

An appeal

- by -

1073775 B. C. Ltd. carrying on business as Tim Hortons
(the “Employer”)

- 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.: 2017A/83

DATE OF DECISION: August 9, 2017

DECISION

SUBMISSIONS

Phyllis and Jon Pankuch

on behalf of 1073775 B.C. Ltd. carrying on business as Tim Hortons

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), 1073775 B.C. Ltd. carrying on business as Tim Hortons (the “Employer”) has filed an appeal of a Determination issued by the Director of Employment Standards (the “Director”) on May 9, 2017. In that Determination, the Director found that the Employer had contravened sections 58 and 63 of the *Act* in failing to pay James Michael Schritt annual vacation pay and compensation for length of service and interest in the amount of \$1,052.78. The Director also imposed an administrative penalty in the total amount of \$500 for the contravention, for a total amount owing of \$1,552.78.
2. The Employer appeals the Determination contending that the delegate failed to observe principles of natural justice in making the Determination.
3. This decision is based on the submissions on behalf of the Employer, 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. Incorporated in April 2016, the Employer operates a number of Tim Hortons franchises. John Pankuch and Phyllis Pankuch are the sole directors of the Employer.
5. Until January 2016, Mr. Pankuch was, along with Jacqueline Chaytor, a director of Chaytor Holdings Ltd. (“Chaytor”) which operated six Tim Hortons franchises. One of those franchises was located at Rogers Way in Kamloops. From January 1, 2016, until July 10, 2016, Ms. Chaytor was the sole director of Chaytor. Chaytor sold three of the six franchises, including the Rogers Way location, to the Employer effective July 11, 2016.
6. Mr. Schritt began working at the Rogers Way Tim Hortons location on July 25, 2015. On May 10, 2016, he sustained a workplace injury which resulted in a WorkSafe BC claim. Mr. Schritt participated in a graduated return-to-work program following his injury. Mr. Schritt stated that WorkSafe BC made several requests for information from his employer during his return-to-work program and that there were no communication difficulties between WorkSafe BC and Chaytor. However, after the franchise location was sold, requests for information from the Employer by both WorkSafe BC and Mr. Schritt were unsuccessful.
7. Mr. Schritt was able to return to work on September 27, 2016, under a graduated return-to-work schedule. However, when WorkSafe BC spoke to the Rogers Way store manager regarding his return to work, the manager indicated that there was no position for Mr. Schritt to return to. Mr. Schritt’s WorkSafe BC claim was concluded on October 28, 2016. Mr. Schritt stated that, prior to his injury, he worked 40 hours per week.

8. During her investigation of Mr. Schritt's complaint, the delegate informed Ms. Chaytor and Mr. Pankuch about section 97 of the *Act* and its relevance to the issue of compensation for length of service. She invited both parties to make submissions on whether compensation for length of service was owed, and if so, by whom.
9. Ms. Chaytor provided the delegate with a "Reorganization Proposal," according to which the Employer assumed responsibility for all employees that were employed at the three locations transferred from Chaytor. The document also included a list of employees employed at the three locations. Mr. Schritt's name was included on that list.
10. Ms. Chaytor also provided payroll documents showing that Mr. Schritt had been employed since July 25, 2015. The documents identified that Mr. Schritt had been "terminated," which Ms. Chaytor indicated was because he had been employed at the locations which had been transferred to the Employer. She indicated that Chaytor had not terminated Mr. Schritt's employment and that the Employer was liable for Mr. Schritt's compensation for length of service. Ms. Chaytor also provided the delegate with documentation from WorkSafe BC regarding Mr. Schritt's workplace injury.
11. Ms. Pankuch contended that Mr. Schritt had never been an employee of the Employer. She said that the Employer used the same payroll system as Chaytor and effective July 11, 2016, all employees on Chaytor's payroll were automatically transferred over to the Employer. Ms. Pankuch also provided the delegate with a copy of the sale of goods containing an inventory of all assets transferred from Chaytor effective July 11, 2016.
12. Neither Chaytor nor the Employer provided the delegate with information regarding Mr. Schritt's weekly hours of work.
13. The delegate found that, at the time of his injury, Mr. Schritt was an employee of Chaytor, and at the time he was ready to return to work from his workplace injury, his workplace had been sold to the Employer.
14. The delegate outlined the effect of section 97 of the *Act*:

The purchaser assumes the role of employer and is required to honour the employee's past service with the seller and assume all of the seller's liabilities and obligations under the Act towards the employees.

If employees are employed at the time the business is sold or otherwise disposed of and are subsequently terminated by the purchaser, the employment of the employee is continuous and uninterrupted, and the purchaser is responsible for any CLOS [compensation for length of service] or notice in lieu, calculated from the date the employees were hired by the original seller, and any other outstanding wages including annual vacation pay.
15. The delegate noted there was no evidence Mr. Schritt's employment had been terminated by Chaytor before the date of disposition as his name was on the list of employees who were to be transferred to the Employer effective July 11, 2016. The delegate noted that while Mr. Schritt was not an "active" employee, he was a Chaytor employee at the time of the sale of the businesses to the Employer. The delegate determined that, as of July 11, 2016, Mr. Schritt was an employee of the Employer.
16. The delegate further determined that the Employer terminated Mr. Schritt's employment on September 27, 2016, when it informed WorkSafe BC that it had no job for Mr. Schritt to return to. Consequently, the delegate determined that Mr. Schritt was entitled to two weeks' compensation for length of service as well as vacation pay and interest.

Argument

17. Ms. Pankuch contends that Mr. Schritt was never an employee. She argues that Chaytor was “not acting in good faith” by “withholding” employment information from them regarding Mr. Schritt. Ms. Pankuch alleges that, at the time of the sale, Chaytor “made no mention” that Mr. Schritt was transferred to the Employer and that it had no correspondence from WorkSafe BC that Mr. Schritt was a Chaytor employee.
18. Ms. Pankuch contends that Chaytor is liable for Mr. Schritt’s compensation for length of service.

ANALYSIS

19. Section 114 of the *Act* provides that at any time after an appeal is filed and without a hearing of any kind the Tribunal may dismiss all or part of the appeal if the Tribunal determines that any of the following apply:
 - (a) the appeal is not within the jurisdiction of the tribunal;
 - (b) the appeal was not filed within the applicable time limit;
 - (c) the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process;
 - (d) the appeal was made in bad faith or filed for an improper purpose or motive;
 - (e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;
 - (f) there is no reasonable prospect that the appeal will succeed;
 - (g) the substance of the appeal has been appropriately dealt with in another proceeding;
 - (h) one or more of the requirements of section 112(2) have not been met.
20. 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.
21. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with the decision.
22. In *JC Creations* (BC EST # RD317/03) the Tribunal concluded that, given the purposes and provisions of the legislation, it is inappropriate to take an “overly legalistic and technical approach” to the appeal document: “The substance of the appeal should be addressed both by the Tribunal itself and the other parties, including the Director. It is important that the substance, not the form, of the appeal be treated fairly by all concerned.” As the Employer is self-represented, I have given it wide latitude in addressing the stated grounds of appeal.

Failure to observe the principles of natural justice

23. 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. Natural justice does not mean that the delegate accepts one party's notion of "fairness".
24. There is nothing in the appeal submission that establishes that the Employer was denied natural justice.
25. In a letter dated March 17, 2017, the delegate informed the Employer about the complaint. She noted that she had information that the business had changed hands effective July 10, 2016, that the agreement between the Employer and Chaytor included a clause specifying that existing employees would have their employment continue with the Employer, and that a list of all employees was included as part of that agreement. The delegate noted that Mr. Schritt's name was included even though he was on disability at the effective date of purchase. The Employer was offered an opportunity to respond to the allegations and facts outlined by the delegate. The Employer did respond, providing the delegate with material that it asserted supported its position. The delegate considered the Employer's response in her Determination.
26. I find no basis for this ground of appeal.

Error of law

27. The Tribunal as adopted the following definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):
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 reasonably be entertained; and
 5. adopting a method of assessment which is wrong in principle.
28. The delegate considered the evidence of the parties regarding Mr. Schritt's employment at the time the three Tim Hortons locations were sold. The documentation indicates that Mr. Schritt was employed by the Employer at the time of the sale although he was off work due to a workplace injury.
29. The record discloses that the delegate was informed by a human resources manager for Chaytor that efforts were made to contact Mr. Schritt prior to the sale to advise him that his employment had been terminated effective July 4, 2016. Those attempts were unsuccessful. There is no evidence Mr. Schritt received notice of his termination or was issued a Record of Employment. Therefore, whether or not Chaytor intended to terminate Mr. Schritt's employment, it did not do so.
30. The "Reorganization Proposal" which appears to be the sole legal document between the parties regarding the sale of the three franchise locations, expressly provides that the Employer agreed to continue the employment of a number of employees, including Mr. Schritt after July 10, 2016. Consequently, despite the position advanced by the Employer, it clearly agreed to Mr. Schritt's continued employment after the date of purchase.

31. I find no basis to interfere with the delegate's conclusions regarding either the application of section 97 of the *Act*, or Mr. Schritt's employment status with the Employer.
32. The appeal is dismissed.

ORDER

33. Pursuant to section 115 of the *Act*, I Order that the Determination, dated May 9, 2017, be confirmed in the amount of \$1,552.78, together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal