

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



DECISION

on her own behalf

on behalf of the Director of Employment Standards

SUBMISSIONS

Gillian MacGregor

Tanja Mayer

OVERVIEW

This is an appeal by Tanja Majer, pursuant to Section 112 of the *Employment Standards Act (Act)*, against an undated decision of the Director of Employment Standards (Director) received in the Tribunal office on July 29, 2004. The decision followed a referral back to the Director on a number of issues (Tribunal decision BC EST #D043/04).

Ms. Majer alleged that Dr. Masha Maxim Inc. and Dr. Nana Saric Inc. operating as Plaza Dental Centre constructively dismissed her by altering her job duties and failing to pay an overtime bank. She also claimed wages, statutory holiday pay, vacation pay and overtime wages. The Director's delegate determined that Ms. Majer was entitled to overtime wages of \$337.55, but was not owed regular wages, vacation pay or statutory holiday pay.

The delegate also concluded that Ms. Majer had not been constructively dismissed and that she was not entitled to compensation for length of service.

On appeal, the Tribunal found no error in the delegate's conclusions with respect to wages, overtime wages, statutory holiday pay or vacation pay. However, the Tribunal found that the delegate had failed to consider Ms. Majer's position with respect to the overtime bank:

The Delegate applied section 80(1) of the Act, which contained a limitation on recovery to wages arising six months before the complaint is made. The Delegate failed to consider whether there was an overtime bank in existence, and whether Majer demanded payment of the time bank on April 12, 2002, or within six months of the date of termination of employment. If, as Majer alleges, she did demand the time bank, and the Employer refused to pay the time bank the Employer was arguable in breach of section 42(3) of the Act. A breach of section 42(3) of the Act arguably may have an effect on the Determination of Majer's entitlement to payment of the overtime bank, the finding of the Delegate on the issues of constructive dismissal and compensation for length of service, and vacation pay arising.

The Tribunal referred the following issues back to the delegate for consideration and determination:

- 1. Was there an overtime bank in existence as of April 12, 2002 as provided by section 42 of the Act?
- 2. What was the value of the bank?
- 3. Did Majer demand the payment of the bank and the employer refused to pay?
- 4. When did this demand and refusal occur?

- 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.

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(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