

An appeal

- by -

Tanja Majer
("Majer" or "Employee")

- 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: Paul E. Love

FILE No.: 2003A/314

DATE OF DECISION: March 12, 2004

DECISION

SUBMISSIONS

Tanja Majer
Dr. Masha Maxim
Gillian MacGregor, on behalf of the Director of Employment Standards

OVERVIEW

This is an appeal by an employee, Tanja Majer (“Majer” or “Employee”), from a Determination dated October 20, 2003 (the “Determination”) issued by a Delegate of the Director of Employment Standards (“Delegate”) pursuant to the *Employment Standards Act, R.S.B.C. 1996, c. 113* (the “Act”). Majer was employed as a certified dental assistant at the Plaza Dental Centre. There was a change in ownership of the business and Majer remained employed with the new owners, Drs. Maxim and Saric. Majer worked for nine months with the new employer before going off on sick leave on April 12, 2002, and she did not return to work. In September of 2002, Majer raised a claim of constructive dismissal based on an alteration of job duties and a failure to pay an overtime bank. She also raised complaints related to regular wages, statutory holiday pay, vacation pay and overtime wages. The Delegate found that there was no substantial alteration of job duties, and therefore the Delegate was not satisfied that Majer was constructively dismissed. Majer’s claim for compensation for length of service was denied. The Delegate allowed a claim for overtime hours worked in 2002 in the amount of \$337.55. The Delegate’s findings with regard to the overtime claim were correct. I also found that Majer had not shown any error with regard to regular wages, overtime in March and April of 2002, statutory holiday pay, or vacation pay.

The Delegate did not consider Majer’s argument with regard to non-payment by the Employer of a time bank, alleged to have been created during the employment of Majer by Dr. Goldberg, the original owner of the business. The Delegate applied section 80(1) of the *Act*, which contains a limitation on recovery to wages arising six months before the complaint is made. The Delegate failed to consider whether there was an overtime bank in existence, and whether Majer demanded payment of the time bank on April 12, 2002, or within six months of the date of the termination of employment. If, as Majer alleges, she did demand the time bank, and the Employer refused to pay the time bank the Employer was arguably in breach of section 42(3) of the *Act*. A breach of section 42(3) of the *Act* arguably may have an effect on the Determination of Majer’s entitlement to payment of the overtime bank, the finding of the Delegate on the issues of constructive dismissal and compensation for length of service, and vacation pay arising. I referred back this issue to the Delegate for further investigation or hearing, consideration, and determination.

ISSUE:

Did the Delegate err in finding that Majer was not constructively dismissed?

Did the Delegate err in failing to find that Majer was entitled to overtime banked in an overtime bank?

Did the Delegate err in findings related to regular wages or overtime, vacation pay and statutory holiday pay?

FACTS

The Tribunal determined that this case did not require an oral hearing. I decided this case after considering the notice of appeal and submissions filed by the Employee, the submissions of the Employer, the written submissions of the Delegate and the record provided by the Delegate. The Delegate issued the Determination in this matter on October 20, 2003, after conducting a hearing into the complaint on February 20 and May 1, 2003.

Tanja Majer was employed as certified dental assistant at the Plaza Dental Centre. She commenced her employment with Dr. Martin Goldberg (“Goldberg”) in February of 1992. In June of 2001, Goldberg sold his practice to Drs. Maxim and Saric (“Maxim and Saric”). Majer remained employed with the new employer. Her principal responsibilities were booking patients, billing and dealing with the patients’ insurers. From time to time she would assist the dentists, but this was not her primary function. Majer alleges that all conditions of her employment with Goldberg were maintained in her employment relationship with Maxim.

Majer went on sick leave on April 16, 2002, from injuries sustained in a motor vehicle accident in August of 2001, from which she did not recover. She did not return to work. Majer’s employment came to an end on September 30, 2002 when she submitted her resignation. At the hearing, before the Delegate, Majer claimed that she was constructively dismissed because of an increased work load and the failure of Maxim and Saric to pay overtime or to cash out an accumulated bank of overtime hours. Majer sought compensation for length of service, as well as overtime, vacation pay, and statutory holiday pay for November 11, 2001. Majer filed a complaint, on September 27, 2002 claiming the sum of \$16,539.94 which included \$2,602.74 for regular wages, \$3,531.24 for overtime, \$2,700.00 for vacation pay, \$6,923.04 for compensation for length of service and \$783.39 for vacation pay on outstanding wages.

At the hearing, Maxim gave evidence that at the time of the purchase of the practice, the practice was “doing approximately \$40,000 (forty thousand) dollars a month in business. That has not changed significantly”. The Employer said that Majer was never asked or authorized to work overtime, and that Majer had a flexible schedule. The Delegate did not accept Majer’s evidence concerning a change in the number of dentists she worked for after the sale of the business, or that there was a substantial change in the job duties.

The Delegate found that there was no substantial change in the conditions of employment, and therefore Majer resigned, and was not constructively dismissed. The Delegate did not order compensation for length of service, because Majer resigned. The Delegate found that Majer was paid an annual salary of \$45,000 per year, based on a 37.5 hour work week.

On the issue of constructive dismissal arising from an allegation of a refusal to pay earned wages the Delegate found as follows:

Refusal to pay earned wages may trigger a claim of constructive dismissal. The issue of Majer’s claim for overtime wages is dealt with in detail in the next paragraph. To sum up, there is insufficient evidence to establish that Majer worked overtime hours that the employer declined to compensate. The employer does agree that Majer may have worked some overtime hours, and that she paid a sum of money to Majer on Majer’s final pay cheque that compensates Majer for additional hours.

Majer’s own records indicate that while there were days worked that were in excess of 7.5 or 8, there are also days where hours worked were less than 7.5 or 8 and some scheduled days where no

hours were worked. On the basis of Majer's records, the employer's position that hours were flexible is supported.

The Delegate found that there was no cogent proof of overtime worked during lunch hours, as Majer agreed that she often took extended lunch hours to compensate for extra time worked. The Delegate found:

However, since no clear records were submitted by either party that show Majer's start time, end time and lunch times, I am unable to speculate what if any additional wages she could be owed, and therefore, find that she is not owed any regular wages.

The Delegate rejected claims with regard to vacation pay, as the Employee did not show that the final pay cheque paid by the employer, in the amount of \$2,333.46, was incorrect.

The Delegate issued a zero dollar penalty pursuant to section 98 of the *Act*, and section 29 of the *Employment Standards Regulation*, for the employer's failure to maintain time records.

Employee's Argument:

Majer submitted a lengthy appeal submission alleging the Director erred in law, that the Director failed to observe the principles of natural justice, and that new evidence became available. Majer submits new evidence which she located at the time of cleaning out her garage, following the issuance of the Determination. Intermeshed in her submission, are quotations from the *Act*, and other information she obtained apparently from the Director's internet web-site. Majer submits that Maxim and Saric agreed that her time bank for overtime established with Goldberg, and the practice of banking over time hours would be continued on purchase of the business. Majer submits that the most critical change in her employment relationship occurred on April 12, 2002 when Maxim failed to pay out her overtime bank as she requested. Majer says that Maxim agreed to continue all benefits after the business was purchased. Majer says that the bank extended back to July 2001. Majer says that she considered herself constructively dismissed on September 13, 2002 because Maxim did not pay the amount of the banked time. She maintains that she never agreed to any increase in her weekly hours from 37.5 to 40.5 hours per week, without the extra hours considered as banked overtime.

Delegate's Argument:

The Delegate indicates that the new evidence tendered was available to Majer at the time of the hearing, and that she chose not to research and locate the material prior to the hearing. The Delegate says that the Employee has failed to identify errors in law or any errors amounting to a failure to observe the principals of natural justice. The Delegate argues that the Employee seeks to recover overtime and other amounts outside the six month recovery period.

Employer's Argument:

The Employer says that Majer had been paid all her wage entitlements. Maxim and Saric submit that Majer has been fully paid for overtime, and that Majer had been paid for her overtime for a period of six months prior to the purchase of the business. The Employer says that Majer refused to maintain daily time sheets, and that the Employer did not take disciplinary action against her for the sake of maintaining good relations with a new employee.

ANALYSIS

In an appeal of a Determination, the burden rests with the appellant, in this case the Employee, to demonstrate an error such that I should vary or cancel the Determination.

The Delegate found that there was no substantial change in the duties performed by Majer after the new employers took over the business. The Delegate found that she performed the same duties, in the same location, for the same wages.

In April of 2002, Majer apparently protested the increased hours of work, from 30 to 37.5 or 40 hours. The Delegate found:

Majer introduced evidence that her agreement with Goldberg was that she would work 30 hours a week, with extra pay if she was compelled to work Friday or Saturday. Neither party to this matter brought forward evidence that this schedule had been changed, but it appears that in July 2001, and according to the time sheets entered by Majer (Exhibit 30), she worked occasional Fridays, and regular Saturdays. However, no evidence was put forward that she protested this change, or that she sought extra hours at any time until April of 2002, when she merely proposed working shorter hours, and September 30, 2002 when she specifically asked for additional moneys to be paid to her.

She does not assume any breach of her employment contract in working extra hours, does not explain how the hours went from the agreed 30 to 37.5 or 40 hours that appears to have become the standard, and more importantly, does not put forward any evidence that she protested the change until April 2002. I can only assume, in the absence of evidence from either party, that her agreement with Goldberg had changed at or even before the time of the sale of the clinic, or that she accepted the hours that were offered to her. An employee waives the right to claim that a change became a dismissal, if they have accepted and worked with the change for a period of time. While the period of time that an employee may “try on” the new conditions before deciding that the contract has been breached and they are constructively dismissed, is not set out in the jurisprudence as a formula, Majer appears to have accepted the hours of work from July 2001 until April 2002, a span of nine months. Nine months is considerably more time than is necessary to “try on” the new hours of work, if in fact they even were new. She cannot now state that her hours of work agreement was breached.

In my view, the Delegate has correctly stated and applied the law with respect to constructive dismissal, based on an argument of alteration of job duties, and hours of work. The finding with regard to Majer’s hours of work, in my view is a finding of fact. In my view, the finding was based on the evidence and was not unreasonable.

Overtime Bank and Constructive Dismissal:

Majer’s April 12, 2002 letter to Maxim, raises an issue of the existence of an overtime bank, which was accumulated through work with Goldberg. Majer argues, however, that one of the major changes in the employment relationship, resulting in her constructive dismissal, was Maxim’s denial of payment of the overtime bank when Majer requested it to be paid on April 12, 2002. I note that if Majer had an overtime bank, and Majer demanded payment of the bank, it is arguable that the Employer was in breach of section 40(3)(a) of the *Act* by failing to pay the bank. Failure to pay the bank or wages due, may amount to alteration of a fundamental condition of employment or constructive dismissal of Majer, pursuant to section 66 of the *Act*. This might give rise to an entitlement to compensation for length of service.

I have phrased my comments related to constructive dismissal on a conditional basis, as it is unclear from the Determination how the Delegate addressed the underlying facts necessary to evaluate this argument. In the Determination, at page 7, the Delegate states:

I am compelled to limit my examination of the overtime claim to March 31, 2002 to April 13, 2002; April 13, 2002, being the last day that Majer reported to work.

On the last page of the Determination the Delegate stated as follows:

Substantial amount of documentation was produced by both parties at the adjudication and entered as exhibits. Many of these exhibits are not referred to in this Determination, since they were not relied on in reaching my conclusions, due to their irrelevance to the issues. Many of the documents submitted by Majer related to hours of work that were outside the scope of the recovery period and many of the documents submitted by Maxim relate to the argument that if Majer was terminated, it was for just cause. These documents have not been considered in reaching my conclusion.

In the Delegate's submission of December 16, 2003, the Delegate refers to Majer continuing to seek compensation for hours that she claims were worked outside of the six month recovery period.

The Delegate arguably appears to have applied the limitation set out in section 80 (1) to deny recovery for wages in the overtime bank.

- 80 (1) The amount of wages an employer may be required by a determination to pay an employee is limited to the amount that became payable in the period beginning:
- (a) in the case of a complaint, 6 months before the earlier of the date of the complaint, or the termination of the employment, and
 - (b) in any other case, 6 months before the director first told the employer of the investigation that resulted in the determination

Again, I say "arguably", because I am uncertain of the state of the evidence before the Delegate. If, however, there was a time bank, and a demand was made by Majer on April 12, 2004 as she claims in her appeal submission, it is arguable that by virtue of 42(3) of the *Act*, the overtime wages became due on April 12, 2004, within the scope of recovery provided by section 80(1)(a) of the *Act*.

- 42 (3) If a time bank is established, the employee may at any time request the employer to do one or more of the following:
- (a) pay the employee all or part of the overtime wages credited to the time bank;
 - (b) allow the employee to use the credited overtime wages to take time off with pay at a time agreed by the employer and the employee;
 - (c) close the bank
- 42 (4) The employer must ensure that all overtime wages credited to an employee's time bank are paid to the employee, or taken as time off with pay, within 6 months after the overtime wages were earned.

It is apparent that an overtime bank should only contain six months worth of banked time. Section 42(5) provides for closure and termination of the bank in the event of termination of employment, as follows:

- 42 (5) On termination of employment or on receiving the employee's written request to close the time bank, the employer must pay the employee any amount credited to the time bank.

If there was a time bank, and Majer did not demand payment of the bank, the amount of wages in a time bank may well come due at the date of termination, pursuant to section 42(5). In such a circumstance, if the Employee resigned, the non-payment of the bank could not give rise to a constructive dismissal claim, as the non-payment had no effect on the employee's decision to resign.

The Determination does not contain sufficient facts, and I do not appear to have all the information that was tendered by the parties, as the Delegate relied only on information she considered relevant to the decision. She apparently did not consider information outside the six month period from the date of resignation as relevant.

In my view, the Delegate does not appear to have considered the following questions, which should be considered in order to assess whether non-payment of a time bank, constitutes constructive dismissal or substantial alteration of a condition of employment pursuant to section 66 of the *Act*:

1. Was there an overtime bank in existence as of April 12, 2002 as provided by section 42 of the *Act*?
2. What was the value of the bank?
3. Did Majer demand the payment of the bank and the employer refused to pay?
4. When did this demand and refusal occur?
5. Did the Employer's failure to pay the overtime bank on demand result in a substantial alteration of a condition of employment, or constructive dismissal?
6. If the Employee was constructively dismissed based on the failure to pay the overtime bank on demand, is the employee entitled to compensation for length of service?

If the answer to these questions one and three are affirmative, and the bank was demanded by Majer on April 12, 2002 or some later date, arguably the amount of the bank became due at the demand of Majer. If the time bank existed, but was not demanded, the Employer may have been required to pay this bank at the time of termination, pursuant to section 42(5).

The Delegate would then need to consider the applicable law related to constructive dismissal and consider the three stage analysis under section 66:

- (a) Was there an alteration of a condition of employment?
 - (b) Was the alteration substantial?
 - (c) Was the employment of the employee terminated?
- Tollasepp, BCEST #D480/02; Jager BCEST #D244/99; Security Mailing Inc. (c.o.b. Global Direct Inc.), BCEST #D149/03.*

In considering section 66 of the *Act*, there is a discretion for the Delegate to exercise:

If a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated.

I refer back to the Delegate the issues of a time bank, demand for the time bank, the amount of the time bank, and issues of constructive dismissal and compensation for length of service. I leave it to the Delegate after conducting the appropriate fact finding to consider and exercise her discretion. If, however, the Delegate finds a constructive dismissal, Majer would also be entitled to compensation for length of service.

Overtime Claim:

The Delegate found an entitlement to overtime wages for the week of March 31 to April 6, 2002 for 5 hours worked at time and a half the regular wage of \$23.08 per hour or \$115.40. The Delegate also found an entitlement to 4.75 overtime hours for the week of April 7, 2002 to April 13, 2002, amounting to \$110.94. The Delegate found the total owed was \$226.34.

I note that this was a case where neither party kept records. The approach taken by the Delegate, and the findings with regard to the amount of overtime during the period March 31 to April 6, 2002, were reasonable with regard to the evidence before the Delegate. Given my decision to refer this matter back to the Delegate, the amount of the overtime claim may be increased as a result of the Delegate's findings, in the referral back report, related to an overtime bank.

Statutory Holiday:

The Delegate was correct in denying recovery for the statutory holiday of November 11, 2001 as this is outside the period of recovery, set in section 80 (1) of the *Act*.

Vacation Pay:

The Employer did pay the sum of \$2,333.46 to Majer after she resigned. Majer has not shown any error in the calculation of vacation pay.

Conclusion:

In the result, I am satisfied that the following issues must be remitted to the Delegate for a hearing to consider and determine:

1. Was there an overtime bank in existence as of April 12, 2002 as provided by section 42 of the *Act*?
2. What was the value of the bank?
3. Did Majer demand the payment of the bank and the employer refused to pay?
4. When did this demand and refusal occur?
5. Did the Employer's failure to pay the overtime bank on demand result in a substantial alteration of a condition of employment, or constructive dismissal?
6. If the Employee was constructively dismissed based on the failure to pay the overtime bank on demand, is the employee entitled to compensation for length of service?

I would expect that the Delegate would approach this issue by way of a continuation of the hearing process that she conducted with regard to the claims. Credibility of the parties may be an issue for the Delegate. I am satisfied that Majer has shown no error with regard to the balance of the claims set out in the Determination.

ORDER

Pursuant to s. 115 of the *Act* the Determination dated October 29, 2003 is referred back to the Delegate to hear or investigate, consider and determine:

1. Was there an overtime bank in existence as of April 12, 2002 as provided by section 42 of the *Act*?
2. What was the value of the bank?
3. Did Majer demand the payment of the bank and the employer refused to pay?
4. When did this demand and refusal occur?
5. Did the Employer's failure to pay the overtime bank on demand, result in a substantial alteration of a condition of employment, or constructive dismissal?
6. If the Employee was constructively dismissed based on the failure to pay the overtime bank on demand, is the employee entitled to compensation for length of service?

Paul E. Love
Member
Employment Standards Tribunal