Citation: Caffe Artigiano Inc. (Re)
2023 BCEST 32

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Caffe Artigiano Inc. carrying on business as Caffe Artigiano

- of a Determination issued by -

The Director of Employment Standards

PANEL: Maia Tsurumi

FILE NO.: 2022/211

DATE OF DECISION: May 17, 2023

DECISION

SUBMISSIONS

Dean Shillington	on behalf of Caffe Artigiano Inc. carrying on business as Caffe Artigiano
Sanel Kadiric	delegate of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*ESA*"), Caffe Artigiano Inc. carrying on business as Caffe Artigiano ("Artigiano") has filed an appeal of a determination (the "Determination") issued by Sanel Kadiric, a delegate (the "Delegate") of the Director of Employment Standards (the "Director") on November 7, 2022. The Delegate determined Artigiano owed Kamila Stiti (the "Complainant") compensation for length of service under section 63 of the *ESA*, annual vacation pay (section 58), and accrued interest (section 88). The Delegate imposed a mandatory administrative penalty of $500.00 for breach of section 18 (wage payment on termination).

2. Artigiano appeals the Determination on the grounds that the Delegate erred in law and evidence has become available that was not available at the time the Determination was made. Artigiano also requests an extension of the appeal deadline.

3. For the reasons below, I extend the time to file the appeal, allow the appeal pursuant to sub-section 115(1)(a) of the *ESA,* and order Artigiano to pay the amounts set out in the Determination.

4. My decision is based on the submissions made by Artigiano in its Appeal Form, submissions in its request for an extension of the appeal deadline (the "Extension Submissions"), the sub-section 112(5) record (the "Record"), the Determination, the Reasons for the Determination (the "Reasons"), the Director's reply to Artigiano's Appeal submissions (the "Reply"), and additional submissions from Artigiano (the "Additional Submissions").

ISSUES

5. I must decide:

   (a) whether the period for filing the appeal should be extended pursuant to section 109(1)(b) of the *ESA*; and

   (b) whether all or part of this appeal should be allowed or dismissed.

THE DETERMINATION

Background

6. Artigiano operates a chain of coffee shops and Dean Shillington is listed in the BC Registry as its sole director. The Complainant filed the complaint on July 31, 2020, alleging Artigiano breached the *ESA* because it did not pay them compensation for length of service.

Issues Before the Delegate

7. The issue before the Delegate was whether Artigiano terminated the Complainant's employment and owed them compensation for length of service.

Evidence Relied on by the Delegate

8. A delegate ("Investigating Delegate") of the Director investigated the Complaint. Before issuing the Determination and the Reasons, the Delegate reviewed the evidence provided by the parties during the investigation and considered the investigation Report (the "Investigation Report") prepared by the Investigating Delegate (Reasons, p. R2).

9. The Delegate accepted the Investigation Report was an accurate reflection of the parties' evidence and positions (Reasons, p. R3).

10. The parties agreed the Complainant worked at Artigiano for about 17 months, earning $40,000 per year (about $19.23 per hour), until the parties agreed to a temporary layoff starting on March 18, 2020, because of the Covid-19 pandemic (Reasons, pp. R3-R4). At the time of the temporary layoff, the Complainant was a Store Manager, regularly working 40 hours per week.

11. The parties also agreed Artigiano offered to rehire the Complainant to participate in online training programs at a 75% reduction of her original salary (Reasons, p. R3). These training programs would be completed from home (Reasons, p. R3).

12. The Delegate found the evidence showed Artigiano did not tell the Complainant if she declined its offer, her employment would be terminated (Reasons, p. R4). Artigiano emailed the Complainant on April 13, 2020 saying it would, "stay in touch and keep [the Complainant] posted as things progress" (the "April 13 Email").

The Delegate's Decision

Termination and compensation for length of service

13. The Delegate concluded the Complainant's employment was terminated on August 31, 2020 and was owed compensation for length of service.

14. Under section 63 of the *ESA*, an employer must pay compensation for length of service if they terminate an employee's employment. However, section 65 sets out certain circumstances where section 63 does not apply. One of the exceptions is where an employee has been offered and has refused reasonable alternative employment by the employer: *ESA*, section 65(1)(f).

15. The Delegate noted it was important to stress section 65(1)(f) of the *ESA* was a complete defence to one of the most notable entitlements an employee has under the *ESA* (Reasons, p. R3). This entitlement is to give employees a minimum safety net when they lose their livelihoods through no fault of their own. Because the entitlement of compensation for length of service under section 63 should not lightly be removed from an employee, offers of alternative employment must be reasonable.

16. The Delegate explained the test to determine whether an offer of alternative employment is reasonable is the "reasonable person test" (Reasons, p. R3) This is an objective test that asks, "would a sensibly officious bystander consider the employer's alternative employment offer to be reasonable?" There are several factors that may be considered when answering this question, including: (1) the nature of the job offered compared to the one currently performed; (2) any express or implied understandings or agreements; (3) whether the wages, benefits, working conditions, and security of employment are comparable to the position already held; (4) geographic proximity or costs of dislocation; and (5) any objective personal circumstances that might make an employee refuse the offer. Because the test is objective, an employee's subjective belief about what is reasonable is not considered.

17. The Delegate concluded Artigiano's offer of alternative employment was not reasonable (Reasons, pp. R3-R4). The nature of the new position, participating in training programs from home, differed from the Complainant's previous role as store manager, offered her less responsibility, and was a significant wage reduction. He found a sensibly officious bystander would not consider it unreasonable for the Complainant to refuse to accept a significantly reduced salary and altered working conditions, especially where the employer failed to explain the ramifications of not accepting its offer (Reasons, p. R4).

18. The Delegate rejected Artigiano's argument that its offer was reasonable because it offered to return the Complainant to her former wage at some uncertain later date (Reasons, p. R4). It was not certain the Complainant would regain her former wage and if she did it would only be at Artigiano's discretion.

19. The Delegate concluded section 66 of the *ESA* did not apply because Artigiano did not unilaterally and substantially change the Complainant's employment (Reasons, p. R4).

20. The Delegate concluded from the evidence, including the April 13 Email, that following the refusal of Artigiano's offer of alternative employment, the Complainant remained on temporary layoff (Reasons, p. R4).

21. The maximum length of temporary layoff during the relevant period was 24 weeks in a period of 28 consecutive weeks (Reasons, p. R4). Because Artigiano did not recall the Complainant to their former position or a reasonable alternative position within the temporary layoff period, the Delegate found Artigiano terminated the Complainant's employment (Reasons, p. R4). This termination occurred on August 31, 2020 when the Complainant's temporary layoff exceeded the *ESA's* temporary layoff definition.

22. As Artigiano terminated the Complainant's employment, the Complainant was owed compensation for length of service under section 63 of the *ESA* (Reasons, p. R4). Section 63(5) of the *ESA* states a terminated employee under temporary layoff is deemed terminated on the first day of the layoff, which for the Complainant was March 18, 2020. Given the length of the Complainant's employment, this meant the Complainant was owed two weeks' regular wages.

23. The Delegate calculated compensation for length of service as per section 63(4) of the *ESA* (Reasons, p. R5). As the Complainant's regular work hours were 40 hours per week in the eight week period prior to their temporary layoff, she was entitled to $1,538.40 (40 hours/week at $19.23 for two weeks).

Annual vacation pay (section 58)

24. The Delegate found, under section 58 of the *ESA*, the Complainant was owed 4% annual vacation pay on her compensation for length of service (Reasons, p. R5). This was $61.54.

The Determination

25. In the result, the Delegate determined Artigiano owed the Complainant compensation of $1,599.94. The Complainant was also entitled to accrued interest of $96.85 under section 88 of the *ESA* (Reasons, p. R5).

26. The Delegate imposed a mandatory penalty of $500.00 for Artigiano's breach of section 18 of the *ESA* (Reasons, p. R5). Section 18 requires employers pay all wages owing to an employee within 48 hours after the employer terminates the employment of an employee. Artigiano did not pay compensation for length of service by September 2, 2020 (two days after it terminated the Complainant's employment).

ARGUMENT

27. Artigiano submits the Delegate erred in law and there is new evidence not available when the Determination was made.

28. Specifically, Artigiano says:

(a) the Delegate erred because he mistakenly found Artigiano offered the Complainant 75% of their former salary for 40 hours per week, when Artigiano offered the Complainant 75% of their former 40 hours per week but at their former salary;

(b) the Complainant was offered their same role as store manager so the only change to their employment status was their hours of work;

(c) an email from the Complainant refusing the offer of alternative employment indicates they refused the offer for fear of impacts on their entitlement to Employment Insurance ("EI") if the pandemic were to worsen again and concern about the merits of the offer versus the ability to receive EI is not part of the test for reasonable alternative employment; and

(d) in determining whether the alternative employment offer was reasonable, the Delegate should have considered the impact of the Covid-19 pandemic on the business.

29. In the Additional Submissions, Artigiano takes exception to the Director's Reply.

ANALYSIS

Issue 1: Request for extension of time to file the appeal

30. The Determination was issued on November 7, 2022 and served on Artigiano by email to its Financial Controller and to Mr. Shillington, its sole director (Determination, p. D3). The Determination indicates that the appeal period expired on December 1, 2022 if it was served by e-mail. If served by registered mail, the appeal deadline was December 15, 2022. Artigiano filed its appeal on December 15, 2022.

31. As the Branch cc'd the Determination to two of Artigiano's addresses via registered mail, Artigiano may not need an extension of time to file the appeal. If the Branch's methods of service of the Determination results in two possible appeal periods, it seems fair that the longer period should govern.

32. However, I do not have to decide this issue because if an extension is necessary, I grant it.

33. Extensions of time should not be granted as a matter of course: *Liisa Tia Anneli Niemisto*, BC EST # D099/96. Appellants seeking extensions of time for filing appeals should satisfy the Tribunal that criteria set out in the Niemisto decision are met:

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 ongoing *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.

Niemisto at p. 3; see also *Gorenshtein v. British Columbia*, 2013 BCSC 1499 at paras. 28 and 57.

34. These criteria are not an exhaustive list. There may be other factors that ought to be considered. Further, not all the above factors may be applicable in determining whether an extension should be granted or not, depending on the circumstances of each case.

35. I accept Artigiano mistakenly thought the deadline was December 15, 2022, and thus Artigiano has a credible explanation for why it did not file its appeal on time. I also find that Artigiano has a strong *prima facie* case in their favour and that the respondent will not be unduly prejudiced by the granting of the extension. The Director did not object to Artigiano's request for an extension.

36. Based on the *Niemisto* criteria, I exercise my discretion and grant Artigiano's request to extend the time limits for filing its appeal under sub-section 109(1)(b) of the *ESA*.

Issue 2: Should the appeal be allowed or dismissed?

37. I conclude the Delegate did not err in his Determination that Artigiano owed the Complainant compensation for length of service, vacation pay, and accrued interest totalling $1,696.79 and breached section 18 of the *ESA*. However, I find the Delegate erred in his analysis in arriving at his Determination when he concluded section 66 (termination) did not apply.

38. An appeal is not a re-hearing of the matter and is not another opportunity to give one's version of the facts. Section 112(1) of the *ESA* says a person may appeal a determination on any 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.

39. In the context of appeals to the Tribunal, an error of law occurs in the following situations:

(a) a misinterpretation or misapplication by the decision-maker of a section of its governing legislation;

(b) a misapplication by the decision-maker of an applicable principle of general law;

(c) where a decision-maker acts without any evidence;

(d) where a decision-maker acts on a view of the facts that could not reasonably be entertained; and/or

(e) where the decision-maker is wrong in principle:

Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam), 1998 CanLII 6466 (BC CA). The Tribunal has adopted this definition: see e.g., *Re: C. Keay Investments Ltd. (Re)*, 2018 BCEST 5, at para. 36.

Error of law

40. The Delegate did not act without evidence or come to an unreasonable view of the facts. The Reasons and Record, including the Investigating Delegate's workflow notes (Record, pp. 52-55) and Investigation Report (Record, pp. 19-29), show the Delegate had evidence on which to make his findings of fact and was reasonable in his conclusions based on the facts he found.

41. I reject Artigiano's argument that the Delegate erred in finding the offer was not reasonable because he mistakenly assumed Artigiano offered the Complainant 75% of their former salary, when Artigiano actually offered the Complainant 75% of their former 40 hours per week at their former wage rate (Appeal Form, p. 5). The evidence before the Delegate was Artigiano offered the Complainant 75% of their salary (Record, pp. 26, 39, 49-50, 53-54, 64, 83, 119, 149). Further, the fact the Complainant was offered 75% of her salary was clearly set out in the Investigation Report, to which Artigiano had an opportunity to respond. If this was incorrect, then Artigiano should have addressed it by responding to the Investigation Report.

42. Moreover, even if the Complainant was offered 25% of their pre-pandemic hours (i.e. about 10 hours a week) at their pre-pandemic rate of $19.23 per hour, I conclude the Delegate did not err in his Determination that Artigiano's offer was not reasonable. A 75% reduction in working hours would also have been a significant reduction in the Complainant's wage and therefore a reasonable basis on which the Delegate could find the offer was not reasonable: *Royal Pacific Millworks Ltd. (Re)*, BCEST #D010/16 at para 59. Moreover, the Delegate based his determination on more than the wage reduction. He also considered the nature of the work offered, attending online training programs from home, versus her pre-layoff position as store manager with greater responsibilities.

43. I also reject Artigiano's argument that the Complainant was offered their same role as Store Manager so the only change to their employment status was their hours of work. Even if the Complainant's title was to remain "Store Manager," the evidence was the offer of work involved attending training programs online from home. This would have involved a great change in the Complainant's pre-layoff working conditions, role and responsibilities.

44. However, I find the Delegate erred in law because he misapplied the *ESA*. He concluded section 66 did not apply (Reasons, p. R4).

45. The Director addressed this issue in Reply, saying the issue was addressed by the Delegate. In the alternative, if section 66 applies, the Director says the offer of work amounted to a substantial alteration in the Complainant's employment that resulted in termination.

46. I conclude the offer to recall the Complainant to attend online training programs from home at a reduced wage was a substantial change in the Complainant's employment and so the Complainant's employment was terminated on April 12, 2020 when the offer was made: *Royal Pacific Millworks Ltd. (Re)*, BCEST #D010/16 at para 59. The Complainant's employment was not terminated through expiry of the temporary layoff period, as found by the Delegate.

47. However, even though the Complainant's employment was terminated under section 66 of the *ESA*, Artigiano does not owe the Complainant compensation for length of service if the exception in section 65(1)(f) of the *ESA* applies: *Royal Pacific Millworks Ltd. (Re)*, BCEST #D010/16 at para 59.

48. I find the Delegate did not err in his application of section 65(1)(f) of the *ESA*. The Reasons indicate the Delegate was aware of the relevant legal principles regarding section 65(1)(f) of the *ESA* and applied them correctly (see "The Determination" section above): see *Helliker*, BC EST #D338/97, reconsideration of BC EST #D357/96.

49. Artigiano says the Delegate erred in considering the Complainant's concern about their EI entitlement in determining if the offer of alternative employment was reasonable (Appeal Form, p. 5). However, there is no indication in the Reasons or Record that the Delegate took this into account. The Delegate clearly states he determined the offer of alternative employment was not reasonable, because of the nature of the new position, the reduction in the Complainant's responsibilities, and the significant wage reduction (Reasons, pp. R3-R4). The Reasons also indicate the Delegate was aware the Complainant's subjective view of reasonableness was irrelevant (Reasons, p. R3).

50. Artigiano also says the Delegate should have considered the impact of the Covid-19 pandemic on its business when determining if the offer of employment was reasonable. There is nothing in the Record or Reasons showing Artigiano made this submission to the Delegate. In any event, I conclude the Delegate did not err in not considering the impact of the pandemic on the business. It may well be that because of the pandemic Artigiano could not offer the Complainant equivalent employment to what she had until March 18, 2020, but the question was whether a reasonable bystander would consider the offer a reasonable alternative to the Store Manager position, not whether the bystander would consider the offer reasonable considering economic and social circumstances. The impact of external circumstances on a business is not relevant to whether the position offered is comparable to the position held, and ultimately, to whether an employee is entitled to compensation for length of service.

51. The result of the Delegate's error in not applying section 66 of the *ESA* means the date of termination was April 12, 2020 and not the first day of temporary layoff of March 18, 2020.

52. Although the Delegate had the wrong termination date, the Complainant was still only entitled to two weeks regular wages as compensation for length of service, so the Delegate did not err in calculating the amount of compensation for length of service, annual vacation pay, and accrued interest owed to the Complainant. As Artigiano did not pay the compensation for length of service within two days of termination, the Delegate did not err in finding Artigiano breached section 18.

New evidence

53. With respect to Artigiano's ground of appeal based on new evidence not available when the Determination was made, I find there is no new evidence.

54. The April 12, 2020 email included with the Extension Submissions (p. 4) was, as noted by Artigiano on its Appeal Form (p. 5), submitted to the Branch during the Investigation (Record, pp. 27-28, 51, 62, 84, 122, 150).

55. The template used for the offers to staff during the temporary layoff is not admissible as new evidence. This document was available when the Determination was made and so could have been put before the Delegate. For the Tribunal to accept new evidence it must not have been able to be discovered and presented to the Director prior to the Determination being made: *Bruce Davies et al.*, BC EST # D171/03 at p. 3.

ORDER

56. Pursuant to sub-section 115(1)(a) of the *ESA*, I vary the Determination, dated November 7, 2022 to find the Complainant's employment was terminated under section 66 of the *ESA* and the date of termination was April 12, 2020.

57. As the Delegate's error does not affect the Delegate's conclusion about the amount Artigiano owes to the Complainant, I see no purpose served by sending the matter back to the Delegate to apply section 66 and arrive at the same Determination. I therefore order Artigiano to pay $1,696.79 in compensation for length of service, annual vacation pay, and accrued interest to the Complainant because it substantially altered

the Complainant's conditions of employment (section 66) and did not offer the Complainant reasonable alternative employment (section 65(1)(f)).

Maia Tsurumi
Member
Employment Standards Tribunal