Employment Standards TRIBUNAL

An appeal

- by -

Mildred Wighton
("Wighton")

- 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:	Kenneth Wm. Thornicroft
FILE No.:	2003A/250
DATE OF DECISION:	December 23, 2003

DECISION

INTRODUCTION

This is an appeal filed by Mildred Wighton ("Wighton") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*). Ms. Wighton appeals a Determination that was issued by a delegate of the Director of Employment Standards (the "Director") on August 20th, 2003 (the "Determination").

Ms. Wighton filed a complaint against West Chilcotin Community Health Services (the "Employer") in which she sought nearly $10,800 in unpaid regular wages, approximately $27,000 in unpaid overtime pay, approximately $1,600 for vacation pay, compensation for length of service as result of having been terminated without just cause and reimbursement of an alleged unauthorized $299 payroll deduction.

The Director's delegate rejected all of Ms. Wighton's claims save for the unauthorized payroll deduction. Accordingly, the delegate determined that the Employer owed Ms. Wighton the sum of $310.67 being an unlawful deduction made by the Employer to recover, on a pro-rated basis, a moving allowance, and an additional amount reflecting section 88 interest.

By way of a letter dated November 28th, 2003 the parties were advised by the Tribunal's Vice-Chair that this appeal would be adjudicated based on their written submissions and that an oral hearing would not be held (see section 107 of the *Act* and *D. Hall & Associates v. Director of Employment Standards et al.,* 2001 BCSC 575).

Ms. Wighton appeals the Determination on two grounds. First, she says that the Director's delegate erred in law [section 112(1)(a) of the *Act*] in failing to conclude that Ms. Wighton was "wrongfully dismissed".

Second, Ms. Wighton says that the Director's delegate failed to observe the principles of natural justice in making the Determination [section 112(1)(b)]. According to Ms. Wighton, there was "overwhelming evidence" to support her overtime claims and that this evidence was ignored by the delegate. Ms. Wighton asserts that the delegate's failure to take into account this latter body of evidence reflects bias on the delegate's part.

I propose to address each issue in turn.

ANALYSIS

Just Cause for Termination

The Employer is a non-profit society which formerly provided counselling services to both children and adults. I understand that the Employer is no longer a functioning agency. In any event, Ms. Wighton was employed by the Employer as a "mental health counsellor" from June 11th, 2001 until April 19th, 2002 when she was terminated.

On April 19th, 2002 the Employer issued a letter to Ms. Wighton--under the signature of three officers and two directors of the Employer--indicating that Ms. Wighton was being dismissed for cause. The April 19th letter identified a number of performance and other deficiencies including failing to file monthly client activity reports despite being specifically directed to do so, failing to complete daily time

records as directed, an "unprofessional attitude" toward the Employer's board members, disclosing confidential information (in particular, matters discussed in board meetings), and an instance of insubordination by refusing--despite a specific request--to turn over a key to a cabinet containing client files.

In her appeal form, Ms. Wighton does not deny any of the above matters; rather, her position is that her dismissal was "unauthorized" and that it was subsequently "withdrawn". In a subsequent submission to the Tribunal, dated November 9th, 2003, Ms. Wighton, while not necessarily wholly denying the allegations made against her, tried to explain her reasons for acting as she did.

Ms. Wighton's position that her termination was "unauthorized" is problematic in that one is either terminated or one is not. A termination cannot be "reversed" as it were, by some subsequent conduct. At best, the parties might agree to some sort of new employment contract after a former agreement has been terminated (in law, this may amount to what is known as a "novation") in which case the parties may agree to waive or limit liability for the wrongful termination of the former employment agreement.

However, the Employer's April 19th letter amounts to a clear and unequivocal notice of immediate termination, allegedly for just cause. Having issued such a letter, the Employer was not then free to take the unilateral position, at some later point in time, that it did not terminate Ms. Wighton on April 19th. To reiterate, Ms. Wighton's employment was unilaterally and unequivocally terminated on April 19th, 2002. If that termination was unlawful--in the sense that the Employer did not have just cause--the Employer would be obliged to pay compensation for length of service even if it subsequently attempted to "rescind" the termination.

I have before me a letter to Ms. Wighton dated June 5th, 2002; this letter is signed by Bernie Wiersbitzky in his capacity as a director of the Employer. Mr. Wiersbitzky was also one of the five signatories to the April 19th termination letter. In this letter Mr. Wiersbitzky states that Ms. Wighton's termination "was carried out without proper authorization by the current and existing registered board of directors" and, accordingly, Mr. Wiersbitzky states that "I am therefor rescinding (retroactive effective to April 4th, 2002 with full entitlement to pay from that date forward) your alleged suspension and subsequent dismissal and am also requesting that you immediately resume your duties until this matter can be properly considered by the full board".

Clearly, Mr. Wiersbitzky was embroiled in some sort of dispute with his fellow board members regarding who had the authority to terminate Ms. Wighton. Nevertheless, as noted above, Ms. Wighton's employment was terminated--and quite apart from whether the parties purporting to act on behalf of the Employer held the formal authority to do so--on April 19th, 2002. That termination could not, legally, be "retroactively rescinded".

The issue that is properly before me is not whether the individuals carrying out the termination held the formal authority to terminate but, rather, whether the Employer had just cause to terminate as of April 19th. I understand, in any event, that Ms. Wighton never returned to work. Thus, there does not appear to have been a concluded contract between the parties whereby Ms. Wighton would, in effect, be reinstated. If there were such an agreement, then Ms. Wighton's remedy would be to sue in the civil courts for damages for breach of the reinstatement agreement. Neither the Branch nor this Tribunal has the statutory authority to order reinstatement in a case such as this nor does either body have the statutory authority to award damages for breach of an alleged "reinstatement" agreement.

Thus, the only issue is whether or not Ms. Wighton's termination was lawful in the sense that there was just cause. Very clearly, the individuals who signed her termination letter had, at the very least, the ostensible authority to act on behalf of the Employer such that the Employer was bound by the actions of its apparent agents (namely, the five signatories).

I have reviewed the evidentiary record that was before the delegate and, having done so, cannot conclude that the delegate erred in law in finding that the Employer had just cause for termination. That being so, Ms. Wighton was not entitled to any compensation for length of service [see section 63(3)(c) of the *Act*]. In my view, there is no reason to call into question the delegate's analysis of the facts and law as set out at pages 11 through 14 of the reasons for decision appended to the Determination.

The unpaid wage claim

The delegate rejected Ms. Wighton's claims for both regular wages and overtime pay. In determining these latter matters, the delegate acknowledged that the Employer failed to keep proper time records as mandated by the *Act* but nevertheless was unable to put any stock in Ms. Wighton's records (which the delegate characterized as being impractical, unreliable and unreasonable). Further, and with respect to the overtime claim, the delegate accepted the Employer's submission that Ms. Wighton was not entitled to be paid any overtime by reason of section 34(1)(r) of the *Employment Standards Regulation.*

Having reviewed the evidentiary record, I am in agreement with the delegate that Ms. Wighton fell within the ambit of section 34(1)(r) and otherwise failed to prove an independent contractual right to overtime pay. Further, and in any event, I see no reason to disturb the delegate's finding that Ms. Wighton failed to prove that she worked the overtime hours she claimed to have worked.

There is nothing in the record before me to indicate that the delegate failed to observe the principles of natural justice in making the Determination. The delegate was not, nor does she appear to have been, biased against Ms. Wighton. The record discloses that Ms. Wighton was given a fair and full opportunity to present her case to the delegate. The fact that the delegate found Ms. Wighton's evidence wanting (as do I) is not, of itself, proof of bias.

ORDER

Pursuant to section 115 of the *Act,* I order that the Determination be confirmed as issued in the amount of **$310.67** together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act,* since the date of issuance.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal