Citation: Style by West Trading Inc. (Re)
2023 BCEST 108

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Style by West Trading Inc.

- of a Determination issued by -

The Director of Employment Standards

PANEL: Carol L. Roberts

FILE NO.: 2023/083

DATE OF DECISION: December 6, 2023

DECISION

SUBMISSIONS

Maria Belykh	counsel for Style by West Trading Inc.
Kara Crawford	delegate of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* ("*ESA*"), Style by West Trading Inc. ("Employer") filed an appeal of a determination issued by a delegate of the Director of Employment Standards ("Director") on May 9, 2023 ("Determination").

2. Stefany Renteria ("Employee") filed a complaint with the Director alleging that the Employer had contravened the *ESA* in failing to pay her compensation for length of service and vacation pay.

3. A delegate of the Director ("Investigating delegate") investigated the Employee's complaint. During the investigation, the Employee received funds representing her vacation pay entitlement. Remaining outstanding was the Employee's claim for compensation for length of service.

4. On June 14, 2022, the Investigating delegate issued an Investigation Report ("Report") which was provided to the parties for response. A second delegate ("Adjudicating delegate") reviewed the information produced during the investigation, the Report, and the responses of the parties to that Report before issuing the Determination.

5. The Adjudicating delegate determined that the Employer had contravened sections 58 and 63 of the *ESA* in failing to pay the Employee vacation pay and compensation for length of service. The Adjudicating delegate also determined that the Employee was entitled to compensation for length of service plus vacation pay on the outstanding amount.

6. The Director imposed two $500 administrative penalties for the contraventions of the *ESA*.

7. The Employer contends that the Director erred in law; specifically, by characterizing certain changes of the Employee's responsibilities as fundamental, thereby falling within section 66 of the *ESA*.

8. 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 and the section 112(5) "record" that was before the Director at the time the Determination was made, I sought submissions from the Employee and the Director. Although the Director made submissions, the Employee did not.

9. This decision is based on the record, the appeal submissions, and the Reasons for the Determination.

FACTS

10. The Employer operates a wholesale housewares business in Coquitlam, British Columbia. Lidia Prol was the sole director and officer at the time of incorporation. Kimberly Bruce Krehbiel was also a director for a period of time between February 2020 and April 2021.

11. The Employee worked as a sales assistant/representative from October 1, 2013, until early 2020.

12. The parties agreed that on March 19, 2020, the Employer informed the Employee that she would be on temporary layoff due to the financial impact of the COVID-19 emergency on the business, effective March 20, 2020.

13. Although the parties did not have a written employment contract, they agreed that at the time of layoff, the following were terms of the employment through practice and verbal agreement:

- The Employee's regular hourly wage was $30.00;
- The Employee's hours of work at the office were from 8:00 a.m. to 3:00 p.m. Monday, Tuesday and Thursday, and the Employee pursued "out of office" sales on Wednesday and Friday;
- The Employee was eligible for a 2% commission on increases in sales to one specific vendor (sic) as of September 3, 2019, and became eligible to earn commission wages on sales to a second vendor (sic) as of February 7, 2020; and
- The Employee's responsibilities included attending two trade shows annually as the Employer's representative, for which she received flat fee compensation.

14. The parties also agreed that on August 17, 2020, the Employer gave the Employee a written contract which she was asked to sign and return to the Employer by August 24, 2020. The letter also asked the Employee to return to work on August 31, 2020. The Employee was offered a signing bonus of $100.00. In a covering letter, the Employer advised that it was transitioning all existing employees to written agreements, and that all previous agreements would be replaced with the new agreement, once signed.

15. The parties further agreed that the new contract changed the following terms of the Employee's existing contract:

- The Employee's job title was to become 'Inside Sales Consultant';
- The Employee's hours of work would be from 10:00 a.m. to 5:00 p.m. Monday, Wednesday and Thursday;
- The Employee would no longer attend trade shows or receive compensation for working at those events;
- The Employee would no longer be eligible to earn commissions on 'out-side' sales or otherwise.

16. The Employee did not sign the written contract and did not return to work on August 31, 2020, or thereafter.

17. At issue before the Director was whether the Employee was entitled to compensation for length of service. The Employee argued that because she was not recalled to the position she held at the time of layoff she was entitled to compensation for length of service. The Employer argued that it was not liable to pay compensation because the Employee had abandoned her employment after it recalled her from temporary layoff effective August 31, 2020.

18. The Adjudicating delegate considered section 45.01 of the *Employment Standards Regulation* ("*Regulation*") which extended the maximum period of temporary layoff from 13 weeks to 24 weeks for employees without a right of recall, provided that the layoff ended on or before August 30, 2020, where the layoff was due to the COVID-19 emergency. A layoff that exceeded this period constituted a termination of employee.

19. The Adjudicating delegate found that the Employee was laid off, at least in part, due to the COVID-19 emergency and that the Employer had up to and including August 30, 2020, to recall her to the position she held at time of layoff.

20. The Adjudicating delegate determined that the Employer did not recall the Employee to the position she held on March 20, 2020, on or before August 30, 2020, and that the employment relationship terminated as of August 31, 2020. The Adjudicating delegate did not accept the Employer's argument that its correspondence of August 17, 2020, asking the Employee to sign a new employment contract by August 24, 2020, and to start work on August 31, 2020, on new terms, fulfilled its obligation to recall or reinstate the Employee.

21. The Adjudicating delegate also did not accept the Employer's argument that it was made clear to the Employee prior to August 31, 2020, that she could return to work without signing the new agreement and that her compensation would remain the same:

> The letter of August 18, 2020 from Prol to the [Employee] is silent about the new contract and merely states, "Your compensation and total hours will remain the same as before your temporary layoff. Your start and finish times have been altered to 10:00 a.m. – 5:00 p.m." I accept that the days and hours of work [the Employer] required of the [Employee] were different than pre-COVID layoff. I find based on the emails exchanged between August 17-31, 2020 that [the Employer] was uncertain about the number and size of trade shows that may occur into the future post COVID but was clear in its communications with the [Employee] that she would not be able to earn commissions and would not be attending trade shows going forward. I find that when Prol indicated the 'compensation' was the same she was narrowly defining 'compensation' and was only referring to the [Employee's] regular hourly wage of $30.00 per hour (sic) and not the other types of wages the [Employee] had been entitled to earn prior to the layoff. (p. R5)

22. The Adjudicating delegate found that the written contract the Employer asked the Employee to sign as a condition of returning to work substantially altered the terms of employment in place at the time, including a reduction in job responsibilities and wages. The Adjudicating delegate also found that the Employer substantially altered the Employee's hours of work by requiring her to start and end her shift 2 hours later each day and requiring that she work on Wednesdays instead of Tuesdays each week. The

Adjudicating delegate further determined that the Employer placed the Employee in a position of having to accept unilateral and substantial changes to the terms of her employment as a condition of continued employment.

23. The Adjudicating delegate concluded that because she had determined the employment relationship had been terminated on August 31, 2020, when the Employer did not recall the Employee to her existing job, it was not necessary to exercise her discretion under section 66 of the *ESA* to find that the Employer had constructively dismissed the Employee. However, the Adjudicating delegate found that section 66 was applicable to the Employee's circumstances and determined, "in the alternative," that the Employee had been constructively dismissed.

24. The Adjudicating delegate determined that the Employee was entitled to 7 weeks wages as compensation for length of service plus vacation pay on those wages.

ARGUMENT

25. The Employer contends that the Director erred in characterizing certain changes to the Employee's responsibilities as fundamental and substantial, thereby enabling her to exercise her discretion under section 66 of the *ESA* to find that the Employee had been constructively dismissed.

26. The Employer argues that:

- attending two trade shows annually was not part of the Employee's job description but instead were offered to every employee in the office;
- the hours the Employee would be expected to work upon her return to work was not a substantial change, rather, it was a reasonable change and confirmed to the Employer as such by an Employment Standards Branch representative;
- any restriction on earning commissions on outside sales was a direct result of the Employee pursuing her own business outside of her job with the Employer; and
- that if there were any substantial changes to the Employee's employment terms, those were mandated by the realities surrounding the pandemic and outside the Employer's control.

27. The Employer submits that the Adjudicating delegate's position is a misapplication, or at best, a misunderstanding, of the law. The Employer submits that it was not open to the Adjudicating delegate to make a finding that the Employee had been offered job that was substantially different than the original position without relying on section 66 of the ESA. The Employer further contends that it offered the Employee a position on nearly identical terms within the layoff period, and that if the Adjudicating delegate found this offer to be substantially different from her pre-layoff job, it was incumbent on her to then consider the application of section 65(1)(d), which she failed to do.

28. The Employer also submits that the Adjudicating delegate failed to consider the potential application of section 65(1)(d) despite its relevance to a section 66 consideration.

29. The Employer further argued that the Adjudicating delegate erred in determining that the Employee was entitled to vacation pay.

30. The Adjudicating delegate submits that the Employee's entitlement to compensation for length of service was founded on the Director's finding that there was no evidence the Employer had recalled the Employee to the same position she held prior to the layoff, and that the Director did not rely on section 66 in arriving at this conclusion. The Adjudicating delegate further submits that the Employer cannot, for the first time, argue that she sought and received advice from the Branch regarding unilateral changes to the Employee's days and hours of work.

31. In her submissions, the Adjudicating delegate conceded that the amount awarded in the Determination was in error and requested an opportunity to issue a "Corrigendum" to reflect an amount owing of $4,815.00 for compensation for length of service plus 6% vacation pay of $288.90 on that amount.

ANALYSIS

32. Section 112(1)(a) of the *ESA* provides for an appeal of a determination on the grounds that the Director erred in law.

33. 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 (BC CA):

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.

34. Section 66 of the *ESA* provides that if a condition of employment is substantially altered, the Director may determine that the employment of an employee has been terminated.

35. During the investigation, the parties agreed that, at the time of layoff, the Employee's job responsibilities included attending two trade shows annually. This finding was included with the Investigation Report and was not disputed. Consequently, it is not now open to the Employer to argue that attending trade shows was not part of the Employee's job description.

36. The Adjudicating delegate found that the Employer required the Employee to accept several unilateral and substantial changes to the terms of her employment as a condition of continued employment. One of those was that the Employee would no longer attend trade shows, for which she received a flat fee of over $5,000 in 2019. The other changes included alterations to her days and hours of work, without any consultation about those hours or days, and eliminating her ability to earn commissions on outside sales. While the Employer contends that trade shows were cancelled due to the COVID-19 emergency over

which the Employer had no control, the Employer's new contract eliminated the Employee's opportunity to attend at any time in the future.

37. The Employer submits, on appeal, that had the Employee inquired whether she would be able to attend trade shows again once the shows were re-instated, she would have been informed that this was possible. The record demonstrates this is not the case. The Adjudicating delegate found:

> …I find based on the emails exchanged between August 17-31, 2020 that [the Employer] was uncertain about the number and size of trade shows that may occur into the future post-COVID but was clear in its communications with [the Employee] that she would not be able to earn commissions and would not be attending trade shows going forward. (p. R5)

38. Although the Adjudicating delegate expressly stated that she did not have to exercise her discretion to find that the Employer substantially altered several terms of the Employee's employment, she nevertheless did so, and found that "section 66 can be applied to this situation." I am not persuaded that the Adjudicating delegate's conclusions were perverse or that they had no evidentiary foundation.

39. While any one of the changes, considered in isolation, may not have been characterized as a substantial change, in my view, the Adjudicating delegate did not err in concluding that the cumulative effect amounted to a substantial change. There was a significant alteration to the Employee's ability to earn commission wages as well as a loss of the opportunity to attend trade shows. While the Employee's hourly wage did not change, and the number of hours she worked remained the same, the days and times she worked those hours were unilaterally changed.

40. The Employer's representative contends that she spoke with someone at the Branch who informed her that the changes were not substantial. The difficulty with this assertion, made for the first time on appeal, is that there is no record of who the Employer's representative spoke to, what information she gave to the Branch representative, or what information she received. Assertions about what question was asked or what the response was cannot form a basis for an appeal based on an error of law in the absence of any evidence confirming those discussions.

41. The Adjudicating delegate's conclusion was based primarily on her finding that the Employer failed to recall the Employee within 24 weeks as provided for in section 45.01 of the *Regulation*. I am also not persuaded that this conclusion had no factual foundation.

Temporary layoff

42. The Employer's August 18, 2020 recall letter stated, in part, as follows:

> …
>
> This letter serves as an official notice of recall to your position with Style by West. You are expected to return to work on Monday, August 31, 2020 at 10:00am. If this date does not provide you with enough notice, please contact me to make other arrangements.
>
> Your compensation and total hours will remain the same as before your temporary layoff. Your start and finish times have been altered to 10:00am – 5:00pm.

43. There was no dispute that the Employer was entitled to lay off the Employee under *Regulation* 45.01.

44. The Employer instructed the Employee to sign the new contract by August 24, 2020, that the current terms of her employment would come to an end and that when she returned to work on August 31, 2020, the new terms would apply to her employment. In other words, the Employee was recalled on the condition that she accept new terms of her employment. Having found that the new terms altered both the conditions of the Employee's work as well as her wage structure, the Adjudicating delegate determined that it was reasonable for the Employee to understand the new contract as constructive dismissal in the context of a temporary layoff recall. The Adjudicating delegate arrived at the same conclusion. Given that the Employer did not rescind the August 17, 2020 letter prior to August 31, 2020, the Employer had effectively terminated the Employee upon expiry of the time period permitted by *Regulation* 45.01.

45. Although the Employer contends that the Employee was not obliged to agree to the new terms, the Director found that the Employer failed to clearly communicate its intentions to the Employee to honour the previous, verbal terms of the employment agreement before August 31, 2020. In my view, there was sufficient evidence before the Adjudicating delegate for her to arrive at that conclusion.

Did the delegate err in failing to consider section 65(1)(d)?

46. Section 65(1)(d) of the *ESA* provides that an Employer's obligation to pay compensation for length of service does not apply where the employment agreement is impossible to perform due to an unforeseeable event or circumstance. While the Employer now asserts that any changes to the Employee's employment terms were mandated by the realities of the COVID-19 emergency and outside the control of the Employer, the record and the Determination both show that the Employer did not raise this argument at any time during the investigation and adjudication of this complaint. Given that it was never raised by the Employer until the appeal was filed, I am unable to find that the Director erred in law in failing to consider section 65(1)(d). Furthermore, evidence regarding an Employer's financial circumstances regarding the impact of COVID-19 must be produced, not simply asserted either on appeal or at first instance (see *Labyrinth Lumber Ltd.*, BC EST # D407/00).

47. Finally, having found that the Employee was entitled to compensation for length of service, the Adjudicating delegate calculated vacation pay on the outstanding amount. I find no error in the Adjudicating delegate's decision in this respect.

48. I dismiss the appeal.

49. As noted above at paragraph 31, the Adjudicating delegate concedes that she made a calculation error in determining the period of the Employee's employment with the Employer. I agree with the Adjudicating delegate that the quantum of compensation for length of service payable under section 63 of the *ESA* should be $4,815.00 and 6% vacation pay should be $288.90.

ORDER

50. Pursuant to section 115(1) of the *ESA*, the Determination, dated May 9, 2023, is varied to reflect an amended amount for compensation of length of service in the amount of $4,815.00 and vacation pay in the amount of $288.90, together with whatever interest may have accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal