Employment Standards TRIBUNAL

An appeal

- by -

Ted N. Hunt

- 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: Robert E. Groves

FILE No.: 2011A/71

DATE OF DECISION: August 23, 2011

DECISION

SUBMISSIONS

Thomas Beasley	counsel for Ted N. Hunt
Myrtle Point Golf Club Board of Directors	on behalf of Myrtle Point Golf Club
Katherine Wulf	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal brought by Ted N. Hunt (the "Appellant") pursuant to section 112(1) of the *Employment Standards Act* (the "*Act*"). The Appellant challenges a determination (the "Determination") of a delegate of the Director of Employment Standards (the "Delegate") dated May 2, 2011.

2. In the Determination, the Delegate decided that the Appellant's complaint should not proceed because it was time-barred.

3. I have before me the Determination, the Delegate's Reasons for the Determination, the Appellant's Appeal Form together with a submission from his counsel, a submission from the Delegate, the record the Delegate has delivered pursuant to section 112(5) of the *Act*, a submission from the Appellant's former employer, and a reply submission delivered on behalf of the Appellant.

4. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act*, and Rule 17 of the Tribunal's *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings when it decides appeals. A review of the material that has been delivered by the parties persuades me that I may decide the merits of this appeal on the basis of the written documentation before me without conducting an oral, or for that matter an electronic, hearing.

FACTS

5. The Appellant was employed for several years as the Golf Course Superintendent at the Myrtle Point Golf Club (the "Employer").

6. It appears there were negotiations between the Appellant and the Employer in the early spring of 2010 regarding the terms and conditions of his employment. On or about May 26, 2010, the Appellant received a letter of that date from the Employer (the "Letter"). It said this, in part:

> The Myrtle Point Golf Club Board of Directors reviewed your counter proposal on May 25th, 2010. The Board feels that the settlement offer in our April 20th, 2010 correspondence was fair.
>
> This letter is a notice of termination of employment as of Monday May 31st at the end of the working day. Please clear out all of your personal belongings and hand in any possessions owned by the Club.
>
> The club will continue to pay you your regular salary, paid out in as regular pay period from June 1st 2010 to January 15th, 2011 this payment is all inclusive including all days in lieu, vacation pay and any other monies owed to you by the club.

7. The Appellant ceased to perform work for the Employer on May 31, 2010. Thereafter, the Employer paid the Appellant the sums noted in the Letter. It appears to have done so without the Appellant's agreement regarding any final settlement of claims arising from his employment.

8. On February 17, 2011, the Appellant filed a complaint under the *Act*, claiming that the Employer had failed to pay him for overtime, and accrued annual vacation pay.

9. Sections 74(2) and (3) of the *Act* say this:

> (2) A complaint must be in writing and must be delivered to an office of the Employment Standards Branch.
>
> (3) A complaint relating to an employee whose employment has terminated must be delivered under subsection (2) within 6 months after the last day of employment.

10. By letter dated April 6, 2011, the Delegate informed the Appellant that since his last day of work with the Employer was May 31, 2010, his complaint should have been filed with the Branch by November 30, 2010. As it was not filed until two and half months later, it appeared to the Delegate that the complaint had been filed out of time.

11. The Delegate advised the Appellant that she had a discretion to extend the period for the filing of a complaint. Her authority to exercise such discretion flows from a combined reading of sections 76(1) and (3)(a) of the *Act* (see *Karbalaeiali v. British Columbia (Employment Standards)* 2007 BCCA 553). Those sections read, in part:

> (1) Subject to subsection (3), the director must accept and review a complaint made under section 74
>
> (3) The director may refuse to accept, review, mediate, investigate or adjudicate a complaint or may stop or postpone reviewing, mediating, investigating or adjudicating a complaint if
>
> (a) the complaint is not made within the time limit in section 74(3)

12. The Delegate invited the Appellant to explain why he had failed to file his complaint within time. The Appellant delivered a memorandum addressed to the Delegate, and dated April 10, 2011. In it, the Appellant stated that he had received legal advice that the six month limitation period for the filing of his complaint would not commence until January 15, 2011, the last date on which the Employer was to issue him a payment. It was thought that filing a complaint while the payments continued would have compromised the "severance payments" scheduled to be made thereafter. Further, the Record of Employment that the Employer issued after the payments ceased on January 15, 2011, would show that date as the Appellant's final date of employment. That being so, the Appellant's filing his complaint a little over a month later, in February 2011, brought him well within the six month timeframe.

13. In other communications to the Delegate, the Appellant said that his counsel was of the view that since he was being paid after May 31, 2010, he was still on the Employer's payroll, and so he was still to be viewed as an employee until his "salary continuance" ended.

14. In the Determination, the Delegate found that the Appellant's last day of employment was May 31, 2010, because the Appellant's employment was terminated as of that date, and he performed no work for the Employer thereafter.

15. The Delegate went on to state that the discretion to extend the time was to be exercised in exceptional circumstances, where the reasons for doing so were compelling. In the Delegate's opinion, the circumstances did not warrant an extension of time.

16. A principal reason why the Appellant had deferred taking action under the *Act* until February 2011, was that he feared the Employer would cease to make the remaining payments were he to have filed his complaint earlier. The Delegate concluded that this rationale was insufficient to support an exercise of the discretion in the Appellant's favour. Not only was there nothing to prevent the Appellant from filing within time, he accepted the payments that the Employer had stated were for all wages and severance owed to him without informing the Employer until after the payments ceased that it was his intention to seek further sums he believed were owing. Therefore, the Appellant was aware of the time limit and "made a decision not to file a complaint until it suited his purpose to do so."

17. The Delegate also found support for her decision in the wording of section 2(d) of the *Act*, which mandates as a purpose of the legislation that it provide fair and efficient procedures for resolving disputes over its application and interpretation. For the Delegate, the six month time bar for filing complaints assisted with the realization of that purpose. In the circumstances of this case, as the Appellant had accepted payments from the Employer for a period of over seven months after his employment was thought to have ended, it was reasonable for the Employer to have expected that no further sums were payable, at least under the *Act*.

18. The Employer issued two Records of Employment for the Appellant. In the opinion of the Delegate, neither provided compelling support for an argument that the Appellant's employment continued until January 15, 2011. In the Determination, the Delegate stated that the Appellant knew he was terminated as of May 31, 2010, and that he would not be returning to work thereafter. She also stated that the Appellant called the payments he received from the Employer after that date "severance payments" until he became aware that the Director might not accept his complaint, at which time he commenced to call the payments "salary continuance." In the end, it did not matter what the payments were called; they were payments made by the Employer to resolve the claims of the Appellant "all inclusive including all days in lieu, vacation pay and any other monies owed to you by the club."

ISSUE

19. Is there a basis for my deciding that the Determination must be varied or cancelled, or that the matter must be referred back to the Director for consideration afresh?

ANALYSIS

20. The appellate jurisdiction of the Tribunal is set out in section 112(1) of the *Act*, which reads:

> 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 being made.

21. Section 115(1) of the *Act* should also be noted. It says this:

> 115 (1) After considering whether the grounds for appeal have been met, the tribunal may, by order,
>
> (a) confirm, vary or cancel the determination under appeal, or
>
> (b) refer the matter back to the director.

Positions of the Parties

22. The Appellant rests his appeal on section 112(1)(a). He says that the Delegate erred in law in determining that his employment was terminated under the *Act* on the May 31, 2010, date stipulated in the Letter, and not when the payments the Appellant received thereafter came to an end on January 15, 2011.

23. The Appellant's argument rests on the contention that during the period from May 31, 2010, until January 15, 2011, he remained an employee of the Employer. He asserts that his employment was not terminated on May 31, 2010. Rather, the Employer's actions, properly construed, were akin to its giving notice to the Appellant that his employment would end when the payment of his salary ceased on January 15, 2011, and in the interim he would not be required to report for work. The fact that the Appellant performed no work for the Employer after May 31, 2010, is not conclusive of the issue whether he remained employed, because there are many situations where employees continue to maintain that status despite the fact they do not report to work. Examples include absences due to illness, or leaves.

24. The Appellant alleges that such an interpretation of the relevant events is supported by several important facts. First, he continued to receive his regular salary, less statutory deductions, for each pay period during the period in question. Since he continued to receive wages under the *Act*, he should be construed to have continued to be an employee under the *Act*, notwithstanding he was receiving wages for no work. Further, if the Appellant had been terminated on May 31, 2010, he should have received compensation for length of service pursuant to section 63 of the *Act*. Since this did not occur, the inference to be drawn is that he was not terminated on this date, and so on that basis, too, he must be construed to have remained an employee.

25. Second, the salary continuance payments were made at the behest of the Employer, and not as a result of any agreement reached with the Appellant.

26. Third, he received a Record of Employment dated December 20, 2010, which stated that the last date for which he would be paid was December 24, 2010. That document was followed by a second Record of Employment dated January 17, 2011, which said that the last day for which the Appellant was paid was January 15, 2011. It also stated that the reason for issuing the ROE was that the "position was eliminated." The fact that two ROE's were issued is explained by the fact that the Employer changed the way it paid the Appellant in December 2010. Prior to the change he had been paid twice per month; for the last few weeks before the payments ended on January 15, 2011, he was paid every two weeks.

27. It follows from all of this, the Appellant submits, that his employment ended when the payments ended, on January 15, 2011, and so his complaint was filed within time.

28. Alternatively, the Appellant says that if he was terminated when he was told to go home at the end of May 2010, his employment ended when he was paid the equivalent of his full compensation for length of

service under section 63, which in the case of the Appellant would have been eight weeks later. If that is so, and the Appellant says it is, his February 17, 2011, complaint was filed within the six month timeframe.

29. The Delegate's submission reiterates several of the justifications for the Determination set out in the Reasons she issued in support of it. She also addresses several of the arguments presented by the Appellant on appeal.

30. Regarding the Appellant's submission that he was merely on a forced leave of absence from May 31, 2010, until January 15, 2011, the Delegate concedes that the definition of "employee" in the *Act* includes "a person on leave from an employer." However, she argues that the type of leave contemplated in the definition is one in which the employee anticipates a return to his or her position of employment, and not a forced leave of the type the Appellant says he experienced here, with no prospect of a return to work. Moreover, the Delegate submits that in the absence of a permitted leave of absence and an expectation of a return to work, the essence of the employment relationship is the performance of work. Since the Appellant was in a position, after May 31, 2010, where he was neither performing work for the Employer, nor expecting a return to work at that place of employment, his employment with the Employer must be deemed to have been terminated as at that date.

31. On the significance of the Records of Employment issued to the Appellant, the Delegate implies that they should be given limited weight because they are issued pursuant to federal legislation and are meant to assist persons to obtain employment insurance benefits. Moreover, it is indisputable that the Appellant's last day of work for the Employer was on May 31, 2010, and the ROE's do not say otherwise.

32. As for the Appellant's argument that the six month limitation period commenced to run eight weeks after the end of May 2010, the Delegate points out, properly in my view, that even if this submission is accepted, it nevertheless means that the time period would have expired in January 2011, and so the complaint filed some weeks later would still have been time-barred.

33. The Employer submits it was clear that the Appellant was terminated effective May 31, 2010, that the payments made to the Appellant after that date included severance and all other sums owed to him, and that the Appellant agreed to receive them as such. As the complaint was filed over eight months later, it is out of time. The Employer supports the disposition contained in the Determination.

Discussion

34. In my opinion, the Delegate committed no error of law in determining that the Appellant's employment was terminated effective May 31, 2010. The wording of the Letter leaves no room for debate that it was the Employer's intention the Appellant's employment would end as of that date. The notice of termination that was provided was from May 26, 2010, to May 31, 2010, not January 15, 2011.

35. I am also of the view that the mere fact the Employer elected to pay the Appellant sums equivalent to his regular salary from May 31, 2010, until January 15, 2011, is insufficient to force a conclusion that the termination which the Employer explicitly stated would occur on the earlier of these dates should be construed, instead, as the beginning of a paid leave of absence which continued until the Appellant's employment finally did come to an end some eight and a half months later. I can discern in the record no evidence of any communication involving the parties during the payment period on the basis of which one might conclude that the Appellant was on a paid leave.

36. The Appellant argues that since he remained on the Employer's payroll, and received his regular salary, he must be construed to have remained an employee until January 15, 2011. I disagree. While it is no doubt true

that the Appellant continued to receive payments equivalent to his regular salary after May 31, 2010, those payments were not, in fact, payments in respect of salary. Nor can it be said that the payments fall easily within any of the various definitions of "wages" that are contained in section 1 of the *Act*. Rather, they were payments that were intended to be "all inclusive," and to compensate the Appellant for "all days in lieu, vacation pay, and any other monies owed" by the Employer as a result of its terminating the Appellant's contract of employment.

37. It matters not, in my view, that the payments made to the Appellant after May 31, 2010, resulted from a unilateral decision taken by the Employer, and not a binding settlement agreement negotiated by both parties. The Letter made clear the purpose for which the payments were being made. It does not appear that the Appellant expressly disputed the Employer's characterization of the payments while he continued to be in receipt of them. Regardless, what is important, in the end, is the character of the payments, and not whether the Appellant agreed that they adequately compensated him in respect of the claims which might be said to have arisen as a result of the termination of his employment.

38. Nor am I persuaded that the Records of Employment issued by the Employer act in such a fashion as to demonstrate, conclusively, that the Appellant's employment continued until January 15, 2011, notwithstanding the clear wording of the Letter. The ROE's do not state when the Appellant's employment ended. They do say the periods for which he received payments from the Employer. They were prepared pursuant to the requirements of a federal statute, and for a purpose different than establishing the Appellant's entitlements under the *Act*. In the circumstances, I cannot say that the Employer is estopped by anything contained in the ROE's from asserting that the Appellant's employment ended on May 31, 2010.

39. I take the Appellant's point that if he was dismissed without cause as at May 31, 2010, he should have received the compensation for length of service owed to him as wages under section 63 within 48 hours thereafter (see section 18 of the *Act*). Having said that, the failure on the part of the Employer to make this payment in a timely way does not lead inexorably to a conclusion that the Appellant remained an employee of the Employer for a period of time after May 31, 2010. It may also mean that the Employer elected to discharge its obligation under section 63 by means of the salary continuance regime it implemented after the Appellant was let go. I agree with the Delegate that this factor is, in any event, of limit import because the Employer ended up paying the Appellant sums greatly in excess of the amounts owed to the Appellant under section 63.

40. It follows from this that I agree with the Delegate's conclusion that the complaint was filed out of time.

41. The Delegate had discretion to extend the time available to the Appellant to file his complaint (see *Karbalaeiali, supra*). The Appellant did not address the issue whether the Delegate exercised that discretion properly in this case. But even if he had, I would have declined to interfere with the Delegate's decision, in the circumstances.

42. In most instances, the Tribunal will be reluctant to interfere with a delegate's exercise of a statutory discretion. The exceptions are situations where the discretion is exercised in bad faith, or the decision is unreasonable in the sense that the delegate has misapplied the law, or relied on considerations that are irrelevant to the statutory purpose. As was stated in *Bridge*, BC EST # RD044/09, absent factors of this type, a delegate has the right to be wrong.

43. In my view, the Delegate exercised her discretion properly in this case. Here, the Appellant appears to have decided not to file a complaint under the *Act* while the Employer made the payments to him after May 31, 2010, for two reasons. First, he says he received legal advice on the basis of which he concluded that

his employment would not terminate, and the six month limitation period for filing his complaint would not commence to run, until the payments ceased on January 15, 2011. Second, he elected not to file a complaint while the payments continued, lest he jeopardize any payments yet to be made.

44. The first justification was untenable because it rested on a mistake of law. The Appellant believed that his employment would continue until the payments ceased on January 15, 2011. That was incorrect. His employment had ceased on May 31, 2010.

45. I understand that the Appellant might be reluctant to file a complaint under the *Act* if he believed it would compromise the remaining payments from the Employer. Nevertheless, I have concluded that the Delegate was right to decide that his desire to achieve this perceived tactical benefit falls short as a compelling reason why the time for the filing of his complaint should be extended. If anything, it reveals that the Appellant was aware he could file a complaint, but deliberately chose not to do so. Clearly, the Appellant was entitled to make that choice, but I am not persuaded that the consequences should be visited upon the Employer.

46. Extending the time may contribute to the vindication of one of the purposes of the *Act* set out in section 2, which is to ensure that employees like the Appellant receive at least the basic standards of compensation and conditions of employment. That is an important consideration. However, I believe that it is outweighed in this case by a consideration of other purposes also referred to in section 2. I am of the view, for example, that extending the time for the filing of the Appellant's complaint would undermine, rather than promote, the fair treatment of the Employer in this case. As the Delegate observed, the Employer was entitled to expect that if the Appellant did not file a timely complaint, its obligations to him under the *Act* would be at an end. Extending the time would also discourage, rather than encourage, open communication between employers and employees in similar circumstances. If employees could simply wait until a period of salary continuance ended and then successfully apply to extend the time for filing a complaint based on a fear that the filing of a timely complaint might have jeopardized the continuation of the payments, no employee in similar circumstances would ever advise an employer as to his or her intentions regarding a potential claim under the *Act*. Finally, if the time for filing complaints were to be extended for this reason, I am unable to discern how it could be said to contribute to the provision of fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*. Rather, it will only encourage delay.

ORDER

47. Pursuant to section 115(1)(a) of the *Act*, I order that the Determination dated May 2, 2011, be confirmed.

Robert E. Groves
Member
Employment Standards Tribunal