



An appeal

- by -

Tanja Majer

- 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

TRIBUNAL MEMBER: Carol L. Roberts

FILE No.: 2004A/135

DATE OF DECISION: September 17, 2004

5. Did the Employer's failure to pay the overtime bank on demand result in a substantial alteration of a condition of employment, or constructive dismissal?
6. If the Employee was constructively dismissed based on the failure to pay the overtime bank on demand, is the employee entitled to compensation for length of service?

In the undated decision, the delegate says that no claim was made that a time bank was set up in accordance with section 42 at the original hearing, nor was there any evidence to suggest one had been established. She also says that there is no evidence a request had been made to pay any time bank, or that there was any refusal to pay. The delegate says that, had evidence been presented that a time bank been established, the employer may not have been penalized for a failure to maintain records in accordance with the Act, since a time bank is a method of recording overtime.

The delegate indicated that she sought, and received, submissions from the parties in order to address the Tribunal's questions. The Employer submitted that there was no time bank, and Ms. Majer submitted that she had an established pattern with the previous owner of taking time off when she worked additional hours. The delegate found that, had either party produced documentation of the establishment of a time bank on the referral back she would have been surprised, given the advanced nature of the proceeding and would have questioned the veracity of any such document.

The delegate found that no time bank had been established within the meaning of section 42. Given her findings on this question, she determined that she need not address the subsequent questions posed by the Tribunal.

Ms. Majer submitted that a time bank was established years before the sale of the office, and that, upon the sale of the clinic, her new employers assured her that her contract would not change. She argues that extra hours and overtime had accumulated in the time bank.

ANALYSIS

Section 42 of the Act provides as follows:

- (1) At the written request of the employee, an employer may establish a time bank for the employee and credit the employee's overtime wages to the time bank instead of paying them to the employee within the time required under section 17.
- ...
- (5) On termination of employment or on receiving the employee's written request to close the time bank, the employer must pay the employee any amount credited to the time bank.

The issues on the referral back are restricted to those questions posed by the Tribunal following the appeal; specifically, whether a time bank had been established under section 42.

Ms. Majer's submissions are a repeat of the arguments she advanced in her complaint and on appeal. She provides no evidence that a time bank was established at her written request. While it may be that a number of original documents went missing before the delegate's hearing, Ms. Majer does not allege that her written request to establish a time bank was among those documents.

In light of the evidence and submissions of the parties, I conclude that no time bank was established in accordance with section 42 of the Act. Therefore, the other questions posed by the Tribunal on the referral back need not be addressed.

I dismiss the appeal.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination dated October 20, 2003 be confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal