

An appeal

- by -

Rebecca Simon

- 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.: 2006A/63

DATE OF DECISION: July 20, 2006

DECISION

SUBMISSIONS

Rebecca Simon	on her own behalf
Ian MacNeill	on behalf of the Director of Employment Standards
Peter Price, Director	on behalf of 538969 B. C. Ltd. operating as Esperanza Spa

OVERVIEW

1. This is an appeal by Rebecca Simon, pursuant to Section 112 of the *Employment Standards Act* (“the Act”), against a Determination of the Director of Employment Standards (“the Director”) issued April 10, 2006.
2. Ms. Simon worked as a certified body worker for 538969 B.C. Ltd. operating as Esperanza Spa (“Esperanza”), from July 2004 until October 16, 2004. She filed a complaint alleging that Esperanza owed her wages and annual vacation pay. She also sought compensation for length of service, alleging that her employment had been terminated as a result of a substantial change in her terms and conditions of employment, and that there were insufficient funds in Esperanza’s account to enable her to cash her pay cheque.
3. Following an investigation into the complaint, the delegate determined that Esperanza had contravened Section 18 of the *Employment Standards Act* in failing to pay Ms. Simon wages and annual vacation pay in the amount, with interest, of \$934.27. The delegate found that Ms. Simon was not entitled to compensation for length of service, as he concluded that there was no change to the terms and conditions of her employment.
4. The delegate also imposed a \$500 penalty on Esperanza for the contraventions of the Act, pursuant to section 29(1) of the *Employment Standards Regulations*.
5. Ms. Simon appeals the Determination on the grounds that the delegate erred in law. She says the delegate erred in his findings about the terms of the employment contract.
6. This appeal is decided on the section 112(5) “record”, the submissions of the parties, and the Reasons for the Determination.

ISSUES

7. Whether the delegate erred in law in determining the terms of the employment contract between the parties.

FACTS AND ARGUMENT

8. For the purposes of this appeal, the facts are as follows.
9. Ms. Simon had been employed at Esperanza at various times since December 2000. Her latest period of employment commenced May 25, 2004 at which time it was operated by Ms. Bermudez. Ms. Bermudez sold the business to Mr. Price in July 2004, and Ms. Simon continued working in the same capacity. Mr. Price, who lives in Australia, met with Ms. Simon in mid August, and hired her as the spa manager.
10. Ms. Simon contended that the parties agreed she would be paid \$35 per hour for massage therapy/bodywork, and \$20 per hour for time spent on management duties. Ms. Simon alleged that she asked Mr. Price for a written agreement but he felt it unimportant.
11. Mr. Price said that, shortly after meeting Ms. Simon, he sent her an email laying out the terms and conditions of her employment. He provided the delegate with a copy of an August 15, 2004 email which established Ms. Simon's remuneration based on her billing 50% of her time as a massage therapist at \$35 per hour. The gross receipts received for her services was to cover her wages, and the balance went to pay for hours worked managing the business, with a maximum of 40 hours per week for all duties.
12. Ms. Simon denied receiving the August 15 email, but acknowledged that a formula similar to this had been discussed at the mid August meeting. She took the position before the delegate that she would not have agreed to this method of calculating her remuneration. Ms. Simon maintained her own hours of work, prepared the payroll records for all the employees including herself, and calculated her pay based on her understanding set out in paragraph 11 above.
13. The delegate found that Mr. Price's email of August 15, 2004 had been sent and received, and that it established Ms. Simon's conditions of employment.
14. Ms. Simon argues that the email "does not meet the criteria set out in the *Employment Standards Act*, and that it "breeches my right to fair remuneration..." She contends that she did not receive the email and she did not sign any agreement. She argues that the Outlook email program enables the original document to be printed with a date and time signature, and that the email version of the letter accepted by the delegate as forming the basis of the employment contract differs only slightly from one she received in October that caused her to quit her employment. She further contends that the terms and conditions of that email do not guarantee a set wage or hours, nor does it comply with the minimum wage or hours per week as set out in the *Act*.
15. The delegate submits that, although Ms. Simon alleges that he erred in law, the appeal documentation does not state what that error is. Further, he says that Ms. Simon, for the first time, alleges other breaches of the *Act* that were never made in either the initial complaint or at any time during the investigation. He submits that it is too late to introduce new issues on appeal.
16. The delegate says that his conclusions on the terms of the employment contract are set out in the Determination, and are supported by the evidence.
17. The delegate notes that while the *Act* provides for a minimum wage, it does not guarantee a set wage or hours to an employee.

18. The delegate seeks to have the Determination upheld on the grounds that it does not disclose any error of law or denial of natural justice; rather, that it is an attempt to re-argue her complaint.
19. Mr. Price submits that the letter setting out the terms of employment were sent by an email which was dated, and that the email printout has been certified as a true copy of the file on the computer. He also says that since Ms. Simon was the only person who had access to the computer, her comments that she did not receive the email are not credible.

ANALYSIS

20. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
- (a) the director erred in law
 - (b) the director failed to observe the principles of natural justice in making the determination;
or
 - (c) evidence has become available that was not available at the time the determination was being made
21. The burden of establishing the grounds for an appeal rests with an Appellant. Ms. Simon must provide persuasive and compelling evidence that there were errors of law in the Determination. I am not persuaded that Ms. Simon has discharged that burden.
22. Questions of fact alone are not reviewable by the Tribunal under section 112. 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. At issue is whether the delegate arrived at his conclusion that Ms. Simon received Mr. Price's August 14 email which set out the terms and conditions of her employment without any evidence, or that his conclusion is inconsistent with and contradictory to the evidence.
24. I have reviewed the record and the submissions, and am satisfied that there was ample evidence for the findings made by the delegate.
25. The delegate reviewed Mr. Price's evidence that the email had been sent, including a confirmation from the "sent items" folder of his computer. He wrote
- Ideally, I would have preferred to see the August 15, 2004 letter with the date it was sent, noted on it. Mr. Price was not able to provide that as my request to do so was 6 or 8 months after the letter was sent. The best he was able to do was to recover the print out from the "sent items folder" of his email. This confirms that a letter titled "Rebecca's conditions of employment" was sent Sunday August 15, 2004 at 11:42 am.
26. I am not persuaded that the delegate's conclusion on this point is perverse or inexplicable (see *Britco, supra*). Although Ms. Simon continues to dispute the delegate's conclusion, an appeal is not an opportunity to re-argue a case that has already been made before the delegate.

27. I note that the original email printout, which shows the sender, receiver, time and date sent, as well as the subject, was provided to the delegate. Also supplied to the delegate was a print out of the 'Sent' box of Mr. Price's email program, confirming the date and time of the sending of the email. I find that the evidence before the delegate amply supports his conclusion
28. The appeal is dismissed.

ORDER

29. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated April 10, 2006, be confirmed in the amount of \$1,434.27, plus whatever interest might have accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal