Employment Standards TRIBUNAL

An appeal

- by -

Port Browning Marina Resort Ltd.
("PBMR")

- 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: Carol L. Roberts

FILE No.: 2006A/58

DATE OF DECISION: June 29, 2006

DECISION

SUBMISSIONS

Lucille Henshaw	on behalf of Port Browning Marina Resort Ltd.
Terry Hughes	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Port Browning Marina Resort Ltd. ("PBMR"), pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued March 29, 2006.

2. Sean Hurley worked for PBMR as a cook from December 21, 2004 until his employment was terminated on October 25, 2005. Mr. Hurley filed a complaint alleging that he was owed compensation for length of service.

3. The Director's delegate held a hearing into Mr. Hurley's complaint on March 14, 2006. Ms. Henshaw and Kerry Thompson represented the employer, Mr. Hurley appeared on his own behalf. At issue before the delegate was whether Mr. Hurley's employment was terminated for cause, thereby relieving PBMR of its obligation to pay him compensation for length of service.

4. The delegate determined that PBMR had contravened Sections 63 and 58 of the *Employment Standards Act* in failing to pay Mr. Hurley compensation for length of service and annual vacation pay. The delegate concluded that Mr. Hurley was entitled to wages and interest in the total amount of $389.76. The delegate also imposed a $500 penalty on PBMR for the contravention of the Act, pursuant to section 29(1) of the *Employment Standards Regulations.*

5. PBMR contends that the delegate erred in law, and failed to observe the principles of natural justice in concluding that Mr. Hurley's employment was terminated. PBMR says that the delegate failed to consider relevant evidence, or inaccurately assessed the evidence, in arriving at this conclusion.

6. This appeal is decided on the section 112(5) "record", the written submissions of the parties, and the Reasons for the Determination.

ISSUE

7. Whether the delegate erred in law, or failed to observe the principles of natural justice in arriving at the conclusion that Mr. Hurley's employment had been terminated without cause. Specifically, the issue is whether the delegate failed to consider certain evidence presented by the employer, or "inaccurately" considered the evidence before him.

ARGUMENT

8. PBMR contends that Mr. Hurley both lied under oath and gave evasive answers while being questioned by the employer at the hearing, and that the delegate failed to give appropriate weight to that evidence. It also contends that the delegate misconstrued the effect of the Record of Employment (ROE) issued by the employer and failed to consider the employer's explanation of the issuance of an amended ROE.

9. The delegate says that the employer provided no specifics of Mr. Hurley's alleged perjured testimony, and that he is unable to respond to it. He also submits that there was conflicting evidence about the issuance of the ROE, and that all the evidence was considered in arriving at the decision.

THE FACTS AND ANALYSIS

10. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

(a) the director erred in law

(b) the director failed to observe the principles of natural justice in making the determination; or

(c) evidence has become available that was not available at the time the determination was being made

11. The burden of demonstrating either an error of law or a failure to observe the principles of natural justice rests with an Appellant. Having reviewed the submissions of the parties, I am unable to find that the appellant has discharged that burden.

12. During the hearing into Mr. Healy's complaint, it appears that significant oral evidence was adduced. While I have the record before me, which includes the complaint form, the ROE, a number of letters, time sheets and some hand written notes, I do not have a transcript of the proceedings. As the grounds of this appeal are based on what is asserted to be some of the oral evidence, the record is of little assistance to me in this appeal.

13. The Determination discloses that, at the hearing, the employer took the position that Mr. Hurley quit his job. The delegate properly placed the burden of proving that Mr. Hurley quit on the employer. The Determination indicates that the employer did not dispute Mr. Hurley's evidence that he asked for his job back one week after he suffered an injury, and that Ms. Henshaw said she would think about it. The delegate determined that this was not the behaviour of an employee who had abandoned their employment.

14. The Determination also indicates that the employer was unhappy with certain aspects of Mr. Hurley's employment, including his injuries and missed time, and that this evidence supported the conclusion that the employer did not want Mr. Hurley to return. As a result, the delegate determined that Mr. Hurley was entitled to compensation for length of service.

Error of Law

15. As I understand the employer's argument, it is that the delegate arrived at a wrong conclusion because he failed to disregard Mr. Hurley's perjured evidence:

> …Specifically, the complaint, while under oath, committed perjury by knowingly making a false statement under cross examination by the representative of the employer, and, in a second instance during cross-examination by the representative of the employer, the complainant was so evasive in his answer to a line of questioning that he came very near to committing perjury a second time. The representative of the employer brought both of these instances to the attention of the Delegate of the Director who heard the matter, both at the time they occurred and in the representatives' closing summation.

16. The delegate was not required to assess the credibility of the parties in arriving at the Determination. The delegate considered uncontroverted evidence, noted that the employer was unhappy with Mr. Hurley, and concluded that PBMR had not discharged its burden of establishing that Mr. Hurley quit or was fired for cause.

17. While the employer seeks to have the Determination set aside for reasons of alleged perjury, there is no reference in the appeal documents to what that perjured evidence was. In his response to the appeal, the delegate noted that PBMR's allegations of perjury were too vague to respond to. Rather than attempting to clarify that vagueness in reply, the employer merely made additional arguments as to why Mr. Hurley is not entitled to compensation for length of service, arguments I infer she made before the delegate.

18. Given that the employer says that the alleged perjury was noted during the hearing as well as in final submissions, I infer that the delegate considered the evidence in the context of all of the other evidence. Even if the delegate did not reference all of the evidence that the employer considers relevant, that fact alone does not constitute an error (see *International Longshore & Warehouse Union (Marine Section), Local 400 v. Oster*, 2001 FCT 1115 (FCTD), at paragraph 46)

19. Having reviewed the record and the Determination, I am unable to find that the delegate erred in law in finding that Mr. Hurley had not quit. As the Tribunal has noted on many occasions,

> To be a valid and subsisting resignation, the employee must clearly have communicated, by word or deed, an intention to terminate their employment relationship and, further, that intention must have been confirmed by some subsequent conduct. In short, an "outside" observer must be satisfied that the resignation was freely and voluntarily given and represented the employee's true intention at the time it was given. (see, for example, RTO (Rentown) Inc., BC EST # D409/97)

20. Finally, the evidence discloses, and indeed as the employer makes clear in reply submissions, PBMR was unhappy with Mr. Hurley's performance. Nevertheless, as the delegate notes, there is no evidence that he was ever warned that his job was in jeopardy. The delegate also concluded that Mr. Hurley's employment had been terminated without just cause, a conclusion I find to be supportable on the evidence.

21. In the absence of any compelling evidence that the delegate failed to properly consider certain evidence, which is undisclosed by the employer on appeal, I decline to find an error in the delegate's conclusion.

Natural Justice

22. Principles of natural justice are, in essence, procedural rights that ensure parties a right to be heard by an independent decision maker. Parties alleging a denial of a fair hearing must provide some evidence in support of that allegation. (see *Dusty Investments Inc. dba Honda North* BC EST #D043/99)

23. There is no evidence the employer was denied the right to know the case and to respond to it. While the employer suggests that the delegate came to the wrong conclusion, she does not argue that the delegate was biased, or failed to afford her a full opportunity to respond to the evidence.

24. The delegate, having conducted a hearing, is entitled to base his conclusions on the evidence and submissions presented at the hearing. That the conclusions may differ from a party's view of the evidence does not constitute a denial of natural justice, nor does a misapprehension of the evidence. The employer does not specify what evidence the delegate may not have considered, nor is there any suggestion that such evidence was relevant to, or even determinative of, the issue before him.

25. I find no basis for this ground of appeal.

ORDER

26. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated March 29, 2006, be confirmed in the amount of $889.76, plus whatever interest might have accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal