

An appeal

- by -

Kootenai Community Centre Society
(“KCCS”)

- of a Determination issued by -

The Director of Employment Standards
(the “Director”)

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

TRIBUNAL MEMBER: Shafik Bhalloo

FILE No.: 2011A/164

DATE OF DECISION: January 11, 2012

DECISION

SUBMISSIONS

Susan Sangha	counsel for Kootenai Community Centre Society
Shari Leyte	on her own behalf
Amanda Clark Welder	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) brought by Kootenai Community Centre Society (“KCCS”) of a Determination that was issued on October 7, 2011, by a delegate of the Director of Employment Standards (the “Director”). The Determination found that KCCS contravened section 54 of the *Act* by failing to return Ms. Shari Leyte (“Ms. Leyte”) to work following the expiration of her parental leave and ordered KCCS to pay her \$18,171.73, consisting of wages and accrued interest. The Determination also imposed on KCCS an administrative penalty of \$500.00 pursuant to section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”).
2. KCCS, while not agreeing with the outcome in the Determination, is only challenging the remedy ordered in the Determination on the basis of Section 112(1)(c) of the *Act*, namely, that new evidence has become available that was not available at the time the Determination was made.
3. As for remedy, counsel for KCCS is asking the Tribunal, pursuant to Rule 32 of the *Tribunal’s Rules of Practice and Procedure*, to order production from Ms. Leyte of information pertaining to her alleged re-employment after the hearing of her complaint but before the issuance of the Determination including any remuneration she earned in her new employment. KCCS is also asking the Tribunal, based on this information, to change or vary the amount of the award in the Determination, since the award in the Determination was based, in part, on the Director’s consideration of the mitigation efforts of Ms. Leyte, the time she would need to secure alternate employment, and any other earnings during her period of unemployment.
4. Pursuant to section 103 of the *Act* and Rule 17 of the *Tribunal’s Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. In this case, none of the parties have requested an oral hearing and, in my view, the appeal may be adjudicated on the basis of the section 112(5) “record”, the written submissions of the parties and the Reasons for the Determination.

ISSUE

5. The sole issue to be addressed in this decision is whether evidence has become available that was not available at the time the Determination was made by the Director and, if so, does that evidence justify changing or varying the Determination in any manner?

FACTS AND SUBMISSIONS

6. It should be noted that KCCS, in its appeal, sought a suspension of the Determination, in part, pursuant to Section 113 of the *Act* and the Tribunal saw fit to grant KCCS’ application. The Tribunal’s decision is

reported at BC EST # D001/12. In that decision, the Tribunal very succinctly summarizes the relevant facts and appeal submissions of KCCS as follows:

Ms. Leyte filed a complaint alleging KCCS contravened the *Act* by failing to return her to work following the expiration of her parental leave. The Director's delegate ultimately concluded that KCCS had contravened section 54 of the *Act*. Although KCCS disagrees with this conclusion, it has appealed only the remedy awarded by the delegate. The delegate concluded that, despite making diligent and reasonable efforts to secure employment, Ms. Leyte had been unable to find a suitable job to apply for [*sic*]. The delegate calculated her award based on her conclusion that it would be reasonable that it would take Ms. Leyte 28 weeks to secure employment.

KCCS contends that Ms. Leyte obtained replacement employment in July 2011, after the hearing date but before the Determination was issued. KCCS submits that, based on the assumption that Ms. Leyte obtained replacement employment on July 1, 2011, the calculation of her compensation entitlement would be 16 weeks rather than the 28 weeks found by the delegate, bringing Ms. Leyte's compensation entitlement from \$18,671.73 to \$10,705.64. In a subsequent submission, KCCS's counsel indicated that she had erroneously calculated the number of weeks at 16, rather than the actual 15, but nevertheless, deposited the originally calculated amount with the Tribunal.

KCCS deposited the amount of \$7,359.75 with the Tribunal, representing a partial amount required to be paid under the Determination, with its appeal. This amount represents what KCCS submits is Ms. Leyte's entitlement (based on 16 weeks entitlement rather than what it submits should be 15) less statutory deductions.

7. I also note that counsel for KCCS, in her appeal submissions, contends:

(t)hat the objectives of compensation under the *Act* are not to put the employee in a better position than she would have been in if the contravention had not occurred, or to provide the employee with a windfall. Accordingly, if Ms. Leyte was gainfully employed at some point prior to September 30, 2011, her compensation under the Determination should be adjusted to ameliorate the apparent injustice that has occurred.
8. In her reply submissions, the Director concedes that the evidence of re-employment of Ms. Leyte, after the hearing of the latter's complaint and before the Determination was issued, was unavailable at the time of the hearing and this information is both relevant to a material issue and highly probative. Therefore, the Director does not object to its introduction on appeal.
9. The Director also submits that in deciding the award to Ms. Leyte in the Determination, she considered, *inter alia*, Ms. Leyte's lost earnings during the 28-week period of March 21, 2011, to September 28, 2011. Therefore, if Ms. Leyte had earnings from re-employment during any part of this period, then the Director submits it is appropriate to consider them and accordingly reduce the amount awarded to Ms. Leyte. Similarly, the Director submits that if Ms. Leyte, in her new employment, received MSP benefits, then the pecuniary award in relation to such benefit should be deducted from the award in the Determination.
10. The Director concludes her submissions by proposing that either the Tribunal may compel Ms. Leyte to provide relevant information pertaining to her re-employment or refer the matter back to the Director "to deal solely with the issue of remedy".
11. Ms. Leyte, in her reply submissions, states that while she does not agree that an award based simply on calculation of "[lost] wages alone" satisfactorily puts her in the position she would have been in had KCCS not contravened the *Act*, she understands the limitations under the *Act*.

12. Ms. Leyte further submits that that she does not object to either the Director or the Tribunal reviewing information pertaining to wages she earned in her new employment, which she admits commenced as of July 4, 2011, “on a temporary, day to day basis” but without any MSP coverage. However, she does not want any information about her new employment shared with KCCS or its counsel.
13. Ms. Leyte also submits that “to move forward” and conclude this matter, she is prepared to accept the amount KCCS was prepared to deposit with the Director as set out in its counsel’s appeal submissions of November 14, 2011. More particularly, that amount is \$10,705.64 less statutory deductions. However, I note that counsel for KCCS in a subsequent correspondence with the Tribunal indicated that she had erred in calculating the amount KCCS was proposing to deposit with the Director pending the appeal. The corrected gross amount was \$9,900.80, which after statutory deductions netted to \$7,359.75.

ANALYSIS

14. The Director, in awarding Ms. Leyte compensation for KCCS’ breach of Section 54 of the *Act*, relied on Section 79(2) of the *Act* and considered the general principle of damages, namely, to put the injured party in the same position she would have been but for the breach of the statutory obligation. More particularly, as previously indicated, the Director, in calculating the award made to Ms. Leyte in the Determination, considered, *inter alia*, the time Ms. Leyte would need to find alternative employment, mitigation on her part and her other earnings during her period of unemployment.
15. Having said this, I find myself strongly agreeing with both KCCS and the Director that the evidence of Ms. Leyte’s re-employment after the hearing and before the Determination and, particularly, her earnings from that new employment is relevant to a material issue in her complaint and of high probative value. Neither the Director, nor KCCS, at the time of the hearing, was aware of Ms. Leyte’s re-employment, as she was not then re-employed. She only found new employment on July 4, 2011, as indicated in her own appeal submissions. In my view, knowledge of Ms. Leyte’s re-employment before the Determination was made would most certainly have led the Director to a different conclusion on a material issue. That is, the Director would have taken this information into account in calculating the “make-whole” award she made to Ms. Leyte under section 79(2). Effectively, the award in the Determination would have been less than it was had the Director the benefit and knowledge of Ms. Leyte’s earnings in her new employment during the “lost earnings” period of 28 weeks the Director considered in making her award.
16. In the circumstances, I find that the purported new evidence amply qualifies under the tests adopted by the Tribunal for admitting new evidence on appeal (See *Re: Merilus Technologies Inc.*, BC EST # D171/03 and *Senor Rana’s Cantina Ltd.*, BC EST # D017/05). Further, as indicated previously, the Director is not opposed to the relief sought by KCCS and Ms. Leyte has not made any submissions that would persuade me otherwise than to favourably consider the relief sought by KCCS.
17. As for the two (2) options the Tribunal has in this case - to order Ms. Leyte to provide relevant evidence of her re-employment and income or refer the matter back to the Director to deal with this issue - I find it more convenient and perhaps expeditious for all parties concerned to refer the matter back to the Director with express instructions to the Director to investigate, obtain and consider relevant wage and benefits information pertaining to Ms. Leyte’s new employment during the relevant period and, based on this information, recalculate the award to Ms. Leyte.

ORDER

18. Pursuant to section 115(1), I order that the award for “compensation and lost wages” and accrued interest in the Determination, dated October 7, 2011, be set aside and the matter referred back to the Director for recalculation of the award based on the instructions set out above.

Shafik Bhalloo
Member
Employment Standards Tribunal