Employment Standards TRIBUNAL

An appeal

- by -

Langley Senior Resources Society
("LSRS")

- 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.: 2016A/115

DATE OF DECISION: December 6, 2016

DECISION

SUBMISSIONS

Paul Goldberg	on behalf of Langley Senior Resources Society
Shelley L. Wells	on her own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), Langley Senior Resources Society ("LSRS") has filed an appeal of a Determination issued by a delegate (the "delegate") of the Director of Employment Standards (the "Director") on July 28, 2016. In that Determination, the Director found that LSRS had contravened sections 18, 58 and 63 of the *Act* in failing to pay Shelley L. Wells ("Ms. Wells") wages, compensation for length of service, vacation pay and interest. The Director ordered LSRS to pay $7,052.99. The Director also imposed three $500 administrative penalties for the contraventions, for a total amount owing of $8,552.99.

2. LSRS appeals the Determination contending that the delegate erred in law and seeks to have the Determination varied.

3. This decision is based on the written submissions of LSRS and Ms. Wells, the section 112(5) "record" that was before the delegate at the time the decision was made, and the Reasons for the Determination. The delegate did not respond to my request for submissions.

FACTS AND ARGUMENT

4. Ms. Wells was employed as the Executive Director of LSRS, a society operating a seniors' resource centre, from September 10, 2014, until July 13, 2015. On July 26, 2015, Ms. Wells filed a complaint alleging that LSRS contravened the *Act* by failing to pay her regular wages, compensation for length of service and by making improper deductions from her wages.

5. The delegate held a hearing into the complaint on October 21, 2015. Mr. Goldberg and Shauna Sailer represented LSRS and Ms. Wells appeared on her own behalf. At issue before the delegate was whether or not Ms. Wells was entitled to regular wages, vacation pay, compensation for length of service, and to be compensated for improper deductions.

6. LSRS appeals only the portion of the Determination relating to vacation pay, along with the administrative penalty imposed for the contravention of section 58 of the *Act* (the vacation pay) and interest on those wages. Consequently, I have set out only the facts relevant to that issue.

7. Ms. Wells began working for LSRS on a part-time basis on September 10, 2014. Although Ms. Wells said that she maintained a record of her hours of work from September 10 until September 30, there were no records of her hours of work for that period available. LSRS agreed that Ms. Wells was not paid for that period of time. Ms. Wells' evidence was that Ms. Sailer agreed that the hours she worked during this period would be banked as vacation time, although that agreement was never incorporated into the Employment Agreement.

8. According to the Employment Contract, Ms. Wells' vacation time was to accrue from the time she started work full-time, which was October 1, 2014. Ms. Wells requested time off for a family vacation that had been scheduled prior to her employment. She negotiated unpaid leave time for that holiday, which was from December 15, 2014, to January 2, 2015. During her vacation, issues arose that required Ms. Wells' attention. The time she spent dealing with the issues was minimal and considered non-compensable given the amount of time she spent addressing them, as well as by virtue of her position they were issues she was responsible for. Ms. Wells' evidence was that, during her vacation, she worked for eight hours on some of those days, and for two to three hours on other days, as evidenced by her e-mails to Ms. Sailer.

9. The Employment Agreement provided that Ms. Wells would work a minimum of 36 hours per week and that overtime would be required from time to time and would not be compensated. LSRS expectation was that Ms. Wells would work whatever hours were required to get the job done, and a minimum of 36 hours, or four and a half days a week, at the Centre. Ms. Wells' understanding was that her salary was based on a 36 hour work week. With Ms. Sailer's approval, Ms. Wells worked at the Centre Monday through Thursday and from her home on Friday for one half day. Ms. Wells asserted that she should be paid for time worked during her vacation. Ms. Wells asserted that she was entitled to eight days of banked vacation time.

10. Pursuant to the Employment Agreement, Ms. Wells was entitled to five weeks' vacation annually. Ms. Wells went on medical leave on March 4, 2015. She remained on sick leave until July 12, 2015. Ms. Wells' employment was terminated on July 13, 2015.

11. In the course of reviewing payroll documents, Ms. Sailer also discovered that Ms. Wells had authorized payment of vacation time from December 15, 2014, until January 2, 2015. The money had not been deducted from Ms. Wells' final pay.

12. LSRS calculated a daily vacation rate based on Ms. Well's salary, divided by the total number of weeks per year, divided by the employee's days of work. Ms. Wells worked from September 10, 2014, to March 4, 2015, at which time she went on medical leave. LSRS took the position that Ms. Wells was only entitled to vacation pay for the 23 weeks she actually worked, or 11.06 days of vacation. She was also paid for 12 days of vacation from December 15, 2014, until January 2, 2015, days that were supposed to be unpaid leave. LSRS took the position that Ms. Wells was not entitled to additional vacation pay.

13. Ms. Wells did not submit timesheets for approval to LSRS' accounting department or to any Board member. The timesheets Ms. Wells submitted at the hearing were never approved nor, according to Ms. Sailer, ever seen by the Board. LSRS also contended that it had no knowledge that Ms. Wells worked during her vacation or during her medical leave other than a few e-mails she sent during these periods, and had not approved her hours of work during this time. LSRS also said that Ms. Wells did not seek, and was not granted, approval to work from home at any time.

14. The delegate considered sections 58 and 59 of the *Act* and noted that the *Act* did not provide for the banking of, or deferral of payment for hours worked. She accepted LSRS's evidence that the Employment Agreement did not allow employees to bank work time for future use as vacation and determined that Ms. Wells had not demonstrated an entitlement to banked hours for work performed from September 10 to September 30, 2014. The delegate also noted that the statutory wage recovery period was December 14, 2014, to July 13, 2015, and that any wages earned during the period September 10 to September 30, 2014, were outside that six month time limit.

15. The delegate rejected LSRS's argument that Ms. Wells' vacation entitlement should be pro-rated based on the actual days she worked, and determined that Ms. Wells was entitled to five weeks, or 25 days, vacation per

year according to the Employment Agreement. She determined that Ms. Wells had taken 12 days during December 2014 and January 2015, and was owed the balance of her entitlement of 13 days. The delegate stated that she accepted LSRS's calculation method for the vacation rate based on its policy, which was Ms. Wells' annual salary divided by 52 weeks, divided by 5 working days per week. Taking into consideration the April 1, 2015, wage increase, the delegate calculated that Ms. Wells was entitled to $5,500 in annual vacation pay.

Argument

16. LSRS says that the issue of how Ms. Wells' annual vacation was earned (i.e. accrued, or all at once on the first day of her employment) was never raised or discussed at the hearing. LSRS argues that the delegate's method of determining how Ms. Wells earned and took paid vacation, the calculation of how and when the days were earned and the application of the salary figure to any untaken vacation balance at the termination of employment was in error.

17. LSRS relies on the Employment Agreement and the Employee Handbook, both of which were submitted in evidence at the hearing, in support of its argument that Ms. Wells was to earn her vacation over time during the employment period. LSRS argues that the delegate erred in awarding Ms. Wells a full 5 weeks' vacation pay.

18. LSRS submits that Ms. Wells' vacation entitlement for the period September 10, 2014, to March 31, 2015, amounted to 13.8 days, and any unused balance was not approved for carry over.

19. Further, LSRS argues that Ms. Wells' probationary period ended March 10, 2015, and since she went on leave before that period, her vacation entitlement, which was based on acceptable performance, should be unenforceable.

20. Finally, LSRS argues that Ms. Wells' vacation entitlement should be based on her salary at the time the vacation was earned rather than the salary increase that came into effect on April 1, 2015.

ANALYSIS

21. 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.

22. 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

23. 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.

24. As the delegate did not respond to the request for submissions on the Employer's appeal, I must rely on the record and the Determination.

25. LSRS's Employee Handbook, which forms part of the record, provides that "vacation entitlement for employees in their first year of employment will have their vacation entitlement pro-rated from their hire date until March 31st". The Employment Agreement between the parties, which also formed part of the record, provided that Ms. Wells would be entitled to five weeks' vacation effective on the hire date.

26. Ms. Wells' evidence indicates that she understood her vacation pay was to be accrued. As noted in the Determination, any claims Ms. Wells may have had up to September 30, 2014, were outside the six month recovery period.

27. Based on the record, it is unclear to me how the delegate determined that Ms. Wells was entitled to five weeks' vacation. Ms. Wells' employment commenced September 10, 2014, on a part time basis. She commenced full time employment on October 1, 2014. She took vacation leave in December. She returned to work full time after her vacation ended on January 2, 2015. She worked full time until she took medical leave on March 5, 2016. Her employment was terminated July 13, 2015. Ms. Wells was employed for less than one year in total. During that period of approximately ten months, she took some vacation, although there was a dispute about whether it was part of her vacation entitlement or taken in lieu of work she had performed in September.

28. I find that the delegate's conclusion that Ms. Wells was entitled to five weeks' vacation pay in light of these circumstances to be based on a view of the facts that cannot reasonably be entertained. Furthermore, there is no analysis in the Determination about the provisions of the Employer's Handbook or Employment Agreement regarding the accrual method of calculating vacation entitlement, which it appears Ms. Wells agreed with.

29. I also conclude that the salary figure used by the delegate to be applied to Ms. Wells' vacation entitlement to be in error. I agree with the position of LSRS that the vacation entitlement should be based on the salary paid during the period the vacation was earned.

30. I do not agree with LSRS's argument that the vacation clause should be unenforceable given that Ms. Wells did not satisfactorily complete her probationary period. Section 67 of the *Act* provides that a notice of termination given to an employee who is on leave has no effect. Therefore, as I understand LSRS's argument that it had the right to terminate Ms. Wells' employment on March 10, 2015, which was the end of her

probationary period, to be unsustainable. Given that Ms. Wells was on medical leave as of March 5, 2015, LSRS was unable to terminate her employment at the end of the probationary period.

31. I find that the delegate erred in law and allow the appeal.

ORDER

32. Pursuant to section 115 of the *Act*, I allow the appeal. I Order that the Determination, dated July 28, 2016, be referred back to the delegate for a reconsideration of the issue of Ms. Wells' vacation entitlement.

Carol L. Roberts
Member
Employment Standards Tribunal