

An appeal

- by -

Jennifer Oster
("Oster")

- 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: David B. Stevenson

FILE No.: 2009A/104

DATE OF DECISION: October 20, 2009

DECISION

SUBMISSIONS

Thomas F. Beasley	on behalf of Jennifer Oster
Scott A. McCann	on behalf of Tight Line Ventures Ltd.
Andres Barker	on behalf of the Director of Employment Standards

OVERVIEW

1. This decision completes an appeal filed by Jennifer Oster (“Oster”) under Section 112 of the *Employment Standards Act* (the “*Act*”) of a Determination that was issued by a delegate of the Director of Employment Standards (the “Director”) on August 22, 2008.
2. The Determination was made on a complaint filed by Oster against Tight Line Ventures Ltd. carrying on business as McDonald’s Restaurant (“Ventures”). The complaint alleged Ventures had contravened Part 2, Section 8, Part 3, Sections 16 and 28, Part 4, Sections 33, 36 and 40, Part 8, Section 63 and Part 10, Section 83 of the *Act* and, as a consequence, Oster was owed wages and compensation relating to those contraventions.
3. The Director found that no wages were owed, but that Ventures had contravened Section 46 of the *Employment Standards Regulation* (the “*Regulations*”) by failing to produce employment records for Oster when required to do so by the Director. An administrative penalty of \$500.00 was imposed for that contravention.
4. Oster appealed the Determination, alleging the Director had made several errors of law and had failed to observe principles of natural justice in making the decision.
5. The Tribunal considered the appeal and issued a decision, BC EST # D120/08 (the “original decision”). In the original decision, the Tribunal concluded Oster had demonstrated several reviewable errors had been committed by the Director, cancelled the Determination in respect of those matters and referred them back to the Director under the statutory authority given to the Tribunal in Section 115 of the *Act*.
6. In accordance with the result in the original decision, the Director has conducted a further investigation and has issued a supplement to the Determination, dated August 7, 2009 (the “Referral Back Report”).
7. In the Referral Back Report, the Director has concluded that Oster’s employment should have been considered terminated under section 66 of the *Act*, and issued a declaration to that effect, that Ventures had contravened section 83 of the *Act* and that Oster had failed to show Ventures had contravened section 36 or section 40 of the *Act*. The Director found Oster was entitled to wages and compensation in the amount of \$1,019.84, an amount which included vacation pay and interest, and that Ventures was liable for additional administrative penalties for contraventions of section 63 and section 83 of the *Act*.
8. In the referral back process, Oster and Ventures filed submissions and evidence to the Director on the issues being considered. All of the parties have made submissions to the Tribunal in respect of the conclusions and decision reached in Referral Back Report.

9. Oster agrees with the finding and the remedy on the section 66 issue and with the finding that Ventures had contravened section 83, but disagrees with the results on the section 36 and section 40 issues and with the disposition of the remedial aspect of the section 83 issue.
10. Ventures continues to take the position there was no violation of the *Act* in respect of the matters being considered in the referral back process.
11. The Referral Back Report and this decision continue to be elements of the appeal process commenced by Oster on September 15, 2008.

ISSUE

12. The issues raised by the submission filed on behalf of Oster to the Referral Back Report are whether the referral back process was procedurally fair and whether the Director erred in rejecting Oster's claims under section 36 and section 40 and in determining the available remedies for the contravention of section 83 of the *Act*. The issue raised by the submission filed on behalf of Ventures is whether the Director erred in finding Ventures contravened sections 63 and 83 of the *Act*.

THE FACTS

13. The Determination, the original decision and the Referral Back Report capture all of the facts that are relevant to this aspect of the appeal process.
14. As indicated above, the parties did provide additional evidence during the referral back process. This additional evidence was contained in affidavits from Oster and Anna Colonna, the Operations Manager for Ventures. This material was considered by the Director in the referral back process. There can be no complaint that the Director received and considered additional evidence as that was contemplated by the original decision. The Director found that key elements of the additional evidence provided by both Oster and Ms. Colonna were either not credible or not helpful. I do not intend to review this additional evidence any further as the conclusions reached by the Director on the additional evidence were findings of fact which, in my view, were adequately reasoned and supported in the Referral Back Report and in respect of which the Tribunal has limited authority to review in an appeal: see *Britco Structures Ltd.*, BC EST # D260/03.
15. In the submissions made during the referral back process, counsel for Oster, among other arguments, submitted that Ventures should be required to pay Oster, under the rubric of "compensation" and "out of pocket expenses" found in subsection 79(2) (c) and (d), for legal and advocate costs, punitive damages, lost wages from September 21, 2007 until the date of the original decision, telephone and courier expenses and reimbursement for transportation and lost wages for time spent preparing for and attending the hearing.
16. In a letter dated July 22, 2009, counsel for Oster provided an outline of costs and out of pocket expenses incurred by Oster in pursuing her claims under the *Act*.
17. In the Referral Back Report, the Director considered and denied the claims for legal and advocate costs and punitive damages, finding no authority in the *Act* to make such awards. In respect of the out of pocket expense claims, the Director found there was no documented evidence to support those claims and, in any event, some of the claims stood on the same footing as the legal expense claim and were denied on the same basis.

ARGUMENT

18. The difficulty with much of the submissions made on behalf of both Oster and Ventures on the Referral Back Report is that they are fact driven, requiring the Tribunal to take a different view of the facts than was taken by the Director.
19. Counsel for Oster says the Director's decision on the hours free from work (section 36) and the overtime (section 40) issues was flawed by a failure to hold a hearing. Counsel says a hearing was required because the earlier process was flawed by a failure to observe principles of natural justice, the records produced by Ventures in the referral back process are incomplete and oral evidence would both contradict Venture's submissions on their overtime practices and establish that Oster was picked up from work by her boyfriend at late hours.
20. There was no suggestion during the referral back process by any of the parties that an oral hearing was necessary. There is an indication by the Director that the process followed in the referral back, which did not contemplate an oral hearing, had the consent of the parties; that assertion has not been challenged. The submission of counsel for Oster on the section 36 and section 40 issues following the Referral Back Report does not explain why the Tribunal should not give effect to his consent to the process followed by the Director or why, if there was some perceived relevance to evidence that could be provided by others, that evidence was not provided to the Director during the referral back process.
21. The Referral Back Report examined the available evidence on these issues and found, on the facts, it did not support Oster's claims under section 36 or section 40. In this respect, it bears noting that in the referral back process the Director was provided with incomplete payroll records for Oster for the six month period preceding her suspension. There was no request by Oster for the Director to demand any additional information. Against that incomplete record, Oster did not provide any documents to support her section 36 and section 40 claims and, in the Director's view, provided unreliable and contradictory affidavit evidence on those issues. The measure of a claim is based on an assessment of the evidence provided. There is a burden on a claimant to show the claims made have a legitimate factual foundation. There is no principle that a claimant who does not otherwise establish an acceptable factual foundation for the claims being made can succeed on a complaint simply because the employer has not provided complete employment records.
22. There is no factual or legal basis for suggesting there was any procedural unfairness in the referral back process. The parties had full opportunity to present their position and to respond to the position of the other party. The findings of the Director on these issues were fact driven and, in the circumstances, not reviewable by the Tribunal.
23. While counsel for Ventures has not provided a comprehensive submission on the Referral Back Report, the submission that has been made takes issue with the Director finding any violation of the *Act* in respect of those matters referred back and adopts the submission made on behalf of Ventures in the referral back process on those matters. That submission, however, quite plainly acknowledges that apart from potential remedial issues arising from subsection 79(2), all of the issues being considered in the referral back process are fact driven. As such, the same response as made above is appropriate: the appeal provisions in section 112 of *Act* do not provide the Tribunal with the authority to consider challenges to findings of fact made by the Director when determining a complaint unless such findings raise an error of law. There is no error of law in this case in the findings of fact made by the Director in the Referral Back Report.
24. As a result, the submissions of both Oster and Ventures in those areas are outside the authority of the tribunal under section 112 and are accordingly dismissed.

25. The only issue arising from the Referral Back Report that permits consideration by the Tribunal in the context of this appeal is that relating to the disposition by the Director of the remedies requested by Oster under subsection 79(2). For ease of reference, that provision states:

79 (2) In addition to subsection (1), if satisfied that an employer has contravened a requirement of section 8 or 83 or Part 6, 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. At issue is the application by the Director of paragraphs (c) and (d) of that subsection in response to the claims for punitive damages and legal fees and expenses.

27. Counsel for Oster says the decision of the Director in response to these claims fails to respect the statutory purpose reflected in subsection 79(2), which is to provide the fullest measure of statutory entitlement where it is appropriate to do so in order to make an employee “whole” for the effect of a violation of the *Act*.

28. He contends the Director erred in law in concluding there was no authority in the *Act* to award legal fees, advocate costs and related expenses. He says the term “actual out of pocket expenses” in paragraph 79(2) (d) can include such expenses and the circumstances of the case made it appropriate to award them.

29. Counsel for Oster argues that the same considerations that make an award of legal fees, advocate costs and related expenses appropriate also make it appropriate to give a substantial punitive award under paragraph 79(2) (c) to compensate for the bad faith treatment of her by Ventures, for the false accusations made against her and for the obvious effect the actions by Ventures had on her personally.

30. The Director concluded in the Referral Back Report there was no language in the *Act* supporting the proposition that the Director was authorized to provide a remedy based on “hurt feelings” or “bad faith”.

31. Counsel for Ventures has taken the position the Director is without authority to award legal fees, advocate costs and related expenses or to make an award based on “mental distress and hurt feelings”. Counsel says even if there were that authority, there is nothing particularly unique or complex that makes such an award appropriate.

ANALYSIS

32. I have already addressed, and disposed of, those aspects of the positions taken by Oster and Ventures in the referral back process that represent disagreements with, and challenges to, findings of fact. The remainder of this analysis will address the decision in the Referral Back Report on the remedies sought by Oster and the arguments made by the parties relating to the availability and appropriateness of those remedies.

33. As a backdrop, the Tribunal has consistently held that subsection 79(2), and its predecessor, subsection 79(4), allows for a complainant to be “made whole” at least in a financial sense, so as to place the complainant in essentially the same economic position that individual would have been in had a contravention of sections 8

or 83 or Part 6 not occurred: see *Afaga Beauty Service Ltd.* BC EST # D318/97, *W.G. McMahon Canada Limited*, BC EST # D386/99, *Angie MacKenzie*, BC EST # D033/00, *Britco Structures Ltd.* BC EST # D260/03, *Photogenis Digital Imaging Ltd./PDI Internet Café Incorporated*, BC EST # D534/02, *Rite Style Manufacturing Ltd. and M.D.F. Doors Ltd.*, BC EST # D105/05 and *Rose Miller*, BC EST # D062/07. In *Afaga Beauty Service Ltd.*, the Tribunal wrote:

This section of the *Act* [now section 79(2)] is unique in that it anticipates that a former employee may be reinstated after an unjust dismissal or . . . can receive compensation instead of reinstatement. In the latter case, appropriate compensation for loss of employment normally is based on the circumstances of the employee, e.g., length of service with the employer, the time needed to find alternative employment, mitigation, other earnings during the period of unemployment, projected earnings from previous employment and the like.

34. In a general sense, the remedies awarded under subsection 79(2) have reflected an identifiable economic loss, calculated either in terms of lost wages or the monetary value of a lost opportunity, as in a number of section 8 cases, or in terms of monetary compensation that reflects, more or less, the employee's common law wrongful dismissal entitlement, adjusted for mitigation, or the employee's section 63 entitlement to compensation for length of service, as in several section 83 and Part 6 cases.

35. In a few cases, the Tribunal has either fashioned or affirmed subsection 79(2) remedies that go beyond simple economic loss and reflect the following comments from *Tricom Services Inc.*, BC EST # D485/98:

With respect to compensation, the general principle of damages must be to put the individual in the same position the individual would have been in but for the breach of the statutory obligation. Section 79(4) [now section 79(2)] permits a remedy not available at common law. We are not in any way limited to, for example, such damages as might have been awarded in an action for wrongful dismissal. In our view, the statutory remedy should not be narrowly constructed and we have the power to fashion a remedy that is fair, compensatory and promotes compliance with the Act. In short, the remedy depends on the extent of the injury suffered because of the breach. Some of the factors we have considered are those relied on by the Tribunal in a recent decision *Afaga Beauty Service Ltd.* (BCEST #D318/97): length of employment with the employer; the time needed to find alternative employment; mitigation efforts undertaken; other earnings during the period of unemployment; projected earnings from previous employment; etc. The Tribunal is not limited to considering only those factors as which factors are appropriate will depend on the specific circumstances of each appeal.

36. The Tribunal has indicated there is no statutory authority to grant a remedy for emotional suffering related to a contravention of the *Act*: see *Capable Enterprises Ltd.*, BC EST # D033/98, *VCS Hytek Air-Conditioning Inc.*, BC EST # D201/98 and *Tricom Services Inc.*

37. In *W.G. McMahon Canada Limited*, the Tribunal stated that what is now subsection 79(2) (d) did not allow the Tribunal to order reimbursement of legal fees and disbursements. The same conclusion was stated by the Tribunal in *Rite Style Manufacturing Ltd. and M.D.F. Doors Ltd.*

38. Notwithstanding these earlier decisions, there is some merit in the submission of counsel for Oster that it is incongruous to approach the remedies available in subsection 79(2) in a way that substantially mirrors statutory entitlements found in other provisions of the *Act*. In my view, that approach does not reflect a full consideration of the purposes and objects of the *Act* and the value of the rights which are sought to be protected in section 8, section 83 and Part 6 of the *Act*.

39. That being said, it would not be appropriate for me, comprising a single Member Panel of the Tribunal in this appeal, to engage in a review and potential re-writing of the view taken by several different members of the

Tribunal on remedies available under what is now subsection 79(2) over the last twelve years, particularly when I do not have the benefit of complete submissions on this matter from any of the parties.

40. While the Tribunal is not bound by the doctrine of *stare decisis*, we have committed to the desirability for uniformity and consistency in decision making: see *Park Lane Ventures Ltd.*, BC EST # D211/03. That is not to suggest the objective of uniformity and consistency is absolute. A strict application of that objective would be counter-productive as the Tribunal must be able to evolve and remain responsive to changing legislative and policy objectives. In the circumstances of this case, however, the objective of uniformity and consistency must prevail over any concerns I may have about the correctness of the Tribunal's approach to available remedies under subsection 79(2).
41. Accordingly, I will follow the previous decisions of the Tribunal and the claims by Oster for compensation for emotional suffering and the bad faith exhibited by Ventures and for reimbursement of legal fees, advocate costs and related expenses are not accepted. As there is no other basis for challenging the Referral Back Report, I accept it and vary the Determination accordingly.

ORDER

42. Pursuant to Section 115 of the *Act*, I order the Determination dated August 22, 2008 be varied to order Ventures pay Oster an amount of \$1,019.84, together with any interest that has accrued under Section 88, and to order Ventures to pay additional administrative penalties in the amount of \$1000.00 for the contraventions of section 63 and section 83 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal