



Civil Resolution Tribunal

Date Issued: September 18, 2020

File: SC-2020-003263

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Hammer v. Vitalis Extraction Technology Inc.*, 2020 BCCRT 1059

B E T W E E N :

JAEMIE HAMMER

APPLICANT

A N D :

VITALIS EXTRACTION TECHNOLOGY INC. and JOEL SHERLOCK

RESPONDENTS

REASONS FOR DECISION

Tribunal Member:

Sherelle Goodwin

INTRODUCTION

1. This dispute is about wrongful dismissal.
2. The applicant, Jaemie Hammer, was previously employed by the respondent, Vitalis Extraction Technology Inc. (Vitalis), between January and April 2020. Ms. Hammer says she continued to work for Vitalis after being laid off on March 23, 2020 but was

not paid for that work. Ms. Hammer also says Vitalis terminated her employment on April 9, 2020 without giving her any notice. She claims \$3,076 for two weeks' work, \$3,076 in lieu of 2 weeks' notice, and payment of \$909 in accrued vacation time. Ms. Hammer foregoes her claim for any amount over \$5,000 to fit within the CRT's small claims monetary limit.

3. The respondent, Joel Sherlock, appears to be an officer or employee of Vitalis. I will address Mr. Sherlock's role in this dispute below.
4. The respondents deny Ms. Hammer continued to work after March 23, 2020. They also say Ms. Hammer was not entitled to notice of termination as she was still under probation. The respondents say Vitalis was entitled to keep Ms. Hammer's accrued vacation pay of \$909 in partial satisfaction of a \$1,400 pay advance Vitalis paid Ms. Hammer prior to her termination. The respondents ask the dispute be dismissed.

JURISDICTION AND PROCEDURE

5. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act* (CRTA). The CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the CRT must apply principles of law and fairness, and recognize any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.
6. The CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. I decided to hear this dispute through written submissions because I find that there are no significant issues of credibility or other reasons that might require an oral hearing.
7. The CRT may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of

law. The CRT may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.

8. Where permitted by section 118 of the CRTA, in resolving this dispute the CRT may order a party to do or stop doing something, pay money or make an order that includes any terms or conditions the tribunal considers appropriate.
9. A preliminary issue is whether Ms. Hammer's claim is within the CRT's jurisdiction, or whether it falls within the Employment Standards Branch (ESB)'s jurisdiction under the *Employment Standards Act* (ESA). An employee is only prevented from bringing a civil action when the employee is seeking to enforce a right that is only available under the ESA. Where an employment contract provides certain benefits, the employee may pursue a remedy by civil action, such as through a CRT dispute (see the non-binding but persuasive decision in *Bellagama v. International Tentnology Corp.* 2018 BCCRT 549). I find Ms. Hammer's claims for wages, vacation pay, and contractual notice, arise under the parties' private employment contract. So, I find Ms. Hammer's claim is within the CRT's small claims jurisdiction over debt and damages.
10. A second preliminary issue is Mr. Sherlock's role in this dispute. None of the parties described Mr. Sherlock's role at Vitalis, or his role in this dispute. Ms. Hammer has not made any allegations against Mr. Sherlock and the evidence does not suggest that Mr. Sherlock is involved in any of Vitalis' decisions or actions at issue. So, I dismiss Ms. Hammer's claims against Mr. Sherlock.

ISSUES

11. The issues in this dispute are:
 - a. Did Ms. Hammer continue to work after Vitalis temporarily laid her off and, if so, must Vitalis pay Ms. Hammer for that work?
 - b. Was Vitalis required to provide Ms. Hammer with notice of her termination under the employment contract?

- c. How much must Vitalis pay Ms. Hammer for her continued work, in lieu of notice, or for accrued vacation, if anything?

EVIDENCE AND ANALYSIS

12. In a civil claim such as this one the applicant, Ms. Hammer, must prove her claim on a balance of probabilities. I have reviewed all submissions and evidence provided, but I will only refer to that which explains and gives context to my decision.
13. Ms. Hammer signed an employment agreement with Vitalis on January 3, 2020. On January 13, 2020 she began working for Vitalis as an accounts manager. On March 15, 2020 Ms. Hammer received an email from her manager (MM) telling her to work from home starting March 16, 2020, due to COVID-19 safety precautions. On March 23, 2020 Vitalis temporarily laid off Ms. Hammer and the rest of the sales team. On April 9, 2020 Vitalis terminated Ms. Hammer's employment. None of this is disputed.

Did Ms. Hammer continue to work after the March 23, 2020 lay-off?

14. In its March 23, 2020 letter to Ms. Hammer Vitalis wrote that Ms. Hammer was temporarily laid off and relieved of her job duties, effective immediately. Ms. Hammer says she spoke to MM on the phone. MM told Ms. Hammer that the sales team was going to "continue moving business opportunities along" to help Vitalis. Ms. Hammer interpreted MM's statement as a clear expectation for Ms. Hammer and the sales team to continue working, despite temporary lay-offs. Ms. Hammer says she agreed to continue working and that MM thanked her for her efforts.
15. Ms. Hammer says she continued to work until April 3, 2020. Ms. Hammer submitted screenshots of her work emails, work phone calls, and work calendar between March 23 and April 3, 2020. Based on those screenshots, I find Ms. Hammer attended daily sales team meetings online, contacted clients and co-workers through email, phone, and online meetings, and sent updated quotes to clients.

Based on the January 3, 2020 employment agreement I find these tasks are part of Ms. Hammer's described job duties as an accounts manager.

16. In a July 16, 2020 signed statement, Ms. Hammer's co-worker (X) wrote that Vitalis expected him to continue working as a sales associate, even though he was laid off at the same time as Ms. Hammer. X wrote that he and Ms. Hammer continued to have daily online meetings, continued to meet with managers, and continued to make sales for Vitalis, after March 23, 2020.
17. Vitalis says there was no expectation for any employee to work during lay off and denies that Ms. Hammer worked between March 23 and April 3, 2020. However, Vitalis did not address Ms. Hammer's evidence showing she continued to send emails, take phone calls, and attend sales meetings. Nor did Vitalis provide any contrary evidence, such as a statement from MM, or explain why it could not obtain such evidence.
18. Based on Ms. Hammer's screenshots and X's statement, I find Ms. Hammer did continue to work her normal duties between March 23 and April 3, 2020. I also find Vitalis encouraged Ms. Hammer to continue working after being laid off, through MM's conversation with Ms. Hammer and MM's ongoing sales team meetings. On balance, I find Ms. Hammer is entitled to payment for that work, as set out in the employment agreement. I will address the amount below.

Is Ms. Hammer entitled to notice or pay in lieu of notice?

19. It is undisputed that Vitalis terminated Ms. Hammer's employment on April 9, 2020, without notice.
20. Under the employment agreement, either party may terminate Ms. Hammer's employment with a minimum of 2 weeks' notice, or the minimum amount of notice under the applicable legislation, if that is more than 2 weeks. The agreement sets out a 3-month probationary period for Ms. Hammer and I find Ms. Hammer was in that probationary period when Vitalis terminated her employment. The agreement is silent on whether notice is required to terminate employment during probation.

21. An express probationary clause in an employment contract may rebut the presumption of reasonable notice, provided no statutory entitlement is contravened (see *Ly v. British Columbia (Interior Health Authority)*, 2017 BCSC 42). During a probationary period, an employer has the implied contractual right to dismiss an employee without notice and without giving reasons, provided the employer acts in good faith in assessing the employee's suitability for a permanent position. (see *Jadot v. Concert Industries Ltd.*, 1997 CanLII 4137 (BCCA)).
22. Despite the notice provision in the employment agreement, I find Vitalis was not required to give Ms. Hammer 2 weeks' notice to terminate her employment, as she was still within her probationary period. However, Vitalis must show it acted in good faith in assessing Ms. Hammer's suitability for a permanent position. Good faith requires that the employer make it clear to the probationary employee what its expectations are and give the employee every reasonable opportunity to demonstrate their suitability. The onus rests on the employer to justify the dismissal by proving its decision was based on an honest, fair and reasonable assessment of the employee's suitability with regard to job skills, performance, judgment, compatibility, reliability and future with the company (see *O'Hara v. Selwyn Resources*, 2009 YKSM 6).
23. Vitalis says it deemed Ms. Hammer unsuitable for her role. However, it did not explain how it assessed Ms. Hammer's suitability. Ms. Hammer says that, in early March 2020, she received an informal employee evaluation over the phone with MM. She says MM told her that she was doing a great job, learning quickly, and already building good sales opportunities. Ms. Hammer says MM told her to "keep up the good work". Vitalis has not provided any evidence disputing Ms. Hammer's positive performance evaluation, such as performance data or a statement from MM. Nor has Vitalis explained why it could not provide such evidence.
24. I find Vitalis' decision to temporarily lay off Ms. Hammer on March 23, 2020 inconsistent with a finding that she was unsuitable for her position. If Ms. Hammer was unsuitable, I would anticipate Vitalis would terminate her employment on March

23, 2020. Further, it is undisputed that Vitalis offered Ms. Hammer \$1,400 in its March 23, 2020 temporary lay-off letter, provided Ms. Hammer sign a Wage Deduction Authorization Agreement. I find the \$1,400 was a pay advance and find such an advance more consistent with a temporary lay off than a determination that Ms. Hammer was to be terminated for unsuitability.

25. As noted above, the onus is on Vitalis to show it acted in good faith in assessing Ms. Hammer's suitability for the position of accounts manager. On balance, I find Vitalis has failed to prove that it acted in good faith. So, I find Ms. Hammer is entitled to reasonable damages for dismissal without notice. I will address the amount of damages below.

How much must Vitalis pay Ms. Hammer?

26. For Ms. Hammer's ongoing work between March 23 and April 3, 2020, I find she is entitled to payment of 2 weeks' wages. Ms. Hammer claims \$3,076, which is consistent with the \$80,000 annual salary noted in the employment agreement. However, Vitalis must also calculate and remit the usual statutory deductions from any gross pay Ms. Hammer is entitled to. Ms. Hammer says her biweekly net pay from Vitalis was \$2,279.57. Although Ms. Hammer provided no supporting evidence, Vitalis did not dispute this amount and I find it a reasonable net payment amount. So, I find Vitalis must pay Ms. Hammer \$2,279.57 net for her 2 weeks' work between March 23 and April 3, 2020.

27. As noted above, I find Vitalis' \$1,400 payment to Ms. Hammer was a pay advance. Ms. Hammer signed the Wage Deduction Authorization Agreement on March 31, 2020, which I find allows Vitalis to deduct the balance of the advance from Ms. Hammer's pay. So, I find Vitalis is entitled to deduct the \$1,400 pay advance from Ms. Hammer's \$2,279.57 pay. This leaves \$879.57.

28. Ms. Hammer accrued \$909 worth of vacation time by the time she was terminated on April 9, 2020. Instead of paying Ms. Hammer her vacation time, Vitalis applied the \$909 vacation pay to Ms. Hammer's outstanding \$1,400 pay advance, relying

on the Wage Deduction Authorization Agreement. None of this is disputed. As I have already addressed repayment of the \$1,400 pay advance, I find Vitalis must pay Ms. Hammer her \$909 in accrued vacation pay.

29. I turn now to Ms. Hammer's damages for dismissal without notice.
30. I do not agree with Ms. Hammer that she is entitled to 2 weeks' pay in lieu of notice, as I found that the employment agreement's notice provision does not apply during probation. Although Ms. Hammer's claim is not for ESA entitlements, the ESA does provide useful guidance. Under section 63(1) of the ESA, Ms. Hammer is not entitled to any compensation in lieu of notice, as she worked at Vitalis for less than 3 consecutive months. Factors that will inform an assessment of reasonable notice at common law include the character of the employment, the length of service, the employee's age and the availability of similar employment having regard to the employee's experience, training and qualifications (see *Buchanan v. Introjunction Ltd.*, 2017 BCSC 1002).
31. I have considered Ms. Hammer's salary, her role as an accounts manager, and her nearly 3 months' employment with Vitalis in finding that 1 weeks' gross wages in lieu of notice is reasonable in the circumstances. So, I find Vitalis must pay Ms. Hammer \$1,533.50 in lieu of notice.
32. In summary I find Vitalis must pay Ms. Hammer \$2,279.57 net for 2 weeks' work, \$909 for accrued vacation pay, and \$1,533.50 in lieu of notice, less Ms. Hammer's \$1,400 pay advance. This equals \$3,322.07.
33. The *Court Order Interest Act* applies to the CRT. Ms. Hammer is entitled to pre-judgement interest on the \$3,222.07 in wages and damages from April 9, 2020, the date of her termination, to the date of this decision. This equals \$18.01.
34. Under section 49 of the CRTA and CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. I see no reason in this case not to follow that general rule. I find Ms. Hammer is entitled to reimbursement of \$50 in CRT fees.

35. As Vitalis was unsuccessful in this dispute I find it is not entitled to reimbursement of its claimed \$1,221.12 in dispute-related expenses. Even if Vitalis had been successful, I would find it is not entitled to reimbursement of administrative time spent on this dispute, as I find there are no extraordinary circumstances in this dispute which would justify such an order under CRT rule 9.5.

ORDERS

36. Within 14 days of the date of this order, I order Vitalis to pay Ms. Hammer a total of \$3,390.08, broken down as follows:

- a. \$3,322.07 for wages, vacation pay, and damages in lieu of notice,
- b. \$17.97 in pre-judgment interest under the *Court Order Interest Act*, and
- c. \$50 in CRT fees.

37. Ms. Hammer is entitled to post-judgment interest, as applicable.

38. Ms. Hammer's claims against Mr. Sherlock are dismissed.

39. Under section 48 of the CRTA, the CRT will not provide the parties with the Order giving final effect to this decision until the time for making a notice of objection under section 56.1(2) has expired and no notice of objection has been made. The time for filing a notice of objection is 28 days after the party receives notice of the CRT's final decision. The Province of British Columbia has enacted a provision under the *COVID-19 Related Measures Act* which says that statutory decision makers, like the CRT, may waive, extend or suspend mandatory time periods. This provision is expected to be in effect until 90 days after the state of emergency declared on March 18, 2020 ends, but the Province may shorten or extend the 90-day timeline at any time. A party should contact the CRT as soon as possible if they want to ask the CRT to consider waiving, suspending or extending the mandatory time to file a Notice of Objection to a small claims dispute.

40. Under section 58.1 of the CRTA, a validated copy of the CRT's order can be enforced through the Provincial Court of British Columbia. A CRT order can only be enforced if it is an approved consent resolution order, or, if no objection has been made and the time for filing a notice of objection has passed. Once filed, a CRT order has the same force and effect as an order of the Provincial Court of British Columbia.

Sherelle Goodwin, Tribunal Member