



An appeal

- by -

Momo's Kitchen Ltd.
("Momo's")

- 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

ADJUDICATOR: April D. Katz

FILE No.: 2003A/139

DATE OF DECISION: August 12, 2003



DECISION

OVERVIEW

Cindy K. S. Lee (“Lee”) filed a complaint with the Director of Employment Standards (“Director”) after receiving her last pay cheque 4 weeks after the end of her employment with Momo’s Kitchen Ltd. (“Momo’s”). She claimed she had not been paid all the wages owed to her. The Director’s Delegate conducted an investigation and issued a Determination on April 30, 2003 which found that wages of \$721.96 were owed to Lee by Momo’s. Momo’s has appealed the Determination on the basis that the Director made an error of law in the Determination, failed to observe the principles of natural justice in making the Determination and that new evidence has become available that was not available at the time of the Determination.

The appeal proceeded by way of written submissions from the Appellant, the Respondent and the Director. The Director’s Delegate provided a copy of the documentation from the investigation file.

ISSUE

Is there evidence to support the conclusion that the Director erred in law or failed to observe the principles of natural justice in making the determination, or, is there evidence which has become available that was not available at the time the determination was being made that should be considered?

ARGUMENTS

Momo’s argues that no money is owed to Lee, that she was overpaid, and that Lee’s complaint to the Director was frivolous and an abuse for the purposes of the *Employment Standards Act* (“Act”). Specifically Momo’s argues that Lee was paid for hours she did not work and was given \$300 cash in December 2001 which was not credited as wages in the Determination. Momo’s position is that the Delegate refused to accept potential evidence offered from people who observed Lee receive \$300 cash. Momo’s also argues that the Director was biased in failing to advise Momo’s of an employer’s rights during the negotiations for settlement.

Lee’s argument in support of the Determination is in response to the 8 page submission from Momo’s. Lee relies on the evidence of her co-workers provided to the Delegate that she was not late for work and did not take more than 40 minutes for lunch. Lee argues that there was no time clock to punch to determine the actual hours she started and finished and disputes that she did not work the full hours expected. Lee argues that she in fact worked overtime at home because she did not have access to internet on her computer at work, but was responsible for updating the website for Momo’s and other internet activities.

Lee argues that Momo’s concern about any lateness or work absences arose for the first time after she gave her two week notice on January 21, 2002. Lee argues that her relationship with her employer was good until she refused to extend her employment beyond February 8, 2002 due to her conflicting plans. Lee points out that Momo’s raised her salary in July 2001 and thanked her in writing for her “hard work and enthusiasm!” at Christmas 2001. Lee submits that she had to work at home on occasions to complete internet assignments which effectively required overtime. Lee claimed credit for this overtime during the



investigation but because records of her hours were not kept the Delegate did not consider this additional time in calculating wages owed.

Lee argues that Momo's was in breach of section 18 of the *Act* in failing to provide Lee with her last pay cheque 6 days after her last day of work on February 8, 2002. Lee received her Record of Employment and last cheque on March 4, 2002. Lee submits that the Determination material show that Momo's was given until June 9, 2003 to appeal the April 30, 2003 Determination, more than 30 days. Lee also points out that the Determination directs Momo's to pay the amount owed "less the required statutory deductions" contrary to Momo's argument that they were not informed of an employer's rights.

Lee argues four points that show that Momo's position is inconsistent with the evidence submitted.

The Director's Delegate submission challenges the appeal on the basis of lack of evidence in support of the grounds of appeal. The submission directs the Tribunal's attention to the fact that Momo's appeal states it is based on error of law but no error is identified in Momo's submission. The Delegate argues that Momo's agrees that it paid Lee a salary for the period of employment and decided in the last pay cheque to deduct an amount on the basis of alleged hours that Lee was late to work from home or from lunch. The Delegate argues this is not an option for an employer in dealing with a salary. The Delegate submits that Momo's claim that \$300 cash was given to Lee was unsupported by any documentation during the investigation or with this appeal. The Delegate sites the requirement in Section 28 of the *Act* for an employer to "keep records" of the "dates of the annual vacation taken by the employee, the amounts paid by the employer and the days and amounts owing". No records were provided during the investigation or with this appeal to support a vacation payment of \$300 cash. The payroll records and other documents have no record of a \$300 payment in December 2001 to Lee for any purpose. The Delegate argues that Momo's has alleged bias on the part of the Delegate but has provided no evidence to support this claim. Finally the Delegate relied on the Determination and the information from the file of the investigation to support the Determination that show that the position of each party was disclosed to the other and opportunity to add new information was given until the Delegate proposed a settlement prior to making the Determination.

FACTS

The evidence for the most part is undisputed. I make the following findings of fact from the material presented by the parties or the undisputed findings in the Determination. Where the facts are in dispute I have set out the position of the parties and drawn a conclusion based on the evidence submitted.

Momo's hired Lee as a Marketing Assistant in February 2001 and her first day of work was April 2, 2001. The delay in the start date was related to the fact that Momo's had to finalize a contract with Western Economic Diversification Corporation (WEDC) to subsidize Lee's salary. After her probationary period in July 2001, Momo's reviewed Lee's status as an employee and her salary as was required by Clause 3 of the contract with WEDC. Lee's salary was increased on July 11, 2001 from \$1750 per month to \$1900 per month. Lee was paid half monthly with an advance payment on the 15th of the month and the balance less deductions on the last working day of the month.

Lee worked from 8 AM to 5 PM Mondays to Fridays. She brought her lunch to work and ate on site with other employees. She took between 30 and 40 minutes for lunch. Lee took paid sick days during her employment for half a day on May 15, 2001 and all of May 16, 2001 and August 22, 2001. No deductions were made from Lee's pay cheque due to these absences.



Lee was responsible for preparing invoices, bills of lading, accounts receivable and payable using the Quickbook program on her computer notebook. Her computer did not have a modem and was not connected to the internet. Lee updated the corporate website, prepared the corporate online newsletter and sent emails to other agents regarding Momo's advertisements from other staff's computers, who had access to the internet. Lee worked on the internet and other projects for Momo's at home on her own time and was not paid for this additional time.

Lee was on unpaid vacation from December 26, 2001 to January 11, 2002 inclusive, a total of 13 days excluding weekends. The vacation was for 10 working days plus January 1, 2002, a statutory holiday, and December 31, 2001, a company holiday.

Lee was paid her full \$950 half monthly salary on December 31, 2001. Lee was not paid from January 1, 2002 to January 15, 2002. Lee was paid for December 26, 2001, December 27, 2001, December 28, 2001 and December 31, 2001 normal working days while she was on vacation. Lee returned to work on Monday January 14, 2002 but was not paid for January 14, 2002 or January 15, 2002. Lee was not paid for January 1, 2002, a statutory holiday. As a result Lee was overpaid 1 day at the rate of \$87.69.

Lee was paid her full wages for the half a month from January 16, 2002 to January 31, 2002 on January 31, 2002.

Lee gave her two week written notice to Momo's on January 21, 2002. Her last day of work was February 8, 2002 one week after her notice. In her written note to her supervisor Lee thanked Momo's and wished them well. Lee indicated she was leaving to pursue an educational opportunity.

Lee received her last paycheque on March 4, 2003. Her Record of Employment which was enclosed was dated February 12, 2002. The paycheque was for 6 days of work, February 1, 4, 5, 6, 7 and 8, 2002. The cheque included 4% holiday pay based on a total salary of \$17429.70 for a total of \$697.19. Momo's then deducted \$300 and an additional 8 days gross pay. The calculations and deductions were not explained. Lee could not understand how Momo's had arrived at \$433.15. Lee was surprised by the substantial deductions from her last cheque and went to her employer on March 5, 2002 seeking an explanation. When Momo's refused to explain the calculation Lee filed the complaint with the Director, hoping for an explanation.

During her employment Lee was did not have any deductions made for late arrivals or illness. Lee was off for 1 ½ days, May 15, 2001 and May 16, 2001, with a fever and for one day on August 22, 2002. At Christmas 2001 Lee received a gift of perfume from Momo's with a card which stated "Thank your for all your hard work & enthusiasm! Have a very happy New year! Warmest wishes, Vivian Dec 2001". Vivian was Lee's supervisor.

The Delegate determined that based on the evidence submitted from Momo's pay records, Lee was paid \$18,136.67. After deducting the \$87.69 for the day which was overpaid the base wage for calculating vacation pay is \$18048.98. The vacation pay due on \$18948.98 is \$721.96.

The last period, February 1, 2002 to February 8, 2002 the pay was \$570 gross. After statutory deductions the February 8, 2002 net pay was \$449.53. Added to this net pay is the \$721.96 holiday pay for a total of \$1171.49. Lee was paid \$433.15.



Momo's deducted \$300 from the last pay cheque. The explanation given was that Momo's gave Lee \$300 cash at Christmas. Lee disputes receiving this cash payment. There are no records of a \$300 wage payment from Momo's to Lee in December in excess of the standard salary cheques on the 15th and 31st of the month. Momo's indicated they could take lie detector tests and produce affidavit evidence of people who had observed Lee being paid. Momo's did not produce this evidence during the investigation or with this appeal. I find that if this payment was made to Lee, Momo's did not consider it wages or vacation pay and that is the reason it does not show in the payroll records.

Momo's states in the appeal submission that Lee worked fewer hours than the number she was paid for. Lee disputes this allegation. If Lee's salary was to be adjusted for time missed at work it should have been adjusted in relation to the time not worked and the parties could have produced records of the days and times in dispute. The decision to deduct wages without notice to Lee was contrary to the employment arrangement. It is impossible to determine what hours Lee actually worked because the employer did not keep hourly records. The evidence, in fact shows that Lee was paid a monthly salary not an hourly wage. The calculation of any hours not worked is not available for this appeal and therefore cannot be considered relevant for any deduction.

Momo's deducted 8 days wages from Lee's final cheque without justification. Momo's suggests in their submission that Lee prepared payroll cheques and it therefore responsible for any deductions. Lee left her employment on February 8, 2002 and was not employed at the time her cheque was prepared. I find that she did not prepare her last cheque.

Momo's suggests Lee inflated her salary to increase her vacation pay and Momo's had extra time and expense to prepare Lee's cheque. Momo's has not provided any information to support this allegation. The figures set out in Lee's submission are supported by Momo's payroll records sent to the Delegate. I find that the Determination is based on Momo's payroll records.

LAW AND ANALYSIS

The onus of proof for establishing that a Determination is incorrect rests with the Appellant.

Section 112(1) of the Act provides that a person may appeal a determination on the following grounds:

- (a) the director erred in law
- (b) the director failed to observe the principles of natural justice in making the determination; or
- (c) evidence has become available that was not available at the time the determination was being made.

Momo's relies on all three ground of appeal. In this appeal the burden is on Momo's to show that the Director erred in law, failed to observe the principles of natural justice in making the Determination or that new evidence has become available that was not available at the time of the Determination.



In *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 - Coquitlam)*, [1998] B.C.J. No 2275 (C.A.) the B.C. Court of Appeal set out the elements of 'error of law' as follows:

- (a) a misinterpretation or misapplication of a section of the Act;
- (b) a misapplication of an applicable principle of general law;
- (c) acting without any evidence;
- (d) acting on a view of the facts which could not reasonably be entertained; and
- (e) exercising discretion in a fashion that is wrong in principle.

As the Tribunal has stated in earlier decisions there may be some instances when errors of fact may give rise to errors of law. However, an appeal to the Tribunal is not a re-investigation of the complaint. It is a proceeding to decide whether there is any error in the Determination. The Tribunal will not substitute its opinion for that of the Director without some basis for doing so. The burden is on Momo's to demonstrate that there are grounds for dismissing or varying the determination.

There is no evidence in Momo's submission to support a misapplication of a section of the *Act*, a misapplication of a principle of general law, acting without evidence, acting without supporting evidence, or exercising discretion in a fashion which is wrong in principle.

Momo's submission states that the Delegate wrongly relied on sections 18 and 21 which are set out below.

If employment is terminated

- 18 (1) An employer must pay all wages owing to an employee within 48 hours after the employer terminates the employment.
- (2) An employer must pay all wages owing to an employee within 6 days after the employee terminates the employment.

Deductions

- 21 (1) Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.
- (2) An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations.
- (3) Money required to be paid contrary to subsection (2) is deemed to be wages, whether or not the money is paid out of an employee's gratuities, and this Act applies to the recovery of those wages.

Momo's did fail to pay Lee her last cheque within the 6 days of her last day of work contrary to section 18. Momo's deducted money from Lee's cheque without Lee's permission contrary to section 21 without justification in the payroll records. The Determination recalculated the amount owing and found that Momo's owe Lee \$721.96.



The principles of natural justice are, in essence, procedural rights that ensure parties a right to present their evidence and be heard by an independent decision maker. Momo's had the right to know what allegations were made by Lee and that Momo's had the right to respond. Momo's written submission suggests that Momo's expected the Director to assist Momo's in deciding what evidence it should submit, for example affidavit evidence or lie detector evidence. It was not for the Director to make these decisions but for Momo's to decide what evidence should be submitted to support Momo's position. I find that Momo's was given the information about Lee's complaint and asked for the normal business records the *Act* requires an employer to keep under sections 28.

“Payroll records

- 28** (1) For each employee, an employer must keep records of the following information:
- (a) the employee's name, date of birth, occupation, telephone number and residential address;
 - (b) the date employment began;
 - (c) the employee's wage rate, whether paid hourly, on a salary basis or on a flat rate, piece rate, commission or other incentive basis;
 - (d) the hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis;
 - (e) the benefits paid to the employee by the employer;
 - (f) the employee's gross and net wages for each pay period;
 - (g) each deduction made from the employee's wages and the reason for it;
 - (h) the dates of the statutory holidays taken by the employee and the amounts paid by the employer;
 - (i) the dates of the annual vacation taken by the employee, the amounts paid by the employer and the days and amounts owing;**
 - (j) how much money the employee has taken from the employee's time bank, how much remains, the amounts paid and dates taken.
- (2) Payroll records must
- (a) be in English,
 - (b) be kept at the employer's principal place of business in British Columbia, and
 - (c) be retained by the employer for 2 years after the employment terminates.”

There is no evidence of a denial of natural justice in the material filed with this appeal.

If there had been a denial of natural justice, the onus is on an appellant in an appeal of a Determination to show on a balance of probabilities that the Determination ought to be varied or cancelled. To be successful the submissions from the appellant must demonstrate some error in the Determination, either in the facts accepted, the factual conclusions reached or in the Director's analysis of the applicable law.

The final ground for this appeal is that there is new evidence that was not available during the investigation. In the written submission in support of the appeal Momo's headings were as follows.

1. Introduction

Argument and Evidence Concerning the Complainant

Argument and Evidence Concerning the Delegate

2. Error of Law

Contravention of the Intent of the ESA



Exceeding Authority under Sections 18 and 21 of the ESA

Abuse of Power under Section 98 of ESA to Penalize

Denial of Basic Rights

3. **Delegate Failed to Observe Natural Justice**
4. **Intentional Neglect of Evidence**
5. **Remedy**

Momo's submission raised different arguments under each point in its written submission but there is no new evidence that was not presented to the Delegate. Momo's has several complaints about the delay in response time from the Delegate after information was submitted but there is no new substantive evidence in the appeal submission in respect of the complaint.

In the "Remedy" section of the submission Momo's asks the Tribunal to cancel the Determination, assess a penalty against Lee for abuse of process and impose discipline on the Delegate for abuse of power and breach of public trust. The Tribunal has the authority to confirm, vary or cancel a Determination. The other remedies sought are beyond the jurisdiction of the Tribunal.

The requests convey the sense of frustration with the process that Momo's experienced. The problem with the appeal submission is that although it makes general statements about the state of affairs during Lee's employment, there is no new evidence to support a finding of fact that differs from those found by the Delegate. For example, Momo's alleges that Lee was paid wages of \$300 in cash. Momo's did not record the wages that that were allegedly paid. The *Act* specifically provides that an employer must keep records of wages paid for 2 years in section 28 set out below.

Momo's has no record of a \$300 payment. The Delegate asked for the records and reported to Momo's that Lee was denying receiving the payment. The Delegate could not find a record of this payment. Momo's offered alternative evidence from witnesses but the fact that the \$300 may have been paid and not recorded supports the conclusion that the payment was not for wages. Momo's knew that all wages had to be recorded in the payroll records.

Momo's was frustrated that the Delegate went on to make a finding and ask for a cheque to settle the matter. Momo's did not agree that any money was owed to Lee. The proposal letter did not set out Momo's appeal rights. The letter did not mention a penalty that the Delegate had spoken of in the conversations with Momo's.

It is important to understand that in an effort to settle the matter without a final decision the Delegate may write a settlement proposal in a letter. The letter is not the final decision. The Delegate put a time limit for the offer in the letter to try and reach a settlement. The time limit is whatever the negotiator wishes to use and is not covered by any time periods in the *Act*.

Until there is a final decision by the Director there is nothing on which to base an appeal. After Momo's phoned for information on how to appeal the Delegate's proposal the Delegate decided to write a final decision in the form of this Determination. When the final decision, the Determination, was issued, the appeal rights and the time periods were all set out. The Delegate decided that no penalty was appropriate.



The Determination set out a different method of calculating the amount owed and the different method resulted in a different amount owed than in the proposal letter.

After reviewing all the submissions and the law, I find no evidence that the Director erred.

CONCLUSION

Based on the evidence on the facts presented I find that there is no evidence of an error on the part of the Director in reaching the conclusions in the Determination. Momo's appeal is dismissed.

ORDER

Pursuant to section 115 of the Act, the Determination dated April 30, 2003 is confirmed.

April D. Katz
Adjudicator
Employment Standards Tribunal