

An appeal

- by -

Sigma Inn & Suites Ltd.
(“Sigma Inn”)

- 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: Raewyn J. Brewer

FILE No.: 2012A/135

DATE OF DECISION: February 8, 2013

DECISION

SUBMISSIONS

Paul Yun

on behalf of Sigma Inn & Suites Ltd.

OVERVIEW

1. Pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) Sigma Inn & Suites Ltd. (“Sigma Inn”) has filed an appeal of a Determination issued by a delegate (the “Delegate”) of the Director of Employment Standards (the “Director”) on October 11, 2012. In that Determination, the Director ordered Sigma Inn to pay its former employee, Kaitlin Howarth (“Ms. Howarth”), \$9,597.47 in wages, compensation for length of service, and interest for contravening Section 54 of the *Act*. The Director also imposed an administrative penalty of \$500.00 for the contravention, for a total amount payable of \$10,097.47.
2. In its appeal, Sigma Inn alleges that the Director failed to observe principles of natural justice in making the Determination. While not raised as a specific ground, Sigma Inn also argues that the Director erred in law.
3. Section 114 of the *Act* and Rule 22 of the Tribunal’s *Rules of Practice and Procedure* (the “*Rules*”) provides that the Tribunal may dismiss all or part of an appeal without seeking submissions from the other parties or the Director if it decides that the appeal does not meet certain criteria.
4. The Tribunal has decided this appeal is an appropriate case for consideration under Section 114 of the *Act* and, at this stage, I am assessing this appeal based solely on Sigma Inn’s written submissions, the Section 112(5) “record” that was before the Delegate at the time the decision was made (the “Record”) and the reasons for the Determination. If I am satisfied that the appeal, or part of it, has some presumptive merit and should not be dismissed under Section 114(1), Ms. Howarth and the Delegate may be invited to file further submissions. If the appeal is not meritorious, it will be dismissed.

FACTS

5. Sigma Inn operates a hotel where Ms. Howarth was employed as a desk clerk from February 6, 2012, to July 3, 2012. Upon returning from a two-week vacation, Ms. Howarth found she was no longer on the shift schedule. At the time Ms. Howarth was pregnant. Mr. Choi, Sigma Inn’s general manager, told her that they had hired her maternity leave replacement while she was on holiday and there was not enough work for both women. Ms. Howarth reiterated she was not prepared to take her maternity leave until September 30, 2012. At this point, Mr. Choi advised he would be laying her off.
6. During the investigation Mr. Choi told the Delegate that he was concerned about Ms. Howarth completing certain parts of the job (e.g. carrying laundry) and felt she would have a hard time working until the end of September. Therefore, he decided the best thing to do was to lay her off. Mr. Choi also confirmed that Ms. Howarth wanted to return to work full-time; stated she could handle the work; and, did not request reduced hours or work. The Delegate also spoke with Sigma Inn’s owner/director who told him Mr. Paul Yun (“Mr. Yun”), his senior manager, would be handling the matter.
7. On August 13, 2012, the Delegate met with Mr. Yun and the front desk supervisor. Mr. Yun expressed that although he was not present at the hotel, there were some performance issues with Ms. Howarth (e.g. not smiling, unclean lobby and laundry not done). The Delegate discussed section 54 with Mr. Yun. Mr. Yun

advised he would discuss the matter with Sigma Inn's owner/director and get back to the Delegate with a response.

8. Over the course of the next two months, a number of emails were exchanged between the Delegate and Mr. Yun and they spoke on the phone on at least one occasion. The Delegate made repeated attempts to elicit a response from Mr. Yun and gave him several extensions of time, as follows:

September 24, 2012 – email from Mr. Yun to the Delegate referencing an earlier email of September 13, 2012 that did not get to sent to the Delegate and could not be found by Mr. Yun. Mr. Yun also asks for an additional day to make his submissions.

October 1, 2012 – email from the Delegate to Mr. Yun advising he has not received any further submissions and therefore will be proceeding to issue the Determination.

October 1, 2012 – email from Mr. Yun to the Delegate asking for an additional few days to provide his submissions.

October 1, 2012 – email from the Delegate to Mr. Yun giving him until October 5, 2012 to make additional submissions.

October 5, 2012 – email from the Delegate to Mr. Yun advising he has not received any further submissions and therefore will be proceeding to issue the Determination on October 9, 2012 if he does not hear anything further.

October 5, 2012 – email from Mr. Yun to the Delegate asking for an additional two days to make his submissions noting he had lost the email which should have been sent to the Delegate.

9. On October 11, 2012, after receiving no further communication from Mr. Yun, the Delegate issued the Determination.
10. The issue before the Delegate was whether Ms. Howarth was terminated because of her pregnancy in contravention of section 54 of the *Act* and if so, what was the remedy under section 79 of the *Act*?
11. As succinctly summarized by the Delegate in the Determination:

[...] I find that the employer effectively terminated Ms. Howarth by removing her from the work schedule while she was on holidays. I further find that the sole reason for this termination was her pregnancy.

The general manager, Mr. Choi, was very clear as to why the decision was made, to not schedule Ms. Howarth and to "lay her off". Subsequent conversations with Mr. Yun inferred a performance issue; however, this was not part of Mr. Choi's decision. In any event based on a review of all the information I find that the employer would fall short of establishing just cause.

12. Pursuant to section 79 of the *Act*, the Delegate found Ms. Howarth was entitled to wages and compensation for length of service, plus accrued interest.

ARGUMENT

13. Sigma Inn contends that the Director failed to observe the principles of natural justice in making the Determination and asks that the Tribunal cancel the Determination. The substance of the appeal is set out in a covering letter submitted by Mr. Yun:

Ms. Howarth was justifiably terminated due to poor work performance, long absences, and unacceptable relations with both guests and staff. I, as the director of the hotel, did not authorize, permit or acquiesce in the companies [sic] contravention, therefore am not liable for the penalty that has been determined.

I have submitted my earlier email to your office, in which I have sited several specific instances that led to the termination of Ms. Howarth. I am enclosing this earlier email for your evaluation.

14. The enclosed email is from Mr. Yun to the Delegate, dated October 19, 2012, and time stamped 1:00 pm. The email was returned to sender due to the incorrect address for the Delegate. The email is lengthy and provides Mr. Yun's version of the facts, as gathered from his own internal investigation. In brief, Mr. Yun makes two arguments in the email: first, Ms. Howarth was terminated because of poor performance unrelated to her pregnancy; and second, she resigned. As such, Mr. Yun asserts in the email that Sigma Inn should owe her at most two weeks' wages.
15. During the appeal process, Sigma Inn also filed an objection to the Record before the Tribunal. Sigma Inn argued that the Record should have included a copy of the October 19, 2012, (1:00 pm) email. In support, Sigma Inn produced two additional emails from the same day: first, an email from Mr. Yun to the Delegate, dated October 19, 2012, and time stamped 1:27 pm, in which Mr. Yun disputes the statement in the Determination that "[t]o date after several requests and extensions, there has been no further response from the employer" and attaches an email dated September 21, 2012, that is identical to the email forwarded with his appeal dated October 19, 2012, (1:00pm). Second, Sigma Inn includes an email from Mr. Yun to Sigma Inn's owner/director dated October 19, 2012, and time stamped 1:30 pm, stating "it is getting more serious on their side".
16. In response to Sigma Inn's objection to the Record, the Director submits all documentation is before the Tribunal and provides a succinct timeline of events. The Director notes that the additional information submitted by Mr. Yun as part of the Record was forwarded to the Director after the Determination was made. The Director also notes the September 21, 2012, email was never received.

ANALYSIS

17. Under Section 114(1) of the *Act*, the Tribunal may dismiss all or part of the appeal if the Tribunal determines that any of the following apply:
 - (a) the appeal is not within the jurisdiction of the tribunal;
 - (b) the appeal was not filed within the applicable time limit;
 - (c) the appeal is frivolous, vexatious, trivial or gives rise to an abuse of process;
 - (d) the appeal was made in bad faith or filed for an improper purpose or motive;
 - (e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;
 - (f) there is no reasonable prospect the appeal will succeed;
 - (g) the substance of the appeal has been appropriately dealt with in another proceeding;
 - (h) one or more of the requirements of section 112(2) have not been met.
18. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
 - (a) the director erred in law;
 - (b) the director failed to observe the principles of natural justice in making the determination;

- (c) evidence has become available that was not available at the time the determination was made.

19. After a careful review of the Determination, the Record, Sigma Inn's submissions, and applying well-established principles that operate in the context of appeals to the Tribunal, I am able to dismiss this appeal under Section 114(1).

Principles of Natural Justice

20. Section 112(1)(b) of the *Act* requires the Director to observe the principles of natural justice in making the Determination. The Tribunal has explained that principles of natural justice are, in essence, procedural rights ensuring the parties have an opportunity to learn the case against them, the right to present their evidence, the right to receive reasons for the decision, and the right to be heard by an independent decision-maker (see *Re: 607730 B.C. Ltd. (c.o.b. English Inn & Resort)*, BC EST # D055/05). Further, the party alleging a denial of natural justice must provide some evidence in support of that allegation (see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99).

21. I interpret Sigma Inn's submission on this ground to be that their evidence and argument as presented in the October 19, 2012, (1:00 pm) email should have been considered by the Delegate. However, as the Tribunal has repeatedly stated, an appeal is not an opportunity for an appellant to present evidence that ought to have been provided to the delegate during the investigation (see *Re: Merilus Technologies Inc.* (BC EST # D171/03). All of the information contained in the October 19, 2012, (1:00pm) email was available at the time of the investigation and should have been provided to the Delegate. While Mr. Yun claims to have sent this information on behalf of Sigma Inn on two occasions (September 13, 2012, and September 21, 2012), he subsequently claims to have lost it when the Delegate states he did not receive it. Despite the Delegate's repeated attempts to elicit submissions from and grant extensions to Sigma Inn, it was not until after the Determination was issued and Mr. Yun realized the matter was "getting more serious" did the submissions get sent to the Delegate.

22. While unfortunate that Mr. Yun did not recognize the investigation required his attention prior to the Determination being issued, it is clear from the Record that Sigma Inn was aware of the investigation, knew the nature of the evidence before the Delegate, had ample opportunity to present evidence to support its position, had notice of the Delegate's intention to issue a Determination and was provided with all of the relevant evidence in a timely fashion. Therefore, I am not persuaded that there is a reasonable prospect the appeal will succeed on this ground of appeal.

23. Additionally, even if I accepted the evidence set out in the October 19, 2012, (1:00pm) email, there is nothing to suggest that even if it were believed it would have led the Delegate to a different conclusion regarding the reason for Ms. Howarth's termination.

Error of Law

24. While not argued as an appeal ground, in my view, the crux of Sigma Inn's argument on appeal is that the Director erred in law in concluding that Ms. Howarth was terminated solely because of her pregnancy. According to Sigma Inn, Ms. Howarth was terminated for just cause "due to poor work performance, long absences, and unacceptable relations with both guests and staff."

25. The *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law (see *Britco*

Structures Ltd., BC EST # D260/03). The Tribunal noted in the *Britco Structures Ltd.* case that the test for establishing an error of law on this basis is stringent, requiring the appellant to show that the findings of fact are perverse and inexplicable, in the sense that they are made without any evidence, that they are inconsistent with and contradictory to the evidence or they are without any rational foundation.

26. The conclusion that the sole reason for Ms. Howarth's termination was because of her pregnancy was based on the facts before the Delegate (including performance issues raised by Mr. Yun). This is not a case of the Delegate acting without any evidence or on a view of facts that could not reasonably be entertained. To the contrary, the Delegate persuasively sets out the evidentiary basis for his conclusion in the Determination. Nor is there any error of law raised by Mr. Yun's statement that he "did not authorize, permit or acquiesce" in the contravention of Section 54 of the *Act*.
27. As such, there is no presumptive merit to an error of law argument.

ORDER

28. Pursuant to Section 114(1)(f) of the *Act*, I dismiss the appeal on the grounds that there is no reasonable prospect that it will succeed. Accordingly, the Determination, dated October 11, 2012, is confirmed, together with whatever further interest that has accrued under Section 88 of the *Act* since the date of issuance.

Raewyn J. Brewer
Member
Employment Standards Tribunal