Employment Standards TRIBUNAL

An appeal

- by -

Betty Steinke
("Appellant")

- 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: Rajiv K. Gandhi

FILE No.: 2016A/159

DATE OF DECISION: February 22, 2017

DECISION

SUBMISSIONS

Betty Steinke	on her own behalf
Kevin D'Souza	on behalf of the Director of Employment Standards

OVERVIEW

1. The Appellant, Betty Steinke, is an operating room nurse who, until her termination on December 22, 2014, was employed by Dr. Mathew C. Mosher Inc. (the "Employer").

2. By way of a complaint submitted to the Employment Standards Branch on February 24, 2015, the Appellant sought to recover outstanding wages – both regular and overtime – from her Employer, together with accrued but unpaid vacation pay. In the aggregate, she alleged to be owed the sum of $16,916.82, plus $7,780.80 as compensation for length of service.

3. In March 2015, the Appellant and the Employer reached settlement with respect to compensation for length of service, outstanding vacation pay, and wages specifically earned on December 22, 2014. A copy of the settlement agreement is included in the Director's Record received on November 22, 2016 (the "Record"), bur I am not privy to the specific allocation of settlement funds actually paid to the Appellant.

4. Unresolved, however, was the Appellant's claim for other wages and overtime pay alleged to be due for the period starting June 23, 2014, and ending December 22, 2014, being the six-month period immediately preceding the end of her employment.

5. To deal with those items, a delegate of the Director of Employment Standards (the "Director") convened a hearing and, over two separate days, received evidence from the Appellant, and three witnesses testifying on behalf of the Employer.

6. On September 30, 2016, the Director issued a determination (the "Determination") in which the Employer was found to have contravened section 17 of the *Employment Standards Act* (the "*Act*"), and consequently required to pay to the Appellant additional wages, vacation pay, and accrued interest, in the aggregate amount of $6,349.60.

7. Of note, the Director held that the Appellant was a manager and, as such, excluded from Parts 4 and 5 of the *Act* because of sections 34 and 36 of the *Employment Standards Regulation* (the "*Regulation*"). The Director also found the Appellant's calculation of hours worked to be unreasonable. For the most part, the Director preferred the Employer's accounting of time.

8. In the result, because the overtime provisions in the *Act* were found not to apply, the amount awarded to the Appellant was considerably less than the amount originally claimed.

9. Dissatisfied with the result, the Appellant now asks the Tribunal to refer this matter back to the Director, ostensibly because evidence has become available that was not available at the time the Determination was made, one of the permitted grounds for appeal under section 112(1)(c) of the *Act*.

10. I say ostensibly because in reading her 191-page submission, it is clear that the Appellant is intent on re-arguing her complaint. She says that the Employer's evidence was incorrect, taken out of context, and confusing. (I interpret this as a claim that the Director erred in fact.) She does not believe the result was fair, in part because her cross-examination of the Employer's witnesses was – as she puts it – unsuccessful.

11. In considering this appeal, I have had the benefit of the Determination, the Director's Record, and the Appellant's submissions.

FACTS

12. The relevant facts, as set out in the Determination, are summarised as follows:

(a) The Employer operates a private surgical centre, with two lines of business – YES MedSpa, which provides non-surgical cosmetic treatments, and YES Surgery Centre ("YSC"), which provides cosmetic surgeries.

(b) YSC is a material resource of the Employer and how it provided cosmetic surgical services to patients.

(c) The Appellant worked as an operating room nurse for the Employer, starting in May 2008. From and after January 13, 2014 until the end of her employment on December 22, 2014, she was employed as the YES Surgery Centre OR Manager.

(d) Although the Appellant characterized herself as a manager in name only, she was responsible for advertising available YSC nursing positions, hiring YSC staff, signing employment contracts on the Employer's behalf, supervising and directing staff, providing staff orientation, scheduling staff for operating room days, assisting in the preparation of policy manuals. She also appears to have had authority to make minor financial decisions.

(e) The Appellant also had a direct role in managing YSC, including assisting in ensuring facility accreditation, and ordering equipment, supplies, and necessary medications for surgical patients.

(f) For these reasons, the Appellant was determined to be a manager within the meaning of section 1 of the *Regulation*.

(g) Between June 23, 2014 and December 22, 2014, the Appellant worked a total of 1,056.86 hours, was paid for a total of 941.50 hours, and was therefore entitled to receive pay for an additional 115.36 hours, at her regular hourly wage rate of $48.63.

13. A manager, according to section 1 of the *Regulation*, includes a person whose principal employment responsibilities consist of supervising or directing, or both supervising and directing, human or other resources.

14. In her submissions to this Tribunal, the Appellant acknowledges her role in hiring almost all of the staff, guiding them, and scheduling them for work, but disputes the conclusion that she is a manager.

ANALYSIS

15. Although she does not advance an appeal under sections 112(1)(a) or 112(1)(b) of the *Act,* I must address the Appellant's complaint that the Employer's evidence was incorrect, and that the hearing itself was somehow was unfair.

Was the hearing unfair?

16. Fairness, in the legal sense, means that all parties involved have the right to notice, the right to know the case to be met and the right to answer it, the right to cross-examine witnesses, the right to a decision on the evidence, and the right to counsel (*Tyler Wilbur operating Mainline Irrigation and Landscaping*, BC EST # D196/05 at paragraph 15).

17. I am unable to discern in the Appellant's submissions any legitimate basis upon which to conclude that the hearing or the result was legally "unfair".

18. Certainly, the Employer had the benefit of counsel whereas the Appellant did not, but inexperience and the possibility of tactical disadvantage does not in and of itself mean that the hearing was unfair.

19. The first and second day of the hearing was separated by a period of almost two months. It is clear to me that the Appellant had every opportunity before and during the break between hearing days to engage, speak to, or otherwise seek guidance from a lawyer with respect to the hearing and her right to adduce evidence. In point of fact, she was appropriately advised by an Industrial Relations Officer to consult with a lawyer.

20. The burden rests with an appellant to demonstrate unfairness.

21. Seeing nothing in the materials before me to conclusively show that the Appellant was deprived of any of the rights enumerated in *Tyler Wilbur*, I am satisfied that the Appellant believes the hearing to be unfair only because the result was not as favourable as she had hoped. That is not unfair, in a legal sense; that is life, in the literal sense.

Was the evidence incorrect?

22. That leads me to the Appellant's second complaint – namely, that the Employer's evidence was incorrect, taken out of context, or confusing.

23. An appeal is not a *trial de novo*. It is not my function to make findings of fact in place of, or in addition to, findings made by the Director. This is true even where I do not necessarily agree with the Director.

24. My ability to interfere with the Director's findings of fact is limited to circumstances where the Appellant has established, on a balance of the probabilities, that "a reasonable person, acting judicially and properly instructed as to the relevant law…" would not have reached the same conclusion (see *3 Sees Holdings Ltd.*, BC EST # D041/13 at paragraph 27).

25. I have reviewed the entirety of the Appellant's submissions with respect to the evidence received by the Director and, while I do not challenge the Appellant's *bona fides,* I am forced to conclude that she has failed to offer a plausible basis upon which I could properly say that the Director's factual conclusions were patently unreasonable. It is not enough for the Appellant to supplement her evidence and to rebut – after the fact – those parts of Employer's evidence with which the Appellant disagrees. She must show that the Director's conclusions with respect to the evidence are unsupportable.

26. As with establishing unfairness, the onus of proof on appeal rests with the Appellant, and I do not believe that obligation has been satisfied.

New Evidence

27. The meat of this appeal is found in the Appellant's efforts to adduce fresh evidence. This evidence takes the form of documents, written statements (from the Appellant herself, interspersed throughout her submissions, and from a third party), and evidence that the Appellant suggests is in the hands of the Employer and in respect of which she now seeks disclosure.

28. I turn, firstly, to the documents and other evidence that the Appellant seeks to adduce, as new evidence, which include the following items:

(a) job description of a YSC registered nurse;

(b) electronic mail correspondence, dated December 6, 2011, sent by Dr. Mosher;

(c) electronic mail correspondence, dated February 6, 2013 (to and from "S."), and February 27, 2013 (to and from "K.");

(d) a table, prepared by the Appellant, outlining a history of raises received by the Appellant between May 2008 and January 2014;

(e) a listing of various YSC policies and procedures;

(f) electronic mail correspondence dated April 17, 2015, from G.M. to the Appellant attaching a report showing opening and closing times for YSC (without attachments);

(g) a letter from D.S., former YSC employee, dated December 10, 2016.

29. According to *Davies et. al.*, BC EST # D171/03, it is the Appellant who bears the burden of meeting a rather strict four-part test before Tribunal will exercise discretion to accept and consider new evidence:

(a) 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;

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

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

(d) the evidence must have high potential 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.

30. The evidence in question will not be admitted if the Appellant fails to satisfy any one part of the four.

31. To be thorough, I assess each of the nine items listed in paragraph 28 above against the *Davies* test. For the sake of brevity, I refer to each of the four parts of that test as Part A, Part B, Part C, and Part D, correlating to sub-paragraphs (a), (b), (c), and (d) in paragraph 29 above.

(a) job description of a YSC registered nurse

32. This two-page document has been available to the Appellant since at least May 7, 2015, and appears to be a listing of qualifications and duties relating to the position of registered nurse for the Employer's operating room. It is undated, and does not appear to be in a format consistent with other job descriptions included the Record.

33. I am prepared to accept that this evidence would satisfy Part C. I am not convinced that it satisfies Part B. It clearly does not pass Part A or Part D.

34. In my estimation, this document was available and could have been supplied to the Director before commencement of the hearing or, failing that, before the hearing continuation on June 15, 2015. It is not enough to satisfy Part A for the Appellant to say she did not know she could produce this evidence at hearing. Moreover, I do not believe that the probative value of this evidence is so high that it would have led the Director to a different result; in concluding that the Appellant was a manager, the Director relied on evidence of what the Appellant actually did, and I do not believe this job description would in any way change that conclusion.

35. I decline to admit this evidence.

(b) electronic mail correspondence, dated December 6, 2011, sent by Dr. Mosher

36. This document is a widely circulated electronic mail message concerning the efforts of Dr. Mosher to establish the YSC.

37. I accept that this document would satisfy Part C. However, it clearly fails Part A, it arguably fails Part B, and unquestionably fails Part D. This message was available to the Appellant before the start of the hearing and could have been submitted to the Director. I do not believe it is particularly relevant to the question of whether or not, during her employment, the Appellant was a manager within the meaning of section 1 of the *Regulation*, and it would not, in my estimation have led to a different conclusion.

38. I decline to admit this evidence.

(c) electronic mail correspondence, dated February 6, 2013 (to and from "S"), and February 27, 2013 (to and from "K")

39. These documents consist of two separate threads of electronic mail messages passing between the Appellant and an individuals named K. and S. Both are reasonably capable of belief, but each unquestionably fails Part A, Part B, and Part D.

40. The Appellant does not explain why this evidence could not have been submitted during the hearing.

41. The Appellant argues that the communications show that her messages in 2013 were signed "Betty, R.N. Surgical Nurse Coordinator" and signed from "Registered Nurse 2". But, as the Director noted, when answering the question of whether or not an employee is a manager, the job title is not as important as what the employee actually does. In my view, these messages are not relevant and would not have lead to a different result.

42. I decline to admit this evidence.

(d) a table, prepared by the Appellant, outlining a history of raises received by the Appellant between May 2008 and January 2014

43. The table is found in the Appellant's submissions. It does not satisfy any of the four parts of the *Davies* test. It clearly was information that could have been presented at the hearing. Ultimately, I believe it is irrelevant, and I find that it would not have led the Director to a different conclusion on any issue material to the Determination.

44. I decline to admit this evidence.

(e) a listing of various YSC policies and procedures

45. This is a three-page listing of files, which the Appellant says demonstrates what policies she contributed to in 2012 and 2013.

46. Again, there is no explanation as to why this evidence could not have been submitted during the hearing and, in any event, I do not believe that it satisfies any of Part B, Part C, or Part D. There is nothing in this document that, in my view, would alter the Director's findings of fact, or the determination that the Appellant was a manager within the meaning of section 1 of the *Regulation.*

47. I decline to admit this evidence.

(f) electronic mail correspondence dated April 17, 2015, from G.M. to the Appellant attaching a report showing opening and closing times for YSC (without attachments);

48. The Appellant submits this electronic mail in connection with her challenge to the Director's calculation of hours worked.

49. I point out that the report appears to have been supplied directly to the Director, was considered, and ultimately rejected as a satisfactory means of establishing the Appellant's hours of work.

50. This letter does not satisfy any part of the *Davies* test, and I decline to admit this evidence.

(g) a letter from D.S., former YSC employee, dated December 10, 2016

51. As I understand it, this letter is intended to demonstrate the way in which the Employer's former office manager was required to report her hours and otherwise received overtime pay.

52. While the letter itself was not available before the hearing, the Appellant offers no explanation why the information it purports to include could not have been obtained and presented during the hearing. The message itself relates to the employment of a third party, and I fail to see how it relates to the specific circumstances of the Appellant's employment. To the extent that it is not a sworn statement, I have no basis to say that it is reasonably capable of belief. More damaging, however, is the low probative value. The letter does not set out that individual's duties, the duration of her employment, or how it relates to the Appellant's employment arrangement with the Employer. It would not, in my view, have led to a different result.

53. This letter does not satisfy any part of the *Davies* test, and I decline to admit this evidence.

54. That leaves the Appellant's request for the disclosure of additional documents apparently in the hands of the Employer.

55. Specifically, I understand the Appellant to seek disclosure of the job description of a YSC post-anaesthesia care unit nurse (the PACU RN), and a copy of the operating room logs for the period January to December 2014.

56. The purpose for both appears to be to demonstrate what jobs the Appellant was required to perform (or not perform), and to more accurately calculate the Appellant's hours worked.

57. Rule 11 of the Tribunal's *Rules of Practice and Procedure* set out the procedure to compel disclosure. It does not appear to me that the Appellant has properly complied with Rule 11(3) but, in any event, I am not inclined to order disclosure for the following reasons:

(a) The Appellant seeks the PACU RN job description to show that in June 2014 and December 2014 she did, in fact, do the work of a post-anaesthesia care unit nurse when, she says, the Employer (through Dr. Mosher) testified otherwise at hearing. However, the evidence attributed to Dr. Mosher is not set out in the Determination; if the statement was made, I find that it was not material to the Director's determination that the Appellant was a manager. What is important is what the Appellant actually did, not what others did, or what the Appellant did not do.

(b) The Appellant seeks operating room logs for the purpose of determining, I suppose, whether or not she was working primarily as a staff nurse or in a managerial capacity. It strikes me that the value of this evidence would have been clear before or during the original hearing but, in any event, there does not appear to be a dispute with respect to the fact that the Appellant worked as a nurse in the operating room in addition to her various other duties.

58. Based on the materials before me, I am not satisfied that these materials, which would represent new evidence, would satisfy the first part of the *Davies* test, or otherwise have lead to a different result, and I am unconvinced that disclosure of either documents at this late stage is warranted. Accordingly, I decline to make any such order.

Compensation for Length of Service

59. There is one final matter – in her submissions, the Appellant appears to challenge the payment made to her with respect to compensation for length of service. She claims that she should have received eight weeks, but was only paid six. That matter was not specifically addressed in the Determination because, as I said earlier, it was settled before the hearing. I note that the Appellant, having been employed for a period of approximately six years between 2008 and 2014 would be entitled to six weeks' wages under section 63(2)(b) of the *Act*. That said, the question of compensation for length of service falls outside the scope of this appeal and, to the extent that the Appellant has raised it in her submissions, I have not considered further the Appellant's arguments or attempts to adduce further evidence.

Conclusion

60. The Appellant seeks a new hearing, with the ability to call new evidence and to require the Employer to produce new evidence. Armed with a better understanding of "… what will take place during an ESA hearing…" she says that she will be "better prepared…". The Appellant seems to think she can call a "mulligan", and in doing so, start her claim over. Regrettably, this is not the case.

61. I am satisfied that the Director's conclusions were reasonable. Nothing in the additional evidence would have led the Director to a different conclusion either with respect to the question of whether the Appellant was a manager, or the Director's final calculation of wages due and owing.

62. I agree with the Director's conclusion that what the Appellant was not permitted to do is irrelevant; what is important is whether or not the Appellant's actions met the definition of manager in section 1 of the *Regulation*. Put another way, it is unimportant that the Appellant did not have <u>all</u> the power, or that she did not sit at or near the top of the pyramid. It is material that she was not at the bottom, and under her was a resource (human or otherwise) the supervision and direction of which was her responsibility.

63. In the absence of a convincing argument that the Director's findings were patently unreasonable, in the absence of any evidence demonstrating that the process was unfair, and in view the conclusions drawn following my review of the "new" evidence, I see no reasonable basis upon which this appeal can succeed.

64. Given these findings, I do not find it necessary to address the Appellant's request for an extension of time with respect to her submissions tendered after the deadline for appeal, but in any event I would have allowed the extension given the circumstances related by the Appellant and her clear intention to proceed.

ORDER

65. This Appeal is dismissed pursuant to section 114(1)(f) of the *Act*, and the Determination confirmed according to section 115(1)(a) of the *Act*.

Rajiv K. Gandhi
Member
Employment Standards Tribunal