Employment Standards TRIBUNAL

An appeal

- by -

Maltesen Masonry Ltd.
("Maltesen")

– 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)

and

An application for suspension

- by –

Maltesen Masonry Ltd.
("Maltesen")

– of a Determination issued by –

The Director of Employment Standards
(the "Director")

Pursuant to section 113 of the
Employment Standards Act R.S.B.C. 1996, C. 113 (as amended)

TRIBUNAL MEMBER: David B. Stevenson

FILE No.: 2010A/57 & 2010A/58

DATE OF DECISION: June 30, 2010

DECISION

SUBMISSIONS

Erin L. Brook	Counsel for Maltesen Masonry Ltd.
Kristine Booth	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by Maltesen Masonry Ltd. ("Maltesen") of a Determination that was issued on April 8, 2010, by a delegate of the Director of Employment Standards (the "Director"). The Determination found Maltesen had contravened Part 6, section 54 of the *Act* in respect of the employment of Christopher P. Hardy ("Hardy") and ordered Maltesen to pay Hardy an amount of $3,649.83 as compensation, an amount which included wages and interest.

2. The Director also imposed an administrative penalty on Maltesen under Section 29(1) of the *Employment Standards Regulation* (the "*Regulation*") in the amount of $500.00.

3. The total amount of the Determination is $4,149.83.

4. In this appeal, legal counsel for Maltesen says the Director failed to observe principles of natural justice in making the Determination. Maltesen also says the Tribunal should consider additional evidence, which has been submitted with the appeal, that was not considered by the Director when the Determination was being made. Finally, Maltesen challenges the remedy provided by the Director under section 79(2) of the *Act*.

5. Maltesen seeks a suspension of the Determination under section 113 of the *Act*. I shall address this request within this appeal.

6. None of the parties to this appeal has requested an oral hearing before the Tribunal and while we have a discretion whether to hold an oral hearing on an appeal – see section 36 of the *Administrative Tribunals Act* ("*ATA*"), which is incorporated into the *Employment Standards Act* (s. 103), Rule 17 of the Tribunal's Rules *of Practice and Procedure* and *D. Hall & Associates v. Director of Employment Standards et al.,* 2001 BCSC 575 – I have reviewed the appeal, the submissions and the relevant material submitted by all of the parties, including the section 112 (5) record filed by the Director, and have decided the appeal can be decided on that material and that an oral hearing is not necessary.

ISSUE

7. The issues here are whether the Director made a reviewable error in finding Maltesen contravened section 54 of the *Act* or, alternatively, in determining and calculating the remedy given to Hardy.

THE FACTS

8. The Determination provides the following information by way of background:

> Maltesen Masonry Ltd. operates a masonry business on Vancouver Island and this business falls within the jurisdiction of the Act. Mr. Hardy was employed as a labourer from September 8, 2009 and his last

> day worked for Maltesen was November 23, 2009 at which point he was earning $16.00 an hour. The complaint was file on December 4, 2009, within the time limit provided under the Act.

9. Hardy complained that he had been terminated for reasons relating to his taking parental leave under the *Act*.

10. The Director found, notwithstanding some assertion to the contrary, that Maltesen was Hardy's employer during his period of employment.

11. The Director found Hardy had requested parental leave to commence after the birth of his child (although the request was not made in writing) and the request had been approved and supported by the employer. I note here that a written request is not a condition for entitlement to the leave provided in section 51 of the *Act*: see *Capable Enterprises Ltd. operating as Christopher Robin School*, BC EST # D336/98 (Reconsideration of BC EST # D033/98). In the *Capable Enterprises Ltd.* decision, the Tribunal said the following about a section 50 leave, and also applies to leave under section 51:

> I agree completely with the Adjudicator in the original decision that the *Act* cannot be interpreted in a way that would disentitle a pregnant employee to leave under Section 50 by reason only that the employee did not request the leave in writing to the employer. . . .
>
> The requirement for written notice is present in Section 50 of the *Act* for the purpose of achieving a degree of certainty about the timing and length of an employee's pregnancy leave. The *Act* allows for a number of possibilities about when leave may be commenced, when it may be ended and in what circumstances it may be shortened (or lengthened, as in the case of a request for parental leave).

12. Ironically, the kind of certainty contemplated in the above comment would likely have avoided the dispute that has arisen in this case.

13. The Director found Hardy was entitled to the rights afforded by section 51 of the *Act*. The Director also found Hardy commenced his parental leave under the *Act* on November 24, 2009. Neither of those findings is challenged in this appeal.

14. There was a dispute during the complaint investigation about whether Hardy had been laid off or terminated. Maltesen took the position Hardy had been laid off for reasons unrelated to his leave. The Director found Hardy was terminated on November 26, 2009. This conclusion was based on a consideration of several facts and factors relating to a general displeasure with Hardy as an employee, culminated by his failure to report for work on November 25, 2009. The Director found it unnecessary to perform an analysis of either section 66 of the *Act* or whether Maltesen had a right to lay-off.

15. The Director found the failure of Hardy to report for work on November 25, 2009 to be one of the reasons for his termination.

16. The Director considered the possible remedies under section 79(2) and determined the only appropriate remedy was to award compensation to Hardy under section 79(2)(c) of the *Act*. The Director did not consider reinstatement to be appropriate in the circumstances and found no evidence that Hardy had incurred out of pocket expenses. The amount of the compensation was indicated in the Determination to be based on a consideration of the factors expressed in *Afaga Beauty Service Ltd.*, BC EST # D318/97.

ARGUMENT

17. Legal counsel for Maltesen argues two grounds of appeal: a failure by the Director to observe principles of natural justice in making the Determination and evidence becoming available that was not available at the

time the Determination was being made. That aspect of the appeal which challenges the remedy provided to Hardy does not attach this argument to any specific ground of appeal, but raises concerns with the process and the evidentiary basis for the remedy ordered.

18. Hardy has made no reply to the appeal.

19. The Director has provided a response to the appeal, which is organized under four headings: failure to consider relevant evidence; bias; new evidence; and remedy.

Natural Justice

20. The failure to observe principles of natural justice is said by counsel for Maltesen to arise in two respects: by the failure of the Director to fully examine and investigate the statements made by Maltesen with respect to what is said to have been Hardy's stated intent to return to work on November 25, 2009; and a bias by the Director demonstrated by the failure to examine the issue of Hardy's alleged stated intention to return to work and the comments made in the Determination on that issue.

(a) Failure to Consider Evidence

21. On this point, counsel argues the error made by the Director was in failing to give effect to the comment attributed to Hardy by Mr. Maltesen that he intended to be at work on November 25, 2009. I note here that the evidence of Hardy on that point is that he told Mr. Maltesen during a conversation which occurred at approximately six p.m. on November 24, 2005, that his girlfriend had just gone into labour, would be going into surgery (for caesarean section delivery) and that he might be at work the following day, but could not guarantee it. The Director did not consider this discussion to be relevant to whether Hardy was either entitled to parental leave under section 51 or, if entitled, had commenced that leave.

22. Counsel argues the position of Maltesen on this matter was relevant to whether Hardy had brought his parental leave to an end on November 24 by indicating he would return to work the following day. The relevance, the argument goes, lies in the need to decide whether or not Hardy was on parental leave when he was notified of his lay-off. Counsel argues that if he had terminated his parental leave by November 26 (his termination date), there could be no contravention of section 54 of the *Act* as he would no longer be on statutorily protected leave.

23. Counsel argues the logical inference of the statement by Hardy that he would be at work on November 25 was that he was bringing his leave to an end on that date.

24. In response, Director says the evidence presented by both parties concerning telephone conversations that occurred on November 24 was considered, but found an assessment of credibility was not warranted in order to decide the effect of this evidence on the outcome. The Director refers to the comment found on page R8 of the Determination, reflecting on a lack of certainty surrounding a birth delivery and the statutory purpose expressed in section 2(f), as justifying the view taken of this evidence.

25. The Director adds that even if it were found Hardy had ended his leave, the prohibitions in section 54(2) are not confined only to the period the employee is on leave, but to a termination or change in condition of employment which is made "because of" a leave allowed under Part 6. The Director indicates the statement at page R10 of the Determination that finding a contravention of section 54 requires finding that the "leave need only play some role in the decision to dismiss" and that such a finding was made.

(b) Bias

26. Counsel for Maltesen says the Director demonstrated a bias by failing to examine the effect of Hardy's stated intention to return to work on November 25 and by relying on a subjective assessment of the unpredictability of pregnancies and deliveries for deeming an analysis of Hardy's statement to be unnecessary. Counsel says this is effectively allowing Hardy, unilaterally and without contacting Maltesen, to extend his leave without performing a proper balancing of the respective interests of the employee with those of the employer and without an analysis of the broader implications of such a statement on continuing leave entitlement.

27. The Director says Maltesen has failed to produce any evidence supporting this allegation. The Director refers to the nature of the evidentiary burden that is on Maltesen in making an allegation of bias, which was expressed by the Tribunal in *Dusty Investments Inc. dba Honda North*, BC EST # D043/99, and says this burden has not been met.

28. The Director says, generally, Maltesen has not established a failure by the Director to observe principles of natural justice.

Further Evidence

29. Counsel for Maltesen says this ground of appeal is raised in order to demonstrate the Director erred in finding Hardy was "terminated" on November 26, rather than "laid off" and supports the contention by Maltesen that Hardy was not laid off for reasons relating to parental leave. The evidence comprises Records of Employment of several other persons who were "laid off" at various times during the same general period as the date on which Hardy was found by the Director to have been terminated.

30. Counsel argues this evidence shows Hardy would have been laid off regardless of his attendance issues and contradicts the Director's finding that Hardy's failure to show up for work on November 25 may not have been the only reason for his termination, but was undoubtedly one of the reasons.

31. The Director says all of the evidence presented with the appeal was available and could have been provided to the Director before the Determination was made. The Director says such evidence should not be permitted to be presented or relied on in the appeal. The Director cites the Tribunal's decisions in *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03, and *Senor Rana's Cantina Ltd.*, BC EST # D017/05, in support of this position.

The Remedy

32. As an alternative argument, counsel for Maltesen argues there was no evidentiary basis for the remedy ordered by the Director. Counsel says the remedy ordered was based on speculation about Hardy's prospective loss.

33. The Director says the matter of a remedy under section 79(2) is largely discretionary and the argument of Maltesen has provided no reason to interfere with that exercise of discretion in this case. The Director says the discretion was exercised in accordance with the *Act* and considered all of the relevant factors. The Director also says the representations of the employer on the question of remedy were sought and the response provided was given consideration.

Suspension Request

34. Maltesen seeks a suspension of the effect of the Determination under section 113 of the *Act* on payment of a smaller amount than the Determination into trust. Counsel for Maltesen relies on the merits of the appeal to support the request.

35. The Director opposes the suspension request. The Director says the request does not meet the circumstances in which such a request would be granted.

36. The Director says the appeal is without merit and Maltesen has provided no other basis for the Tribunal acceding to their request.

37. In response to the response by the Director, counsel for Maltesen has provided final submissions.

38. Counsel for Maltesen says the response of the Director on the first part of the natural justice argument is demonstrative of her inability to objectively view the situation from the employer's perspective and is indicative of her bias. Counsel also submits if Hardy was not on leave when he was given his lay-off notice there is no possible connection to parental leave and no contravention of the leave provisions. Counsel says there was ample evidence showing Hardy was laid off because of a lack of work and not "terminated" because of his leave or any reasons relating to it.

39. Counsel for Maltesen says the allegations of bias do not import any allegations of a personal agenda or financial stake in the outcome of Hardy's complaint. Rather, counsel says the allegation is based on a failure by the Director to bring a balanced perspective to the complaint process. Counsel alleges the Director dismissed, or failed to consider, elements of the investigation that were not favourable to the complainant. The Director made no mention of Hardy's other job or the scope of availability of work in that job and failed to consider that work in the context of possible mitigation, or lack of it.

40. Counsel for Maltesen makes several other assertions and submissions in the reply, which I will summarize:

i. the Director failed to examine the structure of the businesses run by Mr. Maltesen or consider if the interplay between the businesses was relevant;

ii. the Director was informed of the availability of evidence supporting Maltesen's position, but failed to request or review it;

iii. the Director should have undertaken a "fair and objective assessment" of the business environment to see if the "so called termination" was done as part of a broader lay off of numerous employees, and not because of Hardy's leave; and

iv. the Director should not have relied on the employer's statement about the "Last Straw" and failed to give effect to the employer's explanation of the statement and the events relating to it.

41. Counsel argues that the evidence provided with the appeal was available and was mentioned in communications between the Director and Mr. Maltesen, but was never requested by the Director. Counsel says this was not a case where the employer refused to participate in the complaint process by withholding documents.

42. Counsel suggests the failure of the Director to request these documents is indicative of her bias. Counsel submits the documents are credible and highly probative when considered with other evidence.

43. Counsel reiterates the points made on the remedy provided to Hardy, submitting there was insufficient evidence and a failure to discuss Hardy's other job or his attempts to obtain alternative employment, as well as an arbitrary decision about how long it would take to find alternate employment. Counsel also says there was no examination of when Hardy's parental leave would have actually ended.

ANALYSIS

44. As a result of amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are statutorily limited to those found in Subsection 112(1) of the *Act*, which says:

> *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 made.*

45. The Tribunal has consistently indicated that the burden in an appeal is on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds. A party alleging a denial of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.

46. The *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03.

Natural Justice

47. I am not persuaded the Director has failed to observe the principles of natural justice in making the Determination.

48. Contrary to the submission of counsel for Maltesen, the Director did not fail to consider the respective evidence of the parties on the conversations which occurred on November 24, 2009. It is apparent from the Determination that the Director was alert to both what each of the parties recalled having said and the differences in their respective recollections.

49. The position taken by counsel for Maltesen in this appeal, that Hardy had brought any parental leave entitlement to an end by indicating he would be at work on November 25, is new. During the investigation of the complaint, Mr. Maltesen referred to this event as just "another day he didn't show up for work". Mr. Maltesen claimed to be unaware that Hardy's absence had any relationship to his child's birth.

50. Hardy's absence on November 25, which was to attend the birth of his child, goes to the central purpose of parental leave, and, as the Director indicated in the Determination, is supported by one of the purposes of the *Act*: section 2(f). The *Act*, it has been stated many times before, is basic social legislation governing employment, a matter described by Mr. Justice Iacobucci in *Machtinger v. HOJ Industries Ltd.*, [1992] 1 SCR 986, to be "of central importance to our society", (at page 1002). The entitlements contained in the *Act* have, by their inclusion in the legislation, been considered by the legislature to be basic social entitlements.

51. The argument of counsel on this point is tantamount to saying an equivocal, and disputed, verbal expression may be used to deny a significant statutory benefit. Unless I am legally compelled for some reason (and none has been suggested) to unequivocally accept the evidence of Mr. Maltesen as signifying Hardy's intention to bring his leave to an end at the very moment it commenced, I do not accept such a finding can be made, even accepting Mr. Maltesen's recollection of the conversation. In my view, it would require clear and convincing evidence showing Hardy fully understood his leave entitlement and consciously abandoned that right before the kind of finding advocated by counsel could be reached. There is certainly no indication in anything Hardy had said or done indicating he had any intention of giving up his statutory right to leave. As the Director stated, such a result is irrational and inconsistent with a stated purpose in the *Act*, and I can find no fault in refusing to accept the evidence, on any analysis, as being capable of having that effect.

52. The bias allegation substantially relies on the success of the above argument. As counsel has stated in the appeal submission:

> The Delegate's failure to examine the issue of the employee's statement of intent to return to work and her comments made with respect to the situation illustrate that there is clearly a bias in favour of the employee.

53. The failure of the above argument seriously undermines the bias argument.

54. It is trite that a party alleging bias against the Director, or one of his delegates, has the burden of providing clear and cogent evidence that will allow the Tribunal to make objective findings of fact demonstrating actual bias or a reasonable apprehension of bias: see *Dusty Investments Inc. d.b.a. Honda North*, BC EST # D043/99. Further, a consideration of a bias allegation against the Director, or one of his delegates, which is predominantly fact driven, must address and reflect the purposes of the legislation and the practical reality of the function of the Director, including his delegates, under the *Act*: see *Director of Employment Standards (Re Milan Holdings Inc.)*, BC EST # D313/98. While the principal bias allegation and subsequent submissions on this aspect of the appeal that identify other areas which counsel says demonstrate bias, a reflection on those submissions clearly shows the real dispute is with the Director's findings. Bias is not demonstrated by simply showing the Director did not accept the position of the employer and reached other conclusions on the facts. As well, the Director does not have to recite all of the evidence provided by all the parties in providing reasons. Thus, the fact a delegate does not mention particular evidence in a Determination does not demonstrate anything, unless that evidence is shown to be sufficiently relevant and probative to warrant express consideration. None of the matters raised by counsel for Maltesen have been shown as falling in that category of evidence.

55. I find the burden on Maltesen has not been met; the allegation of bias has not been established and this argument is rejected.

56. In sum, for the reasons expressed above, the natural justice ground is dismissed.

Further Evidence

57. Maltesen has sought to provide additional evidence with the appeal in support of the challenge to the Director's finding that Hardy was terminated. This argument directly challenges a finding of fact made by the Director. The Tribunal has discretion to allow such evidence, but has consistently taken a relatively strict approach to what will be accepted. The Tribunal considers whether the evidence which a party is seeking to introduce on appeal was reasonably available during the complaint process, whether such evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it is reasonably capable

of belief, and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination: see *Davies and others (Merilus Technologies Inc.)*, BC EST #D171/03 and *Senor Rana's Cantina Ltd.*, BC EST #D017/05.

58. It is apparent that all of the evidence Maltesen seeks to submit in this appeal was available and could reasonably have been provided to the Director during the complaint process. Maltesen says the evidence was not provided during the investigation because the Director did not ask for it, even though the existence of this evidence was made known to the Director.

59. The Director says the evidence has no probative value, as the documents only show employees (some of whom were employed by another, albeit related, company) were issued Records of Employment indicating a lay off. The Director says these documents are not capable of changing the conclusion that Hardy was dismissed for reasons relating to his leave.

60. I find the additional evidence should not be allowed. The documents were available and could have been provided to the Director during the complaint process. It is insufficient for counsel to say the existence of the documents were made known to the Director and to suggest the failure of the Director to ask for them somehow makes the Director responsible for their not being provided. If Maltesen felt such evidence was important and relevant, it was their responsibility to ensure it was provided, not the Director's responsibility to ask for it.

61. In any event, while the Director's not reviewing the documents would be a concern if it was clear that evidence was probative and relevant, there is nothing in the Determination or in the material on file which suggests these documents were evidence which the Director needed to consider in deciding whether Maltesen had met its burden under section 126(4)(c) of the *Act*. The material in the file shows Maltesen told the Director during the investigation that Hardy had been laid off for lack of work, just as many other employees had been on numerous jobs in the past. There is no indication the Director rejected this information in finding Hardy's "lay off" to be, in the circumstances, a termination. It is clear the Director was aware of the fact that these documents are presented to support, but simply found that fact to be unhelpful, considered against other facts and factors, in deciding whether Hardy's dismissal was unrelated to his leave.

62. I find the argument of counsel on this ground is, like the natural justice arguments, an effort to have the Tribunal reassess findings of fact made by the Director without adding to the factual matrix that was before the Director. As indicated above, there is a statutory limitation on the authority of the Tribunal to consider appeals based on a challenge to findings of fact. To engage in an analysis of findings of fact made by the Director in the context of "evidence not considered" would be inconsistent with direction of the legislature. In this regard, see the comments of the Tribunal in *Jane Welch operating as Windy Willows Farm*, BC EST # D161/05, at paras. 40-43.

63. This ground of appeal is also dismissed.

Remedy

64. I am not inclined to interfere with the Director's decision that the appropriate amount of compensation in this case should be fixed at $3,649.83. I begin my comments on this aspect of the appeal by making two points: first, there appears to be some misunderstanding in the submission of counsel for Maltesen that the amount awarded to Hardy is calculated on proven loss; and second, as indicated by the Director, the remedy chosen, including amount awarded under section 79(2)(c), is discretionary.

65. In respect of the first point, the appropriate remedy selected by the Director in this case was to provide Hardy with "compensation". The Tribunal has indicated in several decisions what considerations may go into determining the amount of compensation awarded: see *Afaga Beauty Service Ltd.*, *supra*; *W.G. McMahon Canada Limited*, BC EST # D386/99; *Angie MacKenzie*, BC EST # D033/00; *Britco Structures Ltd.* BC EST # D260/03; *Photogenis Digital Imaging Ltd./PDI Internet Café Incorporated*, BC EST # D534/02; *Rite Style Manufacturing Ltd. and M.D.F. Doors Ltd.*, BC EST # D105/05; and *Rose Miller*, BC EST # D062/07. Each of these cases indicates the considerations identified are not exhaustive. In some cases, the Tribunal has clearly identified that payment of compensation flowing from a contravention of the *Act* is a statutory consequence of the failure to comply with a requirement of the *Act*. It does not represent a form of damages for breach of contract, to which the strict rules relating to proof of loss, mitigation and duplication of compensation are applicable. Instead, it is, predominantly, a form of remedy for having one's statutory rights violated or ignored: see *660 Management Services Ltd. et al*, BC EST # D147/05.

66. Compensation under section 79(2)(c) is not determined by any formula and is necessarily calculated on information that is uncertain. In *Photogenis Digital Imaging Ltd./PDI Internet Café Incorporated*, the Tribunal noted:

> Given that awards made under section 79(4)(c) cannot be estimated with precision since there is no clear formula (as is the case, for example, with compensation for length of service payable under section 63 or group termination pay under section 64), I do not think it appropriate for the Tribunal to, as it were, "micro-manage" such awards. In my view, such awards should only be disturbed where the award is based on a clearly erroneous footing or where the award does not take into account relevant factors.

67. In this case, the Director considered certain matters in deciding what compensation should be paid to Hardy. While the reasoning is not as precise at it might have been, I am unable to find there is any basis for disturbing the Director's exercise of discretion or the award.

68. The appeal is dismissed.

69. As a result of the disposition of the appeal, the request to suspend the effect of the Determination as it relates to this appeal is denied.

ORDER

70. Pursuant to Section 115, I order the Determination dated April 8, 2010, be confirmed in the amount of $4,149.83, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal