Employment Standards TRIBUNAL

An appeal

- by -

0762736 B.C. Ltd. carrying on business as Wharfside Eatery
(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: Robert E. Groves

FILE No.: 2010A/139

DATE OF DECISION: January 5, 2011

DECISION

SUBMISSIONS

Maria Hernandez	on behalf of 0762736 B.C. Ltd. carrying on business as Wharfside Eatery
Terry Hughes	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal brought on behalf of 0762736 B.C. Ltd. carrying on business as Wharfside Eatery (the "Employer"). It challenges a determination dated August 31, 2010, (the "Determination") issued by a delegate of the Director of Employment Standards (the "Delegate"), in which the Employer was found to have contravened sections 63 and 58 of the *Employment Standards Act* (the "*Act*") in respect of one of its employees, the complainant, Ryan Medwed ("Medwed").

2. The Delegate ordered the Employer to pay $144.00 for compensation for Medwed's length of service, vacation pay of $5.76, and interest under section 88 of the *Act* in the amount of $1.71. The Delegate also imposed two administrative penalties of $500.00, one resulting from the Employer's failure to pay wages, and the other due to the Employer's neglecting to respond to a demand to produce records. The total amount found to be payable was $1,151.47.

3. I have before me the Determination and the Reasons supporting it, the Appeal Form delivered to the Tribunal on behalf of the Employer along with a short submission, the record produced pursuant to section 112(5) of the *Act*, and a submission from the Delegate.

4. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act*, and Rule 17 of the Tribunal's *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings when it decides appeals. My review of the material before me persuades me that I may decide the merits of this appeal on the basis of the written documentation before me without conducting an oral, or for that matter an electronic, hearing.

FACTS

5. The Employer operates a restaurant in Victoria. On August 10, 2009, it commenced to employ Medwed as a food runner.

6. Medwed's employment ended on March 7, 2010. He told the Delegate, and the Delegate accepted, that he "called in sick" on that day, and was told by the Employer's principal, Maria Hernandez ("Hernandez"), that he was "off the schedule" and that he should not return to work thereafter. Medwed asserted that he did not quit.

7. Medwed filed a complaint under the *Act*, claiming non-payment of wages. The Delegate commenced an investigation. He sent a letter directed to the Employer, dated April 22, 2010, by registered mail and regular mail, setting out the particulars of Medwed's complaint. The letter was accompanied by a Demand for Employer Records issued pursuant to section 85 of the *Act*. It requested a response no later than May 13, 2010. It also

stated, among other things, that a failure to participate in the investigation might result in a determination being issued based solely on the information provided by Medwed.

8. The Canada Post records obtained by the Delegate revealed that the registered mail version of the April 22, 2010, communication was successfully delivered at both the civic and registered office addresses for the Employer. The regular mail version was not returned to the Branch.

9. Hernandez telephoned the Delegate and left a voicemail message on April 28, 2010. The Delegate called Hernandez twice thereafter, without success. He did, however, leave a message on her voicemail asking her to contact him. It appears she did not do so.

10. The Delegate received no response to his April 22, 2010, correspondence by the May 13, 2010, deadline. On May 18, 2010, the Delegate again wrote to the Employer by registered and regular mail, referring to his earlier communication, and again requesting a reply, this time by June 4, 2010. The Delegate again warned the Employer that a failure to respond might result in a determination being issued based on the account given by Medwed. He also warned that the determination might also include a penalty for the failure to provide the employer records.

11. As before, the Canada Post records confirmed to the Delegate that the May 18, 2010, correspondence was successfully delivered to the Employer.

12. Despite these attempts, no response or records were provided to the Delegate by the Employer, either before the stated due dates, or at all.

ISSUE

13. Is there a basis for my deciding that the Determination must be varied or cancelled, or that the matter must be referred back to the Director for consideration afresh?

ANALYSIS

14. The appellate jurisdiction of the Tribunal is set out in section 112(1) of the *Act*, which reads:

> 112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:
>
> (a) the director erred in law;
>
> (b) the director failed to observe the principles of natural justice in making the determination;
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> (c) evidence has become available that was not available at the time the determination was being made.

15. Section 115(1) of the *Act* should also be noted. It says this:

> 115 (1) After considering whether the grounds for appeal have been met, the tribunal may, by order,
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> (a) confirm, vary or cancel the determination under appeal, or
>
> (b) refer the matter back to the director.

16. The Employer's Appeal Form indicates that it challenges the Determination on the basis that evidence has become available that was not available at the time the Determination was being made. More specifically, the Employer alleges that Medwed had on occasion missed a shift for reasons that were uncertain, and that Hernandez had spoken to Medwed expressing her "concern" for him, but that in the end he simply did not show up for work on the day in question, and so he must be construed to have abandoned his employment without notice.

17. The Tribunal's right to consider an appeal based on new evidence under subsection 112(1)(c) incorporates an obligation to exercise a discretion. The discretion must be exercised with caution. In general, an appellant will not be permitted to rely on evidence that was available and could have been presented during the investigation leading up to a determination. Moreover, the clearer it is that an appellant has either refused, or neglected, to participate in the investigation, the more strictly this principle will be applied (see *Senor Rana's Cantina Ltd.*, BC EST # D017/05, *Re 607470 BC Ltd. (c.o.b. Michael Allen Painting)*, BC EST # D096/07).

18. Here, the evidence is clear, and the Employer does not dispute, that it received notice of the investigation, and the substance of Medwed's complaint, in a timely way, yet it made no reply, nor did it supply the records that the Delegate requested. In these circumstances, the Delegate can hardly be blamed for relying on the information provided by Medwed when preparing the Determination. It is also, I think, too late for the Employer to suggest that the Delegate got it wrong, by offering an interpretation of the relevant events for the purposes of this appeal that the Employer could easily have presented before the Determination was issued.

19. Even if I am wrong in concluding that the evidence on which the Employer seeks to rely is now new, I am further of the view that it is not sufficiently probative to warrant my disturbing the Delegate's conclusion that Medwed's employment was terminated in circumstances entitling him to the award of wages contained within the Determination. The Delegate accepted that Medwed called in sick on the day his employment ended. The Employer does not dispute this, but implies that Medwed's reason for being absent was not genuine, and so he must be deemed to have abandoned his employment.

20. The Delegate's accepting Medwed's reason for being absent was a finding of fact which the Tribunal will be very reluctant to disturb. In order for the Tribunal to decide to do that it must be shown that the Delegate's finding was irrational, perverse, or inexplicable. This is so because the appellate jurisdiction of the Tribunal under section 112 does not permit it to correct errors of fact. Instead, the Tribunal may only correct errors of law. An error of fact does not amount to an error of law unless the Tribunal concludes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have made the impugned finding of fact (see *Gemex Developments Corp. v. B.C. (Assessor)* (1998) 62 BCLR 3d 354; *Delsom Estates Ltd. v. British Columbia (Assessor of Area 11 – Richmond/Delta)* [2000] BCJ No.331).

21. In my view, the Delegate was entitled to accept Medwed's statement that he did not attend work on March 7, 2010, because he was ill, and that he never formed an intention to quit his employment. The Employer's impugning Medwed's veracity on appeal, and its vague allusion to a prior warning relating to absences, is in this case insufficient to persuade me that the Delegate's finding was irrational, perverse, or inexplicable.

22. It follows that I see no reason to disturb the Delegate's conclusion that Medwed's employment was terminated by the Employer in circumstances entitling Medwed to the wages referred to in the Determination, and that the Employer should be responsible for paying the administrative penalties.

ORDER

23. Pursuant to section 115 of the *Act*, I order that the Determination dated August 31, 2010, be confirmed.

Robert E. Groves
Member
Employment Standards Tribunal