

An appeal

- by -

Shelley L. Wells

- 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/125

DATE OF DECISION: December 6, 2016

DECISION

SUBMISSIONS

Shelley L. Wells

on her own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Shelley L. Wells (“Ms. Wells”) 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 Langley Senior Resources Society (“LSRS”) had contravened sections 18, 58 and 63 of the *Act* in failing to pay 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. Ms. Wells appeals the Determination contending that the delegate erred in law and failed to observe the principles of natural justice in making the Determination.
3. This decision is based on Ms. Wells’ written submissions, the section 112(5) “record” that was before the delegate at the time the decision was made, and the Reasons for the Determination. Neither LSRS nor the delegate made any submissions in response to Ms. Wells’ appeal.

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. 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.
7. According to the Employment Agreement, 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 which 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.

8. 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.
9. Ms. Wells was entitled to five weeks vacation annually. Ms. Wells' salary was to increase effective April 2015.
10. Ms. Wells was responsible for policy and all related LSRC operations, including supervision of employees and payroll, under the general direction of the Society's Board. She reported to the Board and liaised with the Board on issues from time to time with Ms. Sailer.
11. LSRS had an automated payroll system and staff were paid by direct deposit. Although the system tracked the work hours of employees who were paid by the hour, it was not used by salaried staff. The payroll system required the signature of the Executive Director as well as a Board member.
12. Ms. Wells' evidence was that there were major problems with the accounting system and the use of time sheets when she first started and that she worked to address the oversights. Ms. Wells said that one of those oversights was the use of timesheets and because there were no timesheets in place, she tracked her own hours on a calendar when she started working for LSRC and implemented the use of timesheets by all staff beginning in January or February.
13. Ms. Wells said that she experienced backlash from staff when she attempted to implement changes that she believed were required in the workplace. As a result of the stress arising from the staff dissention as well as other workplace issues, Ms. Wells went on medical leave on March 5, 2015. She remained on sick leave until July 12, 2015.
14. At the time Ms. Wells went on sick leave, she left Ms. Sailer with a list of items that required attention. Ms. Sailer went to the office and attended to the items. Although Ms. Sailer inquired about Ms. Wells' health, Ms. Wells was not asked or expected to perform any work, either when she was in the hospital or when she convalesced at home. During this period, Ms. Sailer or other Board members attended the workplace on a regular basis to check e-mails. Ms. Wells' evidence was that during her sick leave she worked from home. Ms. Wells contended that she was owed for 54 hours of work between March 5 and April 9, 2015.
15. On April 9, 2015, Ms. Sailer asked Ms. Wells for the return of LSRS's laptop, which Ms. Wells had at her home, so that she could cover the Executive Director's duties while Ms. Wells was absent.
16. In April, Ms. Sailer became aware that Ms. Wells had authorized the bookkeeper to continue to pay her salary while she was on sick leave, and a Board member had inadvertently approved Ms. Wells' authorization for payment. On April 14, 2015, LSRS informed Ms. Wells that, while the Board would not seek repayment of the money already paid to her, further salary payments would stop while she was on sick leave.

17. 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.
18. LSRS calculated Ms. Wells' daily vacation rate based on her 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. As Ms. Wells was 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. LSRS also took the position that because Ms. Wells went on medical leave as of March 5, 2015, and did not work after this time, the salary increase did not take effect.
19. LSRS also took the position that because Ms. Wells only worked for the employer for slightly over five months, less than her probationary period, she was not entitled to "severance." Nevertheless, Ms. Wells was paid for several periods in March in an amount that represented almost four weeks' salary.
20. 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.
21. Ms. Wells' employment was terminated on July 13, 2015. LSRS took the position that Ms. Wells was not entitled to work for that day while Ms. Wells contended that she was entitled to pay on that day because she was called in and it took her an hour to get to work. Ms. Wells also contended that she was entitled to be paid at her increased annual salary rather than her original salary.
22. The delegate found that Ms. Wells was entitled to her salary increase based on the fact that she was employed as of April 1, 2015, even though she was on sick leave.
23. The delegate reviewed the emails between Ms. Wells and Ms. Sailer as well as doctor's notes and determined that Ms. Wells was not working during her medical leave between March 5 and April 9, 2015. The delegate accepted Ms. Sailer's evidence that she and other Board members covered Ms. Wells' position during that period.
24. The delegate also determined, based on payroll records and Ms. Sailer's undisputed evidence, that Ms. Wells received her full wages for the period March 5 to March 27, 2015.
25. The delegate also determined that Ms. Wells was entitled to be paid for two hours of work on July 13, 2015, pursuant to section 34 of the *Act*, as she had reported to work that day.
26. 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.

27. 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 accepted LSRS's calculation method for the vacation rate, which was the 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.
28. The delegate rejected LSRS's argument that because it had paid Ms. Wells the equivalent of almost four weeks wages for periods during which she performed no work, it had discharged its obligation to pay length of service compensation. The delegate found that LSRS' offset of money previously paid against the amount owed to her as compensation for length of service was contrary to section 21 of the *Act* and determined that Ms. Wells was entitled to additional wages.

Argument

29. Ms. Wells contends that the delegate erred in law by acting without any evidence or on a view of the facts which could not reasonably be entertained by improperly calculating her wage entitlement. Ms. Wells says she is entitled to amounts greater than those calculated by the delegate for deductions improperly made from her wages, as well as for wages owed for her last day of work as well as her "severance" entitlement.
30. Ms. Wells says that, in July, LSRS improperly deducted wages it had paid to her in March. She contends that the delegate misunderstood her claim for payment, stating that the issue was whether Ms. Wells was entitled to regular wages during her sick leave. Ms. Wells asserts that the delegate failed to properly apply the law to LSRS's deductions from her wages as "overpaid salary." Ms. Wells says that she did not claim that she was owed 54 hours of unpaid wages; rather, she asserted that LSRS deducted an amount from her final pay (which included wages as well as short term sick-leave entitlement) which had been paid to her 4 months earlier. Ms. Wells notes that, in the Determination, the delegate acknowledged LSRS's position that it would not seek repayment of what had already been paid. Ms. Wells says that even though the delegate acknowledged that LSRS contravened the *Act*, she was not reimbursed for the improper deductions.
31. Ms. Wells also argues that the delegate erred in determining the amount of compensation she was entitled to for her last day of work on July 13, 2015. Ms. Wells asserts that LSRS had paid her for seven hours on that day at her 2014 rate of pay rather than the April 1, 2015, rate, and the delegate improperly reduced the claim to two hours, deducting 5 hours of wages the employer had already paid her, in contravention of section 21 of the *Act*.
32. Ms. Wells further asserts that the delegate made both a factual and legal error in determining that she was entitled to one week's "severance." Ms. Wells asserts that her claim was not about "severance" but the pay difference given that she had already been paid four weeks "severance." Ms. Wells argues that rather than making a decision regarding her pay increase, the delegate reduced her "severance" from four weeks to one even after she had been paid an amount as "severance."
33. Finally, Ms. Wells argues that the delegate failed to make a determination regarding her claim that LSRS deducted sick leave and vacation pay "overpayment" from her final pay.

ANALYSIS

34. 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.

Error of Law

35. The Tribunal has 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.

36. In a separate appeal, LSRS contended that the delegate erred in law in concluding that Ms. Wells was entitled to compensation amounting to five weeks vacation. I have allowed that appeal and referred the issue of Ms. Wells’ vacation entitlement back to the delegate for reconsideration. I also find that the delegate did not specifically address the question of whether or not LSRS deducted Ms. Wells’ sick leave and vacation entitlement from her final pay, which constitutes an error of law. In referring the matter back to the delegate, both in respect of Ms. Wells’ appeal (see below) and LSRS’s appeal, I direct the delegate to specifically address these issues in her reconsideration of this matter.

37. I have reviewed Ms. Wells’ submission to the delegate regarding her claim. Under “summary of case”, which was prepared after the hearing, Ms. Wells indicated that she was seeking the sum of \$72.85 over and above what LSRS paid her for July 13, 2015. That amount was based on the rate of pay effective April 1, 2015, and included vacation pay on that amount. The amount awarded by the delegate represented 2 hours of work at the increased pay rate, plus vacation pay. I find no error in the delegate’s calculations, and no denial of natural justice or misunderstanding by the delegate of Ms. Wells’ claim.

38. In her “summary of case” regarding her “severance” entitlement, Ms. Wells asserted that she was owed \$1,324.68, representing the difference between her initial rate of pay and her increased rate of pay. Ms. Wells’ summary clearly indicated that the amount she believed owing to her as “severance” was based solely on the differential rate of pay.

39. Section 63 of the *Act* establishes a statutory liability on an employer to pay length of service compensation to an employee on termination of employment. This is often erroneously referred to, as in the present case, as “severance.” I find no basis to conclude that the delegate misunderstood or misconstrued the basis for Ms. Wells’ claim.

40. While noting that LSRS's payments to Ms. Wells during her medical leave were made in error and subsequent offsetting of those wages was contrary to section 21 of the *Act*, the delegate determined that the final payment was short of the one week wages Ms. Wells was entitled to. The delegate noted that,

...the Employer, in calculating the Complainant's entitlement for compensation for length of service has taken into account the March 2015 payments previously paid to the Complainant while she was on medical leave. ... As discussed above, I have taken into account the amounts that the Employer attempted to off-set in calculating the Complainant's entitlement to compensation for length of service. While the Employer did not directly deduct wages from the Complainant's wages, it did so indirectly, contrary to Section 21 of the *Act* prohibiting unauthorized deductions for any purpose.

41. While appearing to agree that offsetting Ms. Wells' compensation for length of service against money previously (over)paid by LSRS in error was contrary to the *Act*, the delegate nevertheless awarded Ms. Wells the equivalent of one week gross wages. In doing so, the delegate did not make a clear finding on the issue of whether or not LSRS off-set Ms. Wells' entitlement to compensation for length of service. It is not entirely clear how the delegate arrived at her conclusion on this issue. Further, the delegate did not appear to consider the Tribunal's jurisprudence in this respect, particularly the decision in *United Specialty Products Ltd.* (BC EST # D102/12, Reconsideration decision BC EST # RD127/12). In failing to make a clear determination on this point, I conclude that the delegate either acted on a view of the facts that cannot be entertained or adopted an erroneous method of assessment.

42. I allow the appeal.

ORDER

43. 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 whether LSRS in fact offset payments made to Ms. Wells' in March against her entitlement to compensation for length of service, and if so, whether those were made contrary to section 21 of the *Act*.

Carol L. Roberts
Member
Employment Standards Tribunal