Citation: Aru Day Spa and Salon Inc. (Re)
2023 BCEST 104

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Aru Day Spa and Salon Inc.

- of a Determination issued by -

The Director of Employment Standards

PANEL: Carol L. Roberts

FILE NO.: 2023/115

DATE OF DECISION: November 24, 2023

DECISION

SUBMISSIONS

Derek Bodnarchuk — on behalf of Aru Day Spa and Salon Inc.

OVERVIEW

1. This is an appeal by Aru Day Spa and Salon Inc. ("Employer") of a decision of a delegate of the Director of Employment Standards ("Director") made July 6, 2023 ("Determination").

2. On October 27, 2021, Randene Ditmars ("Employee") filed a complaint with the Director alleging that the Employer had contravened the *Employment Standards Act* (*"ESA"*) in failing to pay her regular and overtime wages, statutory holiday pay and compensation for length of service.

3. Two delegates of the Director investigated the Employee's allegations. On January 17, 2023, an Investigation Report was issued and provided to the Employee and the Employer for response. A third delegate of the Director ("Adjudicating delegate") reviewed the Investigation Report, the responses of the Employer and the Employee to the Investigation Report as well as additional responses to the supplemental information before issuing the Determination.

4. The Adjudicating delegate determined that the Employer had contravened sections 18, 40, 45, 58 and 63 of the *ESA* in failing to pay the Employee regular and overtime wages, statutory holiday pay, annual vacation pay and compensation for length of service.

5. The Adjudicating delegate found that the Employee was entitled to the total amount of $2,121.86, including accrued interest. The Director also imposed four $500 administrative penalties for the Employer's contravention of sections 18, 40, 45 and 63 of the *ESA*, for a total amount payable of $4,121.86.

6. The Employer appeals the Determination on all three statutory grounds; that is, that the Director erred in law, that the Director failed to observe the principles of natural justice in making the Determination and that new evidence has become available that was not available at the time the Determination was made.

7. Section 114 of the *ESA* provides that the Tribunal may dismiss all or part of an appeal without seeking submissions from the other parties or the Director if it decides that the appeal does not meet certain criteria. After reviewing the appeal submissions, I found it was not necessary to seek submissions from the Director and the Employee.

8. This decision is based on the section 112(5) record that was before the Director at the time the Determination was made, the appeal submissions, and the Determination.

ISSUE

9. Whether the Employer has established grounds for interfering with the Director's decision.

BACKGROUND

10. The Employer operates a spa and salon in Surrey, British Columbia. The Employee was employed as an esthetician from April 19, 2021, until September 4, 2021. Mr. Bodnarchuk is the sole director of the Employer. The Employer was primarily represented during the investigation by Eilah Bodnarchuk, Mr. Bodnarchuk's spouse and the Employer's director of operations.

11. The issues before the Director were:

a) what the Employee's work schedule and wage rate was, and whether she had been paid all wages owed; and

b) whether the Employee was entitled to compensation for length of service.

12. The record discloses that three delegates were involved in the investigation and adjudication of the complaint. The Employer says, and I accept, that it communicated extensively with the first Investigating delegate, who then went on a leave of absence. The second Investigating delegate ("Investigator") ultimately assumed conduct of the file; the record discloses she advised the Employer that she had no access to the first Investigating delegate's notes of discussions he had with the Employer. In the Investigator's January 17, 2023 Investigation Report, she wrote:

> On November 24, 2022, I left a detailed phone message for Ms. Bodnarchuk, introducing myself as the new investigating delegate for this file. I advised her that I had some questions regarding her submissions and requested she call me back so that we could discuss the evidence. She did not return my call.
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> On November 25, 2022, I sent a detailed e-mail to Ms. Bodnarchuk again introducing myself and explaining that there were some gaps in the payroll information for which I required further information. I also pointed out that the image she sent of the wage statements were difficult to see clearly and, upon attempting to enlarge the images, they lost clarity and could not be read. I requested that she re-send the wage statements in a format that could be more easily read. I also requested a record of the daily hours worked by Ms. Ditmars for the purposes of properly calculating statutory holiday pay.
>
> Ms. Bodnarchuk responded by email on November 25, 2022 and stated that she had already submitted payroll information to the previous investigator. She instructed me to look through the previous investigator's file for the information I was seeking. She also stated that she had participated in lengthy telephone discussions with the previous investigator about the evidence.
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> On November 28, 2022, I responded by email to Ms. Bodnarchuk and acknowledged that she most likely had some discussions with the previous investigator, but I was not privy to their discussion, there were no notes of those discussions and, unfortunately, the previous investigatory (sic) was no longer available for me to question. I also explained that I required further information to complete the investigation, specifically a record of the daily hours the Complainant had worked. I provided Ms. Bodnarchuk with links to the Act pertaining to her obligation to keep a record of daily hours worked and to produce them if required. I received no further response from Ms. Bodnarchuk.

The Employee's Submissions to the Director

13. The Employee's appointments were scheduled by way of an application ("app") called Forest. The Employee reviewed her appointments, which dictated her work schedule, regularly. She was required to clock in and out of work using the app, or, if the time tracking system was not working, by writing her hours in a book. The Employee was to be paid $18 per hour for all regular hours, and $25 per hour for massage appointment between 55 to 65 minutes or $35 for massage appointments that were between 75 and 86 minutes. The Employee was required to arrive 15 to 25 minutes prior to each appointment to prepare the workstation.

14. The Employee also said that she was to receive a percentage of retail sales but was unclear on how that was calculated. She met with Ms. Bodnarchuk to seek clarification on how her wages were calculated. She also asked Ms. Bodnarchuk to email her information about the breakdown of her wages but never received a response. She believed she was missing hours and that her wages were incorrectly calculated and began maintaining her own record of hours.

15. The Employee submitted her handwritten daily record of hours of work, screen shots of the Forest app showing her scheduled appointments for work for two discreet periods and a breakdown of her massage appointments by duration. She also provided the Investigator with a breakdown on the retail sales for each pay period.

16. The Employee submitted that on September 4, 2021, she arrived at work at 8:35 a.m. for her 9:00 a.m. appointment to find the doors locked. When the staff person responsible for opening the salon finally opened the door, the Employee had little time to set up her workstation and discovered that there were no clean towels in any of the service rooms. The Employee was upset as she had no time to launder towels and told the front desk staff person to rebook her appointments. She immediately messaged Ms. Bodnarchuk advising her what had happened. Ms. Bodnarchuk asked the Employee if she was quitting. The Employee responded that she was not quitting but would not be working that day due to the circumstances.

17. The following day, another employee informed the Employee that she had been removed from the schedule entirely and asked her if she had quit. The Employee believed Ms. Bodnarchuk decided to fire her as she was no longer able to access the scheduling app.

18. On September 8, 2021, the Employee contacted Ms. Bodnarchuk to inquire into her situation. Ms. Bodnarchuk told her she was not interested in meeting with her and that her final wages and Record of Employment would be mailed to her.

The Employer's Submissions to the Director

19. The Employer submitted a written response to the first Investigating delegate and told him that the Employee had been paid all wages she was entitled to. Ms. Bodnarchuk confirmed the Employee's rate of pay and provided the first Investigating delegate with a copy of the parties' employment agreement. The agreement did not reference the massage appointment pay structure.

20. The Employer's records did not contain a daily record of hours worked by the Employee but did include undated photos related to her hours of work.

21. The payroll records indicated that effective August 1, 2021, the Employee earned $20 per hour to the end of her employment.

22. The Employer contended that the Employee did not earn, and was not paid, overtime during her employment. The Employer submitted time clock data related to the Employee's employment between April 1, 2021 and September 30, 2021. The data showed that the Employee worked 9.38 hours of overtime and 7.23 hours of weekly overtime.

23. The Employer disputed the Employee's entitlement to compensation for length of service, contending that the Employee walked off the job twice in three days. The Employer further asserted that, had the Employee not quit, she would have been terminated because of her verbal abuse of front desk staff.

24. The Investigator issued the Investigation Report on January 17, 2023.

The Adjudication of the Complaint

25. The Record shows that on January 18, 2023, both the Employer and the Employee provided a response to the Investigation Report.

26. The Adjudicating delegate determined that the Employer's payroll records were accurate and reliable and that the parties agreed that the Employee earned $18 per hour. The Adjudicating delegate noted that, despite the agreement that the Employee was to be paid $18 per hour, she was actually paid $20 per hour after August 1, 2021.

27. The Adjudicating delegate determined that the Employee was paid what she was entitled to be paid for massages. The Adjudicating delegate further determined that the Employer's time clock records, where they corresponded with the Employee's time records, were reliable and accurate. However, where there was a discrepancy, the Adjudicating delegate found the Employee's records to be the best evidence.

28. Based on the records, the Adjudicating delegate determined that the Employee had been paid for her regular hours of work between April 19 and July 31, 2021, but that she was owed wages for 11.5 hours between August 1 and September 4, 2021. The Adjudicating delegate also found that the Employee was entitled to an additional $455 in regular wages for massages.

29. The Adjudicating delegate determined that there were no outstanding commission wages owed to the Employee.

30. Taking into account the differing wage structure, the Adjudicating delegate determined that the Employee was entitled to $339.84 in overtime wages up to July 31, 2021, and a further $75.90 between August 1 and September 4, 2021.

31. The Adjudicating delegate determined that the Employee was entitled to statutory holiday pay for three days during the period of her employment in the total amount of $211.55 as well as vacation pay in the amount of $43.29.

32. Finally, the Adjudicating delegate determined that the Employer had not established that the Employee quit her employment. After setting out the test for determining whether or not an employee had voluntarily quit their employment, the Adjudicating delegate found that "an employee leaving the worksite is not sufficient to discharge an employer from paying compensation for length of service."

ARGUMENT

33. On appeal, the Employer's principal argues that both he and his wife had several telephone conversations with the first Investigating delegate, and that they provided a significant amount of material to that delegate. The Employer suggests that evidence submitted to the first Investigating delegate was not considered by the Adjudicating delegate, and that the conversations with the first Investigating delegate could have assisted the Adjudicating delegate to understand the background to the complaint.

34. The Employer also submits that its records indicate that the Employee was paid for all hours worked, and that time clock records constitute "new evidence."

35. The Employer appeals the Adjudicating delegate's finding that the Employer had contravened section 18 of the *ESA*. Mr. Bodnarchuk says that because the Employee "exited the company on a weekend" and the payroll was processed the following Tuesday and the Employee received the funds on Thursday, the "fine" should be "waived."

36. The Employer appeals the Adjudicating delegate's finding that the Employee was entitled to overtime wages, and relies, in part, on the "new evidence" – that is, the time clock records.

37. The Employer further appeals the Adjudicating delegate's finding of a contravention of sections 40, 45 and 58 of the *ESA* and seeks to have these "fines" "waived" based on the "new evidence."

38. Finally, the Employer submits that the Adjudicating delegate erred in determining that the Employee was entitled to compensation for length of service:

> According to the Determination, it is up the Employer to "demonstrate that the Complainant quit her employment." When an employee walks off the job 2 of the 3 days they were scheduled is a very big indication that they have quit, whether it be "quiet quitting" or sending a message that says "I'm done", without notice and without an appropriate excuse to walk off the job. I am not a lawyer but find that Natural Law applied to this, as Natural Law, when defined in layman's terms is having common sense, understand and observing human nature – human nature, in this example would be "I'm done = I quit.". The complainant is an adult, who is in charge of her own behaviours and actions, as an employer, her walking out of my company on the busiest days and losing out on that income, show me she quit. It is not my job to chase an employee, who is an adult, who walks off the job, twice, to see if they still want to be employed at my company.

39. The Employer says that it wishes to submit a text message from another employee who was in the salon that day as "new evidence" for the Employee's departure and why she was not entitled to compensation for length of service.

ANALYSIS

40. Section 114 of the *ESA* provides that at any time after an appeal is filed and without a hearing of any kind, the Tribunal may dismiss all or part of the appeal if the Tribunal determines that any of the following apply:

(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.

41. 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.

42. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with a determination. I am not persuaded that the Employer has met that burden.

43. Acknowledging that the majority of appellants do not have any formal legal training and, in essence, act as their own counsel, the Tribunal has taken a liberal view of the grounds of appeal. (see *Triple S Transmission*, BC EST # D141/03) I have addressed the Employer's arguments under each ground of appeal.

New Evidence

44. The basis for the Employer's appeal rests largely on "new evidence," consisting of time clock records as well as text messages from another staff member, in support of its argument that the Employee is not entitled to vacation pay, regular and outstanding wages and compensation for length of service.

45. In *Re Merilus Technologies* (BC EST # D171/03), the Tribunal established the following four-part test for admitting new evidence on appeal:

1) 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;

2) the evidence must be relevant to a material issue arising from the complaint;

3) the evidence must be credible in the sense that it is reasonably capable of belief; and

4) the evidence must have high 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.

46. Neither the text message nor the time clock records constitute new evidence. They were provided to the Director in response to the Investigation report and were considered by the Adjudicating delegate prior to issuing the Determination. It appears that the Employer appears to want the Tribunal to "re-weigh" the evidence which has already been provided to the delegates.

47. I find that there is no basis for this ground of appeal.

Natural Justice

48. Natural justice is a procedural right which includes the right to know the case being made, the right to respond and the right to be heard by an unbiased decision maker. It does not mean that the Director's delegate must arrive at a conclusion the appellant considers just and fair.

49. I accept that the Employer experienced a delay and inconvenience during the investigation process. It provided a significant amount of information to the first Investigating delegate whose notes were not provided to the Investigator. While I appreciate the Employer was frustrated with this situation, the Investigator explained this to the Employer and sought additional information and clarification of certain points. The Employer was not responsive to the Investigator's request.

50. I am unable to find that the Employer was denied the opportunity to know the allegations and respond fully to them. The Employer provided information to the delegates and was given the opportunity to respond to the Investigation report and made submissions in response to it. Those responses were considered by the Adjudicating delegate before she made the Determination.

51. I am unable to find that the Employer has demonstrated that it was denied natural justice and dismiss the appeal on this ground.

Error of Law

52. The Employer argues that the Adjudicating delegate erred in finding a) that the burden of demonstrating that the employee is not entitled to compensation for length of service rests with the employer, and b) finding that the Employee had not quit.

53. 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.):

a) a misinterpretation or misapplication of a section of the Act;

b) a misapplication of an applicable principle of general law;

c) acting without any evidence;

d) acting on a view of the facts which could not reasonably be entertained; and

e) adopting a method of assessment which is wrong in principle.

54. Section 63 of the *ESA* provides that an employer is liable to pay an employee compensation for length of service after three consecutive months of employment. That liability is discharged if the employee terminates the employment or is dismissed for cause (section 63 (3)(c)). The Adjudicating delegate correctly placed the burden of demonstrating that the employment quit on the Employer.

55. The Tribunal has applied the following test in determining whether the employee has terminated or quit employment (see *Burnaby Select Taxi Ltd.*, BC EST # D091/96):

> The right to quit is personal to the employee and there must be clear and unequivocal facts to support a conclusion that this right has been voluntarily exercised by the employee involved. There is both a subjective and an objective element to a quit: subjectively, the employee must form an intent to quit employment; objectively, the employee must carry out an act inconsistent with his or her further employment.

56. The evidence, which was not disputed by the Employer, was that the Employee became upset when the service rooms were not stocked with clean towels, which she asserted caused her to be unable to properly perform her tasks. After leaving her place of work and asking the receptionist to reschedule her appointments, she messaged the Employer. In my view, if the Employee was abandoning her position, she would not have taken the step of re-scheduling her appointments or explaining her actions to the Employer. These actions demonstrate that the Employee acted in a manner consistent with her continued employment. The Employer asked the Employee if she was quitting. The Employee said she was not. The evidence supported the Adjudicating delegate's conclusion as there was no evidence the Employee had formed an intent to quit.

57. The Employer has not persuaded me that the Adjudicating delegate's decision that the Employer had not demonstrated that the Employee quit was either irrational or based on a view of the facts that could not be entertained.

58. The *ESA* provides for mandatory administrative penalties without any exceptions (see *Actton Super-Save Gas Stations Ltd.* (BC EST # D067/04). Once the delegate finds a contravention, there is no discretion as to whether an administrative penalty can be imposed. Furthermore, the amount of the penalty is fixed by the *Employment Standards Regulation*. Given that I have found no basis for any of the grounds of appeal, I find no error in the Adjudicating delegate's decision to impose a penalty for each of the contraventions.

59. I find no basis for this ground of appeal.

CONCLUSION

60. I find, pursuant to section 114(1)(f) of the *ESA*, that there is no reasonable prospect that the appeal will succeed.

ORDER

61. Pursuant to section 115(1) of the *ESA*, I confirm the Determination dated July 6, 2023, together with whatever interest may have accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal