Employment Standards TRIBUNAL

An appeal

- by -

Thomas Philp
("complainant")

- 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

TRIBUNAL MEMBER: M. Gwendolynne Taylor

FILE No.: 2003A/252

DATE OF HEARING: March 10, 2004

DATE OF DECISION: March 31, 2004

DECISION

APPEARANCES

Thomas Philp	on behalf of himself
Michael Thede	on behalf of Success Commercial Printing Ltd.

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by Thomas E. Philp ("complainant") of a Determination that was issued on August 15, 2003 by a delegate of the Director of Employment Standards ("Director"), following an oral hearing. The Director found that the complainant had not established that his former employer, Success Commercial Printing Ltd. ("Success" or "employer"), contravened the *Act*. On the issue of whether the complainant was laid off or quit, the Director found the complainant quit and was not entitled to compensation for length of service. On the issue of whether the employer paid the complainant for work on December 2, 2002, the Director also found in favour of the employer.

The complainant alleges that the Director failed to observe principles of natural justice and that evidence has become available that was not available at the time the determination was made. The complainant asks that the Determination be sent back to the Director.

ISSUES

Has the complainant established that the Director erred in law or failed to observe principles of natural justice, or has the complainant established grounds for presenting new evidence?

THE CASE BEFORE THE DIRECTOR

The Facts

The complainant was employed by the employer as a pressman from June 24, 1996 to December 2, 2002, at the wage rate of $18.00 per hour. The employer did not provide termination notice in accordance with the *Act*. The complainant filed a complaint with the Employment Standards Branch on May 27, 2003, claiming entitlement to wages for December 2, 2002, 6 weeks severance pay, and vacation pay, totalling $4,731.84.

The parties met with a mediator at the branch and produced a document entitled 'Agreed Statement of Facts' which defined the issues in broad terms and set out very basic information. The following statement appears at the bottom of the 'Agreed Statement of Facts' form: "Officer conducting Adjudication Hearing will determine whether the employer is in or out of compliance with the legislation and is not limited to the issues set out on this document."

The Director's delegate conducted an oral hearing on August 6, 2003 and provided a written decision on August 15, 2003.

The Parties' Submissions

The employer's testimony before the delegate was that he and the complainant had a conversation on November 29, 2002, in which he advised the complainant he would be laid off as of December 13, 2002. He said he expected the lay-off to be temporary, as it was due to shortage of work. He testified that work had been slow and that the complainant had not worked many hours during November. The employer said that the complainant worked 6 hours on December 2 but did not show up on December 3. The employer said that on the evening of December 3, he contacted the complainant at home and the complainant advised him he had another job and would not be returning to work.

The employer's witness was the manager of the print shop, whose evidence concurred with the employer's recollection of the meeting on November 29, at which she was present. She also testified about payroll records. The complainant challenged the reliability of this witness' evidence because she was, or had been, in a personal relationship with the employer.

The complainant's testimony before the delegate was that there was no meeting on November 29, 2002, but rather on December 2, 2002, at the end of the work day, when the employer told him he was laid off. The complainant's witness was his wife, who was in their vehicle during the meeting on December 2; she could not hear the conversation but reported that the complainant told her after, "That's it, its over, I am laid off." Concerning the employer's recollection of the telephone conversation on December 3, the complainant denied having a conversation then, but recalled a conversation at some time after he was let go, in which they discussed some specific work for the employer.

Exhibit No. 5 is a cancelled cheque dated December 15, 2002, in the amount of $111.96, representing 6 hours work. The employer submitted this was payment for December 2, 2002. The complainant submitted this was work done after his lay-off, and that he is still owed wages for December 2, 2002, for 8 hours worked.

The Delegate's Determination

The delegate found that the complainant had been paid for 6 hours worked on December 2, 2002 and that he resigned by failing to show up for work on December 3 and thereafter.

The delegate set out the test for determining whether the complainant resigned:

> To be a bona fide resignation, the employee must clearly have communicated, by word or deed, an intention to terminate his employment relationship and, further, that intention must have been confirmed by some subsequent conduct. That is, there is a subjective and objective element required in order to demonstrate an employee's intention to quit. In other words in order to be satisfied an employee has freely volunteered his resignation, he must follow through with some deed that is inconsistent with their continued employment.

Concerning the lay off, the delegate stated:

> There is significant conflict in the evidence surrounding this issue. The most significant conflict in the evidence concerns whether the complainant was given two weeks verbal notice of lay off on November 29, 2002 or whether he was told on December 2, 2002 that his employment was terminated.

The delegate acknowledged the issues around the conflicting testimony and assessing credibility of witnesses and quoted the BC Court of Appeal in *Faryna v. Chorny*, (1952) 2 D. L. R. 354. The crux of that quote is: "In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions."

The delegate set out the evidence and positions of both parties and their witnesses. The delegate found support for the employer's testimony in the testimony of the employer's manager and noted that neither of them was shaken from their testimony in cross-examination. Concerning the personal relationship, the delegate stated: "I do not believe the relationship that existed at some time between Mr. Thede and Ms. Christopherson impacted on their testimony any more or less than the relationship of husband and wife in the testimony given by Ms. Philp in support of her husband."

The delegate concluded, on a balance of probabilities, that there was a meeting on November 29 at which the complainant was given two weeks notice of lay off.

The delegate then considered the conflicting evidence of whether the complainant quit on December 3, 2002, as the employer alleged he did during a telephone conversation.

The delegate considered the oral evidence and the employer's payroll records which, the delegate states, "indicate the complainant did not show up for work on December 3 or 4." Concerning the ROE, the delegate noted that it indicated 'temporary lay off' and that the "last day of work was November 29, 2002." The delegate also noted the employer's explanation that he instructed the part time bookkeeper to enter 'temporary lay off" because that is what he had initially advised the complainant. The delegate found the employer "gave this evidence in a credible fashion, explaining why he did it even if it was not correct."

The delegate noted the complainant's confirmation that he had found work with another employer because he was not working enough hours with this employer. The complainant worked for that employer on December 3. The employer's position was that the complainant had quit because of this other work. The delegate found the employer's position was supported "to some degree by the payroll records, although the complainant did not sign them off." The delegate also referred to a letter of recommendation the employer wrote for the complainant on November 4, 2002, and found that it provided some support for the employer's version of the events.

The delegate stated:

> The employer's version seems to hold up as the most probable in this situation. That is, there was not enough work for the complainant to keep him employed full time, the employer issued him with a letter of recommendation, the complainant sought out new work and found alternative employment at the time the employer gave him verbal notice of lay off. The complainant stated he had no reason not to work out a notice period if the employer had given him one. On the other hand it is equally probable that he had no interest in working out a notice period as he had found alternative employment.
>
> It would make sense that the complainant quit his employment as he had found other work. On balance of probabilities, I therefore conclude that Mr. Philp quit his employment with the employer on December 3, 2002. As I have found the complainant quit his employment he is not entitled to compensation for length of service.

Concerning the issue of whether the payment on December 2 was for wages for that day, the delegate noted that although the complainant maintained it was for other work, he did not provide any details of that work or when it was done. "In other words, the complainant has not provided any evidence that he worked on any other day after November 29, 2002, other than on December 2, 2002." The delegate noted that the complainant's wife testified that the payment was for extra work, but also provided no details.

The employer's recollection of this cheque was that he and the complainant attended his credit union where they met with the branch manager and the complainant was given cash. He testified the cheque was for 6 hours work on December 2. The delegate preferred the testimony of the employer, because the complainant had not provided details for his version of the events.

The Exhibits before the delegate were the Complaint Form, Self Help Kit, Record of Employment, employer's response to the Self Help Kit (dated May 9, 2003), cheque dated December 15, 2002, the complainant's employee attendance record for 2002, June 1999 letter re hours of work, Payroll cheque stubs for August, September, October and November 2002, and the letter of reference from the employer for the complainant dated November 4, 2002.

THE APPEAL

The complainant submitted that it is a breach of natural justice for the delegate to rely on the evidence of the manager who had a close personal relationship with the employer. Additionally, he asked to submit new evidence from the new employer.

The complainant alleged that the employer was deceptive in giving evidence. He suggested that the employer had been attempting to make him quit his job by continually giving 'non-sufficient funds' cheques (always replaced with cash), which he suggested was workplace harassment. He stated that he requested the letter of recommendation dated November 4, because he was certain he would not get one at the end of his employment.

The complainant admitted that he secured alternate employment during the last two weeks he worked for this employer, but claimed that it was with the understanding that this employer would have priority for his time if work was needed. The complainant maintained that he was let go on December 2, 2002, when the employer paid him for the last two weeks on November and said he could no longer afford to pay him. The complainant stressed that the Record of Employment issued by the employer on December 10, 2002, states that he was laid off.

The claimant challenged the delegate's findings because he relied on evidence supplied by the manager who was in a common law marriage with the employer for approximately 10 years. He submitted that she would have had a vested interest in the company, she might be responsible for the affairs of the company, and she would have had an interest in supporting her employer. The complainant included in his appeal a statement that the cheque he received on December 15 was for work he did on "a Sunday just prior to that check but could not remember the date." He noted that this should have been recorded in the employer's time sheets, but there was no mention there of a Sunday being worked. The complainant submitted that this shows that the employer's records are not accurate and should not be used to calculate time owing.

The complainant disputed the finding that he was paid for 6 hours on December 2 and he denied that he attended a meeting with the bank manager. He submitted that he received a cheque from the employer, tried to cash it, there were not sufficient funds, and he met the employer in a parking lot where he

received cash in exchange for the cheque. He submitted that there should have been additional evidence from the employer concerning the December 15 cheque, such as a cheque stub indicating what the payment was for.

The complainant submitted that given the conflicting versions of how this employment was terminated, the Employment Standards Branch should have conducted some follow up investigation. In support of his position that he did not quit, he noted that he knew he was entitled to six weeks severance and he wanted to ensure he was eligible for employment insurance, if necessary. He disputed the employer's claim that he did not know who the new employer was and stated that both of his employers knew of the other and had some contact.

In his response to the appeal, the employer denied that he was attempting to have the complainant quit, denied telephoning the new employer, said he did not know who the complainant was working for, confirmed that he and the manager lived together, but not after April 2001, and said that the bank manager would confirm the cashing of the cheque.

In the delegate's response to the appeal he denied that there was a breach of natural justice, noting that the complainant did not allege that he was denied the opportunity to know the evidence against him or to respond to the evidence at the hearing. The delegate submitted that the 'new evidence' was available at the time of the hearing and could have been submitted then.

ANALYSIS

Nature of the Appeal

The appeal is brought under section 112 of the *Act*:

> 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.

The complainant alleges that the Director breached the principles of natural justice by relying on evidence from the employer's manager. The Director submits that there was no denial of natural justice. Natural justice is a legal term that encompasses principles that parties are to be provided an opportunity to know the evidence against them, to respond to that evidence and to have their dispute decided by an unbiased decision maker.

In *J. C. Creations Ltd. (Re)*, [2003] B.C.E.S.T.D. No. 317, BCEST #RD317/03, a reconsideration panel of the Tribunal considered the grounds of appeal in section 112 and determined that the Tribunal should consider the substance of an appeal, regardless of whether an applicant has ticked the correct boxes (see paragraphs 47 – 50). At paragraph 49, the Tribunal stated:

> ¶ 49 Consistent with the nature and purposes of the legislation, we should, as much as possible, approach these potential complexities with a common sense and plain language orientation. That includes addressing the substance of appeals which are filed, as opposed to the form. Of course,

> we must also thereby be true to the finite grounds of appeal now in Section 112(1) of the Act and be fair to all parties before the Tribunal.

In line with that analysis, I include the notion that although an applicant may not precisely define what conduct amounts to the alleged breach of natural justice or error of law, the Tribunal should nonetheless address the substance of the appeal.

In *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No 2275 (C.A.), the Court of Appeal defined error of law as including:

(a) A misinterpretation or misapplication of a section of the Act;
(b) A misapplication of an applicable principle of general law;
(c) Acting without any evidence;
(d) Acting on a view of the facts which could not reasonably be entertained; and
(e) Exercising discretion in a fashion that is wrong in principle.

Accordingly, there may be instances when error of fact gives rise to an error of law.

In reviewing the Determination and submissions on appeal, I was concerned that the delegate had not followed the legal tests he had set out for either testing credibility or for determining whether the complainant had quit. Concerning the challenge to the credibility of the employer's witness, instead of an objective analysis of whether her evidence was in 'harmony with the preponderance of the probabilities', the delegate used the witness' evidence to establish the probabilities. The delegate did not examine the surrounding circumstances to determine whether her evidence was probable.

Additionally, the delegate made a finding that the relationship that existed at one time between the employer and his witness, did not impact on their testimony "any more or less that the relationship of husband and wife", referring to the complainant's witness. With respect, that is not relevant at all. There could be witnesses on both sides lacking credibility – they do not give each other credibility any more than they cancel each other out. The decision maker must consider each witness individually and apply proper tests to their evidence. I find that the delegate failed to apply the proper tests for assessing credibility and thus erred in law.

Concerning the test for whether the complainant had quit, the delegate considered only part of the evidence that would assist in the subjective test, and did not consider the objective test.

Overall, I found the delegate did not apply the legal tests correctly and did not provide adequate reasons for his conclusions. I determined that it would be advisable for the Tribunal to conduct an oral hearing.

ORAL HEARING MARCH 10, 2004

At the beginning of the hearing, I advised the parties of the documents I had on file that would form part of the hearing record, that I would need to hear from them on their recollections of the events surrounding the termination of the complainant's employment, and that I had a number of questions concerning the evidence. At the hearing before the delegate, both parties had witnesses. At this hearing, only the complainant's witness attended. The hearing proceeded with a combination of the parties relating their evidence and responding to my questions.

During the hearing, I asked both parties about their respective knowledge of their rights and obligations at the time this employment was coming to an end. The complainant maintained, as he has throughout the hearing process before the delegate and the Tribunal, that he was aware he was entitled to compensation for length of service and that he would not have jeopardized that right by quitting his job. The employer testified that he had previously worked for 5 years in the human resources department of an international courier company and was aware of the statutory obligation to provide written notice. He said he was not then aware that he would have to pay compensation for not providing that notice.

One of my first questions concerned the payroll records for November 2002, and the evidence of the meeting at which the employer told the complaint he was laid-off. The delegate had accepted the testimony of the employer and his witness, found that the meeting occurred on November 29, and that the employer gave 2 weeks notice of lay-off, to be effective December 13, 2002. However, one of my concerns with the employer's evidence was that the payroll records indicate that the complainant did not work on November 29. At the hearing on March 10, 2004, it was apparent that both parties were surprised to realize that fact. The employer stated that he and his witness must have made a mistake and that the meeting must have occurred on November 28.

The rest of the employer's evidence was much the same as at the hearing before the delegate - that the last day the complainant worked was December 2, 2002, that he only worked 6 hours because there was insufficient work, that he was paid for that day by cheque dated December 15, 2002, and that during a telephone conversation in the evening of December 3 the complainant told him he quit. The employer testified that he did not telephone the complainant at work or at home after that. And, he denied that the complainant did any work for him after December 2, 2002.

Another of my concerns with the evidence before the delegate was that there was no evidence of the payroll record for December 2002. At the hearing on March 10, 2004, the employer provided a copy of the cheque stub on which it is documented that the December 15 cheque is for the pay period ending December 15, 2002, and which shows regular wage (6 hours at $18.00 per hour), vacation pay, less employment insurance. The date when the 6 hours was worked is not recorded on the stub. The employer also provided a clearer copy of the cancelled cheque dated December 15. There are a number of stamps on the back of the cheque and one of them clearly shows "12/23/02.", which could mean that the cheque was processed through the employer's account on December 23, 2002. The significance of the date will be discussed later.

On the ROE dated December 10, 2002, the employer's bookkeeper recorded that the complainant had been laid off, the last day worked was November 29, and that date of recall was unknown. It is obvious that this information contradicts the employer's evidence. In the determination, the delegate noted that the employer said he instructed the bookkeeper to put "laid off" on the form because that was what he had told the complainant in the first place. In testimony at the March 10 hearing, his explanation was that bookkeeper always indicated that employees had been laid off, and did the same with this ROE. He did not know why the last date worked was incorrect. The employer offered no explanation for why he had not corrected the misinformation.

The complainant's evidence was that the employer told him at the end of the work day on December 2 that there was not enough work and that he had to lay him off. The complainant testified that the employer did not provide any notice period so his employment was terminated immediately. The complainant testified that the employer indicated there might be some jobs he would want the

complainant to assist with. The complainant testified that he was willing to continue work full time, but that was not offered.

The employer was not able to recall any specific work orders that were coming in at this time and could not recall what work was available for the complainant after December 2. He acknowledged that business had slowed down and, eventually, in June 2003 he closed the business. After December 2, 2002, he did not hire anyone to replace the complainant. The office manager (the witness in the previous hearing) ran the printing press and attended to the office duties.

During November 2002, the complainant had commenced working part time for another printing company. When Success did not have work, the complainant worked for the new employer. Both parties agreed in the hearing before me that this was a mutually advantageous arrangement. If the complainant had not had alternate employment, the employer would have accepted responsibility for paying him. So, looking at the payroll records for November 2002, each time the complainant was not paid for a full 8 hour day, it was because both parties had agreed that he would get leave without pay. It was also common evidence that the layoff which is the subject of this dispute was the only time the employer had laid off the complainant.

The complainant testified that he understood he had been let go and that the employer might call him if he needed assistance. He said he agreed to that arrangement, but only for payment in cash, because of the number of times the payroll cheques had not been cashable.

The complainant testified that after looking at a calendar he realized that the only Sunday he could have worked for the employer between December 2 and the December 15 cheque was December 8. Therefore, he testified that he was called to work on Sunday, December 8, 2002, worked 6 hours and was not paid as anticipated. He testified that the employer contacted him again for a small job, to be done one evening, but the complainant said he would do it only if he was paid for the outstanding December 8 wage. The employer denied calling the complainant for any work after December 2.

The complainant testified that he was finally paid for the December 8 work by the cheque dated December 15. He testified that he was unable to cash the cheque because of lack of funds, that he contacted the employer and arranged to meet him at the Lumberland parking lot where he was given cash for the cheque. The complainant's wife testified to these same events concerning the December 15 cheque and meeting the employer. They were not certain of the date, but said it was immediately after they received the cheque in the mail. The complainant stressed this incident as a credibility issue to point out the number of ways in which the employer's evidence is not correct.

The employer testified that when the complainant contacted him about cashing the December 15 cheque, he met the complainant at the employer's bank where they were assisted by a manager who initialled the back of the cheque and cashed the cheque. The employer could not recall the date this occurred and could not make out the dates on the back of the cheque.

The complainant testified that he expected to be paid for December 2 when he received the ROE. However, that did not happen and he did not contact the employer about that payment. When he filed with the ESB, he included that as a claim.

The complaint testified that when he received the ROE, he went to the Employment Standards Branch (ESB) and to Employment Insurance (EI). At ESB he was told that if the employer called him back to

work within 13 weeks he would be obligated to return. If he was not called, after 13 weeks he would be able to file a claim for compensation based on length of service. The complainant testified that if the ROE had recorded that he had quit his employment, he would have disputed it immediately. He noted that the employer had ample opportunity to correct the information on the ROE but never did. He also noted that there was no evidence from the bookkeeper to corroborate the employer's version of the events. The complainant testified that he went to EI because he did not have full time employment.

ANALYSIS

The complainant claims for 6 weeks wages as compensation for length of service, pursuant to section 63 of the *Act* and payment for one day's wage, December 2, 2002. The disputed facts are whether the complainant worked 6 hours or 8 hours on December 2, whether the employer paid him for that day, whether the complainant worked on December 8 and was paid, and whether the complainant quit his job. It is not disputed that the employer told the complainant he was laid off. The parties do not agree on when this was said, whether the employer gave two weeks notice and whether the complainant subsequently quit.

Compensation for length of service

Section 63 Liability resulting from length of service

63 (1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.

(2) The employer's liability for compensation for length of service increases as follows:
- (a) after 12 consecutive months of employment, to an amount equal to 2 weeks' wages;
- (b) after 3 consecutive years of employment, to an amount equal to 3 weeks' wages plus one additional week's wages for each additional year of employment, to a maximum of 8 weeks' wages.

(3) The liability is deemed to be discharged if the employee
- (a) is given written notice of termination as follows:
  - (i) one week's notice after 3 consecutive months of employment;
  - (ii) 2 weeks' notice after 12 consecutive months of employment;
  - (iii) 3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice;
- (b) is given a combination of written notice under subsection (3) (a) and money equivalent to the amount the employer is liable to pay, or
- (c) terminates the employment, retires from employment, or is dismissed for just cause.

(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 8 weeks in which the employee worked normal or average hours of work,
- (b) dividing the total by 8, and
- (c) multiplying the result by the number of weeks' wages the employer is liable to pay.

(5) For the purpose of determining the termination date under this section, the employment of an employee who is laid off for more than a temporary layoff is deemed to have been terminated at the beginning of the layoff.

Under section 63, an employee has an entitlement to compensation, and an employer has an obligation to pay compensation, based on the number of years worked. The employer's obligation is discharged in

certain situations, including if an employee quits (s.63(3)(c)). The delegate set out the test for whether an employee has quit:

> To be a bona fide resignation, the employee must clearly have communicated, by word or deed, an intention to terminate his employment relationship and, further, that intention must have been confirmed by some subsequent conduct. That is, there is a subjective and objective element required in order to demonstrate employee's intention to quit. In other words in order to be satisfied an employee has freely volunteered his resignation, he must follow through with some deed that is inconsistent with their continued employment.

On the subjective part of the test, the decision maker must be satisfied by evidence that the employee intended to leave his employment and clearly communicated that. Otherwise, the employee will be entitled to the statutory benefits granted by section 63. In this case, the delegate stated:

> The employer's version seems to hold up as the most probable in this situation. That is, there was not enough work for the complainant to keep him employed full time, the employer issued him with a letter of recommendation, the complainant sought out new work and found alternative employment at the time the employer gave him verbal notice of lay off. The complainant stated he had no reason not to work out a notice period if the employer had given him one. On the other hand it is equally probable that he had no interest in working out a notice period as he had found alternative employment.
>
> It would make sense that the complainant quit his employment as he had found other work. On a balance of probabilities, I therefore conclude that Mr. Philp quit his employment with the employer on December 3, 2002.

It is apparent that the delegate found the parties' viewpoints 'equally probable.' When that occurs, it is necessary to consider which party bears the onus of proof. The delegate did not do that and, in the result, committed an error of law.

The evidence was clear and undisputed that the employer had given an improper termination notice. According to the employer's own evidence his notice of termination was deficient in two regards – it was not in writing and it did not provide the statutory notice period. That would have entitled the complainant to compensation [s. 63(1)] – except for the employer's allegation that the employee then quit [s. 63(3)(c)]. The onus is on the employer to prove the 'quit.' If the evidence is 'equally probable' then the balance tips in favour of the complainant.

On the subjective test, the delegate accepted the employer's testimony that the employee told him in a telephone conversation on December 3 that he quit. That was the total evidence that the "employee must clearly have communicated, by word or deed, an intention to terminate his employment relationship." The complainant denied this conversation ever took place and pointed out that he had no reason to quit, rather he knew it was in his best interests not to quit, and that the ROE proved he had been laid off. The delegate accepted evidence that the complainant had found alternative employment when the evidence was clear this employment had been in place before any discussion of lay-off and was only part time. The delegate rejected the complainant's evidence and accepted the employer's oral testimony. It appears that the delegate placed an onus on the complainant to demonstrate that he did not quit. That is incorrect.

The delegate had earlier accepted the employer's version of the meeting on November 29 over the complainant's testimony that there was no such meeting. The employer's evidence was supported by his witness and the delegate noted they were not shaken in cross-examination. As it happens, that evidence

has now been rescinded by the employer who says that he and his witness were mistaken about the date. It appears that this finding of credibility may have influenced the delegate's subsequent findings of fact, such as whether the complainant said he had quit. The delegate did not provide reasons for rejecting the complainant's evidence on that point.

The objective part of the test to determine whether the complainant quit relates to subsequent conduct. The delegate did not examine this part of the test, other than noting that the complainant had a part time job. What happened after December 2? The complainant continued with his part time job. The employer did not have full time work for the complainant, did not present evidence of any work having been available, and did not hire anyone to replace the complainant. The employer completed and filed a ROE showing the complainant was laid off. The complainant sought advice from the ESB and filed with EI.

The objective tests looks at whether the complainant's subsequent conduct is inconsistent with continued employment. A necessary adjunct to this is that there must be employment available. The evidence does not demonstrate that there was any employment for the complainant with this employer. The delegate suggested that the complainant did not show up for work on December 3 or 4. However, the delegate did not consider the evidence of what work was available, if any. All the employment records demonstrate is that the complainant did not work – not that he did not 'show up' for work. He also did not work on November 29, or November 27, etc., days that were mutually agreed to.

I find that all of the employer's evidence concerning the layoff/quit is suspect, particularly in light of the revelation that both the employer and his witness gave erroneous testimony at the previous hearing. The only evidence the employer has that the complainant quit is the employer's testimony about one telephone conversation. Further, much of the employer's evidence is contradicted by the written ROE. I find that the complainant's evidence is credible and supported by the ROE.

A reasonable view of the evidence points to the employer having terminated the employment, and does not point to the complainant having quit.

I find the preponderance of evidence supports the claimant's version of what transpired. This company had fallen on hard times, there was not enough work to keep the complainant busy and he had found another part time job which he worked when this employer did not have enough work. That employment worked to the benefit of the employer because he saved money when work was slow. I find that the employer told the complainant his employment was terminated at the end of the work day on December 2 and that he did not provide a notice period. I find that the complainant is credible in saying that he knew he was entitled to a proper notice period and that he had no reason to quit.

I find that the complainant is entitled to compensation for 6 weeks wages, vacation pay and interest under section 63.

Wages for December 2, 2002

The evidence to support the employer's version of this part of the dispute is the cheque stub which was entered in the March 10, 2004 hearing. That stub indicates the complainant worked 6 hours in the pay period ending December 15, 2002. The onus is on the complainant to substantiate this claim. According to the complainant, he was owed more for December 2 than for December 8. He maintains that he pursued the employer for payment for December 8 but did not pursue the employer for payment for December 2, 2002. I find that evidence inconsistent and improbable.

Part of the evidence on this aspect is the dispute whether the parties went to the bank to obtain cash for the cheque. I accept the date on the back of the cheque meaning that it was processed on December 23. From a view of all the evidence touching on this point, I find the parties did not attend the bank together on that day. I find that the complainant did not wait that long to get payment. Therefore, I find the complainant's testimony more probable. Concerning the initial on the back of the cheque, I find it more probable that the manager needed to initial it for payment, or deposit, to the employer because of the financials difficulties.

I believe the complainant when he says he worked a Sunday. However, I cannot accept his evidence that the December 15 cheque was more probably payment for December 8 than payment for December 2. The complainant was not reticent about pursuing the employer for other money owed and, accordingly, I cannot accept his contention that he did not pursue payment for December 2. I prefer to rely on the documentary evidence of the cheque stub, which I grant is not conclusive but is probable evidence that the complainant was paid for December 2. This means the complainant was paid for 6 hours work although he alleged he worked 8 hours. The 6 hours is consistent with the payroll record entered in the previous hearing.

I find that the complainant has not established this part of the claim.

ORDER

Pursuant to s. 115 of the *Act*, I vary the Determination dated August 15, 2003 by Ordering the employer to compensate the complainant in the amount 6 weeks wages and vacation pay, plus accrued interest, as compensation for length of service under s. 63 of the *Act*. The Director's office will provide the exact calculation to the date of this Order.

M. Gwendolynne Taylor
Member
Employment Standards Tribunal