Citation: Aspol Motors (1982) Ltd. (Re)
2021 BCEST 2

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Aspol Motors (1982) Ltd.
(the "Employer")

- 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: Robert E. Groves

FILE NO.: 2020/105

DATE OF DECISION: January 07, 2021

DECISION

SUBMISSIONS

J. Geoffrey Howard — counsel for Aspol Motors (1982) Ltd.

OVERVIEW

1. Aspol Motors (1982) Ltd. (the "Employer") appeals a determination (the "Determination") of a delegate (the "Delegate") of the Director of Employment Standards (the "Director") dated June 19, 2020.

2. The Determination was issued following the Delegate's investigation of a complaint filed by Linda Fischer (the "Complainant") under section 74 of the *Employment Standards Act* (the "*ESA*") alleging that the Employer contravened the statute when it failed to pay the Complainant for banked wages she claimed she had earned, other regular wages, and compensation for length of service.

3. The Delegate investigated the complaint and declined to accept the Complainant's claim for banked wages. The Determination did, however, order the Employer to pay the Complainant $4,802.59 for unpaid regular wages, annual vacation pay, compensation for length of service, and interest. The Delegate also imposed three administrative penalties. The total found to be owed was $6,302.59.

4. The Employer has filed an appeal pursuant to section 112 of the *ESA*, asserting that the orders for payment made in the Determination should be cancelled because the Delegate erred in law. No appeal has been filed by the Complainant.

5. I have before me the Employer's Appeal Form, including the Determination and the Delegate's Reasons for it (the "Reasons"), the Employer's submissions, submissions delivered by the Complainant and the Director, and the record the Director is required to deliver to the Tribunal pursuant to subsection 112(5) of the *ESA*.

6. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *ESA*, the Tribunal may hold any combination of written, electronic, and oral hearings when it decides appeals. I find that the written materials now before me enable me to decide the issues raised in the Employer's appeal, without the necessity of my holding an electronic or oral hearing.

ISSUE

7. Has the Employer established that the Delegate erred in law, and that the Determination should be cancelled?

FACTS

8. The Employer operated an auto dealership and employed the Complainant as its controller from October 5, 2013, until August 27, 2018.

9. In July 2018, the Complainant suffered a severe rib injury. She was absent from work for four days to attend a funeral and for another two days related to the injury. She was also absent from August 4 – 19, 2018, a period the Complainant described as vacation. She returned to work on August 20, 2018, and continued to attend until August 27, 2018, at which point she took a stress leave on the advice of her physician.

10. The circumstances surrounding the Complainant's absence from work from August 4 – 19, 2018, were disputed. The Complainant asserted that it was a booked vacation. The Employer said that it never authorized the Complainant to be absent during this time, and so she was not entitled to be paid wages in respect of it.

11. The Employer's representative, Daniel Schilds ("Schilds"), submitted that when the Complainant asked for the time off in August, she was informed that she had already used up her vacation entitlement for the year. Schilds asked the Complainant if it would be possible for her to reschedule, and she said she could not. In the result, the Complainant did take the August time off, and returned to work from August 20 to 27, 2018, as I have noted.

12. The Delegate did not find that anyone on behalf of the Employer specifically told the Complainant that the August vacation time she had requested was not authorized. It is also accurate to say that the Reasons do not reveal that anyone ever communicated to the Complainant, expressly, that the vacation was approved. The Complainant's response to the Employer's position that her vacation was never authorized was to acknowledge that Schilds asked her whether the time off could be rescheduled, and she advised him that it could not because her plans had already been made. That, she said, was the way the matter was left.

13. The Delegate decided that the time off taken by the Complainant in August 2018 should properly be characterized as annual vacation because the Employer was unable to produce payroll records demonstrating that the Complainant's vacation entitlement for the year had been extinguished in the months prior. It followed that the Complainant was entitled to recover wages for the vacation period in question.

14. The issue of compensation for length of service for the Complainant arose because the Employer sold its business to Bannister Ford Ltd. ("BFL"), effective on September 4, 2018.

15. On August 23, 2018, the Employer delivered a letter to its employees, including the Complainant, advising that the Employer's operations would "transfer" to BFL on September 4, 2018. The letter also said this:

> As such your final day of employment with Aspol will be August 31, 2018. On August 31, 2018 all group benefits and related employment benefits with Aspol will also be terminated.
>
> As you already know all employees of Aspol will be offered employment with BFL on the same terms as you currently enjoy with Aspol. Your years of service will be honoured by BFL as if you had been in their employment the entire time you worked for Aspol….

16. The Employer's position before the Delegate was that the Complainant was not entitled to compensation for length of service because it did not terminate her employment before the transfer of the business occurred, BFL did offer the Complainant employment as it was required to do pursuant to its asset

purchase agreement with the Employer, and the Complainant declined the offer, advising that she intended to retire and move to another province. The Employer argued that it was the Complainant, therefore, who terminated the employment relationship.

17. The Complainant acknowledged a discussion with BFL about her future plans due to the pending transfer, but she denied that any offer of continued employment was ever made to her. Instead, she told the Delegate that while she did intend to retire to another province, she could not do so until she sold her current residence, and so she was interested in working for BFL until that occurred.

18. The Employer contended that BFL made an offer of employment to the Complainant when one of its employees, Wayne McIntyre ("McIntyre"), had a conversation with the Complainant after she returned from her vacation in August 2018. The discussion concerned her working for BFL after the transfer. The Employer's evidence was that the Complainant indicated BFL ought "not to bother with her" as she had plans to retire and move elsewhere. The Delegate's Reasons state that McIntyre understood this to mean he should not bother to offer the Complainant a job as he was doing with the other employees.

19. The Delegate concluded, therefore, that the Complainant was never offered employment with BFL.

20. The Delegate also decided that the Employer's August 23, 2018 letter to the Complainant constituted notice to her that her employment with the Employer would be terminated as of August 31, 2018. The Delegate found further that since BFL did not offer the Complainant employment thereafter, the Employer was obliged to pay compensation for length of service to the Complainant.

21. In the alternative, the Employer submitted that it had just cause to dismiss the Complainant, owing to her taking the vacation time in August without the Employer's approval. The Delegate rejected this submission because the Complainant continued to work for the Employer after her return, and the issue of cause only arose after the fact.

ARGUEMENTS

22. The Employer argues that the Determination reveals errors of law when it ordered the Employer to pay wages for the August 4 – 19, 2018 period the Complainant did not attend at work, and to pay her compensation for length of service once her employment ended later that month.

23. Regarding the order to pay the August wages, the Employer repeats that the vacation time the Complainant claimed for that month was never authorized. It argues that the Employer's declining to give approval is consistent with the fact that the Employer was in the process of completing the transfer to BFL, and it needed the Complainant's bookkeeping services during that crucial period.

24. The Employer asserts, further, that the Delegate never found as a fact that an approval was ever given, and that the Employer's evidence that the Complainant had, in fact, taken, and been paid for, approved vacation in July 2018 was undisputed.

25. The Employer contends that the Delegate erred in law when he decided that since the Employer produced no payroll records demonstrating that the Complainant had taken vacation in 2018 prior to August, the August time off must be construed to have been paid vacation time. The Employer says this mode of

analysis is a misinterpretation or misapplication of the *ESA* because, even if the Complainant had taken no vacation time prior to August 2018, she had no unilateral right to determine when she would take vacation thereafter. Instead, the statute is clear that it was the Employer who had the right to decide when the Complainant might take vacation. Since the matter of vacation approval is the correct focus for the analysis, and since no approval for the August 4 – 19, 2018 absence was ever given, the Employer says that the absence should not have been characterized as vacation time for which the Complainant had a right to be paid.

26. The Employer also alleges that it was an error for the Delegate to rely solely on the Employer's records to determine that the Complainant had received no paid vacation time in 2018 prior to August. The Employer submits that the Delegate should have looked behind the Employer's payroll records, especially given the Employer's other verbal evidence that the Complainant had taken other paid vacation time earlier in the year.

27. The Employer says further that since it was the Complainant's duty as bookkeeper to keep proper payroll records, including records of paid vacation time, she should not be permitted to benefit from her failure to maintain accurate records of her own time off.

28. The Employer also disputes the order in the Determination requiring the Employer to pay compensation for length of service to the Complainant. It argues that it was the Complainant who terminated her employment, not the Employer. It also asserts, contrary to the Delegate's finding, that BFL did, in fact, offer continued employment to the Complainant at the time of the transfer.

29. The Employer submits that the August 23, 2018 letter delivered by the Employer to the Complainant did not terminate the Complainant's employment. The Employer refers to the circumstances of two other employees of the Employer who received exactly the same letter, and later made claims against the Employer for compensation for length of service. The Employer states that the Delegate rejected those claims on the basis that the August 23, 2018 letter did not constitute a termination of those employees' employment. The Employer asks how, then, the Delegate could have determined that the August 23, 2018 letter does constitute a termination in the case of the Complainant? The Employer's answer is that the Delegate is bound by his previous findings in the cases involving these other employees, and that a similar result should follow in the case of the Complainant.

30. Applying this reasoning, the Employer submits that the Delegate erred in law when he determined that the Complainant's employment was terminated by the Employer. It argues that the Delegate's determination shows he acted on a view of the facts which could not reasonably be entertained.

31. The Employer submits that since the Employer did not terminate the Complainant's employment, section 97 of the *ESA* deems that the Complainant became an employee of BFL at the date of the closing of the sale, whether BFL made her an offer of continued employment or not. The relevant parts of section 97 say this:

> If all or part of a business is disposed of, …, the employment of an employee of the business is deemed, for the purposes of this Act, to be continuous and uninterrupted by the disposition….

32. The Employer argues that since the Complainant did not attend at work for BFL, she abandoned her employment, and therefore cannot make any claim for compensation for length of service.

33. In the alternative, the Employer submits that the Delegate erred in law by acting on a view of the facts which could not reasonably be entertained when he determined that BFL made no offer of employment to the Complainant. The Employer refers to what it describes as the sworn evidence of McIntyre, in the form of a written statement, and submits that he made an offer of employment to the Complainant in a conversation he had with her, but she rejected it. No subsequent written offer of employment was made by BFL to the Complainant because she advised McIntyre "not to bother with her", as she was retiring and moving out of province.

34. The Employer says McIntyre's evidence should have been preferred over the Complainant's implausible denial that she received no offer of employment from BFL, because the sale agreement required BFL to make such an offer and all the other of the Employer's employees each received one. The Employer argues that McIntyre was a disinterested non-party witness who had no reason to lie about his dealings with the Complainant, and that the Delegate's declining to accept his evidence is inexplicable.

35. In the further alternative, the Employer submits that the Delegate erred in failing to apply subsection 65(1)(f) of the *ESA*, pursuant to which the section 63 liability to pay compensation for length of service "does not apply to an employee who has been offered and has refused reasonable alternative employment by the employer." The Employer contends that since the Complainant refused to accept continued employment with BFL, subsection 65(1)(f) was engaged, and exempted the Employer from paying compensation for length of service.

36. The Delegate has delivered a submission. In it, the Delegate states that the determinations involving the other employees of the Employer to which the Employer has referred in its submissions in the appeal are distinguishable because, in those cases, the complainants had received, prior to the termination of their employment with the Employer, formal written offers of employment by BFL, which they refused. The Complainant, however, received no such offer from BFL before her employment was terminated by the Employer. She also confirmed for the Delegate that had she received such an offer she would have accepted it, and worked for BFL, at least until her house sold and she could proceed with her move out of province.

37. The Complainant has also delivered a submission. She rejects the assertions of the Employer that its evidence on points prejudicial to the Complainant was undisputed. She provides further particulars supporting her position that her absence from work in August 2018 was paid vacation time. She asserts that it was not part of her job to keep the Employer's records regarding the vacation time taken by its employees, and so any failure on the part of the Employer to keep proper payroll records should not be attributable to her. She reaffirms that McIntyre never offered her employment with BFL.

38. In a final reply submission, the Employer disputes the Delegate's statement that the circumstances of the other employee complainants whose complaints were determined by him are distinguishable. The Employer also repeats that McIntyre offered BFL employment to the Complainant.

39. The Employer argues further that the Complainant's submission should not be admitted because it contains irrelevant information, and statements that are not in the record, with the result that they cannot properly qualify as admissible new evidence on appeal.

ANALYSIS

40. The appellate jurisdiction of the Tribunal is set out in subsection 112(1) of the *ESA*, which reads:

> 112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of 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.

41. Subsection 115(1) of the ESA should also be noted. It says this:

> 115 (1) After considering whether the grounds for appeal have been met, the tribunal may, by order,
>
> (a) confirm, vary or cancel the determination under appeal, or
>
> (b) refer the matter back to the director.

42. The Employer's Appeal Form engages, as its ground for the appeal, subsection 112(1)(a) of the *ESA*. It submits that the Delegate erred in law, for the reasons I have described earlier.

43. I have decided that the Employer's appeal cannot succeed. My reasons follow.

The Complainant's claim for unpaid wages for vacation taken in August 2018

44. It is trite, and the Employer is correct to state, that employees have no unilateral right to determine when they will take annual vacation. Section 57 of the *ESA* requires an employer to permit an employee to take the vacation that the statute mandates, but there is no provision in the legislation which requires an employer to accede to an employee's request that the vacation be taken on the days the employee stipulates.

45. The Employer argues strenuously that vacation for the Complainant in August 2018 was never authorized. However, I am not persuaded that it was unreasonable for the Delegate to have concluded otherwise.

46. Schilds acknowledged that he asked the Complainant to reschedule her vacation, which implies that an absence for vacation may already have been contemplated. More importantly, there was no evidence leading the Delegate to conclude that any representative of the Employer expressly communicated to the Complainant that her taking the vacation was not authorized.

47. Given the circumstances, the Employer should have made its position clear, particularly after the Complainant said that she could not reschedule her time off because her plans had already been made. Instead, Schilds appears to have said nothing. In my view, it was reasonable for the Complainant to infer from his silence that her absence was approved.

48. My view of this is further supported by the fact that upon her return from her vacation the Complainant continued to work for the Employer for a time. I see no evidence in the record suggesting that the Complainant suffered any disciplinary repercussions or, for that matter, negative comments, arising from her absence that one would normally expect from an employer who believed that its employee had been so insubordinate as to take an unauthorized vacation at such a crucial time.

49. I am also of the opinion that it was proper for the Delegate to rely on the Employer's payroll records to determine if the Complainant's vacation entitlement for 2018 had been extinguished before August of that year. Subsection 28(1)(i) of the *ESA* makes it an employer's responsibility to keep records of the dates of the annual vacation taken by an employee, the amounts paid by the employer, and the days and amounts owing. The accuracy of its payroll records is, therefore, the obligation of the Employer in this case, not the Complainant. Moreover, payroll records are the principal source of information regarding amounts paid, and owed, to employees that the *ESA* identifies for the purposes of ensuring the enforcement of the statutory scheme. It was, therefore, appropriate for the Delegate to give significant weight to the information contained in the Employer's payroll records, especially as the other evidence relating to the Complainant's vacation entitlement for 2018 was disputed.

50. The Employer's allegation that its own records were inaccurate, and that the Complainant was responsible, does not appear to have been an argument that was made to the Delegate. The argument is also speculative, given the information that was before the Delegate, and so I have disregarded it.

The Complainant's claim for compensation for length of service

51. The Employer submits that the Delegate was bound by his previous decisions involving two other employees who claimed compensation for length of service from the Employer following the transfer of the assets of its business to BFL. The Employer has appended the Delegate's reasons for his determinations in those other cases to its submission in this appeal.

52. I decline to accept the Employer's argument on this ground.

53. The Delegate's determinations in those other cases were not binding on him for the purposes of deciding the Complainant's complaint. Nor are they binding on the Tribunal in this appeal. There is no basis for a finding of *res judicata*, at the very least because the parties are not the same.

54. I note, too, that the facts in the other cases are different from those informing the Delegate's resolution of the Complainant's complaint. The Delegate's reasons in the other cases merely state that the Employer took no action to terminate the employment of the employees in question prior to the disposition of the business, and that BFL offered continued employment to the employees prior to the disposition, which they rejected. There is no substantive discussion in the reasons concerning the August 23, 2018 letter the Employer now says that it delivered to all its employees, and on which it relies as a basis for denying compensation for length of service to the Complainant.

55. I make no comment regarding the persuasive force of the Delegate's analysis in his reasons for the determinations in the cases involving the other two employees. I do say, however, that I believe the Delegate was correct to conclude, in his Reasons for the Determination of the Complainant's complaint, that the August 23, 2018 letter the Complainant received provided notice to her that her employment with the Employer would end on August 31, 2018. Moreover, and notwithstanding that the letter also advised that BFL would offer continued employment to the Complainant, the Delegate found as a fact that no such offer was ever made.

56. As per the August 23, 2018 letter, the Complainant's employment was terminated by the Employer on August 31, 2018, a date that was some days prior to the effective date of the disposition by sale of the Employer's business assets on September 4, 2018. Section 97 only provides for continuous employment if the employee remains employed by the disposing employer at the date the disposition occurs (see *Lari Mitchell et al. v. Director of Employment Standards et al.*, 1998 CanLII 3983; *Director of Employment Standards*, BC EST # RD046/01). Since the Complainant had ceased to be employed by the Employer before the date the disposition occurred, the Delegate was right to find that the Employer's terminating the Complainant's employment resulted in its being obligated to pay her compensation for length of service.

57. In my opinion, the issue whether BFL made an offer of employment to the Complainant is of limited, if any, importance to the analysis. If, however, I am wrong in making this assessment, I would affirm the Delegate's finding that BFL made no such offer.

58. Even if I were inclined to doubt the Delegate's finding on this point, which I am not, I would remain of the view that it would be inappropriate for the Tribunal to interfere with it. The reason for this is that the *ESA* provides no opportunity for the Tribunal to correct a delegate's errors of fact, unless those errors can be said to constitute errors of law.

59. The authorities have described the types of factual errors that have been identified as constituting errors of law. The Employer has referred to some of them and I take no issue with its statements setting out the relevant principles. The formulation I prefer is that errors of fact do not amount to errors of law except in the rare circumstances where they reveal what the authorities refer to as palpable and overriding error. A decision by the Tribunal that there has been a palpable and overriding error presupposes a finding that the factual conclusions of a delegate, or the inferences drawn from those factual conclusions, are so unsupported by the evidentiary record that there is no rational basis for the findings made, and so they are perverse or inexplicable. Put another way, an appellant will only succeed in challenging a delegate's findings of fact if it establishes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have reached the conclusions set out in the determination (see *Gemex Developments Corp. v. B.C. (Assessor)* (1998) 62 BCLR 3d 354; *Delsom Estates Ltd. v. British Columbia (Assessor of Area 11 – Richmond/Delta)* [2000] BCJ No.331).

60. In my view, the Employer has not met the requisite threshold entitling the Tribunal to interfere with the Delegate's findings of fact in this case. It relies largely for its position that BFL made an offer of employment to the Complainant on what it refers to as the sworn evidence of McIntyre. I have reviewed the statement of McIntyre, which forms part of the Director's record, and is dated May 8, 2020. It is also appended to the Employer's submission on appeal. It is a statement in writing, but there is no indication on the face of the document that it was ever sworn.

61. The statement describes McIntyre's speaking to the Complainant about her continuing to work at the dealership after BFL bought it. It also states, explicitly, that the Complainant "was not offered employment" by BFL. The reason, McIntyre explains, is that when he broached the subject of the transfer of the business with the Complainant, she told him "not to bother with her", which he understood to mean that BFL need not offer her a job because she had told him she was going to retire and move out of province.

62. I note, as well, that the Director's record includes a copy of an email from counsel for the Employer to the Delegate dated September 18, 2019, in which counsel affirms that McIntyre never made the Complainant an offer of employment, for the reasons later described more formally in the McIntyre statement.

63. The Director's record also contains a copy of an email from the Delegate to the Complainant dated April 24, 2019, stating that the Delegate had spoken to McIntyre and that he had confirmed to the Delegate that "no offer of continuous employment" was made to the Complainant.

64. In these circumstances, it cannot be said the Delegate's finding of fact that BFL made no offer of employment to the Complainant was perverse or inexplicable.

65. I reject, too, the Employer's argument in the alternative that the Complainant should be prevented from receiving compensation for length of service due to the application of subsection 65(1)(f) of the *ESA*. That provision would only be engaged in the circumstances presented here if it could be said that BFL was a successor employer of the Complainant resulting from the operation of section 97 of the statute, and the Complainant had refused reasonable alternative employment offered to her by BFL. The subsection cannot apply in favour of the Employer because it made no offer of reasonable alternative employment to the Complainant at any time. Since the Delegate determined that the Employer terminated the Complainant before a section 97 disposition occurred, and no offer of employment was made to her by BFL, subsection 65(1)(f) is inapplicable.

66. Given what I have said, I find it unnecessary to address the Employer's arguments against admissibility of comments made by the Complainant in her submission on the merits in the appeal.

ORDER

67. Pursuant to subsection 115(1)(a) of the *ESA*, I order that the Determination dated June 19, 2020, be confirmed.

Robert E. Groves
Member
Employment Standards Tribunal