EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act S.B.C. 1995, C. 38

- by -

West Coast City and Nature Sightseeing Ltd.
("West Coast")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 95/021

DATE OF HEARING: April 12, 1996

DATE OF DECISION: April 18, 1996

DECISION

APPEARANCES

Rudolf Tize and Pam Smithson	-for-	West Coast City and Nature Sightseeing Ltd.
Shelina Shivji	-for-	the Director of Employment Standards
Ken Neal		

OVERVIEW

This is an appeal by West Coast City and Nature Sightseeing Ltd. ("West Coast") under Section 112 of the *Employment Standards Act* (the "*Act*"). West Coast is appealing against Determination CDET# 000493 which was issued on December 18, 1995 by a delegate of the Director. The Determination found that West Coast breached Section 83(1) of the *Act* by refusing to employ or refusing to continue to employ Ken Neal ("Neal") because he made a complaint under the *Act*. West Coast denies that it terminated Neal's employment because he made a complaint.

ISSUES TO BE DECIDED

The issues to be decided in this appeal are:

> Did West Coast refuse to employ or refuse to continue to employ Ken Neal because of a complaint or investigation under the *Act*? and,
>
> If so, is the Determination reasonable?

FACTS

Neal was employed by West Coast as a tour bus driver/guide following an employment interview on February 11, 1994. He began training on March 2, 1994. His rate of pay was $9.50 per hour. His last day of work was October 31, 1994. West Coast issued a Record of Employment showing "shortage of work" as the reason for issuing the Record. These facts are not in dispute.

Neal's evidence was that he was seeking stable employment as a driver/guide while recognizing that the tour business is seasonal with a significant decline in business during the Winter months. At the time he was employed by West Coast, he understood that he would not be required to work during the Winter months. However, he expected to work regularly each subsequent year during the Spring/Summer/Fall. Neal also gave evidence that by June, 1994 he was working full-

time, regular shifts (4 days on / 2 days off). These hours of work continued until October 31, 1994.

West Coast's driver/guides are scheduled either from a "regular board" or from a "spare board." Neal's evidence was that he was on the "regular board" and that there were three driver/guides with more seniority than him (Mike L., Judi W., and John K.). Neal stated that driver/guides were scheduled to work according to their seniority. Furthermore, he stated that drivers/guides were scheduled according to their preferences and could choose to be placed on the "spare board" temporarily if that was their preference.

Rudolph Tize (President and co-owner of West Coast) gave evidence that driver/guides are scheduled and assigned tours on the basis of seniority and work performance. He emphasized that, due to the nature of the tour bus business, no driver/guides could be guaranteed permanent work. Prior to the Winter of 1994/95, West Coast had not operated during the Winter season. For that reason it was difficult to predict the volume of business which West Coast would generate during its first Winter season.

West Coast held a meeting with all driver/guides at 7:00 P.M. on October 5, 1994. The primary purpose of the meeting was to discuss which driver/guides would like to work during the Winter season and who planned to return to work in Spring, 1995. Neal testified that he attended that meeting and informed Wayne Roller (co-owner) and Jeff Veniot (operations manager) of his intention to return to West Coast in the Spring of 1995. His evidence was that he was never told by his employer that he would not be returning after the Winter season. This evidence was not disputed by West Coast.

Neal planned to vacation in Latin America during the winter. A letter dated September 30, 1994, signed by Wayne Roller and Rudolph Tize, contains the following:

> To Whom it May Concern:
>
> This note is to advise that Ken Neal, 2080 Douglas Crescent, Richmond, British Columbia, has been employed by our firm as a driver/tour guide.
>
> Ken began work with us in March this year and has worked regularly with West Coast since then. He will be laid off on October 31, 1994, when the peak tourist season ends in Vancouver.
>
> During the 1994 season Mr. Neal has been a satisfactory employee. Therefore, we have asked him to return to work with us next year, again, as a driver/tour guide.
>
> He has agreed, and will resume regular employment with us on or about March 15, 1995.

Neal gave evidence that he requested this letter to meet the Mexican Consulate's requirements for issuing a tourist visa. It was Neal's intention to return to work with West Coast in March, 1995.

Neal acknowledged that there were "some problems" during his employment with West Coast. Neal exchanged memos concerning these "problems" with Wayne Roller and Jeff Veniot during July, 1994. Roller wrote to Neal on July 19, 1994 to set out his concerns about Neal's performance and concluded by stating: "If we continue to have problems with you, we will have to consider a firmer course of action." These "problems" are described in West Coast's written appeal to the Tribunal. In his evidence Neal expressed his opinion that those issues were dealt with and resolved during July, 1994. There is no evidence that West Coast took "...a firmer course of action."

Neal filed a complaint with the Employment Standards Branch on October 12, 1994 concerning entitlement to overtime wages. He gave evidence that the reason for contacting the Branch was that he wanted clarification concerning his entitlement to overtime wages. The Director's delegate wrote to West Coast on November 28, 1994 to request copies of Neal's payroll records as part of her investigation.

When Neal returned from his vacation in February, 1995 he met with the Director's delegate to discuss her letter of November 28, 1994.

Neal visited West Coast's office's on March 3, 1995 to advise of his availability for work. He spoke with Roller and Veniot. Neal's evidence was that Veniot told him that: he was "...not sure if he (Neal) would be returning to work" because Clarissa Von Bemmel (a part-owner of West Coast) was "...very angry about the complaint" to the Employment Standards Branch.

According to Neal, Veniot also told him that "...neither he (Veniot) nor Roller was pleased about the complaint." Neal testified that Veniot told him that a final decision concerning Neal's employment was to be made by the owners of West Coast at a meeting scheduled for March 8, 1995.

Immediately following his discussion with Roller and Veniot, Neal visited the Branch's office in Burnaby. He was unable to meet with the director's delegate and left a hand-written note describing his concerns as a result of his meeting with roller and Veniot. As result of the concerns expressed by Neal in his note, the Director's delegate spoke to Veniot on March 13, 1995 to explain the provisions of Section 58 of the *Employment Standards Act* which was in force at that time (the former *Act*). Section 58 of the former *Act* prohibits the improper treatment of an employee because of an investigation or action taken under that *Act*.

The Director's delegate spoke to Roller on March 21, 1995 and was advised that Neal's employment with West Coast would not continue "...due to problems experienced during 1994." Neal was not informed either verbally or in writing by West Coast of its decision to discontinue his employment. The Director's delegate advised Neal of her telephone conversation with Roller. As a result of that advice, Neal began looking for alternative employment and

commenced employment with Town Tours Ltd. on April 10, 1995 according to a letter dated May 17, 1995 from Don Eberhart, President of TownTours.

The Reason Schedule attached to the Determination states that there were 27 shifts (203.25 hours) between March 2, 1995 and April 10, 1995 inclusive when Neal could have worked instead of another driver/guide (Jason W.) who had less seniority than Neal.

In a written submission to the Tribunal on behalf of West Coast which was received on January 19, 1996, Roller sets out West Coast's reasons for not continuing Neal's employment in 1995. This submission provides additional details of the "problems" during 1994. Roller did not attend the hearing to give evidence and Neal indicated his objection to some of the statements made in the written submission.

ARGUMENTS

West Coast's argument in support of its appeal is set out in written submissions made by Tize (December 14, 1994) and Roller (January 19, 1995). The elements of West Coast's arguments are:

- Neal was employed as a driver/guide on a "seasonal basis";

- West Coast did not have a "written record" that Neal planned to return to work in Spring, 1995;

- Neal was out of the country with an unspecified return date when Jason W. was scheduled to work due to the death of John K., West Coast's most senior driver;

- Driver/guides' work performance is assessed during their first year (season) of employment to determine their suitability for on-going employment;

- Neal was not available for work in early February, 1995 when West Coast required additional driver/guides;

  The most senior driver available as of February 27, 1995 was Jason W. When Neal was available to work (on March 3, 1995) it was not reasonable to assign hours to Neal which were already assigned to
  Jason W. ;

- The letter provided to Neal by Roller & Tize on September 30, 1994 was intended solely to verify Neal's employment for purposes of acquiring tourist/travel documents;

- The decision not to continue Neal's employment in 1995 was based on problems with his work performance, attitude and a personality conflict with Veniot during 1994;

- West Coast did not breach Section 58 of the former *Act* (Section 83 of the current *Act*) because it had no knowledge of a complaint or investigation under the *Act*;

- Neal was not mistreated because of a complaint or investigation because "...Mr. Neal was caught up in bad timing in the fact he was not available when we were looking to hire a full time driver and lost a position because of this. Whether we wished to take him back at the time is secondary. We could not have reintegrated Mr. Neal into the schedule without having to let go of Jason which would indeed delay his receiving of unemployment benefits."

The Director's delegate determined that West Coast did breach Section 58 of the former *Act* (now Section 83 of the *Act*). She makes the following points in support of the Determination:

- Neal was laid off on October 31, 1994 due to "shortage of work";

- Neal informed West Coast of his vacation plans and his intention to return to work in Spring, 1995;

- The September 30, 1994 letter signed by Roller and Tize acknowledges Neal's plan to return to West Coast following his vacation;

  Neal filed a complaint with the Employment Standards Branch on October 12, 1994 and West Coast became aware of that complaint as a result of the investigation which was conducted subsequently;

- West Coast did not terminate Neal's employment due to unsatisfactory work performance;

- West Coast did not inform Neal that his employment was terminated prior to his departure to Latin America nor when he reported his availability for work on March 3, 1995; and

- In all of the circumstances of this complaint and investigation, it is reasonable to conclude, on the balance of probabilities, that West Coast did not continue Neal's employment because of his complaint.

ANALYSIS

Consideration of this appeal falls under the transitional provisions of the *Act.*

Section 128(3) of the *Act* states:

> "If, before the repeal of the former Act, no decision was made by the director, an authorized representative of the director or an officer on a complaint made under that *Act*, the complaint is to be treated for all purposes, including Section 80 of this *Act,* as a complaint made under this *Act.*"

Section 83 of the *Act* states:

1. An employer must not

   a) refuse to employ or refuse to continue to employ a person,
   b) threaten to dismiss or otherwise threaten a person,
   c) discriminate against or threaten to discriminate against a person with respect to employment or a condition of employment, or
   d) intimidate or coerce or impose a monetary or other penalty on a person, because a complaint or investigation may be or has been made under this *Act* or because an appeal or other action may be or has been taken or information may be or has been supplied under this *Act*.

2. If satisfied that a person has contravened subsection (1), the director may make any determination authorized by section 79 (3) or (4).

My analysis reveals certain inconsistencies in West Coast's argument. On the one hand it argues that Neal was not scheduled to work in early 1995 because he was "...out of the country with no specific return time..." when Jason W. was scheduled to work. That is, Neal was "...caught up in bad timing..." because "... he was not available when we were looking to hire a full time driver and lost a position because of this." On the other hand, West Coast argues that when it considered Neal "...pro and con as a driver/guide for our company we decided that we would not take him back in the 1995 season." This consideration took place, according to the evidence, between March 3, 1995 and
March 8, 1995 at which time the owners of West Coast decided not to continue Neal's employment.

Neal's evidence at the hearing (supported by his note dated March 3, 1995) was that Roller, Veniot and Von Bemmel were "very angry" about his complaint to the Employment Standards Branch and, as a result, Veniot was not sure if he (Neal) would be returning to work at West Coast. Neal's evidence on this point was not contested by West Coast.

Roller's written submission on behalf of West Coast also states:

> "In summary, when we did need to re-hire a driver we took the first senior driver available to work. As Mr. Neal was not available we took someone off U.I.C. who was available."

This practice of scheduling by seniority is supported by an earlier statement in Roller's written submission where he stated:

> "As we go by seniority we went down the list to see who was available to work. At this point we had no idea that Mr. Neal was back from Costa Rica."

This submission by Roller contradicts the evidence given at the hearing by Tize concerning West Coast's scheduling policies.

Neal's evidence that he indicated his intention to return to West Coast after his vacation was not contested at the hearing and is supported by the letter signed by Tize and Roller on September 30, 1994. Thus, Neal's return date was not unspecified. He was expected to return "on or about March 15, 1995." Neal did return and made himself available to West Coast on March 3, 1995. He had been placed on the "regular board" during the 1994 season. Although there were "problems" with his performance and interpersonal skills, he was not removed from the "regular board". In addition, West Coast did not advise him, prior to his departure nor on his return, that his employment would not continue. I conclude, on the balance of probabilities, that Neal's complaint was one factor in West Coast's decision not to continue Neal's employment. It may not have been the only factor. But, given the uncontested evidence of Neal's discussion with Veniot, I conclude that Neal's complaint was indeed a factor in West Coast's decision. Thus, West Coast did breach Section 83(1) of the *Act*.

The Determination includes March 2 and 3, 1995 as dates on which Neal could have worked for West Coast in calculating monies payable under Section 83(2) of the *Act*. Neal's evidence was that he informed West Coast of his availability for work on
March 3, 1995. I would, therefore, reduce the amount of the Determination by $147.25 (15.5 hours x $9.50 per hour) to reflect the hours worked by Jason W. on
March 2 and 3, 1995. In all other respects I conclude that the Determination is reasonable.

ORDER

I order, under Section 115 of the *Act*, that Determination CDET# 000493 be varied to read that the amount payable by West Coast is $1,783.62.

Geoffrey Crampton
Chair
Employment Standards Tribunal

GC:sf