An Application for Reconsideration

- by -

Tanja Majer
("Majer")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE No.: 2004A/203

DATE OF DECISION: January 4, 2005

DECISION

SUBMISSIONS:

Tanja Majer — on her own behalf

OVERVIEW

This is an application filed by Tanja Majer ("Majer") pursuant to section 116 of the *Employment Standards Act* (the "*Act*") to reconsider a decision issued by Tribunal Member Carol Roberts (B.C.E.S.T. Decision No. D168/04, issued September 17th, 2004). Neither the respondent employer, nor the Director, filed any submission with the Tribunal in response to the application. The application consists solely of a one-page "Reconsideration Application Form" and a few appended documents, all of which were previously submitted to one or both of the Director and/or the Tribunal.

The Application is entirely without merit and, accordingly, is dismissed.

PREVIOUS PROCEEDINGS

The Determination

On October 20th, 2003 a Director's delegate issued the Determination (and accompanying "Reasons for Determination") pursuant to which Dr. Masha Maxim Inc. and Dr. Nana Saric Inc., operating as the "Plaza Dental Centre", were ordered to pay Ms. Majer the sum of $354.21 on account of unpaid overtime pay and accrued section 88 interest. The Determination was issued following a 2-day hearing that took place on February 20th and May 1st, 2003.

According to the delegate's Reasons, Ms. Majer was employed by the Plaza Dental Centre as a receptionist/billing clerk (and occasionally, as a dental assistant) from February 14th, 1992 to September 30th, 2002 and was earning $45,000 per year when her employment ended. In June 2001, the ownership of the dental clinic changed hands although Ms. Majer's employment continued uninterrupted by the change in ownership. Ms. Majer's last working day was April 16th, 2002 at which time she commenced sick leave; she never returned to work and submitted a letter of resignation on September 30th, 2002.

Ms. Majer filed a complaint alleging that she had been "constructively dismissed" [see section 66 of the *Act*] and that she was entitled to unpaid regular wages, statutory holiday pay, vacation pay and overtime pay.

The delegate appears to have made two, somewhat inconsistent findings with respect to section 66. First, the delegate noted that if there was a change in Ms. Majer's conditions of employment, that change was effected when the ownership of the dental clinic changed hands and that, in effect (although the delegate did not use this term), there was a novation whereby Ms. Majer agreed (or at least did not object to) new terms and conditions of employment. Second, the delegate simply held that there was no "substantial alternation" of Ms. Majer's terms and conditions of employment and that her resignation was not prompted by the employer's failure to pay her overtime wages.

Ms. Majer's claim for additional regular wages was dismissed since the delegate was not satisfied that Ms. Majer had proven an entitlement on this account. The essence of the parties' dispute over regular wages flowed from the agreement between the parties regarding the usual workday; Ms. Majer testified that her workday was 7.5 hours per day whereas the employer's position was that the workday was 8.0 hours including a 1/2 hour paid lunch break. The delegate does not appear to have resolved this conflict in the evidence.

Ms. Majer's claim for statutory holiday pay (November 11th, 2001) was dismissed as being outside the statutory 6-month wage recovery period [in this regard, the delegate apparently relied on section 80(1) of the *Act*]. The delegate concluded that Ms. Majer had been paid all of the vacation pay to which she was entitled. The delegate held for Ms. Majer with respect to a portion of her overtime claim and awarded her $337.55 on this latter account.

The Appeal

Ms. Majer appealed the Determination on the grounds that the Director's delegate erred in law and failed to observe the principles of natural justice. In addition, Ms. Majer claimed that she had new evidence that was not available at the time the Determination was being made.

Tribunal Member Paul Love adjudicated the appeal based on the parties' written submissions. In Reasons for Decision issued on March 12th, 2004 (B.C.E.S.T. Decision No. D043/04), Member Love confirmed the Determination as it related to the delegate's findings that Ms. Majer i) was not "constructively dismissed" at least to the extent that her terms and conditions of employment were not substantially altered after the change in ownership of the dental clinic; ii) was not entitled to statutory holiday pay for November 11th, 2001; and iii) was not entitled to any vacation pay beyond that already paid to her by the employer after Ms. Majer submitted her resignation.

However, Member Love held that the delegate failed to adequately address Ms. Majer's assertion that the employer unlawfully failed to pay her her "banked overtime" pursuant to her demand for payment allegedly made on April 12th, 2002. The relevant portions of Member Love's decision, at pages 6-10, are reproduced below:

> The Delegate arguably appears to have applied the limitation set out in section 80(1) to deny recovery for wages in the overtime bank...
>
> If, however, there was a time bank, and a demand was made by Majer on April 12, 2004 [sic, 2002] as she claims in her appeal submission, it is arguable that by virtue of [section] 42(3) of the *Act*, the overtime wages became due on April 12, 2004 [sic, 2002], within the scope of recovery provided by section 80(1)(a) of the *Act*...
>
> If there was a time bank, and Majer did not demand payment of the bank, the amount of wages in a time bank may well come due at the date of termination, pursuant to section 42(5). In such a circumstance, if the Employee resigned, the non-payment of the bank could not give rise to a constructive dismissal claim, as the non-payment had no effect on the employer's decision to resign...
>
> In my view, the Delegate does not appear to have considered the following questions, which should be considered in order to assess whether non-payment of a time bank constitutes constructive dismissal or substantial alteration of a condition of employment pursuant to section 66 of the *Act:*

> 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 alternation 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?...
>
> I refer back to the Delegate the issues of a time bank, demand for the time bank, the amount of the time bank, and issues of constructive dismissal and compensation for length of service. I leave it to the Delegate after conducting the appropriate fact finding to consider and exercise her discretion. If, however, the Delegate finds a constructive dismissal, Majer would also be entitled to compensation for length of service...
>
> I would expect that the Delegate wold approach this issue by way of a continuation of the hearing process that she conducted with regard to the claims. Credibility of the parties may be an issue for the Delegate...

Accordingly, Member Love ordered the Director to "hear or investigate, consider and determine" the above-noted six questions by way of a "referral back" order made under section 115(1)(b) of the *Act.*

The Referral Back Report

As detailed in an undated report filed with the Tribunal on July 29th, 2004, the Director's delegate "asked for and received written submissions from the parties to assist me in deciding the Tribunal's questions". The relevant portions of the delegate's July 29th report are reproduced below:

> At the original hearing before the Delegate, no claim was made there was a time bank set up in accordance with Section 42 of the *Act.* No records were maintained by the employer...
>
> At the hearing, no evidence was introduced by either party to suggest the existence of a time bank, nor any request to pay it nor any refusal to pay. The employer and the employee had a relationship that allowed the employee to take time off when she worked additional hours in previous days or weeks...
>
> Dr. Maxim submitted there was no time bank. Ms. Majer submitted she had established a pattern of taking time off when she worked additional hours. She established the pattern with a previous owner of the clinic...
>
> Ms. Majer did not claim she made a written request that the employer establish a time bank...
>
> No time bank existed within the meaning of Section 42 of the *Act.* I do not need to consider the other questions, which are predicated on the existence of a time bank.

The Tribunal's Decision on the Referral Back Report

The parties were invited to make submissions with respect to the delegate's referral back report and with those submissions in hand, Tribunal Member Roberts issued a decision (B.C.E.S.T. Decision No.

D168/04, issued September 17th, 2004) with respect to the matters remitted to the Director by Member Love.

Tribunal Member Roberts was satisfied that a time bank had never been established as provided for in section 42 of the *Act* and, accordingly, she confirmed the original Determination (at pages 3-4):

> 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 in the referral back need not be addressed.

THE APPLICATION FOR RECONSIDERATION

On November 24th, 2004, Ms. Majer applied for reconsideration of Member Roberts' decision. Although the application is timely, it is, in my view, entirely without merit.

The reconsideration provision of the *Act* is not to be used as a second opportunity to challenge findings of fact made by the adjudicator, unless such findings can be characterized as lacking any evidentiary foundation whatsoever.

Ms. Majer asserts that "Section 42 was breached by Dental Plaza in 2002". However, there is absolutely no evidence that a formal time bank was ever established in accordance with section 42 of the *Act.* The evidence suggests that an informal practice may have existed whereby Ms. Majer could take some time off in lieu of overtime worked but this informal practice was never formalized into a section 42 "time bank". As was detailed in both the Determination and Member Love's decision, any overtime that might have been informally "banked" was not recoverable by reason of the 6-month limitation on wage recovery that is set out in section 80(1)(a) of the *Act.* Ms. Majer was awarded compensation for overtime worked within the wage recovery period prescribed by the *Act.*

Member Love, in his Reasons for Decision, suggested that if there was a formal time bank, coupled with a formal demand for payment within the 6-month wage recovery period, Ms. Majer might be entitled to additional compensation [see section 42(5) of the *Act*]. Accordingly, Member Love directed that the delegate investigate the question of whether there was a formal time bank. The delegate concluded that the parties never established a section 42 time bank. Member Roberts concurred in that finding as do I.

Quite simply there is absolutely no evidence that a section 42 time bank was ever formally established. In her Reconsideration Application, Ms. Majer says that the employer "falsified" payroll records and "refused to provide documentation to avoid paying extra wages"--these are serious, but nonetheless wholly unsubstantiated, allegations.

ORDER

The application to reconsider the decision of Member Roberts in this matter is **refused.**

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal