was hired as an Office Manager, Gem Connection gave that position to another employee, relegating Ms. Hamilton to the role of front desk receptionist. When Ms. Hamilton complained to the Employer about this, her employment was terminated. The delegate determined that the Employer had misrepresented Ms. Hamilton's position contrary to section 8 of the *ESA*.
18. The delegate then considered the appropriate remedy for Ms. Hamilton, noting that under section 79(2) of the *ESA*, the employer may be required to, among other things, pay a person compensation instead of reinstating them to their former position. Ms. Hamilton sought compensation for financial losses suffered as a result of the Employer's misrepresentation and the delegate determined that financial compensation was an appropriate remedy.
19. The delegate considered the wages Ms. Hamilton would have earned as the Employer's Office Manager but for the misrepresentation, as well as her actual earnings, the time Ms. Hamilton needed to find alternative employment, her mitigation efforts as well as her other earnings during the recovery period.
20. The delegate determined that Ms. Hamilton's financial loss commenced February 8, 2018, the date she was dismissed. The delegate noted that Ms. Hamilton did not present any evidence as to whether she applied for or received employment insurance benefits subsequent to her termination.
21. The delegate considered that Ms. Hamilton commenced part-time employment with Van Yperen on February 23, 2018, but was let go by that employer on March 22, 2018 because it could not economically sustain another employee. Ms. Hamilton had no further earnings until July 30, 2018, when she obtained permanent, part-time employment. Ms. Hamilton contended that she was entitled to compensation for the period February 8 to July 30, 2018, less her earnings at Van Yperen.
22. The delegate determined that Ms. Hamilton was entitled to recover compensation for the period between the loss of her employment with the Employer (on February 8, 2018) until two weeks after the commencement of her part-time position with Van Yperen (on February 23, 2018).
23. The delegate considered Ms. Hamilton's evidence that, upon securing part-time employment with the second employer, she ceased looking for work to focus on succeeding in her new position. The record indicates that Ms. Hamilton asserted that looking for alternative work could potentially have jeopardized her relationship and prospects at Van Yperen.
24. The delegate concluded:

The reasonableness of an individual's mitigation efforts will be unique to that person's circumstances. While I accept that Ms. Hamilton would not have sought additional employment

had she remained at Van Yperen, I also find that a person is not going to immediately reach that conclusion upon commencement of their employment. I find that Ms. Hamilton was entitled to a reasonable amount of time for the purpose of focusing on her new position prior to deciding that it was satisfactory.

I have determined that two weeks into her employment was a reasonable amount of time for her to have determined whether she wished to remain with Van Yperen or resume her search for employment. In arriving at this conclusion, I have considered the fact that there is nothing in her evidence to suggest that this new position required a significant adjustment or training. Rather, she was employed as an appraiser for a jeweller, a skill in which she was already quite experienced. She worked two days per week.

...While I recognize that the employment she obtained was not on par in terms of hours or compensation with that she had lost, I find that for the purposes of mitigating a financial loss, acceptance of a part-time position does not extinguish the persons' responsibility to pursue additional part-time work or positions with greater hours or remuneration. In this instance, Ms. Hamilton stated that she would have remained with Van Yperen on a part time basis. Although Van Yperen terminated her employment after one month, it is an unfortunate outcome for which Gem Connection is not responsible. I find that Gem Connection's liability for her wage loss was extinguished at the conclusion of Ms. Hamilton's second week of employment with Van Yperen.

## ISSUE

25. Whether the delegate erred in law in calculating Ms. Hamilton's entitlement to compensation in lieu of reinstatement.

## ARGUMENT

26. Ms. Hamilton contends that an award under section 79(2) is intended to be generous and to make the employee whole and is equivalent to reinstatement. She argues that after her position with the Employer was terminated, she accepted part-time employment with another jeweler which did not have enough work to offer her full-time employment. She contends that the delegate failed to consider the principles outlined in *Roy v. Metasoft Systems Inc.* (2013 B.C.S.C. 1190) as well as the Tribunal's decisions in *Re Tricom Services Inc.* (BC EST # D485/98) and *Afaga Beauty Service Ltd.* (BC EST # D318/97).
27. Ms. Hamilton says that she believed that the position at Van Yperen would become a full-time permanent one if the employer was satisfied with her performance, so she did not look for other work. She says that she believed that if she did look for other work, it would negatively affect her prospects of securing full time employment at Van Yperen. However, she continued to keep apprised of job openings in the gemological industry.
28. Ms. Hamilton resumed her active job search after Van Yperen terminated her employment for reasons unrelated to Ms. Hamilton's performance. Ms. Hamilton says that the gemological community is very close knit and that trust and reputation are paramount. She argues that, had she continued to seek other employment while working for Van Yperen, her commitment, loyalty and trustworthiness would have been undermined, making it more difficult for her to find work in the industry.

29. Gem Connection's submissions consisted of a response to the award as well as a purported appeal (albeit late and not in accordance with the Tribunal's Rules) of the Determination itself. Gem Connection submits that the Director committed "an error in natural justice," contending it did not have a full opportunity to respond. Gem Connection also sought an extension of time in which to file an appeal, indicating that it did not file an appeal sooner because the cost of proceeding was disproportionate to the amount awarded.
30. Gem Connection did not appeal the Determination within the statutory time period. As noted on the Tribunal's website, the Tribunal considers a number of factors when deciding an appellant's request for an extension to the statutory appeal period (see *Niemisto*, BC EST # D099/96):
- i) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
  - ii) there has been a genuine and on-going *bona fide* intention to appeal the Determination;
  - iii) the respondent party (*i.e.*, the employer or employee), as well the Director, must have been made aware of this intention;
  - iv) the respondent party will not be unduly prejudiced by the granting of an extension; and
  - v) there is a strong *prima facie* case in favour of the appellant.
31. Gem Connection never filed a timely appeal, or a proper application to extend the appeal period. It sought to appeal, and to extend the appeal period, by way of its written submission filed in reply to Ms. Hamilton's appeal. Even if Gem Connection had filed a formal section 109(1)(b) application to extend the appeal period, we would not have granted an extension of time. Gem Connection has not satisfied any of the *Niemisto* factors.
32. It appears that Gem Connection never had an independent, ongoing intention to appeal the Determination and was only motivated to seek to appeal the Determination after Ms. Hamilton filed her appeal. Neither the employee nor the Director were aware of any intention on the part of the Employer to appeal the Determination. Furthermore, the Employer has not set out any explanation for failing to request an appeal within the statutory time limit.
33. Having reviewed the record and Gem Connection's arguments regarding its allegations that the Director failed to observe the principles of natural justice, we conclude that Gem Connection does not have a strong *prima facie* case. On February 21, 2019, the Employer's counsel sent the delegate submissions in response to the complaint. The delegate sent his preliminary assessment to the Employer's counsel on March 4, 2019, followed by a second preliminary assessment on April 2, 2019. Gem Connection had several opportunities to respond to the complaint and the delegate's preliminary views of the facts and analysis well before the Determination was issued.
34. With respect to the compensation in lieu of reinstatement award, Gem Connection submitted that "...lost wages for Ms. Hamilton (if owed at all) are properly ended upon her commencement of new employment, which occurred within 15 days" and that an award of wages beyond February 23, 2018 "would be disproportionate and arbitrary."

35. The delegate submits that, in her appeal submissions, Ms. Hamilton misrepresented the delegate's findings and introduced evidence, specifically an additional rationale for her decision not to seek other employment while at Van Yperen, that had not been submitted during the investigation.
36. The delegate also submits that he properly considered all the relevant factors in determining her entitlement to compensation, including the time she needed to find alternative employment, her mitigation efforts as well as her projected earnings based on previous employment.

## **ANALYSIS**

37. 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.
38. We have considered whether or not Ms. Hamilton has demonstrated any basis for the Tribunal to interfere with the Determination. The Panel has concluded that the delegate erred in law in determining Ms. Hamilton's compensation.

### *Error of Law*

39. 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.

### Statutory Provisions

40. Section 8 of the *ESA* provides that an employer must not induce, influence or persuade a person to become an employee, or to work or to be available for work, by misrepresenting, among other things, (a) the availability of a position, or (b) the type of work. Section 79(2)(c) provides that, where the Director is satisfied that an employer has contravened a requirement of section 8, the Director may require the employer to pay a person compensation instead of reinstating the person in employment.

41. In *Tricom (supra)*, the Tribunal observed what is now section 79(2)(c) of the *ESA*:
- ...is perhaps the most restorative remedial provision in the *Act*, giving the Director broad jurisdiction to place the terminated employee in the same position he or she would have been in but for the wrongful action of the employer.
42. The Tribunal noted that this section provides a remedy that is not available at common law and that, for example, compensation is not necessarily limited to what might have been awarded in an action for wrongful dismissal. Taking note of the fact that the *ESA* called for a liberal and broad interpretation (*Machtinger v. HOJ Industries*, (1992) 91 D.L.R. (4<sup>th</sup>) 491), the Tribunal continued:
- In our view, the statutory remedy should not be narrowly constructed, and we have the power to fashion a remedy that is fair, compensatory and promotes compliance with the *Act*. In short, the remedy depends on the extent of the injury suffered because of the breach.
43. The Tribunal then applied a number of non-exhaustive factors outlined in *Afaga Beauty Service Ltd.* – the length of employment with the employer, the time needed to find alternative employment, mitigation efforts undertaken, other earnings during the period of unemployment as well as projected earnings from previous employment – in determining an appropriate compensation award. The factors identified in *Afaga* were cited with approval in, among other cases, *W.G. McMahon Canada Ltd.* (BC EST # D386/99).
44. In *Metasoft (supra)*, the Supreme Court found that the purpose of section 79(2) was to compensate a former employee economically for the effect of a breach of the legislation, or a “make whole” remedy. In *Re Krausz* (BC EST # RD112/17), the Tribunal also referred to section 79(2) as a “make whole” remedy.
45. A “make whole” remedy is designed to compensate an employee for real loss sustained as a result of the employer’s breach of the *ESA*.
46. The Supreme Court of Canada has repeatedly underscored the importance of employment and the need for fair treatment of employees:
- Work is one of the most fundamental aspects in a person’s life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person’s employment is an essential component of his or her sense of identity, self-worth and emotional well-being. (*Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313)
47. In *Machtinger v. HOJ Industries Ltd.*, ([1992] 1 S.C.R. 986) the Court went further, adding that “not only is work fundamental to an individual’s identity, but also the manner in which employment can be terminated is equally important.” (see also *Rizzo & Rizzo Shoes* [1998 1 S.C.R. 27]). The Court emphasized the remedial nature of employment standards legislation and the need to afford its provisions a large and liberal interpretation.
48. In the Panel’s view, the section 79(2) compensatory award provision must be given a large and liberal interpretation, reflecting the effect of the misrepresentation, and, as in this case, the loss of employment, on a person’s sense of identity, self-worth and emotional well-being, particularly in circumstances where the Employer has engaged in what might be characterized as “bad faith” conduct.



49. In the Panel's view, a proper interpretation of the section 79(2) compensation in lieu of reinstatement provision requires the Director to consider three separate matters:

#### The Recovery Period

50. As the Tribunal noted in *Krausz*, the proper approach is to, as far as it is reasonably possible, return the employee to the position the employee would have been in had the contravention not occurred. It should be stressed that a section 79(2) award is predicated on it reflecting "compensation instead of reinstatement."
51. In considering the length of the wage recovery period, the Director should take into consideration factors such as the labour market, the nature and characteristics of the position, the employee's age, education and qualifications, as well as the employee's mitigation efforts. Then, the Director must consider what the employee's wage loss was over that period, making deductions for amounts actually earned in mitigation.
52. In *Metasoft*, the court awarded the employee compensation for the period from the date of termination until she found a position at a salary equal to her earnings at the position from which she was dismissed.
53. In our view, the delegate erred in concluding that Ms. Hamilton's employment at Van Yperen was equivalent to the one she had at Gem Connection and limiting her compensation to a period ending two weeks after she began working there. Given that Ms. Hamilton's employment at Van Yperen was a part-time, contract position at which she was paid less than at Gem Connection and did not receive any benefits, it cannot be considered suitable alternative employment.
54. The evidence before the delegate was that Ms. Hamilton did not find suitable alternative employment until July 30, 2018, a period of almost six months. In the Panel's view, a recovery period of six months is both fair and reasonable, and while we are not governed by what might be found to be a reasonable notice period at common law, a six-month period is in line with common law awards.

#### Compensation for the Employer's Misrepresentation

55. The fundamental principle underlying section 8 is that both employers and prospective employees must be dealt with honestly and in good faith. The good faith obligation is a matter of general contract law (see *Bhasin v. Hrynew* [2014] 3 S.C.R. 494), including employment contracts. Additionally, the good faith principle is implicit in the section 2 purposes of the *ESA*. In being deprived of the statutory obligation of fair treatment, an employee may suffer more than a pure economic loss. Although Ms. Hamilton only claimed lost wages, in our view, an individual who was not treated honestly and in good faith in accordance with section 8 obligations can be entitled to compensation beyond the recovery of provable lost wages.
56. In the Panel's view, the delegate should consider whether additional compensation for the Employer's "bad faith" treatment of Ms. Hamilton should be awarded. A remedy under section 79(2) need not only reflect an employee's actual wage loss, but should also promote compliance with the *ESA* and compensate an employee for any provable losses that reasonably flow from the section 8 contravention.

### Reasonable Expenses

57. Finally, in the Panel’s view, any remedy awarded under section 79(2)(c) is not limited to lost wages, as it specifically refers to “compensation” rather than “wages.” Compensation can include the loss of such things as vacation pay, benefits (such as insurance and pension), bonuses, commissions and gratuities. In our view, it may also include legal fees and disbursements since a complainant who has engaged counsel to make representations on their behalf cannot be considered “whole” if they are obligated to pay any legal costs out of any award (we note that section 79(2)(d) specifically provides for recovery of “reasonable and actual out of pocket expenses incurred...because of the contravention”).

### **CONCLUSION**

58. Despite acknowledging in the February 2017 preliminary assessment that compensation under section 79(2)(c) must be equivalent to reinstatement, we find that the delegate’s award was not “equivalent to reinstatement.” In our view, the Director failed to fully consider the purposes of the *ESA*, especially sections 2 and 8, in making the section 79(2) “make whole” award in this case.

### **ORDER**

59. Pursuant to section 115 of the *ESA*, we allow the appeal and refer the issue of Ms. Hamilton’s compensation as a result of the Employer’s breach of section 8 of the *ESA* back to the delegate for reconsideration in accordance with the compensation principles we have identified in this decision. After receiving additional submissions from the parties, the delegate should complete his report expeditiously.

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**Carol L. Roberts**  
Panel Chair  
Employment Standards Tribunal

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**David B. Stevenson**  
Member  
Employment Standards Tribunal

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**Kenneth Wm. Thornicroft**  
Member  
Employment Standards Tribunal