

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1995, C.38

- by -

Karen Ballinger
("Ballinger")

Of a Determination issued by

THE DIRECTOR OF EMPLOYMENT STANDARDS

(The "Director")

ADJUDICATOR: Ralph Sollis

FILE NO: 96/045

DATE OF HEARING: March 21, 1996

DATE OF DECISION: April 1, 1996

DECISION

APPEARANCES

Appellant Karen Ballinger
Appellant Counsel Tyna Mason, MacIsaac & Company
Other Party Esquimalt Neighbourhood House
Other Party Counsel Don Linge, Linge, Carr & Associates

Also attending the hearing were Cathy Christopher ("Christopher") and Archer Schultz ("Schultz") of Esquimalt Neighbourhood House ("Esquimalt"), R.D. Newman and Gerry Omstead, a delegate of the Director of Employment Standards. Mr. Schultz was excluded from these proceedings until called as a witness.

OVERVIEW

This is an appeal by Karen Ballinger ("Ballinger") pursuant to Section 112 of the Employment Standards *Act* (the "*Act*") against Determination CDET000327 issued by the Director of Employment Standards (the "Director") on December 5, 1995 in which the Director disallowed Ballinger's claim for severance pay.

A hearing was held at 525 Superior Street, Victoria, BC on March 21, 1996.

It was agreed by counsel, for both parties, that Ballinger was an employee within the meaning of the *Act* from Oct. 11, 1994 to the end of August, 1995.

Mr. Omstead, a delegate of the Director, made a preliminary motion that the matters that were not part of his determination (CDET000327) be referred back to the Director for further investigation, pursuant to Section 114 (2) (a) of the *Act*.

Ms. Mason argued that I should consider the total claim of Ballinger, including the question of alleged unpaid wages and overtime. Mr. Linge argued that his client was only advised that this hearing was concerned with the issue of severance pay.

After considering the arguments of both counsels, I concluded that the issues other than severance pay would be referred back to the Director in accordance with Section 114 (2) (a) of the *Act*.

In dispute was the question as to whether Ballinger was excluded from the requirement for either written notice or severance pay by virtue of Section 43 (c) (i) of the Employment Standards *Act* (SBC Chapter 10) (the former *Act*). Ballinger's employment ended before November 1, 1995, (the date on which the *Act* was proclaimed into force) and the transitional provisions of the current *Act* provides as follows:

Transitional from former Act

128. .

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(3) If, before the repeal of the former *Act*, no decision was made by the director, an authorized representative of the director or an officer on a complaint made under that *Act*, the complaint is to be treated for all purposes, including section 80 of this *Act*, as a complaint made under this *Act*.

(4) Subject to subsections (5) and (6), section 63 applies to an employee whose employment began before section 63 comes into force and is terminated after that section comes into force.

(5) An employer is liable to pay to an employee referred to in subsection (4), as compensation for length of service, an amount equal to the greater of the following:

(a) the number of weeks' wages the employee would have been entitled to under section 42 (3) of the former *Act* if the employment had been terminated without compliance with section 42 (1) of that *Act*,

(b) the amount the employee is entitled to under section 63 of this *Act*.

(6) The employer's liability to an employee referred to in subsection (4) for compensation for length of service is deemed to be discharged if the employee is given notice according to section 42 (1) of the former *Act* or according to section 63 (3) of this *Act*, whichever entitles the employee to the longer notice period.

Based on Ballinger's length of service with Esquimalt Neighbourhood House, the previous *Act* (Section 42) provided a greater potential entitlement for severance pay. Therefore, the relevant statute for purposes of determining the employer's liability is the former *Act*.

The relevant parts of section 42, 43 and 47 of the former *Act* state:

NOTICE REQUIRED

42. (1) An employer shall not terminate an employee without giving the employee, in writing, at least

(a) 2 week's notice where the employee has completed a period of employment of at least 6 consecutive months, and

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(3) When an employer terminates an employee and fails to comply with subsection (1) the employer shall pay the employee severance pay equal to the period of notice

required, whether or not the employee has obtained other employment or has otherwise realized or recovered any amount of money in respect of the period of notice.

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NOTICE NOT REQUIRED

43. Section 42 does not apply to

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- (c) an employee employed
 - (i) for a definite term, or
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Continuation of employment after completion of definite term or task

47. Where an employee referred to in section 43(c) continues to be employed for a period of 3 months or more after completion of the definite term or specific work for which he was employed, his employment shall be deemed not to be for a definite term or specific work and for the purpose of section 42 his period of employment shall be deemed to have commenced at the beginning of the definite term or specific work.

I heard the evidence of Ballinger, Christopher and Schultz.

FACTS

The evidence of Ballinger was that she was employed by Esquimalt from October, 1994 to the end of August, 1995. Initially, she was engaged as the Employment Strategy Program and Employment Facilitator which involved the organizing of the program, team member for policy and staff meetings, input on proposals and acted as liaison with community members. Although the contract set out the hours from 9 to 12.30 and some afternoons, Ballinger testified it did not accurately reflect the hours worked as she often worked afternoons and attended other activities. She testified the first contract was from October 11, 1994 to December 31, 1994 but that she continued after that date although advised by Schultz of possible layoffs.

During the periods between contracts, Ballinger stated that she was asked to take holidays. On other occasions she either worked without pay or was off for short periods of time.

This witness further testified that although she worked under several contracts with Esquimalt, her job responsibilities changed as did her hours of work and that during her period of employment she worked in excess of three months after the expiration of the original contract.

The evidence of Christopher was that she was the Executive Director of Esquimalt during the period of Ballinger's employment. That other than the first contract (Oct. 11, 1994) Christopher was the signing authority on behalf of Esquimalt.

The last contract was for the period April 1, 1995 to August 31, 1995 as Employment Strategies Program Facilitator at the Opportunity Center. The hours were 8.30am to 4.30pm, Monday to Friday at a salary of \$2578.33 per month.

Further, there was an oral agreement with Ballinger that if she had a satisfactory evaluation and funding was obtained, that Ballinger would not have to compete for her job when the current contract expired on August 31, 1995. Ballinger was aware that a new contract would have to be entered into providing the above two conditions were met. Christopher stated that funding for the program in which Ballinger was involved was from the Provincial Government and that she and Schultz were responsible for the application of such funds. Lastly, Christopher testified there was a disagreement with Ballinger over her job description, particularly concerning resumes and as a result it was impossible to complete a job evaluation. This resulted in a decision of the Board not to renew Ballinger's contract when it expired on August 31, 1995. This decision was conveyed to Ballinger on August 25, 1995.

Schultz testified he was the Co-ordinator, of the Opportunity Center for Esquimalt and that he was Ballinger's direct supervisor. He stated there were three signed contracts with Ballinger and that she was fully aware that the first contract was subject to funding for the Rise Project by the Provincial Government. He also stated that if Ballinger worked there was a contract in place and that there were periods between Jan. 1, 1995 and March 13, 1995 that Ballinger did not work. Lastly, he confirmed there was a disagreement with Ballinger over her duties under the last contract (April 1 to Aug. 31, 1995) and consequently, a job evaluation could not be completed.

ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether the employer's liability to pay compensation for length of service has been discharged under Section 42 of the former *Act*. That is, has Esquimalt demonstrated, on the balance of probabilities that Ballinger was employed for a term of employment that did not continue for three months or more.

ANALYSIS

Both Section 42 of the former *Act* and Section 63 of the *Act* provide a reasonable assurance to employees, that having completed the required probationary period, their employment will not be terminated without written notice or severance pay in lieu of notice. Most contracts of employment

are open ended, that is there is an expectation that having completed the probationary period, the employment relationship will continue. The *Act* does not provide tenure or continual employment, but only the manner by which an employer may terminate the employment relationship.

The exceptions are contained in Section 43 of the former *Act*.

Employees employed for a definite term have prior knowledge of the date when their employment will end and consequently written notice is unnecessary. This provision is modified by Section 47 which addresses the circumstances where an employee continues three or more months after the definite term.

I believe it is possible, as in the present case, for an employee to be employed on more than one consecutive term of employment. Further, Section 47 would only apply after the completion of the last definite term.

In Ballinger's case more than three months may have elapsed between the first and second contracts. However, when Ballinger and Esquimalt entered into the final contract from April 1, 1995 to August 31, 1995 it was for a definite term and Section 43 (c) (i) applied.

ORDER

Pursuant to Section 115 of the *Act*, I order that Determination #CDET 000327 be confirmed.

“Ralph Sollis”

Ralph Sollis
Adjudicator
Employment Standards Tribunal

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