

An appeal

- by -

Candace Fox

- 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

TRIBUNAL MEMBER: Matthew Westphal

FILE No.: 2005A/11

DATE OF DECISION: March 15, 2005

DECISION

OVERVIEW

In BC EST #D202/04, I considered two appeals under section 112 of the *Employment Standards Act* (the “*Act*”) of Determination ER # 022259, dated August 6, 2004 (the “*Determination*”), issued by a delegate (the “*Delegate*”) of the Director of Employment Standards. 366178 B.C. Ltd. operating as Northern Hotel (“the *Employer*”) had appealed the *Determination* on the basis that the *Delegate* erred in finding that it contravened the *Act* and the *Employment Standards Regulation*, B.C. Reg. 396/95 (the “*Regulation*”) by not paying compensation for length of service and not complying with a Demand for Employer Records. Candace Fox, a former employee of the *Employer*, had also appealed the *Determination* on the basis that the *Delegate* based the calculation of her compensation for length of service on an incorrect length of service and hourly rate of pay.

I dismissed the *Employer*’s appeal and confirmed the *Determination* as it related to the finding that the *Employer* had breached s. 63 of the *Act* and s. 46 of the *Regulation*. I found, however, that I did not have sufficient evidence to adjudicate Ms. Fox’s appeal, so I referred the *Determination* back to the *Delegate* with the direction that he:

- a) reinvestigate to determine
 - i) the precise length of Ms. Fox’s employment with the *Employer*; and
 - ii) her regular hourly wage during the last 8 weeks in which she worked normal or average hours of work;
- b) recalculate the compensation for length of service owing to Ms. Fox based on that reinvestigation; and
- c) report the results of that reinvestigation to me.

The *Delegate* investigated the matter further and reported the results back to me in a submission dated January 20, 2005 (the “*Report*”). The *Report* was disclosed to the *Employer* and Ms. Fox, but the Tribunal received no further submissions from them. Based on the materials before me when I decided BC EST #D202/04 and the information contained in the *Report*, I am varying the *Determination*.

ISSUE

What is the correct amount of compensation for length of service the *Employer* owes Ms. Fox?

BACKGROUND

I have set out the full background to this appeal in my decision in BC EST #D202/04, so I will not repeat it here. Essentially, the Employer sold its business to another party in March 2004, and terminated the employment of nine of its employees, including Ms. Fox, without providing written notice as required by s. 63 of the *Act*. As a result, it was liable to pay compensation for length of service to each terminated employee.

In the course of his investigation, the Delegate issued the Employer a Demand for Employer Records, but the Employer failed to provide all the records required under the *Act* and the *Regulation*. The Delegate calculated the compensation for length of service owing to each employee based on the incomplete information he had.

The Delegate calculated that the Employer owed Ms. Fox \$251.39 as compensation for length of service. He based this calculation on a finding that Ms. Fox was employed from April 11, 2003 to March 5, 2004 at a rate of \$9.50 per hour, and on the figure of \$1,933.75 as Ms. Fox's total weekly earnings during the last eight weeks in which she worked normal or average hours of work.

Ms. Fox submitted Records of Employment indicating that she was employed with the Employer earlier than April 11, 2003, and alleged that her rate of pay had been \$11.00 per hour.

ANALYSIS BASED ON THE REPORT

In the Report, the Delegate stated that his reinvestigation determined that Ms. Fox's first day worked for the Employer was July 19, 1999, and that she had been employed for a period of more than four, but less than five, complete consecutive years. As a result, she was entitled to four weeks' pay as compensation for length of service, not one week as he had found in the Determination.

Ms. Fox was unable to provide any evidence that she was being paid \$11.00 per hour, and the most recent payroll information available to the Delegate indicated that Ms. Fox's rate of pay was \$9.50. In the Determination the Delegate had found that Ms. Fox's total earnings in her last eight weeks of employment were \$807.50, but owing to a typographical error, he had calculated Ms. Fox's compensation for length of service based on a figure of \$1,933.75. In the Report, the Delegate confirmed that the correct figure for Ms. Fox's earnings during the last eight weeks of her employment was \$807.50 plus \$32.30 in annual vacation pay, for a total of \$839.80. (The Delegate also detected another typographical error in the Determination relating to the total earnings in the last eight weeks of another employee, Andrew Austin, but found that had nevertheless arrived at the correct amount for the compensation for length of service owing to Mr. Austin.)

Based on this information, the Delegate calculated that the Employer owed Ms. Fox \$419.90 as compensation for length of service under s. 63(4) of the *Act*.

I am satisfied from the Report that the correct amount of compensation for length of service owed by the Employer to Ms. Fox is \$419.90. The Determination originally found, based on the figure of \$251.39 owing to Ms. Fox, that the Employer was liable to pay a total of \$8,469.89. If the difference between \$419.90 and \$251.39 (\$168.51) is added to the original amount, then the correct amount owed by the Employer is \$8,638.40.

ORDER

I order, pursuant to section 115(1)(a) of the *Act*, that the Determination be varied so that the amount owed by the Employer to Candace Fox as compensation for length of service be increased to \$419.90, and that the total amount payable by the Employer be increased to \$8,638.40, together with whatever interest may have accrued since the date of issuance.

Matthew Westphal
Member
Employment Standards Tribunal