Employment Standards TRIBUNAL

An appeal

- by -

T.L.C. Automotive Services Ltd.
(the "Appellant")

- 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: Yuki Matsuno

FILE No.: 2007A/30

DATE OF DECISION: June 14, 2007

DECISION

SUBMISSIONS

Kirk Thorgeirson	for the Employer
Michael Richard	for himself
Carrie H. Manarin	for the Director of Employment Standards

OVERVIEW

1. T.L.C. Automotive Services Ltd. (the "Employer") appeals a Determination issued by a delegate (the "Delegate") of the Director of Employment Standards (the "Director") on February 20, 2007. In the Determination, the Delegate found that the Employer contravened section 63 of the Employment Standards Act (the "Act") with respect to the employment of Michael Richard. The Delegate ordered the Employer to pay $7,735.96 for compensation for length of service; $464.12 for concomitant annual vacation pay; and $469.43 for accrued interest under s. 88 of the Act, for a total of $8,669.51. The Delegate also assessed an administrative penalty of $500.00 on the Employer for contravening section 63.

2. The Employer now appeals to the Tribunal on the ground that the Director of Employment Standards failed to observe the principles of natural justice in making the Determination. The Tribunal has decided that this appeal will be decided on the basis of the parties' submissions and the record.

ISSUE

3. Did the Delegate fail to observe the principles of natural justice in making the Determination?

BACKGROUND

4. From January 1, 1998 to February 2006, Mr. Richard worked as a parts manager at an automotive parts and repairs business operated by the Employer. Mr. Richard submitted a complaint to the Employment Standards Branch on July 7, 2006 that he "worked for company for 8 years, was laid off with one day notice." The parties attempted to resolve the complaint by mediation on August 3, 2006. The Delegate then conducted a hearing into the complaint by teleconference on November 15, 2006.

5. The issues that the Delegate had to decide were (1) whether Mr. Richard was laid off or quit his employment with the Employer; (2) if he was laid off, whether he was offered reasonable alternative employment; and (3) if he was not offered reasonable alternative employment, whether he was entitled to compensation for length of service, and if so, what amount. The witnesses at the hearing were Mr. Thorgeirson; Mr. Richard; and Ms. Liddle, Mr. Richard's common-law spouse who worked at another business operated by Mr. Thorgeirson called Rachel's Haidaway.

6. Mr. Richard's evidence during the hearing was that on February 20, 2006, Mr. Thorgeirson told Mr. Richard that he could not afford to keep employing him. Mr. Thorgeirson made two suggestions, one being that Mr. Richard work at Rachel's Haidaway and other that he continue to work in his current

position but would be paid later (referred to by Mr. Thorgeirson as "banking time."). Mr. Richard said that at a meeting around 7 p.m. that evening attended by Mr. Richard, Ms. Liddle and Mr. Thorgeirson (the "February 20th Meeting"), the three talked about options and finally agreed that Mr. Richard should go on a temporary layoff after working the next day. Mr. Richard worked on February 21, 2006 and picked up his Record of Employment (ROE) dated February 23, 2006 on February 24, 2006. The reason for issuing the ROE was shown as "A" for shortage of work. Mr. Richard continued to check in occasionally at the business in the following three months and when he was not recalled to work by the end of May 2006 he filed a self-help kit, claiming his employment had been terminated. After filing his claim, he was issued an amended ROE, in which the reason for issuing the ROE was shown as "E/K" for quit/other. Mr. Richard said that he did not quit his job.

7. Mr. Thorgeirson's evidence was that he never told Mr. Richard that he was laid off; instead, on February 21, 2006 he talked to Mr. Richard about the possibility of laying him off. Mr. Thorgeirson said that he offered Mr. Richard two options for reasonable alternative employment: a management job at Rachel's Haidaway and "banked time", which meant that Mr. Richard could work now and be paid in three months when Mr. Thorgeirson expected things to become more stable (the "Banked Time Option"). Mr. Thorgeirson said that Mr. Richard turned down both options, cleaned off his desk and left before lunchtime without finishing his shift. To Mr. Thorgeirson, this indicated that Mr. Richard had quit his job. According to Mr. Thorgeirson, the February 20th Meeting never took place; layoff was not discussed until February 21st, and only Mr. Thorgeirson and Mr. Richard were present during that conversation.

8. The Delegate found in the Determination that Mr. Richard was laid off from his employment on February 21, 2006; that he was neither recalled nor offered reasonable alternative employment; and that he was therefore entitled to compensation for length of service. Where the evidence of Mr. Richard and Mr. Thorgeirson conflicted, the Delegate preferred the evidence of Mr. Richard.

ARGUMENT AND ANALYSIS

9. Section 112(1) of the *Act* outlines the grounds on which a person may appeal a determination:

> (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.

10. The Employer appeals on the second ground, and must establish the basis of its appeal in order to succeed. The Employer's appeal form contains extensive argument and documentation. I note that the majority of the Employer's submissions express disagreement with the Delegate's factual findings in the Determination, and in effect invite the Tribunal to find errors of fact. However, an appeal is not an opportunity to have the case re-heard on the merits, and if I proceeded to find errors of fact I would be exceeding my jurisdiction.

11. The question raised by the Employer's appeal is whether the Delegate failed to observe the principles of natural justice in making the Determination. The principles of natural justice are concerned with procedural fairness: the right to know the case against oneself, to have an opportunity to respond, and to be heard by an unbiased decision maker. The Employer makes two arguments relevant to the issue of

natural justice: (1) the Determination failed to acknowledge and explain why the Banked Time Option was found not to be an offer of reasonable alternative employment; and (2) The Employer was denied the opportunity to present evidence of the parties' mediation discussions at the hearing of the complaint. Specifically, the Employer says that during the mediation session, the February 20th Meeting was not mentioned. Because he had been told by the mediator that "all records were not allowed to be used at a later date if the mediation did not resolve the conflict", it appears that Mr. Thorgeirson did not bring up the mediation discussions at the hearing. Later, Mr. Thorgeirson says he was informed that "if both parties agreed, the records of the mediation could have been saved and presented as evidence" at the hearing. As I understand his argument, Mr. Thorgeirson says that if he had known earlier that it was possible to put the evidence of the mediation discussions before the Delegate at the hearing, he would have done so, and the fact that there was no mention of the February 20th Meeting during the mediation session "would show that the [February 20th Meeting] never occurred."

12. In response to the first argument, the Delegate says that she found in the Determination that the options presented by Mr. Thorgeirson to Mr. Richard, including the Banked Time Option, were not "offers" within the meaning of section 65(1)(f) of the *Act*; rather, they were all pre-layoff proposals. Because the Delegate found that the options were not offers, it was not necessary for her to make any findings as to whether they constituted "reasonable alternative employment" within the meaning of section 65(1)(f). Regarding the Employer's second argument, the Delegate says that she has no knowledge of what was discussed at the mediation and that the Employer had every opportunity to challenge the evidence of Mr. Richard and Ms. Liddle about whether a meeting occurred on February 20th.

13. I have reviewed the Determination, the record, and the submissions of the parties and conclude that there is no indication that the Delegate failed to observe the principles of natural justice in this case. With respect to Mr. Thorgeirson's first argument, the Delegate finds, rightly, that the Banked Time Option, discussed before the layoff took place, was not an offer within the meaning of section 65(1)(f) of the *Act*. Once she made this finding, the question of whether the option constituted reasonable alternative employment became irrelevant and no longer needed to be answered.

14. With respect to the second argument, the Employer's accounts of what he was told about mediation accords with the general understanding of mediation discussions: they are settlement discussions and as such are held on a "without prejudice" basis, meaning that those discussions cannot be raised in subsequent proceedings unless all parties expressly consent. The Employer fails to show that not having the opportunity to present evidence of mediation discussions at the hearing, which would have required Mr. Richard's consent in any event, violated the principles of natural justice. During the hearing, Mr. Thorgeirson was given ample opportunity to hear and review the evidence against the Employer with respect to the February 20th Meeting, and to respond in full by presenting the Employer's own evidence and challenging the evidence of Mr. Richard and Ms. Liddle through cross-examination. In the Determination, the Delegate thoroughly assessed and weighed the evidence presented by both sides before coming to the conclusion that the February 20th Meeting took place. In my view, the Employer's submissions fall short of showing any failure on the part of the Delegate to observe the principles of natural justice in reaching the conclusions expressed in the Determination.

15. The Employer's appeal does not succeed.

ORDER

16. Pursuant to Section 115 of the *Act*, I order that the Determination dated February 20, 2007 be confirmed in the amount of $9,169.51, together with any interest that has accrued under Section 88 of the *Act*.

Yuki Matsuno
Member
Employment Standards Tribunal