

An appeal

- by -

Michael Danvers

- 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.: 2011A/61

DATE OF DECISION: July 26, 2011

DECISION

SUBMISSIONS

Justine Danvers	on behalf of Michael Danvers
Nicholas Moretto	on behalf of Mario's Towing Ltd. carrying on business as Mario's Towing and Recovery and Del Oro Towing Ltd.
Kerri Widdup	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Michael Danvers pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination of the Director of Employment Standards (the “Director”) issued May 3, 2011.
2. Mr. Danvers worked as a tow truck driver for Mario's Towing Ltd. carrying on business as Mario's Towing and Recovery (“Mario's”) from March 2009 until May 2010. On May 21, 2010, Mr. Danvers filed a complaint alleging that he was owed wages, vacation pay, statutory holiday pay, and compensation for length of service. During the course of the investigation, Mario's voluntarily paid Mr. Danvers wages, statutory holiday pay, and vacation pay. The sole issue remaining to be decided by the delegate was whether or not Mr. Danvers was entitled to compensation for length of service.
3. Following her investigation, the Director's delegate determined that Mario's had not contravened the *Act* and concluded that no wages were outstanding.
4. Mr. Danvers contends that the delegate erred in law and failed to observe the principles of natural justice in making the Determination.
5. Both the Director and Mario's seek to have the Determination confirmed.
6. Section 36 of the *Administrative Tribunals Act* (“*ATA*”), which is incorporated into the *Employment Standards Act* (s. 103), and Rule 16 of the Tribunal's *Rules of Practice and Procedure* provide that the Tribunal may hold any combination of written, electronic and oral hearings. (see also *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). This appeal is being decided on the section 112(5) “record”, the submissions of the parties, and the Reasons for the Determination.

ISSUES

7. Whether or not the Director erred in determining that Mr. Danvers was not entitled to compensation for length of service.
8. Whether or not the Director failed to observe the principles of natural justice in making the Determination.

FACTS

9. Mario's operates two towing companies in Kelowna, Del Oro and Mario's. Mr. Danvers worked for both companies interchangeably. On May 1, 2010, Mr. Danvers' wife wrote to Mario's regarding her belief that Mr. Danvers was owed statutory holiday pay. On May 2, Mr. Moretto telephoned Mr. Danvers to discuss the email. Because Mr. Moretto felt that Mr. Danvers was confrontational in the telephone call, he went to Mr. Danvers' home later that day and had a discussion with Mr. Danvers that was recorded by Mr. Danvers's wife. Mr. Moretto decided to pick up Mr. Danvers' tow truck until Mr. Danver's concerns had been addressed.
10. On May 3, Mr. Danvers arrived at work after his shift started, accompanied by his wife and children, and met with Mr. and Mrs. Moretto to discuss issues with his pay. Mario's says that at no time was Mr. Danvers told that he had been fired or that his employment was in jeopardy. Mr. Danvers told Mario's that he wanted a few days to consider his position and sent a text message to Mr. Moretto that evening indicating that he would be at work the following morning.
11. On May 4, Mr. Danvers arrived at work early to begin his shift to speak with Mr. Moretto. Mr. Danvers was asked to wait for Mr. Moretto to arrive so he could speak with him. After waiting an hour, Mr. Danvers left the office after dropping off a letter for Mr. Moretto containing a Request for Payment and indicating he wished to take parental leave beginning May 28, 2010. Mr. Moretto was unable to reach Mr. Danvers and Mr. Danvers did not return to work that day.
12. On May 5, Mr. Danvers did not arrive at work for the start of his regular shift. Regan Walker, the Human Resources Manager, contacted Mr. Danvers and told him that his parental leave had been approved, effective immediately if he wished. Mr. Danvers later met with Mr. Walker to review the parental leave and extended health benefits documents but refused to sign them believing that he had been fired. Mr. Walker told Mr. Danvers that he had not been fired.
13. Mr. Danvers did not return to work after these events.
14. On May 11, 2010, Mario's sent Mr. Danvers his pay cheques and statutory holiday pay calculations. Mario's advised Mr. Danvers that as he was on parental leave, the company was obliged to keep him on the benefits program but that he was responsible for his portion of the premiums.
15. Two records of employment were issued to Mr. Danvers, one from Del Oro on June 3, 2010, the other from Mario's on May 13, 2010. Both indicated that Mr. Danvers was on parental leave.
16. Mr. Danvers relocated during the course of the delegate's investigation. He did not provide his contact information to Mario's and did not consent to the Director providing that information to the Employer.
17. On November 24, 2010, Mario's sent Mr. Danvers a letter through the delegate confirming his scheduled return to work from parental leave on January 17, 2011, and requested that he confirm his availability to be included in the January schedule. Mr. Danvers did not respond. In a December 10, 2010, letter sent to Mr. Danvers through the delegate, Mario's instructed Mr. Danvers to contact the office as soon as possible so that he could be included in the January and February schedule. Mario's informed Mr. Danvers that if he did not respond by December 31, 2010, it would begin the process of filling his position on the understanding that Mr. Danvers had abandoned his position. Mr. Danvers did not respond to Mario's.

18. On January 5, 2011, Mario's sent Mr. Danvers a final letter, which was forwarded to Mr. Danvers by the delegate on January 6, 2011. Mario's said that all efforts to have Mr. Danvers contact the office had been made and that Mario's concluded that Mr. Danvers had abandoned his position. Mr. Danvers did not respond to Mario's or return to work in January 2011.
19. In his complaint, Mr. Danvers contended that Mario's terminated his employment on May 2, 2010, when Mr. Moretto came to his home to pick up his towing equipment. He also asserted that his employment was terminated when Mario's prevented him from attending his place of business. Finally, Mr. Danvers also argued that his employment was terminated when he was forced to take parental leave earlier than he requested.
20. Mario's contended that Mr. Danvers was not entitled to compensation for length of service on the basis that he abandoned his position. Mario's says that it granted Mr. Danver's request for parental leave from May 5, 2010, until January 17, 2011, which he took, and that despite multiple attempts to recall him to work, he did not respond or return to work.
21. Although the delegate provided Mr. Danvers with the opportunity to respond to Mario's evidence, Mr. Danvers told the delegate that the information was irrelevant and did not prove that he was properly fired. Mr. Danvers also asserted that other employees had told him that he was not permitted on Mario's property. Mr. Danvers also alleged that the delegate was biased in favour of the Employer and kept evidence from him. He argued that he should have been included in conversations the delegate had with the Employer.
22. After reviewing the evidence, the delegate noted that Mario's had the burden of establishing that Mr. Danvers quit his employment. The delegate analyzed the evidence surrounding each of the events Mr. Danvers alleged constituted termination; that is, the events of May 2, whether or not he was prevented from attending Mario's property, and whether or not he was forced to take parental leave earlier than he requested.
23. The delegate concluded that Mr. Danvers was not terminated from his employment on May 2, 2010. She reviewed the audio recording of Mr. Moretto's discussion with Mr. Danvers on May 2 and noted that Mr. Moretto told Mr. Danvers that he was not fired but was going to bring the equipment back to the yard until they could resolve Mr. Danvers' concerns about his pay. She noted that Mr. Moretto also told Mr. Danvers that he was a valuable employee and that he hoped that Mr. Danvers would continue working but was uncertain what he wanted. When Mr. Danvers voiced concerns about being undervalued, Mr. Moretto invited Mr. Danvers to come to the office the following day to try to resolve the complaints. Mr. Danvers agreed to do so. The delegate concluded that if Mario's had terminated Mr. Danvers, Mr. Moretto would have told him so and would not have invited him back to his office the following day.
24. The delegate also found that Mr. Danvers was not prevented from attending the workplace. She noted that Mr. Danvers went to the workplace on May 3 with his wife and children and left voluntarily, that he went to the workplace on May 4 in his work uniform and was told to wait until Mr. Moretto arrived. She found that Mr. Danvers waited for a period of time before leaving. The delegate found that Mr. Danvers was provided with a number of opportunities to discuss and attempt to resolve the concerns he had with his employer and that he left the business of his own accord.
25. Finally, the delegate observed that Mr. Danvers could not both claim compensation for length of service, which he would only be entitled to if his employment had been terminated, and seek parental leave, which was only available if he was an employee. As the delegate found that Mr. Danvers' employment had not been terminated prior to May 4, she then analyzed whether or not Mario's had forced Mr. Danvers to take his

parental leave as of May 5, rather than May 28, as he requested in his letter. If Mr. Danvers was forced to take parental leave on May 5, such an action would have constituted a unilateral change in a condition of his employment and the delegate could determine that his employment had been terminated.

26. Although Mr. Danvers' evidence differed from Mr. Walker's evidence about whether or not Mr. Danvers agreed to take parental leave as of May 5, the delegate preferred the evidence of Mr. Walker. She noted that Mr. Danvers' allegations were uncertain and inconsistent while Mr. Walker's version of events was clear and consistent throughout and corroborated by the documentary evidence. The delegate found that Mr. Danvers agreed to commence parental leave immediately on May 5, 2010, when offered the choice to do so.
27. The delegate concluded that the evidence supported Mario's assertions that Mr. Danvers had not been fired, even though Mr. Danvers refused to believe that. The delegate was not persuaded that Mario's had any intention or desire to terminate Mr. Danvers' employment.
28. The delegate also determined that Mario's invited Mr. Danvers to contact Mr. Walker regarding his return to work by way of emails that were sent to the delegate and forwarded to Mr. Danvers. She was satisfied that Mr. Danvers received the emails and did not respond to them. The delegate concluded that Mario's did everything that could reasonably be expected to recall Mr. Danvers to work given that it had not been provided with Mr. Danvers' contact information and that, by failing to respond to those attempts, Mr. Danvers abandoned his employment. The delegate concluded that Mario's was not obligated to pay compensation for length of service to an employee who quit.
29. The delegate also addressed Mr. Danvers' assertions that she had breached natural justice by not providing transparency in her communications with Mario's. The delegate observed that Mr. Danvers was provided with an opportunity to respond to Mario's position, and did so. She stated that while she was obliged to exchange relevant information to each party and afford them the opportunity to respond, she was not obliged to include each party in her conversations with the other or with witnesses.

ARGUMENT AND ANALYSIS

30. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
 - the director erred in law
 - the director failed to observe the principles of natural justice in making the determination; or
 - evidence has become available that was not available at the time the determination was being made
31. Mr. Danvers bears the burden of establishing the grounds for his appeal. A disagreement with the result, in and of itself, is not a ground of appeal.
32. Mr. Danvers argues that the delegate erred in law in concluding that he was not fired from his employment. He contends that he was "subtly" fired from his employment on May 2, 2010, for asking for the statutory holiday pay that Mario's had "stolen" from him. Mr. Danvers also contends that the delegate "overstepped her bounds by deciding that she had the responsibility to determine whether Mr. Danvers or Mr. Walker was being credible". Mr. Danvers also contends that the Determination should explain "why the employer felt it was appropriate for the (sic) to steal statutory holiday pay, and as well why [the delegate] felt it was acceptable for the employer to steal the money and not be accountable."

33. The delegate submits that she provided Mr. Danvers with her calculations on his statutory holiday pay entitlement on November 2, 2010, and that he did not dispute those calculations. The delegate says that Mario's paid the outstanding amount on November 25, 2010, and that she advised Mr. Danvers that this aspect of his complaint had been resolved and she would not be investigating it further. The delegate notes that on January 3, 2011, Mr. Danvers acknowledged that he had received the statutory holiday pay referred to in his complaint and that any further pay owed to him was outside the jurisdiction of the Branch. The delegate says that she stopped investigating this aspect of his complaint under s. 76(3) of the *Act* since it was no longer an issue.
34. The delegate further submits that the Determination clearly sets out her reasons for concluding that Mr. Danvers was not terminated and thus not entitled to compensation for length of service.
35. The delegate submits that Mr. Danvers has not met the burden of establishing the grounds for his appeal.
36. The Tribunal has adopted the following definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):
1. a misinterpretation or misapplication of a section of the Act;
 2. a misapplication of an applicable principle of general law;
 3. acting without any evidence;
 4. acting on a view of the facts which could not reasonably be entertained; and
 5. adopting a method of assessment which is wrong in principle.
37. An appeal is not an opportunity to re-argue a case that has been advanced before the delegate.
38. There is nothing in Mr. Danvers' appeal submission that is substantively different than what was provided to the delegate. It is clear that Mr. Danvers felt that he was not paid the statutory holiday pay he was entitled to. However, the record shows that this aspect of the complaint was resolved during the investigation. The sole remaining issue before the delegate was whether or not Mr. Danvers quit his position or was fired and therefore entitled to compensation for length of service.
39. Having reviewed the record and the Determination, I am not persuaded that Mr. Danvers has established a reviewable error of law. The delegate's finding that Mr. Danvers quit his job is amply supported by the evidence and the appropriate legal principles. The delegate analyzed the facts and, faced with conflicting versions of the events of May 5, 2010, was required to make an assessment of credibility. She ultimately preferred the evidence of the employer. The delegate was obliged to do so, and was not acting in excess of her jurisdiction as asserted by Mr. Danvers.
40. Mr. Danvers' submission repeats the inconsistencies and confusion apparent in his complaint to the delegate. On the one hand, Mr. Danvers implies that it was inappropriate for him to not seek other employment when he believed that he was fired, while on the other hand, complains that Mario's was staffing his position two weeks before his parental leave had ended. As found by the delegate, Mario's attempted to communicate with Mr. Danvers on many occasions using the delegate as a mailbox because Mr. Danvers refused to provide them with contact information. At no time did Mr. Danvers communicate his intention to Mario's.
41. Principles of natural justice are procedural rights and include the right to know the case against you and the opportunity to respond. Although it is clear that Mr. Danvers disagrees with the result, he has not established

a denial of natural justice. Mr. Danvers was allowed to present his case fully and to respond to the employer's evidence.

42. Mr. Danvers contends that the delegate's bias against him was evident in her preliminary findings dismissing his complaint, her failure to explain why she needed the information she was requesting from Mr. Danvers and her failure to include him in her conversations with the employer. The delegate explained her role in the Determination. I find no error in her approach or explanation.
43. The appeal is dismissed.

ORDER

44. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated May 3, 2011, be confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal