

An appeal

- by -

D. J. Weed Busters Ltd.
(“Weed Busters”)

- 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.: 2012A/22

DATE OF DECISION: May 31, 2012

DECISION

SUBMISSIONS

Myles Koene on behalf of D. J. Weed Busters Ltd.
Gagan Dhaliwal on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by D.J. Weed Busters Ltd. (“Weed Busters”) pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination of the Director of Employment Standards (“the Director”) issued February 1, 2012.
2. Susan Marshall was employed as a manager by Weed Busters from May 1, 2002, until May 6, 2011. On June 6, 2011, Ms. Marshall filed a complaint alleging that Weed Busters had contravened the *Act* in failing to pay compensation for length of service. Weed Busters contended that it had recalled Ms. Marshall, that she had refused to accept the position offered to her and was not, therefore, entitled to compensation beyond what it had already paid her.
3. Following a hearing, the Director concluded that Weed Busters had contravened section 63 of the *Act* in failing to pay Ms. Marshall compensation for length of service. The Director determined that Ms. Marshall was entitled to wages and accrued interest in the total amount of \$5,094.58. The Director also imposed an administrative penalty in the amount of \$500 for the contravention, for a total amount payable of \$5,594.58.
4. Weed Busters contends that the Director erred in law and seeks to have it cancelled or referred back. Weed Busters also sought a suspension of the Determination. On May 14, 2012, the Tribunal allowed the suspension application (BC EST # D045/12).
5. Section 36 of the *Administrative Tribunals Act* (“*ATA*”), which is incorporated into the *Employment Standards Act* (s. 103), and Rule 17 of the Tribunal’s *Rules of Practice and Procedure* provide that the Tribunal may hold any combination of written, electronic and oral hearings. (see also *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). This decision is based on the written submissions of the parties.

ISSUE

6. Whether or not the Director erred in law in concluding that Ms. Marshall was entitled to compensation for length of service.

FACTS

7. At the hearing before the Director’s delegate, the parties agreed that Ms. Marshall had received “salary continuance” for two weeks in lieu of notice.
8. Although Ms. Marshall took leaves of absences each winter during her employment, the parties agreed that her employment had been continuous.
9. On May 9, 2011, Weed Busters sent Ms. Marshall a letter that read, in part, as follows:

Lay-off Notice

With this letter we are providing you with two week written notice for lay off of your employment with DJ Weedbusters Ltd.

Due to a shortage in your field of work, we are no longer able to provide you with part or full time employment. Should any work become available for your position we will be sure to call you.

Your last day of work will be on May 20th 2011

10. Weed Busters issued Ms. Marshall a Record of Employment on June 1, 2011, in which the reason for issuance was stated to be “shortage of work/end of contract or season”. The expected date of recall date was indicated as “unknown”.
11. Mr. Koene’s evidence was that Ms. Marshall had been laid off because the division she was managing was not making money and that Weed Busters had every intention of re-hiring Ms. Marshall when a new position became available. On May 17, 2011, Mr. Koene sent Ms. Marshall an email asking that she call him as he had a job he needed to be done. Mr. Koene sent Ms. Marshall another email on June 6, 2011, indicating that he had a week of work for her including planting beds and picking up flowers and that she could start work Wednesday or Thursday. On June 7, 2011, after receiving no response from Ms. Marshall, Mr. Koene sent another email, indicating that he would have to find someone else to perform the work if Ms. Marshall did not want to do it. On August 16, 2011, Mr. Koene sent Ms. Marshall another letter advising her that he had additional work available, consisting of “anywhere between 20 – 24 hours” each week.
12. Mr. Koene testified that Weed Busters attempted to recall Ms. Marshall on several occasions within 13 weeks, but she was not willing to return. Ms. Marshall’s evidence was that she declined the work because she did not believe Weed Busters would pay her.
13. Ms. Marshall acknowledged she had been paid two weeks wages in lieu of notice but claimed she was entitled to an additional six weeks.
14. The Director’s delegate considered section 63 and noted the circumstances under which an employer could temporarily lay off an employee. The delegate referred to the Supreme Court of British Columbia’s decision in *Besse v. Dr. A.S. Machner Inc.*, (2009 BCSC 1316) which found that the *Act* did not give employers a general right to temporarily lay off employees and found that, in the absence of an express or implied provision allowing temporary layoff, a layoff constituted termination of employment.
15. The delegate further considered the three conditions under which a temporary layoff would be permitted (express provision in the employment contract, implied by well-known industry-wide practice or agreed to by the employee), and determined that Weed Busters had not met any of those conditions. The Director noted:

The Director is bound by the judicial finding in *Besse* that the *Act* confers no statutory right to lay off employees and in the absence of the [three noted] conditions, a layoff constitutes a fundamental breach of the employment contract, regardless of whether the employer intended to repudiate the employment contract.
16. The delegate held that it was an appropriate circumstance for the Director to exercise her discretion under Section 66 to deem the employment relationship terminated due to a substantial alteration in the conditions of Ms. Marshall’s employment. The delegate found Ms. Marshall entitled to 8 weeks of “termination pay”, less the two weeks already paid.

ARGUMENT

17. Weed Busters argues that the Director erred in finding that Ms. Marshall had not been offered work within the 13 week layoff period. Mr. Keone submits that the hours Weed Busters offered Ms. Marshall represented an amount in excess of 50% of her regular wages and that Weed Busters had promised her it would do all it could to offer her full time work when that became available. Weed Busters contends that Ms. Marshall breached her obligation to accept the hours she was offered and that it is insufficient for her to say she rejected that offer based on her assumption that she would not be paid.
18. The Director submits that there was no error of law and seeks to have the Determination confirmed.

ANALYSIS

19. 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 made.
20. 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.

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. (C.A.) as reviewable errors of law:
1. A misinterpretation or misapplication of a section of the 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. Exercising discretion in a fashion that is wrong in principle
22. Weed Busters does not dispute the Director's findings of fact. Therefore, the issues are
- a) whether or not the Director's conclusion that Weed Busters' decision to temporarily lay off Ms. Marshall amounted to a breach of the employment contract, was correct in law; and
 - b) whether Weed Busters is relieved of its obligation to pay additional compensation for length of service.
23. Although the Director's analysis is extremely brief, I am not persuaded that her conclusions are incorrect.
24. As the Director noted, the *Act* does not grant all employers the statutory right to temporarily lay off an employee (see both *Collins v. Jim Pattison Industries Ltd. (c.o.b. Jim Pattison Automotive Group)* (1995), 7 B.C.L.R. (3d) and *Besse*). Unless the right to layoff is found in the employment relationship, the employer has no automatic right of recall. The Director concluded there was no evidence the parties agreed that Weed Busters could temporarily lay off Ms. Marshall, a conclusion Weed Busters does not appear to dispute.

25. Therefore, by imposing a layoff, whether temporary or not, Weed Busters fundamentally breached the employment contract. As noted by the Director, it is irrelevant whether Weed Busters mistakenly or unintentionally intended to repudiate Ms. Marshall's contract of employment.
26. Section 63 of the *Act* establishes a statutory liability on an employer to pay length of service compensation to an employee on termination of employment. While there are some statutory exceptions to this obligation, there is no evidence Weed Busters fell within those exceptions.
27. Weed Busters argues that Ms. Marshall was offered work within the 13 week "layoff period". As already noted, Weed Busters had no statutory right to temporarily lay Ms. Marshall off.
28. Section 66 provides that if a condition of employment is substantially altered, the Director may determine that the employment of an employee has been terminated. The Director found it was appropriate to exercise her discretion under section 66. I find no basis for interfering with this conclusion. The record indicates that on August 16, 2011, three months after her employment had been terminated, Weed Busters offered Ms. Marshall 20-24 hours of work per week on what appeared to be an ongoing basis, an amount it says was in excess of 50% of Ms. Marshall's regular wages. By its own admission, Weed Busters offered Ms. Marshall work that represented a substantial reduction in hours. Consequently, I find no error in the Director's decision to exercise her discretion under section 66 to deem the employment relationship to be terminated.
29. I find no error of law in the Director's conclusion and dismiss the appeal.

ORDER

30. Pursuant to section 115 of the *Act*, I order the Determination dated February 1, 2012, be confirmed in the amount of \$5,594.58, together with any interest that has accrued under Section 88 of the *Act* since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal