

An appeal

- by -

Deborah Simpson
("Simpson")

- 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: Ian Lawson

FILE No.: 2005A/50

DATE OF DECISION: June 24, 2005

DECISION

SUBMISSIONS

Deborah Simpson

on her own behalf

OVERVIEW

1. This is an appeal by Deborah Simpson ("Simpson") pursuant to section 112 of the *Act*. The appeal is from Determination ER#102-860 issued by Alan Phillips, a delegate of the Director of Employment Standards on February 24, 2005. Simpson filed a complaint with the Director on December 4, 2004, alleging she was owed regular wages, overtime wages and compensation for length of service by her former employer Sorensen's Loans 'til Payday Inc. ("Sorensen's"). The Determination dismissed Simpson's complaint. Simpson filed her appeal on April 1, 2005. The appeal is now decided without an oral hearing, on the basis of written submissions and the record before the Tribunal.

FACTS

2. Sorensen's is a business providing short-term loans, income tax services, transfers of funds through Western Union, and the sale of telephone cards. Its head office is in Port Alberni, and Simpson was employed in its Williams Lake office, where she was an Accounts Manager and Accounts Clerk between August 14, 2002 and August 28, 2004.
3. Simpson complained that Sorensen's instructed her to take three days off work, following a meeting on May 26, 2004 to discuss her work performance. Sorensen's agreed to a schedule change resulting in her working on one of the days she was to be off work, and Simpson complains she is owed wages for those two days she was required to be off. Simpson signed a letter which the employer had prepared, setting out its version of the meeting but with which Simpson did not agree.
4. Simpson also complained that she was owed \$408.38 in overtime pay, as a result of hours she worked when serving customers who entered the business just before closing, when faxing daily balance sheets to head office past her scheduled quitting time, and when computer problems occurred.
5. Simpson also complained that she was constructively dismissed when she received a letter from Sorensen's dated July 16, 2004, advising she was to be demoted to part-time employment. Simpson went on medical leave at the end of August, as a result of stress she was experiencing at work. Her doctor recommended she remain off work until the end of October, 2004. An e-mail she sent to Sorensen's in mid-October was not responded to, and she decided she had been dismissed after attending the work site a short while later.
6. The delegate elected to conduct a complaint hearing regarding this complaint, which was held by teleconference on February 9, 2005. The delegate heard from Simpson's supervisor Trudy Folk, who testified that she met with Simpson on May 26 to give her an "employee warning" after customers had complained about her. Folk said Simpson asked whether she could take time off work instead of getting the warning, and Folk agreed. Sorensen's therefore argued before the delegate that Simpson volunteered to take time off work without pay and no regular wages were owing. Folk also reviewed Simpson's time

sheets and pointed out that some overtime hours had been worked, but those hours had already been paid. Folk stated Sorensen's had a "no overtime" policy and its employees are directed not to work overtime hours; she admitted, however, that there were rare occasions when employees work overtime hours and then take paid time off at a later date.

7. Regarding the complaint of constructive dismissal, Sorensen's argued before the delegate that Simpson acquiesced in the reduction of her hours, as she worked for more than a month after the change was imposed. Sorensen's also argued that Simpson has not been terminated, and remained an employee who is merely absent on stress leave. Folk argued the latter is proven by the Record of Employment prepared for Simpson in August, which recorded she was on medical leave.
8. Sorensen's also presented testimony from Karen Sinclair, who was Simpson's co-worker. Sinclair told the delegate that the daily balance sheets were to be prepared throughout the day, and did not require overtime hours in order to be faxed to head office. In cross-examination, Sinclair stated that after Simpson's hours were reduced in July, the employer told her she and Simpson could "split" the hours or she could take over as manager on a temporary basis. Sinclair also admitted that she and Simpson were sometimes required to deal with customers after closing time, but said as compensation they were expected to take time off at a later date.
9. After hearing this evidence, the delegate found that it did not matter whether Simpson had taken the two days off voluntarily or whether she was instructed to take that time off by Sorensen's: the *Act* requires that employers pay wages for work that an employee performs. As Simpson did not do any work during the two days in question, it could not be said she was owed any wages.
10. Regarding the complaint of overtime, the delegate found Simpson did not provide adequate details about the work she was required to perform beyond the regular hours of employment. The delegate found that while Simpson provided daily time sheets to Sorensen's, her own record of hours differed from Sorensen's records made from her daily time sheets. The delegate concluded Sorensen's time records were more accurate than Simpson's, and in the absence of details to support her claim, he dismissed her overtime complaint.
11. Finally, the delegate concluded that by working a further 5 weeks after her hours were reduced, Simpson had acquiesced in the change and so could not complain later that she had been constructively dismissed. The delegate also made the following observation in the Determination:
12. Further, I find that the complainant did not believe she was constructively dismissed as a result of the reduced hours because on October 19th she sent an email to the employer stating in part: "I am making good progress on my recovery but there is still one thing that I need to address before I will be fit to work again. I am still unclear as to exactly what the complaints were that were made against me." The plain reading of the complainant's letter is that she is expressing her intent to return to work in the future, that she has not quit her employment, neither [*sic*] does she believe her employment has been terminated.
13. The delegate also found the parties agreed Simpson went on medical leave on August 28, 2005, and that her doctor noted on September 28th that her expected recovery date was October 29th. Apart from the email that was not responded to, the delegate found there had been no communication between the parties until Simpson submitted the "Request for Payment" form to Sorensen's as part of the self-help kit which all complainants are required to complete before making a complaint to the Director. The delegate stated:

14. At the hearing held on February 9th the employer stated that they believed the complainant was still an employee, that they had not terminated the employment relationship, and that in their view the complainant was still on medical leave. At this hearing the employer asked the complainant if she would be willing to return to work. The employer refused the complainant's request that her disciplinary record be removed from her personnel file as a condition of her returning to work. The employer told the complainant that if she returned to work she would receive the same wage rate, have the same responsibilities, and an increase in hours from 24 to 30 in a week. The complainant refused the employer's offer, and as a result, terminated her employment at that time.
15. As a result of the latter exchange, the delegate concluded Simpson had terminated her employment and dismissed her complaint.

ARGUMENT

16. In her notice of appeal, Simpson claims the Director erred in law and failed to observe the principles of natural justice in making the Determination.
17. As Simpson's submission focused only on the constructive dismissal and overtime issues, I presume she is no longer pursuing the two days of regular wages which were the subject of her initial complaint. Simpson makes the following submission on the natural justice ground of appeal:

On February 9/05, the adjudicator laid out the process for us and then we were to begin the proceedings. I informed him that I had not received a copy of the information submitted by the employer. He said we could postpone the hearing so that I could get the information or we could proceed without it. He said there were time sheets and a Will Say statement from Karen Sinclair that he read to me. He never mentioned the "Event Notes" regarding the customer complaints that Trudy had submitted. I said that I thought it would be okay to proceed without having copies of their submissions and gave somewhat of an opening statement but the company declined the opportunity to give one. While I was trying to ask Karen Sinclair some questions to try to substantiate my claims, I was constantly interrupted by Trudy and Christine. They had said they had no questions for Karen but there was a barrage of questions that they were throwing at me. I felt that the Director should have had more control of the situation but he only occasionally said "We're not getting anywhere. Let's move on". Karen's recollection of the events had changed since any discussions we had about it in the six and a half months prior to the hearing. I think she may have been influenced by the employer. I feel that I was at a disadvantage because I did not have all of the employer's submissions and was unable to present my case properly, as the company representatives were not following proper procedure during the course of the adjudication and the Director did little to control this behaviour. I feel the Director failed to observe the principles of natural justice in making the determination.

18. In a further brief submission, Simpson states:

I noted a couple of errors in the Complaint and Information Docket that Mr. Alan Phillips submitted to you. ... In the Complaint Hearing section, it says that the company's records had been disclosed to me but I did not receive the documentation that they had submitted until after the hearing. I had to ask ESB to send them to me after the fact. Christine Bennett said that she was unaware that they were to disclose their information to me. It was made very clear at the end of the Mediation that they were to supply me with all information that they wished to submit for the hearing.

19. Neither the Director nor Sorensen's filed any submission in response.

ISSUE

20. Was there any failure to observe the principles of natural justice in the making of the Determination under appeal?

ANALYSIS

21. Section 112 of the *Act* was amended in 2002, and failure to observe the principles of natural justice was specified as a ground of appeal. At the same time, the Director's resources were substantially reduced and a "self-help" approach to complaint resolution was introduced. The Director's obligation to investigate a complaint under section 76 was changed, so that the Director is now obliged only to "accept and review" a complaint. The Director may now choose whether to investigate or to "adjudicate" a complaint under section 76(3) of the *Act*. Accordingly, some complaints are now resolved by way of a complaint hearing over which the Director's delegate presides.
22. At these complaint hearings, the investigative role formerly exercised by delegates appears to be passed on to the parties themselves, who are now charged with understanding the applicable law, uncovering relevant evidence and presenting it to the delegate in the hope of persuading the delegate to resolve the complaint in their favour. By specifically adding failure to observe the principles of natural justice as a ground of appeal, I infer the Legislature intended that these major changes to the Director's investigative role must not be at the expense of fairness in how a complaint is resolved. Specifically, the Legislature has invited aggrieved parties to consider whether the *manner* in which the complaint was resolved by the Director has been unfair in any way, and if so, to advance that unfairness as a ground of appeal to this Tribunal.
23. In this case, Simpson argues she was not provided with important documents on which Sorensen's intended to rely at the hearing. She says it was made clear to the parties prior to the hearing that they were to exchange documents on which they will rely at the hearing. She says the Employment Standards Branch Complaint and Information Docket prepared by the Director as part of this appeal process is incorrect, regarding whether records were disclosed to her. Neither the Director nor Sorensen's has responded in any way to the issues she raises on this appeal. In the absence of any reason to believe Simpson *did* receive fair disclosure in advance of material on which Sorensen's intended to rely at the hearing, I am compelled to conclude she was not provided with such disclosure.
24. The Director's failure to ensure proper disclosure has taken place between the parties has been held by this Tribunal to be a breach of natural justice: *Re Kelly Lanz*, BCEST #264/03 (Reconsideration denied in BCEST #RD319/03). I am aware that at the complaint hearing, Simpson was afforded an opportunity to request an adjournment, and that she declined that opportunity. I am also aware, however, that Simpson was not represented by legal counsel and she did not likely possess the knowledge and experience herself to foresee the problems that might result from proceeding with the hearing in the absence of full disclosure. Furthermore, it is one of the guiding principles in the *Act* that disputes must be resolved fairly and efficiently. Adjournments granted on the hearing date to resolve disclosure problems can result in delays which run contrary to these principles. Simpson's decision to proceed with the hearing was likely based on her desire that this dispute be resolved efficiently, a desire shared by the Legislature.

25. In this case, however, the lack of disclosure seems to have put Simpson at a disadvantage in cross-examining the employer's witnesses and knowing in advance the evidence they were likely to give. Simpson herself was not unconcerned about knowing the case against her, as she did ask the employer in October, 2004 to provide her with details of the complaints allegedly made against her by customers, which details I do not believe she has received to this date. There is an inherent power imbalance between a dismissed employee and her employer, especially where that employer tenders as witnesses persons who are current employees. The delegate, as adjudicator of the complaint hearing, had a duty to ensure fairness not only at the hearing itself, but also at the pre-hearing disclosure stage (especially where the parties had already been directed to exchange evidence on which they intend to rely at the hearing). In my view, that duty is not met by simply offering an adjournment on the hearing date if one party has not received full disclosure. If the parties were instructed prior to the hearing to make full disclosure, and if one party wishes to present evidence at the hearing which was not disclosed, a breach of natural justice occurs if the hearing nevertheless proceeds and the evidence is nevertheless heard. With knowledge of the inherent power imbalance and the disclosure concerns clearly expressed by Simpson at the beginning of the hearing, I find the adjudicator breached the principles of natural justice by allowing the hearing to proceed nevertheless.
26. Simpson raises a further issue, however: she says the adjudicator failed to exercise control of the hearing during her cross-examination of Karen Sinclair, and that two of the employer's witnesses started questioning Simpson while she was cross-examining witness Sinclair. There is of course no transcript of the complaint hearing, but again, I do not have the benefit of any submissions from either the Director or Sorensen's on this point. I cannot, therefore, conclude there is no merit to Simpson's argument, because it is always serious if a party has been prevented in any way from cross-examining a witness or in presenting her case as she wishes. In the absence of any evidence to the contrary, I conclude the adjudicator's failure to control the employer at the hearing, and his remarks to the effect that Simpson should "move on", prevented Simpson from conducting a fair cross-examination. When this is put in the context of the power imbalance faced by Simpson at the hearing, I conclude this interference with Simpson's cross-examination is a breach of the principles of natural justice. The right to be heard is at the heart of natural justice, and any proceeding in which a party is prevented from cross-examining a witness in the manner they wish is not a fair hearing (provided the cross-examination is on relevant and probative issues, and is not abusive or otherwise objectionable).
27. I therefore conclude Simpson has established that the Director failed to observe the principles of natural justice in making the Determination. The Determination must therefore be cancelled, and the Director must now resolve the Simpson's complaint respecting compensation for length of service and overtime wages in a procedurally fair manner.

ORDER

28. Pursuant to section 115(1) of the *Act*, Determination ER#102-860 issued by Alan Phillips, a delegate of the Director of Employment Standards on February 24, 2005, is cancelled and Simpson's complaint is referred back to the Director on the issues of her claim for compensation for length of service and her claim for overtime wages.

Ian Lawson
Member
Employment Standards Tribunal