Employment Standards TRIBUNAL

An appeal

- by -

0788104 B.C. Ltd. carrying on business as The Local Kitchen
(the "Employer")

- 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 (as amended)

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE No.: 2009A/139

DATE OF DECISION: January 5, 2010

DECISION

SUBMISSIONS

Patrick Dunkley	on behalf of 0788104 B.C. Ltd. carrying on business as The Local Kitchen
Jason Ducklow	on his own behalf
Katherine Wulf	on behalf of the Director of Employment Standards

INTRODUCTION

1. On September 15, 2009, and following an oral hearing conducted on March 31, 2009, a delegate of the Director of Employment Standards (the "delegate") issued a Determination (the "Determination") ordering 0788104 B.C. Ltd., carrying on business as The Local Kitchen (the "Employer"), to pay its former employee, Jason Ducklow ("Ducklow"), the sum of $923.68 on account of 1 week's wages as compensation for length of service payable under section 63 of the *Employment Standards Act* (the "*Act*") together with concomitant section 58 vacation pay and section 88 interest. Further, and also by way of the Determination, the delegate levied a $500 monetary penalty (see section 98) against the Employer. Thus, the total amount payable under the Determination is $1,423.68.

2. The facts, in very brief form, are that Mr. Ducklow was laid off and not recalled within the 13-week period permitted by the *Act* (see section 63(5)) and thus was deemed to have been dismissed as of the date of the original temporary layoff. The delegate held that the Employer did not have just cause for dismissal and that Mr. Ducklow's refusal to return to work in a lesser position at a markedly lower wage rate did not constitute a refusal of a reasonable offer of alternative employment (see section 65(1)(f)). Given Mr. Ducklow's tenure, he was entitled to 1 week's wages as compensation for length of service.

3. The Employer, who operates a restaurant in Victoria, now appeals the Determination on the basis that the delegate failed to observe the principles of natural justice in making the Determination (see section 112(1)(b)). Although not specifically raised in its Appeal Form, the Employer's appeal submission also arguably asserts that the delegate erred in law in her interpreting and application of section 65(1)(f) of the *Act*. This latter provision states: "65. (1) Sections 63 and 64 do not apply to an employee…(f) who has been offered and has refused reasonable alternative employment by the employer."

4. I am adjudicating this appeal based on the parties' written submissions (see *Act*, section 103 and *Administrative Tribunals Act*, section 36) and in deciding this appeal I have reviewed the delegate's "Reasons for the Determination" ("Reasons") as well as the brief written submissions filed by the delegate, the Employer and Mr. Ducklow. I now turn to the substantive grounds of appeal.

NATURAL JUSTICE

5. The Determination was issued approximately 5 ½ months after the complaint hearing. This lengthy delay has not been adequately explained nor are delays of this duration to be encouraged. Nevertheless, there is no evidence before me that this delay affected the outcome of the complaint proceedings nor is there any evidence that it caused the Employer any prejudice. In *Atkinson*, BC EST # D113/09, I rejected the very same argument as is advanced in this appeal and, at para. 16, observed:

> In *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 the B.C. Human Rights Tribunal heard several sexual harassment complaints about 32 months after they were originally filed. The Supreme Court of Canada observed that in the administrative context, delay, standing alone, does not amount to an abuse of process. The delay must be "unacceptable" and coupled with proof of actual prejudice flowing from the delay. Here, the Appellant does not complain about pre-hearing delay but, rather, about the delay in issuing a decision following the conclusion of the hearing. In my view, while it would have been preferable for the delegate's reasons to have been issued sooner than 5 ½ months after the hearing date, that delay falls well short of being "unacceptable" in light of the *Blencoe* decision and other decisions since *Blencoe* that have addressed the same issue. Given that there is no evidence of actual prejudice relating to post-hearing delay in issuing the Determination, I find that there was no breach of the principles of natural justice flowing from this situation (see also *Quackenbush v. Purves Ritchie Equipment Ltd.*, 2006 BCSC 246 where a post-hearing delay of 23 months in the context of a human rights adjudicative process fell short of constituting an abuse of process; in *Quackenbush*, the petitioner also argued that the delay compromised his ability to pursue an appeal or review process).

6. The Employer asserts, at page 1 of its submission appended to its Appeal Form:

> During this delay on ruling [sic], which ended up taking 6 months, I believe too much time passed to subjectively make a decision on the evidence presented, as [the delegate] made a determination on an issue in which was not to be made [sic].

The Employer says that it never argued that it had just cause (section 63(3)(c)) to dismiss Mr. Ducklow and thus queries why this issue was addressed in the delegate's Reasons (see Reasons, pages R3 and R4-R5). The Employer says "the only issue in question was the offer for reasonable alternative employment". However, as is detailed at page R3 of the delegate's Reasons, the Employer presented evidence (both in chief and by way of cross-examination of Mr. Ducklow) that suggested it *was* putting "just cause" in issue. While it might have been preferable for the delegate – at the complaint hearing – to specifically ask the Employer whether it was arguing cause, I cannot fault the delegate for addressing an issue that seemingly flowed from the evidence tendered by the Employer. It should perhaps also be remembered that the Employer was represented by its general manager, a person who I assume has no legal training, and thus the delegate may have thought it best to err on the side of ensuring that all possible arguments flowing from the evidence before her were addressed in her Reasons. Indeed, if the delegate had failed to address the just cause issue, she faced the risk of her decision being subsequently attacked for failing to consider a key argument advanced by the Employer. In the circumstances, I am not persuaded that the delegate's decision to address the matter of just cause in her Reasons constituted a breach of the principles of natural justice. This ground of appeal is dismissed.

OFFER OF REASONABLE ALTERNATIVE EMPLOYMENT

7. Section 65(1)(f) of the *Act* (reproduced above) states that an employer is not required to pay compensation for length of service if it made an offer of reasonable alternative employment that was refused by the employee. The Employer's argument on this point is as follows (Employer's submission, page 1):

> When I offered alternative employment to Mr. Ducklow, I said I could only afford $14/hr to start and when things became busier, this rate would be increased. Although this rate is considerably lower than the $45,000 [per annum] sous chef position he occupied, let it be known he was only at this pay rate for less than 50% of his tenure with The Local Kitchen. During this layoff period, let it be known that the economy was producing record numbers in regards to unemployment and we at The Local Kitchen were feeling this economic downturn like many others. Our strategy, like many other businesses, was to reduce some salaries, this allowing us to employ more of our staff, as to keep their lively hoods [sic] afloat, while being employed at the Local Kitchen. When things started to pick up this strategy has since allowed us to do this. When Mr. Ducklow's position was replaced, once he refused reasonable alternative employment,

> his replacement took this lower rate position. His replacement has since been given an increase in salary as per the same deal offered to Mr. Ducklow.
>
> In conclusion, The Local Kitchen's management and ownership feel that Mr. Ducklow was offered reasonable alternative employment after his layoff.

8. Mr. Ducklow worked at the Employer's restaurant for approximately 9 months and was earning $45,000 per annum when his employment ended (he was laid off due to a "shortage of work" according to the Record of Employment issued by the Employer). As noted at the outset of these reasons, this temporary layoff was deemed to be a dismissal as of the original date of layoff by reason of section 63(5) of the *Act* since he was not recalled within 13 weeks.

9. Although not recalled to his former position within 13 weeks of his original layoff, he was offered an opportunity to return to work before the 13-week period expired. At the point of layoff, Mr. Ducklow held the position of "sous chef" earning $45,000 per annum (about $21.63 per hour based on the definition of "regular wage" set out in section 1 of the *Act*). The uncontroverted evidence before the delegate was that in late January 2009 the Employer's general manager contacted Mr. Ducklow and offered to rehire him as a "first cook" at a $14 per hour wage rate. This latter position offered less status and responsibility, and about a 35% lower wage, than the position Mr. Ducklow held when laid off. Mr. Ducklow refused the Employer's offer of re-employment and the issue before the delegate was whether this refusal constituted a refusal of an offer of reasonable alternative employment. The delegate – correctly in my view – held that section 65(1)(f) did not apply and thus the Employer was not relieved from its statutory obligation to pay Mr. Ducklow 1 week's wages as compensation for length of service.

10. While it might have been entirely reasonable and prudent for the *Employer* to offer re-employment on substantially less generous terms, it does not follow that the *employee's* refusal to accept a lesser position and absorb a substantial pay cut was unreasonable. It must be remembered that section 65(1)(f) is not a simple codification of the common law "mitigation" rule where in a wrongful dismissal case, for example, the employer is entitled to a "credit" for any wages that an employee earned (or reasonably could have earned) during a reasonable notice period. Section 65(1)(f) is a *complete defence* to a claim for section 63 compensation for length of service. That being the case, employees are not obliged to accept any and all offers of re-employment. Rather, they are only obliged to accept "reasonable" re-employment offers.

11. In *Evans v. Teamsters Local Union No. 31*, [2008] 1 S.C.R. 661 the Supreme Court of Canada discussed what amounts to a "reasonable" offer of re-employment in determining whether an employee has failed to mitigate their damages. At para. 30, the majority observed:

> I do not mean to suggest with the above analysis that an employee should always be required to return to work for the dismissing employer and my qualification that this should only occur where there are no barriers to re-employment is significant. This Court has held that the employer bears the onus of demonstrating both that an employee has failed to make reasonable efforts to find work and that work could have been found (*Red Deer College v. Michaels*, 1975 CanLII 15 (S.C.C.), [1976] 2 S.C.R. 324). Where the employer offers the employee a chance to mitigate damages by returning to work for him or her, the central issue is whether a reasonable person would accept such an opportunity. In 1989, the Ontario Court of Appeal held that a reasonable person should be expected to do so "[w]here the salary offered is the same, where the working conditions are not substantially different or the work demeaning, and where the personal relationships involved are not acrimonious" (*Mifsud v. MacMillan Bathurst Inc.* 1989 CanLII 260 (ON C.A.), (1989), 70 O.R. (2d) 701, at p. 710)… (my underlining)

12. As noted above, I agree with the delegate that the re-employment offer in this case was *not* reasonable from Mr. Ducklow's perspective. A veiled (and contractually unenforceable) suggestion that if Mr. Ducklow

accepted the position he might, in time, be returned to his former wage rate did not make the Employer's offer reasonable. The Employer concedes the new wage was "considerably lower" than the former wage. On that basis alone, leaving aside the lesser status of the new position, the Employer's offer was not reasonable. It follows that I would dismiss the Employer's appeal and confirm the Determination.

ORDER

13. Pursuant to section 115(1)(a) of the *Act*, I order that the Determination in this matter, dated September 15, 2009, be confirmed as issued in the amount of $1,423.68 together with whatever additional interest that has accrued pursuant to section 88 since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal