

An appeal

- by -

Shaun Hellmich
(“Mr. Hellmich”)

- 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.: 2015A/39

DATE OF DECISION: May 26, 2015

DECISION

SUBMISSIONS

Shaun Hellmich	on his own behalf
Vince Aldridge	counsel for Ruskin Construction Ltd.
John Dafoe	on behalf of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Shaun Hellmich (“Mr. Hellmich”) has filed an appeal of a Determination of the Director of Employment Standards (the “Director”) issued on February 24, 2015. In that Determination, the Director found that Ruskin Construction Ltd. (“Ruskin”) had contravened section 40 of the *Act* in failing to pay Mr. Hellmich overtime wages in the amount of \$4,488.67. This aspect of the Determination has not been appealed. The Director also determined that Ruskin had contravened section 83 of the *Act* and awarded Mr. Hellmich compensation in the amount of \$4,293.09. The Director ordered Ruskin to pay Mr. Hellmich \$9,058.92 in wages and compensation. The Director also imposed two administrative penalties for each of the contraventions in the total amount of \$1,000 for a total amount payable in the amount of \$10,058.92.
2. Mr. Hellmich appeals the Determination contending that the delegate failed to observe the principles of natural justice in making the Determination.
3. These reasons are based on the written submissions of the parties, the section 112(5) “record” that was before the delegate at the time the decision was made and the Reasons for the Determination.

FACTS AND ARGUMENT

4. Mr. Hellmich was employed as a project coordinator/quality control for Ruskin, a construction company, from October 28, 2013, until February 6, 2014. On June 12, 2014, Mr. Hellmich filed a complaint with the Employment Standards Branch alleging that Ruskin had contravened the *Act* in failing to pay him overtime wages and compensation for contravening section 83 of the *Act*.
5. Following a hearing on September 29, 2014, the Director’s delegate determined that Ruskin had terminated Mr. Hellmich’s employment, in part, because Mr. Hellmich had filed a complaint about overtime wages in contravention of section 83. Although the *Act* provides that the Director may award up to ten weeks’ wages as compensation for a contravention of section 83, the delegate awarded Mr. Hellmich four weeks’ wages. Mr. Hellmich appeals this conclusion, contending that he is entitled to a full ten weeks’ wages.
6. The relevant facts before the delegate may be summarized as follows:
 - Mr. Hellmich had over 10 years’ experience working in quality control prior to commencing work with Ruskin. At the time his employment was terminated, Mr. Hellmich had successfully completed his three month probationary period. At no time had Ruskin warned or reprimanded him for any aspect of his work performance.

- The employment agreement between the parties prohibited Mr. Hellmich from working in excess of 15 hours per week overtime without the written approval of the Construction Manager. Although Mr. Hellmich never sought or obtained such written approval, he entered his hours of work on an electronic database created by Ruskin, to which Ruskin had access at all times. Mr. Hellmich was never told to stop working the hours he was recording;
- The employment agreement also provided for a 25% wage increase for every seven consecutive days spent in the field (the “uplift”) irrespective of the number of hours worked in those seven days;
- Mr. Hellmich worked long hours (an average of 11 – 12 hours per day in 2013) and in 2014, worked seven days per week while in the field. In January and February 2014, Mr. Hellmich asked Ruskin’s Construction Manager, Cory Ross, about the possibility of receiving additional compensation for working seven days per week. Mr. Ross ultimately told Mr. Hellmich that he had reviewed the matter and that a raise was not justified. According to Mr. Hellmich, when he questioned the response, Mr. Ross told him he could “pack his bags” if he was dissatisfied. Mr. Hellmich’s immediate supervisor also spoke to Mr. Ross, and later told Mr. Hellmich that if he raised the issue of a wage increase again, he would be fired.
- After seeking advice from the Employment Standards Branch, Mr. Hellmich sent Ruskin a “Self-Help” kit on February 5, 2014, seeking overtime wages.
- Ruskin terminated Mr. Hellmich’s employment on February 6, 2014, and paid Mr. Hellmich compensation for length of service, outstanding wages and vacation pay. Ruskin’s termination letter did not give any reasons for the termination.
- Ruskin denied that Mr. Hellmich’s request for overtime wages had any influence on its decision to terminate his employment, contending that Mr. Hellmich had been seeking a wage increase for some time.
- Ruskin argued that Mr. Hellmich’s termination occurred in the context of an ongoing dispute about a wage increase and that Mr. Hellmich had simply refused to accept the Employer’s decision on the matter. Although Mr. Ross suggested that Mr. Hellmich was terminated for insubordinate behaviour, he gave no explanation of what that behaviour consisted of other than his persistence in advancing the issue of overtime wages.

7. For the purposes of this appeal, the factual findings of the delegate are as follows:

- Because Mr. Hellmich contemporaneously recorded his hours of work in the employer’s database, Ruskin was, or should have been, aware of the hours Mr. Hellmich was working. At no time did Ruskin raise the issue of excessive hours of work with Mr. Hellmich. The delegate concluded that Mr. Hellmich was entitled to overtime wages;
- Mr. Hellmich raised the issue of additional pay for work beyond six days per week and 10 hours per day at the time of his hire in October 2013, in January 2014, and again at the time he submitted the Self-Help kit;
- Mr. Hellmich was unable to secure new employment for over 10 weeks following the termination of his employment with Ruskin.

8. In finding that Ruskin contravened section 83 the delegate stated:

In order to find that the Employer has contravened section 83 of the Act, it is not necessary that I find that the potential filing of a complaint under the Act was the sole or even the primary reason for Hellmich's termination. If I find that it was a contributing factor to the decision to terminate, then I may find that section 83 has been contravened. In this case, Mr. Hellmich submitted a Self Help Kit on 5 February 2014, met with Mr. Ross on 6 February 2014 and was terminated that day. While Mr. Ross suggests that Mr. Hellmich was insubordinate, he has provided no evidence or detail with respect to this. While there is no direct evidence of the Employer citing the Self Help Kit in the termination and, in fact, Ruskin expressly denies that it was considered in the decision to terminate, there is strong circumstantial evidence based on the timing of the submission of the Kit and the decision to dismiss Mr. Hellmich. I find, on the balance of probabilities, that Mr. Hellmich's submission of the Self Help Kit was a factor in Ruskin's decision to terminate his employment and, on that basis, I find that Ruskin has contravened section 83 of the Act.

9. Although the delegate concluded that Mr. Hellmich was unemployed for over 10 weeks after his employment was terminated, he determined that an award of four weeks' wages was an appropriate remedy for the section 83 contravention. Noting that section 79 of the *Act* gave the director discretion in determining an appropriate remedy for the contravention and concluding that reinstatement was not appropriate, the delegate said:

... it should be noted that Mr. Hellmich was an employee with just over three months of service and that he was employed at a construction site by a construction employer which would disentitle him from compensation for length of service [see sections 63 and 65(1) of the Act]. I also note that the Employment Agreement provided for payment of two weeks' wages to Mr. Hellmich if terminated without cause after completing three months of employment. While I have found that the Employer has contravened section 83 of the Act, I have done so on the basis that the pursuit of a complaint under the Act was a factor in the immediate decision to terminate Mr. Hellmich. I have not found that it was the primary factor in the decision to terminate.

...

...I am not convinced that it would be appropriate to award compensation of a full 10 weeks to Mr. Hellmich. Rather, I find that compensation in the amount of four weeks' wages would be appropriate with regard to all of the surrounding circumstances.

Argument

10. While acknowledging that the employment relationship had become strained, Mr. Hellmich contends that the relationship became strained only because Ruskin had contravened the overtime provisions of the *Act* and he was obliged to act in a way to defend himself. He says that, had Ruskin not contravened the *Act*, the relationship would not have become strained and he ought not be "penalized" for the employer's contravention. Mr. Hellmich argues that he has the right to be "made whole."
11. Ruskin argues that Mr. Hellmich has established no denial of natural justice or error of law. Ruskin also contends that an award of damages is a factual matter from which no appeal can be taken.
12. The delegate contends that there is no basis for Mr. Hellmich's argument that because it took him 10 weeks to find replacement employment he should receive 10 weeks wages as compensation. The delegate notes that although Hellmich did not provide detailed evidence regarding his job search efforts, Ruskin did not challenge Mr. Hellmich's assertion that it took him 10 weeks to obtain new employment.

13. The delegate says that, in exercising his discretion to award Mr. Hellmich four week's wages, he considered the fact that Mr. Hellmich was an employee of relatively short service as well as the fact that the relationship between the employee and the employer was increasingly strained. The delegate submits that he also noted that, although the submission of the Self-Help kit was a contributing factor, it was not the primary factor in Ruskin's decision to terminate Mr. Hellmich's employment. In conclusion, the delegate says he exercised his discretion in a reasoned fashion.

ANALYSIS

14. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
- the director erred in law;
 - the director failed to observe the principles of natural justice in making the determination;
 - evidence has become available that was not available at the time the determination was being made.
15. The Tribunal has consistently said that the burden is on an appellant to persuade the Tribunal that there is an error in the Determination on one of the statutory grounds.
16. Mr. Hellmich identified a failure to observe the principles of natural justice in making the determination as his ground of appeal. Acknowledging that the majority of appellants do not have any formal legal training and, in essence, act as their own counsel, the Tribunal has taken a liberal view of the grounds of appeal. As the Tribunal held in *Triple S Transmission Inc.*, (BC EST # D141/03), while
- ...most lawyers generally understand the fundamental principles underlying the “rules of natural justice” or what sort of error amounts to an “error of law”, these latter terms are often an opaque mystery to someone who is untrained in the law. In my view, the Tribunal must not mechanically adjudicate an appeal based solely on the particular “box” that an appellant has--often without a full, or even any, understanding--simply checked off.
- The purposes of the *Act* remain untouched, including the establishment of fair and efficient dispute resolution procedures and, more generally, to ensure that all parties receive “fair treatment” [see subsections 2(b) and (d)]. When adjudicating an appeal, I believe it is appropriate for the adjudicator to first inquire into the nature of the challenge to the determination (or the process that led to it being issued) and then determine whether that challenge, *prima facie*, invokes one of the statutory grounds. In making that assessment, I also believe that adjudicators should take a large and liberal view of the appellant's explanation as to why the determination ought to be varied or cancelled or why the matter should be returned to the Director.
17. Where there is any doubt about the grounds of an appeal, the doubt should be resolved in favour of the appellant. I have therefore considered whether or not Mr. Hellmich has demonstrated any basis for the Tribunal to interfere with the Determination.
18. I am not persuaded that the delegate failed to observe the principles of natural justice. Natural justice is a procedural right, which includes the right to know the case being made, the right to respond and the right to be heard by an unbiased decision-maker. There is nothing in the appeal submission that suggests, or establishes, that Mr. Hellmich was denied natural justice.
19. Mr. Hellmich was represented by counsel at the hearing and was given every opportunity to present his case and to respond to the Employer's evidence. There is no evidence, or suggestion, that the delegate was biased.

20. I dismiss the appeal on this ground.

Error of Law

21. The Tribunal has adopted the factors set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)* (1998] B.C.J. No. 2275 (BCCA) as reviewable errors of law:

1. a misinterpretation or misapplication of a section of the *Act*; [in *Gemex*, the legislation was the *Assessment Act*]
2. a misapplication of an applicable principle of general law;
3. acting without any evidence;
4. acting on a view of the facts which could not be reasonably entertained; and
5. adopting a method of assessment which is wrong in principle.

22. Questions of fact alone are not reviewable by the Tribunal under section 112 of the *Act*. In *Britco Structures Ltd.*, BC EST # D260/03, the Tribunal held that findings of fact were reviewable as errors of law if they were based on no evidence, or on a view of the facts which could not reasonably be entertained.

23. The Tribunal must defer to the factual findings of a delegate unless the appellant can demonstrate that the delegate made a palpable or overriding error. I conclude that the delegate erred in his interpretation and application of sections 79 and 83.

24. Section 83(1)(a) provides that an employer must not refuse to continue to employ a person because a complaint or investigation has been made under this *Act*. This is commonly referred to as retaliatory dismissal. The delegate found that Ruskin had terminated Mr. Hellmich in part because he had submitted a Self Help Kit (my emphasis). It is not clear from the record what other reasons Ruskin may have had for terminating Mr. Hellmich's employment and the delegate does not identify them. From my review of the record, there were no other reasons. There was no evidence Mr. Hellmich was not a good employee. He had passed his probationary period. There were no reasons advanced at the hearing for Mr. Hellmich's dismissal apart from a suggestion that Mr. Hellmich was "insubordinate," a suggestion rejected by the delegate in the absence of any evidentiary foundation. No cause was alleged in Mr. Hellmich's termination letter or his ROE. The record indicates that Mr. Hellmich's submission of the Self Help kit was in fact, the sole reason for his termination.

25. Section 79 of the *Act* sets out the Director's powers in the event the Director is satisfied that a person has contravened the *Act* or regulations. Section 79(2) provides that the director may require the employer to do one or more of the following:

- (a) hire a person and pay the person any wages lost because of the contravention;
- (b) reinstate a person in employment and pay the person any wages lost because of the contravention;
- (c) pay a person compensation instead of reinstating the person in employment;
- (d) pay an employee or other person reasonable and actual out of pocket expenses incurred by him or her because of the contravention.

26. Section 79 gives the delegate discretion in awarding a remedy, and I find no error in the delegate's exercise of discretion to award Mr. Hellmich compensation rather than reinstating him. (see *Jody L. Goudreau et.al.* (BC

EST # D066/98) and *Joda M. Takarabe et. al.* (BC EST # D160/98)) Mr. Hellmich did not wish to return to work and it appears the employment relationship was irretrievably broken.

27. However, after deciding the appropriate remedy was to order Ruskin pay compensation to Mr. Hellmich, I find that the delegate failed to fully consider the intent and purposes of section 83 as outlined by the British Columbia Supreme Court as well as the Tribunal.
28. As a violation of section 83, which is often referred to as a retaliatory dismissal, undermines the purposes of the *Act*, section 79 provides for remedies that go beyond common law or contractual rights of reasonable notice.
29. In *Afaga Beauty Service Ltd.* (BC EST # D318/97) the Tribunal held that, in determining appropriate compensation for a person improperly dismissed, a number of circumstances can be considered, including the length of service with the employer, the time needed to find alternative employment, mitigation and other earnings during the period of unemployment. Those factors were cited with approval by the Tribunal in *W.G. McMabon Canada Ltd.* (BC EST # D386/99).
30. In *Roy v. Metasoft Systems Inc.* (2013 BCSC 1190), the court held that the remedy under section 79(2)(c) is to be applied in a generous fashion with a view to placing the employee where he or she would have been had the section 83 breach not occurred. In *Metasoft*, the Court affirmed the Tribunal's decisions awarding lost wages from the date of termination until the date the employee found a comparable position at rates equal to her previous monthly earnings.
31. In *Oster* (BC EST # D120/08) the Tribunal stated that the "obvious purpose and objective of Section 83 of the *Act* is to protect employees from certain types of employer conduct that might have a chilling effect on an employee's right to the minimum employment standards." In *Oster* (BC EST # D104/09) ("*Oster* #2") the Tribunal noted that the purpose of section 79(2) was to place the complainant in essentially the same economic position that individual would have been in had a contravention of, in that case, section 8, not occurred.
32. Although Mr. Hellmich's counsel referred to the *Metasoft* decision in his argument, there is no indication that this case was considered by the delegate.
33. Having concluded, erroneously in my view, that the submission of the Self Help Kit was not the primary factor in Ruskin's decision to terminate Mr. Hellmich's employment, the delegate decided it was appropriate to award Mr. Hellmich four week's wages. There is no reference in the delegate's reasoning to the purpose of section 83 making Mr. Hellmich "whole" as outlined in *Metasoft*.
34. The delegate appears to have considered only one of these factors. There is no indication he considered the fact that Mr. Hellmich had been unemployed for 10 weeks even though he made references to it in the Determination, nor did he discuss any other circumstances such as the nature of the industry, Mr. Hellmich's qualifications, or any other earnings he may have had during the period of unemployment.
35. Accordingly, I find the delegate erred in failing to fully consider the purposes of section 83 and the factors cited by the Tribunal in his award, and refer the matter back for reconsideration.

ORDER

36. Pursuant to section 115 of the *Act*, I allow the appeal and refer the matter back to the Director to reconsider the compensatory award to Mr. Hellmich.

Carol L. Roberts
Member
Employment Standards Tribunal