

An appeal

- by -

Sharon Lang  
("Lang")

- 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.:** 2008A/21

**DATE OF DECISION:** May 5, 2008

## DECISION

### OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) brought by Sharon Lang (“Lang”) of a Determination that was issued on January 21, 2008 by a delegate (the “Delegate”) of the Director of Employment Standards (the “Director”). The Determination concluded that Lang’s employer, Huber Developments Ltd. carrying on business as Prestige Lakeside Resort (“Huber”) contravened the Act by failing to pay Lang termination and vacation pay for a total of \$767.49 inclusive of interest.
2. The Director also imposed an administrative penalty on Huber under Section 29(1) of the *Employment Standards Regulation* (the “Regulations”) in the amount of \$500.00 for the said contravention of the Act.
3. Lang, in her appeal, asserts that the Director failed to observe the principles of natural justice in making the Determination and is requesting the Tribunal to change or vary the Determination. In particular, Lang is seeking the Tribunal to require Huber to pay her the termination pay amount -i.e. \$2,359.44- she sought in her Complaint to the Director.
4. Lang is not requiring an oral hearing and in my opinion, Lang’s appeal can be properly adjudicated on the written submissions of the parties without resort to an oral hearing. Therefore, this appeal will be decided based on the written submissions of the parties, the Section 112(5) “Record” and the Reasons for the Determination.

### ISSUE

5. Did the Director fail to observe the principles of natural justice in making the Determination?

### FACTS

6. Lang filed a complaint under the Act alleging that Huber contravened the Act by failing to pay her compensation for length of service (the “Complaint”).
7. The Delegate held a hearing of the Complaint on September 9, 2007 (the “Hearing”) and issued the Determination on January 21, 2008.
8. Huber operates a full service hotel (the “Hotel”) in Nelson, BC.
9. Lang commenced working for Huber in August 2000 in the housekeeping department as a room attendant and over the course of her employment suffered various ailments and injuries, most significantly epicondylitis or “golfer’s elbow”.
10. In June 2006, Lang’s doctor advised her to take ten weeks off from work to allow her injured elbow to heal. Lang took eight weeks off and returned to work on September 23, 2006 on a reduced schedule. However, following her return, Lang suffered recurring symptoms or injury and was taken to the emergency department of the Trail Hospital. On this occasion, Lang was off work until October 12, 2006.

11. Upon her return to work, Lang commenced working in the laundry (and not the housekeeping) department of the Hotel. She continued in the laundry department until November 16, 2006, and thereafter returned to housekeeping. However, her elbow again acted up and she became again incapacitated. This time Lang's doctor advised her not to return to housekeeping duties at the Hotel.
12. On December 9, 2006, Lang advised her supervisor, Barb Sapriken ("Sapriken") that she would not be able to perform housekeeping duties any longer and went on medical leave.
13. On December 22, 2006, Lang underwent an examination by a neurologist who confirmed to her that she should not continue with housekeeping duties given her condition and the requirements of that job.
14. Thereafter, Lang attended at Huber's hotel from time to time to socialize with her colleagues and on one occasion, Lang helped Sapriken with some work in the laundry department of the Hotel. At the time, Lang also advised Sapriken she was available to help in the laundry department of the Hotel if help was needed in the department. As one of the machines in the Hotel's laundry department had broken down, Lang was in luck as help was indeed required in the laundry department. Accordingly, Lang returned to work at the Hotel on a shift work basis in the laundry department on April 22, 2007.
15. On May 19, 2007, Lang's acting supervisor advised her of her next shift but then immediately telephoned her back to cancel the shift and explained to Lang that it would be covered by some foreign guest workers that had been hired by Huber.
16. On June 10, 2007, Lang telephoned Huber to find out when she was next scheduled. Lang states that she was advised she was no longer on the work schedule. Lang then requested a Record of Employment and when it arrived, she discovered, from reading it that she had been dismissed on June 15, 2007. Shortly thereafter, Lang states she requested Huber to pay her compensation for length of service or termination pay. However, Huber, through the Hotel's General Manager, Darren Klammer ("Klammer"), in a letter dated July 4, 2007 (the "Letter"), denied Lang's request on the basis that Lang had not completed three consecutive months of employment with Huber; she had quit or retired from her employment with Huber; and she only worked on an on-call basis performing temporary assignments.
17. Klammer also stated in the Letter that it was Huber's position that Lang had first terminated her employment on June 15, 2006 due to illness or injury and was then rehired by Huber on August 15, 2006. Thereafter, Lang again terminated her employment with Huber on December 9, 2006 due to illness or injury. Lang was then rehired a third time in April 2007 on a temporary, emergency basis to assist in the Hotel's laundry department and she only worked for seven non-consecutive shifts ending on May 30, 2007. Klammer then concludes the Letter by reiterating that Lang was not owed termination pay because she worked less than three consecutive months, as she worked on an on-call basis performing a temporary assignment.
18. Lang disagreed with Huber's position in the Letter claiming that she never quit her employment or retired therefrom. Lang asserted that she only discovered that she was terminated from her employment with Huber when she received her Record of Employment in June 2007. Lang adduced two Records of Employment at the Hearing, Huber issued the first to her on June 22, 2006, and the second was issued to her on December 18, 2006. Both Records of Employment delineated code "D" as the reason for the issuance for the Record of Employment with an unknown recall date. Code "D" denotes illness or injury.

19. Lang stated that if she had quit her employment on both these occasions as alleged by Huber then the Records of Employment would show code “E” which stands for quit and the expected date of recall would not have read “unknown” but rather “not returning”.
20. Lang also indicated that on these last two occasions when Huber is claiming that she quit her employment, she was truly off due to illness or injury because of the golfer’s elbow and her inability to perform housekeeping duties. Lang further asserted that she never quit her employment and only discovered that Huber terminated her employment when she received her Record of Employment in June 2007 code “M” as the reason for the issuance. Code “M” denotes dismissal.
21. Lang also admitted at the Hearing that while she did not advise Huber she could not return to cleaning rooms, she advised Sapriken that she was able to work in the laundry department of the Hotel.
22. Lang called Sapriken as her witness at the Hearing. Sapriken confirmed that she was the person responsible for advising the management of any absences. She indicated that Lang in June 2006 Lang brought her a note requesting a medical leave which she forwarded to Klammer with the instruction that Lang would contact Huber when she is ready to return.
23. Sapriken also confirmed that Lang returned to work at the Hotel in August 2006, initially in the laundry department and then in the housekeeping department until December 2006 when she stopped working for medical reasons. Sapriken also testified at the Hearing that she spoke with Klammer about Lang returning to work and stripping rooms and doing laundry work. Klammer, according to Sapriken, advised that he thought that that would be good because Huber would not have to train Lang.
24. Sapriken further testified that Lang returned to work in April 2007 to assist in the Hotel’s laundry department but did not work on an on-call temporary assignment basis. Sapriken also testified that Lang did not quit her job with Huber and that she was hoping to return to work. Sapriken also stated that when she spoke to Klammer about Lang’s return, she advised Klammer that Lang was still unable to clean rooms but she could work in the laundry and that help was needed the laundry department because the washer was out of service.
25. Huber called three witnesses at the Hearing, namely, Klammer; Scott Alexander Simpson (“Simpson”), the Hotel’s Guest Service Agent who also performed some payroll duties for Huber; and Destin Klepaychuk (“Klepaychuk”), who worked in Huber’s accounting department in Kelowna and was responsible for issuing Records of Employment to employees of Huber.
26. Klammer testified that in mid June 2006, Sapriken advised him that Lang would be off for medical reasons. He also testified that Lang returned in August 2006 and worked until December 2006 when Sapriken advised him that Lang’s condition had worsened and she had to quit.
27. Klammer adduced an employee timesheet for Lang covering the period December 1 to 15, 2006 which had the word “finished” written on it. He relied upon the timesheet to suggest that Lang quit her employment in December 2006 but could not comment who wrote, “finished” on the timesheet. Simpson, on the other hand, testified that he wrote, “finished” on the timesheet and he would only have written it if the employee quits or is finished for time and payroll purposes.

28. Klammer also adduced at the Hearing a document identified as a note to the head office when there is a change in status of an employee or when a specific request is made to the head office to do something. This document showed a request to pay out holiday pay to Lang with the stated reason on the document that Lang “quit due to medical reasons”. The same document under the heading “Terminations” showed Lang’s name and her termination date as “12/09/06”.
29. Klammer also testified that the work Lang performed in the Hotel’s laundry department in April / May 2007 was a temporary assignment due to an equipment breakdown at the Hotel. He further testified that Sapriken informed him at the time that the Hotel was falling behind and needed help in the laundry department and she wanted to bring Lang in to work because Lang did not require any training. Klammer indicated that he agreed to Sapriken’s request that Lang be employed to work in the laundry department but it was only to help out while the equipment was being fixed. He further indicated that there was no need for another person in the laundry department once the equipment was back in operation.
30. With respect to the cancellation of Lang’s shift on May 19, 2006, Klammer indicated that it was his decision to cancel Lang’s shift and it was based solely on operational need and not related to the use of foreign workers at the Hotel. Klammer stated that he felt there was sufficient coverage in the Hotel’s laundry department and since Lang did not indicate she could return to housekeeping, there was no work for her at the Hotel. He also stated that there was no discussion between him and Sapriken about Lang working in the laundry department as a form of light duty for Lang.
31. Klammer further testified that the code “M” used in the Record of Employment issued to Lang on June 19, 2007 only applied to her temporary employment in the Hotel’s laundry department in April / May 2007. He also explained that the code “D” was used with respect to the previous two Records of Employment issued to Lang because she quit her employment at the Hotel for medical reasons.
32. In cross-examination at the Hearing when Klammer was asked why code “D” is used in the Record of Employment, he explained that it means illness/injury as the reason why the employee quit. When asked why the Record of Employment had the code “E” which denotes that the employee quit, Klammer said he did not know why and explained that the Record of Employment is prepared or filled out at Huber’s head office and sent to the employee. With respect to the last Record of Employment issued on June 19, 2007 to Lang, when asked why code “M” was employed in this Record of Employment instead of code “D”, Klammer explained that the accounting department of Huber told him that “M” was the correct code.
33. When asked whether he believed that Lang had quit her employment in June 2006 when she went on an illness/injury leave, Klammer stated that Lang ended her employment then and returned in August, and then ended her employment again. When asked if he thought Lang had quit both times, Klammer answered in the negative. Klammer explained that Lang did not quit when she took two months off from June to August 2006. When asked what the difference was between the two different occasions in June 2006 and December 2006 when Lang was issued Records of Employment denoting the code “D” as the reason for the issuance, Klammer responded that there was no difference between the two instances.
34. Klepaychuk testified at the Hearing that it was the general managers at Huber’s property who sent information to Huber’s head office, if there is a change in payroll or employee status. He further stated that it would be the manager who would determine or come up with the appropriate code to be employed in the employee’s Record of Employment.

35. Klepaychuk further explained that in Lang's case, there were clerical errors on the Records of Employment issued to her. He indicated that Huber's system defaults to unknown return date if the "not returning" option is not chosen. In Lang's case, the first two Records of Employment show "unknown return date" instead of "not returning".
36. On cross-examination at the Hearing, Klepaychuk agreed that when an employee is re-hired, the employee would normally fill out the usual employment forms such as TD1 form. In Lang's case, while she was not on active payroll after December 2006, when she returned to work at the Hotel, she was simply re-activated according to Klepaychuk.
37. The Delegate, after considering the evidence of both parties at the Hearing, preferred the evidence of Lang and her witness to Huber's witnesses and concluded that Huber had failed to discharge the onus placed on it, on a balance of probabilities, to show that Lang quit her employment. Accordingly, the Delegate ruled that that Huber contravened Section 63 of the Act for failing to pay Lang compensation for length of service plus vacation pay in the amount of \$740.37. The Delegate also ordered Huber to pay Lang an additional \$27.12 for accrued interest on the latter amount under Section 88 of the Act and imposed on Huber an administrative penalty under the Regulations in the amount of \$500.00 for a total amount of \$1,267.49.
38. In calculating the termination pay owed to Lang, the Delegate stated:

The Act requires the amount of termination pay be based on the final 8 weeks in which normal or average hours were worked. I am to total the wages earned in the last 8 weeks, divide by 8 to establish an average weekly wage, then multiply the result by the number of weeks of entitlement (6).

In her complaint, Ms. Lang claims to be owed \$2,359.44 in termination pay. That would put her average weekly wages at \$393.24. It would appear that Ms. Lang based her calculation on hours she normally worked in housekeeping.

Prior to December 9, 2006, it would have been reasonable to view the hours worked in housekeeping as normal as she customarily worked in that department. However, beyond that date, Ms. Lang's work was redefined to whatever hours she could pick up in the areas where she was able to do the work. That became the new normal for Ms. Lang. Therefore, I find the amount owed to Ms. Lang for termination pay must be based on the last 8 weeks of her employment as set out in the Act which includes 6 weeks in the laundry department where she only worked seven shifts, and the final two weeks in housekeeping. This covers the transition in the work she did in housekeeping and the work she did when she was no longer able to do housekeeping. The effect of this greatly reduced the amount of termination pay.

According to the records submitted Ms. Lang worked 74.5 hours in her last 8 weeks of employment, at \$12.50 per hour, this equals \$931.25. When \$931.25 is divided by 8 and the result is multiplied by 6 (the number of weeks of entitlement) it comes to \$698.46. Vacation pay of 6% is applied as well as interest, which results in the amount owed totalling \$740.37.

## LANG'S SUBMISSIONS

39. I have carefully reviewed Lang's submissions on appeal. There is nothing in those submissions that address the natural justice ground of appeal. She commences her submissions by stating "I feel that the principle of natural justice was not taken into consideration because my 'ailment' was much more serious

than just epicondylitis (golfer's elbow)". She then goes on to describe the nature of her injury and the impact upon her at work. She ultimately concludes:

Also, as [the Delegate] determined that I was in continuous employment by Huber Developments Ltd. carrying on business as Prestige Inn, according to the Employment Standards Fact Sheet that I have, they should have had to pay my medical, dental, etc. and if other employees received an increase in wages, they should have had to pay me a wage increase also (sic).

I feel that my situation should be looked at on its own and that I should get at least the amount of compensation that I asked for.

### **DIRECTOR'S SUBMISSIONS**

40. The Director submits that while Lang has appealed on the basis that the Director has failed to observe the principles of natural justice, Lang was clearly afforded the opportunity to present her evidence, call her witnesses and cross-examine Huber's witnesses. According to the Director, there is no basis for Lang to argue failure on the part of the Director to observe the principles of natural justice in making the Determination.
41. Further, the Director submits that Lang's medical condition was not in contention at the Hearing or challenged by the employer and the Delegate concluded that she had not quit her employment and awarded her compensation for length of service.
42. The Director also points out that it is the calculation of the termination pay by the Delegate that Lang takes issue with. In this regard, the Director submits that the Delegate's calculations are in accordance with the Act and based on the last eight weeks of normal or average earnings Lang earned.

### **HUBER'S SUBMISSIONS**

43. Huber has made no submissions in this appeal.

### **ANALYSIS**

44. Lang's appeal is based on the allegation that the Director failed to observe the principles of natural justice in making the Determination. As indicated by the Tribunal in numerous decisions that the principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to learn the case against them, the right to present their evidence and the right to be heard by an independent decision-maker. In this case, Lang has not adduced any evidence in support of her natural justice ground of appeal. To the contrary, there is ample evidence to show that Lang was afforded a fair opportunity to present her case to the Delegate. Lang not only attended at the Hearing of her Complaint and testified but she also produced a witness, Sapriken, and cross-examined Huber's witnesses and made submissions to the Delegate, which the latter carefully considered in making the Determination.
45. It would appear from the preamble of her appeal submissions that Lang may have misunderstood the scope of the natural justice ground of appeal as she states "the principle of natural justice was not taken into consideration because my 'ailment' was much more serious than just epicondylitis (golfer's elbow)". As indicated by the Director, and I agree, that the medical condition of Lang was not in dispute at the

Hearing of her Complaint. Moreover, the Delegate ruled in her favour in finding that her employment was terminated without cause and that she was due termination pay under Section 63 of the Act. I fail to see how the Delegate's Determination would have been more favourable to Lang in terms of the pecuniary award for termination pay if the Delegate had given more consideration to Lang's injuries in the Determination.

46. I completely agree with the Director that the crux of Lang's appeal is her dispute with the manner in which the Delegate calculated the award of termination pay. It is clear that Lang calculated her termination pay based on her regular hours in the Hotel's housekeeping department earlier in her employment with Huber. Lang's hours of work then were significantly more than her sporadic employment at the Hotel in the laundry department prior to her termination. This explains the significant difference between Lang's claim of \$2,359.44 in her Complaint and the Delegate's calculation of \$767.49 inclusive of interest.

47. Section 63(4) of the Act sets out the appropriate formula for calculating termination pay when an employee is dismissed without cause. In particular, this section states:

*(4) The amount the employer is liable to pay becomes payable on termination of the employment and is calculated by:*

*(a) totalling all the employee's weekly wages, at the regular wage, during the last eight weeks in which the employee worked normal or average hours of work;*

*(b) dividing the total by eight, and*

*(c) multiplying the result by the number of weeks' wages the employer is liable to pay.*

48. In this case, the Delegate, in calculating the termination pay awarded to Lang, properly followed the instruction in Section 63(4) and I see no error in that calculation. Accordingly, Lang's appeal is dismissed.

## **ORDER**

49. Pursuant to Section 115(a) of the Act, I order that the Determination be confirmed as issued.

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**Shafik Bhalloo**  
**Member**  
**Employment Standards Tribunal**