Employment Standards TRIBUNAL

An appeal

- by -

Eric Brown
("Mr. Brown")

- 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: Shafik Bhalloo

FILE No.: 2011A/186

DATE OF DECISION: February 14, 2012

DECISION

SUBMISSIONS

Eric Brown	on his own behalf
Michael J. Schalke	counsel for Bowra Group Inc. in its capacity as Receiver-Manager of Gibson Pass Resort Inc.
Andres Barker	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Eric Brown ("Mr. Brown"), pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), of a determination of the Director of Employment Standards (the "Director") issued December 1, 2011 (the "Determination").

2. On May 24, 2011, Mr. Brown filed a complaint under section 74 of the *Act* alleging that Bowra Group Inc. ("Bowra"), in its capacity as receiver-manager of Gibson Pass Resort Inc. ("Gibson Resort"), contravened the *Act* by failing to pay him wages in the form of an annual performance bonus (the "Complaint").

3. On November 22, 2011, a delegate of the Director (the "Delegate") conducted a hearing of the Complaint (the "Hearing") and found that Bowra did not owe any wages to Mr. Brown and thus, did not contravene the *Act*. The Director, as a result, resolved that no further action would be taken with respect to Mr. Brown's Complaint.

4. On December 21, 2011, Mr. Brown appealed the Determination on the basis that the Director failed to observe the principles of natural justice in making the Determination.

5. Mr. Brown is asking the Tribunal to change or vary the Determination. In his submissions in support, it would appear that he wants the Tribunal to reverse or substitute the Delegate's conclusion of fact that Bowra did not terminate his employment as a means to avoid paying him a bonus to which he would otherwise be entitled. He is also seeking the Tribunal to award him a bonus of $22,000 pursuant to his employment contract.

6. Pursuant to section 36 of the *Administrative Tribunal's Act* (the "*ATA*"), which is incorporated in 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. In my view, this appeal can be adjudicated on the basis of the section 112(5) "record", the written submissions of the parties and the Reasons for the Determination.

ISSUE

7. Did the Director breach the principles of natural justice in making the Determination?

FACTS

8. In the Reasons for the Determination (the "Reasons"), the Delegate succinctly summarizes the facts not in dispute and I propose to delineate them verbatim below:

Bowra operates a receiver-management business which falls within the jurisdictions of the Act. Mr. Brown was employed as a General Manager from late March 29, 2011[*sic*] to February 7, 2011. The Complaint was filed on May 24, 2011, within the time period allowed under the Act.

Mr. Brown provided evidence on his behalf, and Doug Chivers, President of Bowra, provided evidence on behalf of Bowra. Those facts that are not in dispute are as follows:

Mr. Brown was the General Manager for Manning Park Resort ('MPR'). MPR was previously operated by Gibson Pass Resort Inc. ('Gibson'). HSBC had loaned Gibson money in exchange for a security interest in MPR. Bowra was appointed receiver manager by HSBC through an instrument appointment on November 23, 2009, following default on the loan by Gibson.

As receiver manager Bowra had the authority to either carry on the operation of MPR or sell the assets. Following a business review Bowra elected to continue with the operation of MPR.

Following that decision Bowra engaged the services of a recruiter to find a General Manager for MPR, and through this process Mr. Brown was hired for the position.

MPR's fiscal year ended October 31, 2010 and Mr. Brown operated MPR under the existing budget when he was hired. During that year MPR made a profit of approximately $75,000. In late November, 2010 Mr. Brown submitted an initial budget for the period November 1, 2010 to October 31, 2011 (the 'draft 2011 budget') which showed an annual operating profit of $145,959. Mr. Brown was informed by Mr. Chivers that this was not satisfactory. After continued consultation between Mr. Brown and Bowra's representatives a revised draft budget showing an annual profit of approximately $400,000 was created. This budget was considered official although it was not finalized while Mr. Brown was employed.

During his employment Mr. Brown hired and trained a new management team, including a Ski Hill Manager, Executive Chef, Food and Beverage Manager, Sales and Marketing Manager and Housekeeping Manager.

In December, 2010 Bowra engaged the services of Ward Morrison ('Mr. Morrison'), a consultant specializing in the hotel industry. Mr. Morrison visited MPR on December 20 and 21, 2010 and sent an email to Bowra on January 15, 2011 which expressed his concerns about various aspects of MPR's operation. Mr. Morrison also sent an email to Mr. Brown on February 4, 2011 which again expressed his concerns.

On February 7, 2011 Mr. Brown's employment was terminated by Bowra on a without-cause basis, and Mr. Brown was given pay in lieu of notice in accordance with the terms of his employment contract.

Mr. Brown's complaint centres on his entitlement to an annual bonus. The bonus is discussed in the second paragraph of the compensation clause of his employment agreement (the bonus clause). The bonus clause reads as follows:

> Based on your performance after the first year, you will be entitled to a bonus. This bonus will be up to 30% of your salary and will be based on both the operating performance and growth of Manning Park Resort and your effectiveness as a resort manager. The operating performance and growth targets will be agreed upon by the Receiver Manager and yourself within 2 months of finalizing the annual budget. We expect to have the annual budget finalized within the next month.

Despite the wording of the clause Mr. Brown continued to operate under the existing budget and no operating performance and growth targets were established apart from the November 1, 2011 to October 31, 2012 budget.

9. The Delegate then, in the Reasons, summarizes the disputed submissions and evidence of the parties. In the case of Mr. Brown, the Delegate notes that he testified about the positive work he did for Manning Park Resort ("MPR"), including changing the management team at MPR; increasing MPR's credibility and relationship with its suppliers including regaining MPR's ability to purchase on credit from two of its major

suppliers; overhauling the computer and reservation systems of MPR; and ensuring MPR's equipment was both repaired and operational.

10. The Delegate also points out Mr. Brown's assertion that there was a high turnover of General Managers at MPR and although he turned the company from money losing to profit making, he was denied sufficient time and opportunity by Bowra to establish himself at MPR. Instead, Bowra, through the involvement of its consultant, Mr. Morrison, effectively set him up for termination before he could be entitled to his annual bonus so that MPR would save money.

11. With respect to the evidence of Bowra, the Delegate notes that Bowra's President, Mr. Chivers, stated that Mr. Brown was hired for his expertise in running ski hills or resorts, which experience Bowra lacked. However, Mr. Brown's performance, during his short period of employment with MPR, was unsatisfactory, and Bowra had to move with haste to terminate Mr. Brown's employment after Bowra's consultant, Mr. Morrison, identified in his report numerous issues with Mr. Brown's performance, including matters related to IT, telephone and switchboard systems. Also critical in Bowra's decision to terminate Mr. Brown's employment were the financial results of MPR in November and December 2010, and January 2011, as compared to the draft 2011 budget, which Mr. Brown created. According to Mr. Chivers, Mr. Brown budgeted MPR to make a profit of $87,000 during the said months, but instead lost $153,607. The Delegate notes that Mr. Chivers particularly felt that January 2011 was a key month in the ski hill business and in light of these financial results his initial reaction was that they might have to shut down the resort. This was a significant contributing factor in Bowra's decision to terminate Mr. Brown's employment.

12. The Delegate, in making his Determination, reviewed the definition of "wages" in section 1 of the *Act*, and notes in the Reasons that the form of bonus claimed by Mr. Brown is encompassed within the definition of wages in subsection (b), namely: "money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency". The Delegate then notes that in the case of Mr. Brown, the bonus he claims fails to meet the initial requirement of being "paid or payable" because the clause in his contract provided that Mr. Brown would be entitled to a bonus based on his performance after the first year of his employment, but his employment terminated after 10 ½ months. The Delegate also notes that Mr. Brown's employment contract contemplated a scenario whereby Bowra could terminate his employment before completing his 1-year period. However, this fact does not end the matter, according to the Delegate. The Delegate then went on to consider Mr. Brown's contention as to whether his employment was terminated by Bowra in bad faith, with a view to specifically depriving Mr. Brown of a bonus to which he would otherwise be entitled. Here, the Delegate notes that Mr. Brown fails to provide any direct evidence in support of his contention and only relies upon the timing of the termination of his employment together with his view that neither Bowra nor Mr. Morrison provided him with any support to operate MPR. Contrastingly, the Delegate notes the evidence of Mr. Chivers that Mr. Brown's termination was entirely based on his failed performance (as identified by Mr. Morrison), including the $157,607 loss MPR suffered in its first quarter. In weighing both parties' evidence, the Delegate reasons there simply was not enough evidence to establish that Mr. Brown's employment was terminated due to a "setup" whereby "Mr. Morrison manufactured a poor appraisal of MPR to set the stage for his [Mr. Brown's] dismissal". The Delegate states it would make no sense to terminate Mr. Brown's employment if the latter was performing in a manner financially beneficial to MPR. In the circumstances, the Delegate concluded, "It is more probable than not that Mr. Brown's employment was terminated based on considerations related to the operation of MPR" and not a "surreptitious [act] to avoid paying the bonus to which he would otherwise have been entitled". Therefore, the Delegate concluded that no bonus was payable to Mr. Brown as he did not fulfil the 1-year employment requirement in his employment contract. Accordingly, the Delegate dismissed Mr. Brown's Complaint holding that there was no contravention of the *Act* on the part of Bowra.

SUBMISSIONS OF MR. BROWN

13. In the preamble to his short written submissions on appeal, Mr. Brown states that the Delegate "made an error in judgement" and the Delegate's "ruling is actually a contradiction" to his (Mr. Brown's) argument. Mr. Brown elaborates that the Delegate made the Determination on the basis of two findings; namely, that Mr. Brown did not complete twelve (12) months in his employment with Bowra and the financial performance of MPR during his employment with Bowra. With respect to the first finding, Mr. Brown states that Bowra terminated his employment without just cause "as a ploy to avoid paying" him the bonus owed under his employment contract, an argument he made at the Hearing. With respect to the second finding of the Delegate, Mr. Brown again reiterates his previous evidence at the Hearing that "the company needs a full season to determine the performance of the company", and he was only afforded two (2) months of the season instead of a full four (4) months. It is "normal for the company to lose money in the first two months as it is recovering from 'off season losses' and opening expenditures, repairs and inventories", submits Mr. Brown. In the circumstances, he states he was not afforded "a proper time line to execute [his] budget".

14. Mr. Brown concludes his submissions by pointing out that MPR experienced losses for five (5) consecutive years prior to his employment as a General Manager. He also argues that he was the first manager in many years to turn a profit for MPR, but he was denied "a fair chance to turn a profit in the winter season". He also submits that Bowra has adduced no evidence that the resort was losing money due to his personal performance. He then reiterates his achievements, his dedication to his position as a General Manager for MPR, and states that he did everything he was asked and expected to do and, therefore, earned and deserves his full bonus under his employment contract.

15. Mr. Brown also submits a Final Reply submission in response to the submissions of counsel for Bowra (which I more properly address in the next section). In his Final Reply submission, Mr. Brown particularly addresses counsel's submission that he has failed to adduce any evidence in support of the "natural justice" ground of appeal upon which he relies. Mr. Brown disagrees with counsel and reiterates that he has in his earlier submissions made his point in support of the "natural justice" ground of appeal by indicating that he does not believe that all of the points he made at the Hearing "were recognized" by the Delegate and the latter's reasons for dismissing his Complaint are contradictory to his (Mr. Brown's) case.

16. Mr. Brown also adduces what he refers to as "new evidence" in his Final Reply submission. I have reviewed those submissions very carefully but only refer to them generally. The allegations, generally speaking, relate to alleged conversations Mr. Brown had with Mr. Chivers about ways in which to save the company money, which Mr. Brown characterizes as unethical and illegal. He also adds his discontent with Bowra injecting Mr. Morrison into the mix, and states the latter did not spend sufficient time with him or at the resort to make the assessment he did. Mr. Brown feels that he was ambushed by Mr. Morrison, rather than helped or assisted by him in the operations of MPR. Mr. Brown concludes by stating that he was denied a fair and proper chance to carry on his work at MPR and, again, reiterates that he worked very hard to "resurrect" MPR's business, which had been neglected for many years previously.

SUBMISSIONS OF BOWRA

17. Counsel for Bowra has, in his submissions, set out numerous decisions very familiar to this Tribunal setting out general principles governing appeals before the Tribunal including the burden of proof, the purpose of the appeal, and the constituent elements of each ground of appeal available in section 112 of the *Act*. I have taken heed of those submissions but do not find it necessary to set them out here.

18. With respect to the gist and substance of counsel's submissions on the merits of Mr. Brown's appeal, counsel states that Mr. Brown has the burden of proof to show his appeal is based on one of the available grounds of appeal and in this regard Mr. Brown has failed to discharge the burden placed upon him. According to counsel, Mr. Brown's appeal does not specify any errors of law or fact, nor does it give any details of how the Delegate breached the principles of natural justice. It also does not request the Tribunal to consider any fresh evidence, as there is no new evidence adduced by Mr. Brown in his appeal.

19. Counsel further submits that Mr. Brown's appeal "merely repeats arguments" he made at the Hearing, which arguments were weighed by the Delegate, together with the evidence of both parties, and rejected. Counsel notes that based on the review by the Delegate of both parties' evidence, including Bowra's evidence and argument regarding Mr. Brown's poor job performance, the Delegate "concluded that it was more probable than not that Bowra terminated [Mr. Brown] because of unsatisfactory job performance, prior to completion of one year's service". According to counsel, the Delegate correctly applied the law in concluding that the bonus claimed by Mr. Brown failed to meet the initial requirement of "being paid or payable", as Mr. Brown was discharged prior to one year's service, which was a precondition for any bonus payment. Accordingly, counsel argues that the Delegate "made no palpable and overriding error" with any findings of fact or his conclusion in the Determination and, therefore, the Delegate's Reasons should be confirmed and the Determination undisturbed.

20. In response to Mr. Brown's Final Reply submission, counsel asks the Tribunal to completely disregard Mr. Brown's submission, as it does not constitute proper reply. Counsel also states that Mr. Brown, in his Final Reply submission, purports to adduce fresh evidence, which does not qualify as new evidence as it pertains to allegations about evidence already before the Delegate and should have been adduced by Mr. Brown in his initial submissions to the Tribunal. Counsel also adds that Mr. Brown characterizes the said evidence "completely inaccurately".

21. Counsel also submits that, in the Final Reply submission, Mr. Brown "re-litigates arguments made before the Delegate of the Director and is also repetitive with Mr. Brown's initial submission to the Tribunal". Counsel submits that the Tribunal should disregard the Final Reply submission of Mr. Brown in their entirety. However, if the Tribunal relies on the Final Reply submission of Mr. Brown, counsel asks the Tribunal to provide Bowra an opportunity to respond to the substance of the submission.

SUBMISSIONS OF THE DIRECTOR

22. The Director rejects Mr. Brown's contention that the Delegate failed to observe the principles of natural justice in making the Determination. The Director states that the Delegate was entitled to consider Bowra's evidence that Mr. Brown's employment was terminated due to MPR's performance during Mr. Brown's employment. While Mr. Brown appears to argue that the Delegate should have undergone a thorough consideration of whether Bowra's decision was reasonable, this was not the issue before the Delegate, contends the Director. Instead, the issue was whether, on a balance of probabilities, Mr. Brown was terminated for reasons related to the operation of MPR. In this regard, the Delegate preferred the evidence of Bowra. In the circumstances, the Director submits that the Tribunal should dismiss Mr. Brown's appeal.

ANALYSIS

23. The *Act*, in section 112(1), set out limited grounds upon which an appeal may be made to the Tribunal from a determination of the Director. The section reads as follows:

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

24. The onus is on the appellant to show that the appeal is properly based on one or more of the statutory grounds of appeal set out in section 112(1), failing which the appellant's appeal may be dismissed.

25. In this case, the appellant, Mr. Brown, has checked-off the box identifying the "natural justice" ground of appeal. However, I note that failure to check-off the appropriate boxes identifying the grounds of appeal on the Appeal Form is not, in itself, fatal to an appellant's appeal. This Tribunal in *Re: Flour Child Bakeries Corp.*, BC EST # D094/06, adopted the view of the Tribunal in *Triple S Transmission Inc.*, BC EST # D141/03, wherein the Tribunal expressed the view that it should not "mechanically adjudicate an appeal based solely on the particular 'box' that an appellant has checked off". In *Triple S Transmission Inc.*, the Tribunal stated:

> When adjudicating an appeal, I believe it is appropriate for the adjudicator to first inquire into the nature of the challenge to the determination (or the process that led to it being issued) and then determine whether that challenge, prima facie, invokes one of the statutory grounds. In making that assessment, I also believe that adjudicators should take a large and liberal view of the appellant's explanation as to why the determination ought to be varied or cancelled or why the matter should be returned to the Director.

26. Based on the view expressed in *Triple S. Transmission Inc.* above, I have reviewed the submissions of Mr. Brown, including his Final Reply submission, with a view to determining the nature of Mr. Brown's challenge of the Determination and whether that challenge properly invokes any of the statutory grounds of appeal, including the one he checked-off on his Appeal Form, the "natural justice" ground of appeal.

27. With respect to the natural justice ground of appeal, I note that principles of natural justice are essentially procedural rights that ensure that parties have a right to be heard by an independent decision maker. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party (see *BWI Business World Incorporated*, BC EST # D050/96).

28. In *Moon Arc Interiors Co. Ltd.*, BC EST # D200/04, the Tribunal described the natural justice ground of appeal as follows:

> Such a challenge normally gives voice to a procedural concern that the proceedings before the Delegate were in some manner conducted unfairly, resulting in the appellant's either not having an opportunity to know the case it was required to meet, or an opportunity to be heard in its own defence.

29. In this case, the main contention of Mr. Brown is that the Delegate made findings of fact that conflict with his "argument" that Bowra was involved in a "ploy" to terminate his employment before he completed 1-year of employment so as to avoid paying him a contractual bonus. The Delegate considered and weighed the evidence of both parties and preferred the evidence of Bowra. It is indeed the role of a delegate to investigate any complaint assigned to him, hear all evidence adduced by the parties and weigh the evidence and make findings of fact which might involve preferring the evidence of one or another party. In this case, I do not find the Delegate did anything unusual but carry out his normal role. There is no evidence that he denied

Mr. Brown any natural justice rights. Mr. Brown appears to have participated fully in the investigation and Hearing of the Complaint and has no basis to complain that the Delegate, by preferring the evidence of Bowra to his, breached the principles of natural justice. Therefore, I reject the natural justice ground of appeal advanced by Mr. Brown.

30. Next, did the Delegate err in law in making the Determination?

31. In *Gemex Developments Corp. v. British Columbia (Accessor of Area #12 – Coquitlam)*, the British Columbia Court of Appeal describes the following elements as constituting an error of law:

(1) A misinterpretation or misapplication of a section of the Act;

(2) A misapplication of an applicable principle of general law;

(3) Acting without any evidence;

(4) Acting on a view of the facts which could not reasonably be entertained; and

(5) Exercising discretion in a fashion that is wrong in principle.

32. In *Britco Structures Ltd.*, BC EST # D260/03, the Tribunal stated that the definition of error of law in *Gemex*, *supra*, should not be applied so broadly as to include errors which are not in fact errors of law, such as errors of fact alone, or errors of mixed law and fact which do not contain extricable errors of law. The Tribunal in *Britco* also added that unless there is an allegation that the Delegate erred in interpreting the law or in determining what legal principles are applicable, there cannot be an allegation that the Delegate erred by applying the incorrect legal test to the facts.

33. I also note that the Tribunal has indicated, time and time again, that it does not have jurisdiction over questions of fact unless of course the matter involves errors on findings of fact which may amount to an error of law (see *Re: Pro-Serv Investigations Ltd.*, BC EST # D059/05; *Re: Koivisto (c.o.b. Finn Custom Aluminum)*, BC EST # D006/05). The Tribunal in *Re: Funk*, BC EST # D195/04, expounded on the latter point stating that the appellant would have to show that the fact finder made a "palpable and overriding error" or that the finding of fact was "clearly wrong" to establish error of law.

34. I note the Tribunal is generally reluctant to substitute the delegate's findings of facts even if it is inclined to reach a different conclusion on the evidence. In this case, having reviewed the Reasons, the section 112(5) "record" and the submissions of the parties, it was open to the Director to reasonably make the findings of fact he made, namely, that Mr. Brown did not complete the 1-year term of his contract of employment to qualify for the bonus and that his early termination was due to the performance of the resort during Mr. Brown's employment. Therefore, I conclude, on the applicable tests for finding an error of law delineated in *Gemex*, *supra*, and as expounded in the Tribunal's decisions in *Re: Britco*, *supra*, that the Delegate made no palpable or overriding error nor reached a clearly wrong conclusion of fact nor acted without any evidence or on a view of evidence that could not reasonably be entertained.

35. In the circumstances, there is no basis for the error of law ground of appeal in Mr. Brown's submissions.

36. Finally, is there new evidence that has become available that was not available at the time the Determination was being made and, if so, does this new evidence provide any basis to a change or vary the Determination?

37. The Tribunal in *Re: Merilus Technologies Inc.*, BC EST # D171/03, delineated the following four-part criteria for allowing new evidence on an appeal of a determination:

- The evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
- The evidence must be relevant to a material issue arising from the complaint;
- The evidence must be credible in the sense that it is reasonably capable of belief; and
- The evidence must have high potential probative value, in the sense that, if believed, it could on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

38. This Tribunal has indicated time and again that the criteria above are a conjunctive requirement and therefore the party requesting the Tribunal to admit new evidence has the onus to satisfy each of them before the Tribunal will admit any new evidence.

39. In the present case, I am not convinced that Mr. Brown has satisfied the criteria in *Re: Merilus*, *supra*. As indicated previously, the purported "new evidence", generally speaking, includes alleged conversations Mr. Brown had with Mr. Chivers about ways in which to save the company money, which Mr. Brown characterizes as unethical and illegal with a view to buttressing or supporting his previous argument that Bowra was also adopting similar practices in denying him a bonus. This submission is not in the nature of new evidence. It is, in my view, information that existed (without making any determination on its veracity) before the Determination was made and Mr. Brown also did not adduce it in his original submissions on appeal. I also question its relevance and very much doubt its probative value.

40. With respect to the balance of the submission characterized as new evidence by Mr. Brown in his Final Reply submission, while I agree with counsel for Bowra that they do not constitute proper reply, the Tribunal is not bound by formalities of evidentiary rules and procedures. Having said this, I find that the balance of the submission in the Final Reply of Mr. Brown are more in the nature of re-argument of his case and there is nothing new in the way of evidence contained in those submissions. More particularly, Mr. Brown, as previously indicated, articulates his discontent with Bowra injecting Mr. Morrison into the mix, and states the latter did not spend sufficient time with him or at the resort to make the assessment he did. He also states he was ambushed by Mr. Morrison, rather than helped or assisted by him in the operations of MPR and concludes by stating that he was denied a fair and proper chance to carry on his work at MPR and reiterates that he worked very hard to "resurrect" MPR's business, which had been neglected for many years previously. None of these submissions would qualify as new evidence under the four-part test delineated in *Re: Merilus*. The submissions are clearly a reiteration and amplification of submissions Mr. Brown made at the Hearing and considered by the Delegate. While Mr. Brown is dissatisfied with the outcome of his Complaint in the Determination, an appeal is not an appropriate forum to conduct a *de novo* hearing and retry his case.

41. In the result, I do not find any basis for granting Mr. Brown's appeal on the new evidence ground of appeal.

ORDER

42. I order, pursuant to section 115 of the *Act*, that the Determination dated December 1, 2011, be confirmed.

Shafik Bhalloo
Member
Employment Standards Tribunal