Employment Standards TRIBUNAL

An appeal

- by -

At Your Service Catering Inc.
(the "Employer")

- 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/98

DATE OF DECISION: September 25, 2014

DECISION

SUBMISSIONS

Shawn Harnett — on behalf of At Your Service Catering Inc.

INTRODUCTION

1. On June 27, 2014, a delegate of the Director of Employment Standards (the "delegate") issued a Determination under section 79 of the *Employment Standards Act* (the "*Act*") against At Your Service Catering Inc. (the "Employer") ordering it to pay its former employee, Marc Amminson ("Amminson"), the total sum of $1,868.44 on account of unpaid wages and interest. Further, and also by way of the Determination, the delegate levied four separate $500 monetary penalties (see section 98) against the Employer for having contravened sections 17 (regular payment of wages), 18 (payment of wages on termination), 58 (vacation pay) and 63 (compensation for length of service) of the *Act*. Thus, the total amount payable under the Determination is $3,868.44.

2. The Employer now appeals the Determination on the ground that the delegate failed to observe the principles of natural justice in making the Determination (subsection 112(1)(b)). At this juncture I am reviewing the Employer's appeal under subsection 114(1)(f) of the *Act* – "…the tribunal may dismiss all or part of the appeal if…(f) there is no reasonable prospect that the appeal will succeed".

3. In determining whether this appeal should be summarily dismissed, I have reviewed the delegate's "Reasons for the Determination" that were issued concurrently with the Determination (the "delegate's reasons"), the subsection 112(5) "record" that was before the delegate when he issued the Determination and the Employer's appeal submissions.

BACKGROUND FACTS

4. Mr. Amminson was employed by the Employer from August 21 to November 21, 2013, as the person who was in charge of the Employer's "school lunch" program – I understand the Employer provided lunches for approximately 300 students enrolled in 9 Kamloops area schools. He was paid an annual $45,000 salary. Following his termination, admittedly without just cause, he filed a timely unpaid wage complaint claiming regular wages, overtime pay, vacation pay, statutory holiday pay and compensation for length of service.

5. The delegate heard evidence and argument relating to the complaint at an evidentiary hearing on May 21, 2014. The delegate heard *viva voce* evidence from five individuals for the Employer; Mr. Amminson testified on his own behalf and, in addition, called one other witness. On June 27, 2014, the delegate issued the Determination and his reasons.

6. Briefly, the delegate held that Mr. Amminson was a "manager" as defined in section 1 of the *Employment Standards Regulation* and thus was not entitled to overtime pay under section 40 of the *Act* or statutory holiday pay under Part 5 of the *Act*. However, the delegate also correctly found that "managers" are nonetheless entitled to be paid for all hours worked and, in that regard, the delegate determined that Mr. Amminson's salary was paid in exchange for a 40-hour work week and that he had not been paid for 32 hours of work at his regular $21.635 hourly wage. Thus, Mr. Amminson was awarded $692.32 on this account. The delegate also found that Mr. Amminson's tenure entitled him to 1 week's wages as compensation for length of service ($873.50) under section 63 of the *Act*. In addition, the delegate found that he was entitled to 4% vacation pay

on all wages earned during his employment and that there was a further amount owing on this account ($270.33) plus an amount reflecting section 88 interest ($32.29).

7. As noted above, the Employer appeals on the ground that the delegate failed to observe the principles of a natural justice in making the Determination. The Employer's reasons for appeal are more fully set out in a 2-page memorandum appended to its appeal form.

FINDINGS AND ANALYSIS

8. The Employer's appeal does not raise even a *prima facie* argument that the delegate breached the principles of natural justice – I suspect this state of affairs lies, in part, with the fact that the Employer's sole director and officer who appealed the Determination on its behalf is a lay person without a clear understanding of this area of the law. In essence, the employer's appeal is based on assertions that at least some of the delegate's findings of fact should be overturned. Although these assertions are not "natural justice" matters, I will nonetheless address them.

9. As for the natural justice ground of appeal, so far as I can see, the delegate gave both parties a fair hearing, considered all of the evidence before him, applied the relevant legal principles, and came to a reasoned conclusion. There is no suggestion that the delegate was in any sort of conflict of interest due to some present or prior relationship with any of the parties or witnesses. In short, there is absolutely no basis upon which I could credibly concluded that the delegate failed to observe the principles of natural justice in making the Determination.

10. Findings of fact can constitute legal errors but only if there is no proper evidentiary foundation for the finding of fact in question. The Employer states that Mr. Amminson argued at the hearing that he was not a "manager" as defined in the *Employment Standards Regulation* but, as noted above, the delegate ultimately found against Mr. Amminson on this issue. The Employer says that Mr. Amminson "produced lie after lie" on this issue and, it would appear, because of this state of affairs the delegate should have wholly rejected *all* of Mr. Amminson's evidence as untrustworthy. Findings of credibility are within the delegate's purview and simply because the delegate found against Mr. Amminson on the "manager" issue, it does not follow that all of his evidence should have been completely rejected.

11. The Employer seemingly contests the delegate's finding that Mr. Amminson was not paid for all of his hours worked and that both this aspect of the Determination, and the concomitant penalty, should be cancelled. However, the delegate carefully considered the evidence before him on this point and, to a large degree, determined that Mr. Amminson's salary was paid in exchange for a 40-hour work week based on the Employer's own documents. Since the Employer did not maintain proper records of Mr. Amminson's working hours, the delegate was left to construct his work history based on other records including secondary records prepared by Mr. Amminson. The delegate's findings regarding Mr. Amminson's total working hours were based on a reasonable assessment of the conflicting evidence before him and certainly it cannot be said that there was no evidentiary foundation for the delegate's conclusions.

12. Mr. Amminson was dismissed without just cause and thus he was entitled to be paid all of his earned wages within 48 hours after his termination (see section 18); the Employer failed to do so and thus, contrary to the Employer's assertion, a penalty under section 98 was properly levied.

13. Mr. Amminson was dismissed without just cause – the Employer does not suggest otherwise but also says that Mr. Amminson never met the "after 3 consecutive months of employment" qualifying period set out in subsection 63(1). This identical argument was advanced before the delegate and was given full consideration

(at page R16 of his reasons). I am unable to conclude that the delegate's conclusion on this issue was clearly wrong; indeed, it appears to me that the delegate's decision was absolutely correct, as was his assessment of a $500 monetary penalty by reason of the Employer's section 63 contravention.

14. In light of the delegate's findings, it is clear that Mr. Amminson was not paid all of the wages to which he was entitled when his employment ended. The fact that there was an accruing balance owed to him was reflected in the additional vacation pay award that was made in his favour. Accordingly, there is no basis for setting aside the section 58 award or the concomitant penalty.

15. Since there is no reasonable prospect that this appeal will succeed, it must be summarily dismissed.

ORDER

16. Pursuant to subsection 114(1)(f) of the *Act*, this appeal is dismissed and in accordance with subsection 115(1)(a) the Determination is confirmed as issued in the amount of $3,868.44 together with whatever further interest that has accrued under section 88 since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal