Employment Standards TRIBUNAL

An appeal

- by -

Shelley L. Wells
("Ms. Wells")

- 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: Carol L. Roberts

FILE No.: 2016A/125

DATE OF DECISION: February 20, 2017

DECISION

SUBMISSIONS

Shelley L. Wells	on her own behalf
Paul Goldberg	on behalf of Langley Senior Resources Society
Shelley Chrest	on behalf of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), Shelley L. Wells ("Ms. Wells) has filed an appeal of a Determination issued by a delegate (the "delegate") of the Director of Employment Standards (the "Director") on July 28, 2016. In that Determination, the Director found that Langley Senior Resources Society ("LSRS") had contravened sections 18, 58 and 63 of the *Act* in failing to pay Ms. Wells wages, compensation for length of service, vacation pay and interest. The Director ordered LSRS to pay $7,052.99. The Director also imposed three $500 administrative penalties for the contraventions, for a total amount owing of $8,552.99.

2. Ms. Wells appealed the Determination contending that the delegate erred in law and failed to observe the principles of natural justice in making the Determination. In a decision issued December 6, 2016 (BC EST #D156/16) I referred the matter of whether LSRS had offset payments made to Ms. Wells against her compensation for length of service, and if so, whether those offsets were made contrary to section 21 of the *Act*.

3. This decision is based on the submissions of the parties, the section 112(5) "record" that was before the delegate at the time the decision was made, and the Reasons in the referral back.

FACTS AND ARGUMENT

4. The facts were set out in my original decision and will not be repeated in detail here.

5. Briefly, Ms. Wells began working for LSRS on a full time basis on October 1, 2014. She went on medical leave on March 4, 2015, and remained on sick leave until July 12, 2015.

6. LSRS inadvertently paid Ms. Wells' salary while she was on sick leave for a period of time. On April 14, 2015, LSRS informed Ms. Wells that, while the Board would not seek repayment of the money already paid to her, further salary payments would stop while she was on sick leave. LSRS also discovered that Ms. Wells had authorized payment of vacation time from December 15, 2014, until January 2, 2015. The money had not been deducted from Ms. Wells' final pay.

7. In the Determination, the delegate noted that while LSRS's payments to Ms. Wells during her medical leave were made in error and subsequent offsetting of those wages was contrary to section 21 of the *Act*, Ms. Well's final payment was short of the wages she was entitled to. I wrote in my decision (at para. 40):

> The delegate noted that,

> ...the Employer, in calculating the Complaint's entitlement for compensation for length of service has taken into account the March 2015 payments previously paid to the Complainant while she was on medical leave. ... As discussed above, I have taken into account the amounts that the Employer attempted to off-set in calculating the Complainant's entitlement to compensation for length of service. While the Employer did not directly deduct wages from the Complaint's wages, it did so indirectly, contrary to Section 21 of the *Act* prohibiting unauthorized deductions for any purpose.

While appearing to agree that offsetting Ms. Wells' compensation for length of service against money previously (over)paid by LSRS in error was contrary to the *Act,* the delegate nevertheless awarded Ms. Wells the equivalent of one week gross wages. In doing so, the delegate did not make a clear finding on the issue of whether or not LSRS off-set Ms. Wells' entitlement to compensation for length of service. It is not entirely clear how the delegate arrived at her conclusion on this issue. Further, the delegate did not appear to consider the Tribunal's jurisprudence in this respect, particularly the decision in *United Specialty Products Ltd.* (BC EST # D102/12, Reconsideration decision BC EST # RD127/12). In failing to make a clear determination on this point, I conclude that the delegate either acted on a view of the facts that cannot be entertained or adopted an erroneous method of assessment.

Argument

8. In the referral back decision, the delegate noted that LSRS provided Ms. Wells with an explanation of how it arrived at the amount of $830.99 in her final paycheque. This summary, which was indicated as a "severance offer", was submitted in evidence by LSRS at the hearing. The delegate concluded that LSRS had waived any privilege over the document by producing it at the hearing.

9. The delegate noted that the summary contained a number of notations that demonstrated LSRS's misunderstanding of the *Act* with respect to compensation for length of service. However, the delegate noted that the document set out an amount for "severance," an amount which would not be enforced by the Director as wages, from which LSRS then deducted amounts for "sick pay," vacation pay and wages paid while Ms. Wells was on sick leave. The delegate also noted that LSRS's summary indicated payment of an amount for July 13, 2015, based on Ms. Wells' original salary. Consequently, the delegate concluded that she erred in imposing a penalty for a breach of section 18 in her Determination.

10. The delegate wrote that

> If the "severance pay" on which the Employer purportedly based this summary is not wages that can be enforced by the director, the "deductions" likewise cannot be considered when calculating wages owed to the Complainant. The sick pay, overpaid salary, and vacation pay are all amounts the Complainant has been paid, and these amounts were not deducted from wages. As a result, it was an error to impose a penalty for a breach of section 21 in my determination.

11. The delegate allocated the wages paid in the amount of $830.99 between wages for July 13 and partial payment of Ms. Wells' compensation for length of service. Noting that the payment for July 13 was in excess of the statutory minimum of two hours and less than the amount Ms. Wells was entitled to for compensation for length of service, the delegate concluded that Ms. Wells was entitled to $5,740.11 as follows:

Vacation pay for 9 days:	$ 3,807.72
Compensation for length of service:	$ 2,115.38
Vacation pay:	$ 84.61
Subtotal:	$ 6,007.71

Less Amount paid:	$ 427.14
Total wages owing:	$ 5,580.57
Interest:	$ 159.54
Total payable:	$ 5,740.11

12. The delegate also imposed two administrative penalties in a total amount of $1,000 for a total owing of $6,740.11.

13. Ms. Wells argues that LSRS made inappropriate deductions from her final paycheque and that in doing so, contravened section 21 of the *Act*. Ms. Wells argues that the delegate failed to consider the Tribunal's jurisprudence in arriving at her conclusion, in particular *United Specialty Products* (BC EST # D102/12, Reconsideration BC EST # RD127/12). In response, the delegate submits that the distinction between severance pay and compensation for length of service has been addressed by the Tribunal and the British Columbia Court of Appeal. The delegate notes that, in *Colak v. UV Systems Technology Inc.* [2007] BCCA 220, the court approved the Tribunal's view that compensation for length of service is wages, while severance pay represents damages for breach of an express or implied term of an employment contract over which the Director has no jurisdiction to enforce.

14. LSRS agreed that the original intention of severance pay and adjustments did not fall within the jurisdiction of the *Act* and accepted the delegate's calculations. However, it contended that Ms. Wells had nevertheless been paid twice for her wages for the period March 5, 2015, to March 27, 2015.

ANALYSIS

15. I find no error in the delegate's re-calculation of Ms. Wells' wage entitlement as well as her amended conclusions regarding the administrative penalties. The delegate concluded that Ms. Wells' payment, which was characterized as "severance" was not within the jurisdiction of the Director to enforce. I find no error in law in the delegate's conclusion on that issue.

16. In *United Specialty Products*, *supra*, the Tribunal determined that an employer could not "claw back" wages. However, given that severance pay is not considered wages, the case has no relevance to the issue before me.

17. I confirm the delegate's reasons in the referral back.

ORDER

18. Pursuant to section 115 of the *Act*, I Order that the amount owing in the Determination dated July 28, 2016, be varied to $6,740.11 together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal