Employment Standards TRIBUNAL

An appeal

- by -

Meicor Realty Management Services Inc.
("Meicor")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2014A/69

DATE OF DECISION: July 30, 2014

Employment Standards Tribunal
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DECISION

SUBMISSIONS

Laurie Sims on behalf of Meicor Realty Management Services Inc.

OVERVIEW

1. This is an appeal filed by Meicor Realty Management Services Inc. ("Meicor") and it concerns a Determination issued against it on April 29, 2014 (over five months after an oral hearing complaint held on November 13, 2013). By way of the Determination, Meicor was ordered to pay its former employee, Gordon T. Holloway ("Holloway"), the sum of $2,458.27 on account of unpaid wages and interest. There is nothing in the record before me to explain why there was such a lengthy delay from the close of the hearing to the issuance of a decision; I can only say that this sort of delay is not in keeping with subsection 2(d) of the *Employment Standards Act* (the "*Act*"). Further, and also by way of the Determination, Meicor was ordered to pay five separate $500 monetary penalties levied against it under section 98 of the *Act*. Thus, the total amount payable under the Determination is $4,958.27.

2. Having reviewed the material before me, including Meicor's written submissions, the Determination and accompanying "Reasons for the Determination" (the "delegate's reasons"), and the subsection 112(5) record that was before the Director of Employment Standards' delegate (the "delegate") when the Determination was issued, I am of the view that this appeal has no reasonable prospect of succeeding and thus there is no need to seek submissions from the respondent parties.

3. This appeal is dismissed pursuant to subsection 114(1)(f) of the *Act*. My reasons for summarily dismissing this appeal are set out in greater detail, below.

BACKGROUND FACTS

4. Mr. Holloway commenced his employment as a "resident caretaker" (see section 1 of the *Employment Standards Regulation*) with another firm in February 2011. Mr. Holloway was responsible for looking after four buildings (with a total of 114 residential units) one of which contained his residence. The separate buildings in the apartment complex are known as "Highland Court", "Park Place Apartments", "Scenic View Apartments" and "Scenic View Manor" and the complex is situated in Campbell River, B.C.

5. During the summer of 2012, the buildings were sold to a company described in a document headed "Offer to Purchase and Acceptance Agreement" as "NPR GP Inc., in its capacity as General Partner of NPR Limited Partnership" (this entity was described in the delegate's reasons, seemingly incorrectly, as "Northern Properties Ltd.). For ease of reference, I will refer to the purchaser under the property sale agreement as "Northern Properties".

6. The "vendor" under the agreement comprised four separate legal entities – two separate numbered companies and Magna Carta Investments Inc. and Magna Carta Properties Inc. For ease of reference I shall refer to the vendor as "Magna Carta". The property sale agreement is dated "for reference" May 17, 2012, but Mr. Holloway did not become aware of the fact of the sale until sometime in late July 2012. Around this time, he was contacted by Laurie Sims (Meicor's sole director and officer; Meicor being the property management firm engaged by Northern Properties to manage the four buildings). Ms. Sims, according to Mr. Holloway, told him "that nothing was changing" and that he should simply carry on with his usual duties

(delegate's reasons, page D7). There was no break in his employment duties although Magna Carta's principal, identified as "Fred Johnston", "provided [Mr. Holloway] with one week of verbal notice and told him that he would have continued employment with the new owner" (delegate's reasons, page D7). I might parenthetically note that Magna Carta seemingly contravened the *Act* by only giving "verbal" notice – section 63 mandates *written* notice and the Tribunal has consistently held that only *written* notice will do (see, for example, *Sun Wah Supermarket Ltd.*, BC EST # D324/96, *Douglas*, BC EST # D085/03, and *McKee*, BC EST # RD089/03).

7. Meicor and Mr. Holloway subsequently entered into a "Resident Caretaker Employment Agreement", dated August 15, 2012 (but signed by both parties on August 8, 2012), that provided for an annual salary of $43,200 and set out in greater detail other terms and conditions of employment including the nature of Mr. Holloway's duties. According to Mr. Holloway: "On September 21, 2012, [Mr. Holloway's] employment was terminated; he was told he 'wasn't doing his job'" (delegate's reasons, page D9). Meicor's evidence on this point was much the same as Mr. Holloway's: "[Mr. Holloway] 'wasn't working out'; rent collections were not consistent and he 'couldn't do the job the way they needed it to be done'" and thus he "was terminated and given one week of severance pay" (delegate's reasons, page D10).

8. The delegate made several findings, most of which are not being appealed:

- Mr. Holloway was a "resident caretaker" as defined in section 1 of the *Regulation*;
- Meicor contravened subsection 36(1)(a) of the *Act* in that it failed to ensure that Mr. Holloway had at least 32 consecutive hours free from work on several separate occasions during the period from July 28 to September 21, 2012;
- Meicor failed to pay Mr. Holloway statutory holiday pay for the B.C. Day and Labour Day statutory holidays in 2012 thus contravening section 45 of the *Act*;
- Mr. Holloway's employment was continuous and uninterrupted, despite the property sale, and thus Meicor was a "successor" employer for purposes of section 97 of the *Act*;
- In light of the section 97 declaration, Mr. Holloway's period of continuous employment dated as and from February 2011 and thus he was entitled to two weeks' wages as compensation for length of service under section 63 of the *Act*;
- Meicor contravened section 63 of the *Act* when it paid him only one week's compensation for length of service rather than the two weeks' pay to which he was entitled;
- Meicor did not keep proper payroll records as mandated by section 28 of the *Act* and, in addition, failed to comply with its "caretaker schedule posting" obligations under section 35 of the *Regulation*;

9. In light of these findings, the delegate issued a $1,068.51 award under section 36, a $356.18 award for the two statutory holidays worked in 2012, an $830.77 award for one further week's wages under section 63, 4% vacation pay on those amounts ($2,255.46 x 4% = $90.22) and section 88 interest ($112.59) for a total award of $2,458.27. As noted above, the delegate also found that Meicor contravened four separate provisions of the *Act* (sections 28, 36, 45 and 63) and section 35 of the *Regulation* and thus levied five separate $500 monetary penalties under section 98 of the *Act*.

THE APPEAL

10. Meicor appeals the Determination on the sole ground that the delegate erred in law (subsection 112(1)(a)) although, as will be seen, its appeal documents also raise an issue regarding subsection 112(1)(c) – "evidence has become available that was not available at the time the determination was being made".

11. Meicor's appeal documents include the Appeal Form (Form 1) and several attachments including a one-page letter dated May 16, 2014, signed by Ms. Sims. I have reproduced the relevant portions of this letter in full, below, relating to the basis of its appeal:

> We would like to appeal this decision only as it pertains to the award…for $90.22 for vacation pay…and $830.77 for compensation for length of service…We would also like to appeal the fine of $500.00 resulting from these awards.

12. Accordingly, Meicor is not challenging the Determination with respect to the awards under sections 36 and 45 (and the two consequent $500 penalties), nor does it challenge the $500 monetary penalty levied for failure to keep payroll records. It should also be noted that Meicor was not penalized for failing to pay vacation pay – the vacation pay award simply represents 4% of the total unpaid wage award since vacation pay must be added to all of the unpaid wages to which Mr. Holloway is entitled.

13. Ms. Sims, in her May 16, 2014, letter, asserts: "Gordon Holloway was either an employee or a contract worker for the previous owner of the buildings but regardless he was terminated by the previous employer before he was hired by Meicor" and that "Section 97…states that if an employee's employment ends before the sale of the business, the seller is responsible for all outstanding wages". This argument turns on the correct interpretation and application of section 97 of the *Act* in this case.

14. In addition, and by way of further refinement of its section 97 argument, Meicor submits a copy of the property purchase agreement in support of its position that it is not liable for any further section 63 compensation. Meicor submits that the vendor "made it clear…that [Holloway] was not an employee but a contract worker" and that Mr. Johnston, for Magna Carta, never issued a final Record of Employment ("ROE") to Mr. Holloway because he "was convinced that his relationship with [Holloway] was as a contract worker and therefore there was no ROE prepared or available as proof of termination". Finally, Meicor submits that if Magna Carta and Mr. Holloway "were employer/employee the awards for vacation pay, termination notice etc. would be the responsibility of Mr. Johnston".

FINDINGS AND ANALYSIS

15. As noted above, the vacation pay award ($90.22) simply constitutes 4% of the unpaid wages that the delegate determined Meicor owed Mr. Holloway. Accordingly, the correctness of this award will turn on the ultimate unpaid wage award due to Mr. Holloway; to the extent that there is any reduction in this latter amount, that will be reflected in a concomitant reduction in the vacation pay award.

16. Thus, the key points in this appeal all concern the section 63 award for compensation for length of service. Meicor does not say that it had just cause for terminating Mr. Holloway's employment; indeed, it provided him with one week's wages as compensation for length of service presumably believing that this payment discharged its obligation under the *Act*. The delegate, applying section 97 of the *Act*, determined that Mr. Holloway's employment continued uninterrupted by the property sale transaction and, accordingly, since his total period of continuous employment spanned the period from February 2011 to September 2012, he was entitled to two weeks' wages under section 63. Accordingly, he was entitled to one further week's wages.

17. Mr. Holloway's evidence was that he did receive *verbal* notice of termination (although section 63 mandates *written* notice) from Magna Carta sometime in July 2012 (although when this notice was actually given is not set out in the delegate's reasons – I note that Meicor did not call anyone from Magna Carta to testify at the complaint hearing). However, Mr. Holloway was also informed that his employment would continue and the evidence before the delegate was that there was absolutely no break in his service as a resident caretaker for the properties in question. For its part, Meicor provided no evidence at the complaint hearing to the effect that there was a formal break in Mr. Holloway's employment as a resident caretaker. Ms. Sims, for Meicor, testified at the complaint hearing as follows: "She confirmed there was no break in employment" (delegate's reasons, page D10). In light of this evidence, section 97 clearly applied and the delegate correctly determined that Mr. Holloway, given his period of *deemed* continuous service, was entitled to two weeks' wages as compensation for length of service.

18. On appeal, Meicor seeks to introduce new arguments and new evidence in support of its position that it should not have been held liable for one further week's wages under section 63. Meicor now says that Mr. Holloway was not "employed" by Magna Carta but rather was a "contract worker". I assume that Meicor is intending to say that Mr. Holloway was an "independent contractor" – *all* employees work under a contract and in that sense are "contract workers" – and thus his prior service with Magna Carta should not be taken into account for purposes of section 97 since he was not "an employee of the business" when the property sale completed. This issue was not raised before the delegate at the complaint hearing and, on that basis alone, should be rejected. In fact, Meicor's present position is wholly inconsistent with its position at the complaint hearing where Ms. Sims testified that it was her understanding Mr. Holloway was "being trained as a manager" by Magna Carta (*i.e.*, he was an employee) prior to the sale and that "Meicor decided to carry on with him as resident caretaker" – see delegate's reasons, page D10.

19. However, quite apart from this fundamental problem with Meicor's present position, there was no evidence before the delegate, and there is no evidence before me now (and, even if there were, such evidence would likely be inadmissible under subsection 112(1)(c) since it would have been available when the Determination was being made), that Mr. Holloway was an independent contractor. The statement attributed to Mr. Johnston regarding Mr. Holloway's status is hearsay evidence of very dubious cogency.

20. Finally, Meicor purports to bolster its position by submitting a copy of the property purchase agreement. This document is inadmissible under subsection 112(1)(c) since it was available when the Determination was being made. However, even if I were to consider this evidence, it wholly undermines Meicor's argument rather than supports it. Paragraph 4.3 of the agreement stipulates that, as a condition precedent, the vendor will, by the closing date, ensure that it "has terminated the *employment* of the two *employees* associated with the operations of the Property" (my *italics*). Even if this occurred, and the evidence on this point is very sketchy, the evidence also suggests that there was immediate re-employment with no break in service. Paragraph 8.4 states: "The Vendor will terminate the *employment of all employees associated with the operations of the Property*, effective on closing, on the condition that the Purchaser will accept no responsibility for any costs associated with such termination." (my *italics*) My previous comment applies with equal force regarding this provision – this provision is inconsistent with Meicor's present position that Mr. Holloway was an independent contractor. Further, since Mr. Holloway was not a party to this agreement, the privity rule applies and he is not bound by the "no liability to Purchaser" provision. If Meicor wishes to seek indemnity from Northern Properties (or Magna Carta, for that matter), that is its choice but this possible right to seek indemnity (and I express no view whatsoever regarding the legal merits of such a claim) in no way impacts Meicor's liability to Mr. Holloway under the combined effect of sections 63 and 97 of the *Act*.

21. To summarize, in my view, this appeal is absolutely doomed to fail. The award for one further week's wages for compensation for length of service was correct and, accordingly, the $500 penalty levied with respect to

this contravention was properly levied. Given those findings, there was no error with respect to the concomitant vacation pay award. The only appropriate step to take at this juncture is to summarily dismiss the appeal under subsection 114(1)(f) of the *Act*.

ORDER

22. This appeal is dismissed under subsection 114(1)(f) of the *Act*. In accordance with the provisions of subsection 115(1)(a) of the *Act*, the Determination is confirmed as issued in the amount of $4,958.27 together with whatever further interest that has accrued under section 88 since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal