Employment Standards TRIBUNAL

An appeal

- by -

Black Fin Marina Ltd.
(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

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 2003A/17

DATE OF DECISION: March 18, 2003

DECISION

INTRODUCTION

This is an appeal filed by Black Fin Marina Ltd. (the "Employer") pursuant to section 112 of the *Employment Standards Act* (the "*Act*"). The Employer appeals a Determination that was issued by a delegate of the Director of Employment Standards (the "Director") on December 9th, 2002 (the "Determination").

The Director's delegate determined, following an oral hearing held on November 28th, 2002, that the Employer's former employee, Ms. Sharlene Bentley ("Bentley"), was not laid off or terminated by reason of her pregnancy contrary to section 54(2) of the *Act.* In other words, the delegate concluded that the Employer had discharged its burden of proof under section 126(4) of the *Act.*

However, the delegate also concluded that a letter from the Employer to Ms. Bentley, dated November 1st, 2001, did not constitute a written notice of *termination* as mandated by section 63(3)(a) of the *Act.* The delegate, having found that Ms. Bentley's tenure with the Employer exceeded 8 years, awarded her 8 weeks' wages as compensation for length of service. The total award made in favour of Ms. Bentley, including concomitant vacation pay and section 88 interest, was $2,037.76.

REASONS FOR APPEAL

The Employer seeks an order from the Tribunal under section 115(1) of the *Act* cancelling the Determination or, alternatively, referring the matter back to the Director, on the grounds that:

- the Director's delegate erred in law [section 112(1)(a)]; and
- evidence has become available that was not available at the time the Determination was being made [section 112(1)(c)].

By way of a letter dated February 28th, 2003 the parties were advised by the Tribunal's Vice-Chair that this appeal would be adjudicated based on their written submissions and that an oral hearing would not be held (see section 107 of the *Act* and *D. Hall & Associates v. Director of Employment Standards et al.,* 2001 BCSC 575). I might add that none of the parties--neither the Employer, Ms. Bentley nor the delegate--asked the Tribunal to hold an oral hearing in this matter.

FINDINGS AND ANALYSIS

I shall deal with each of the above two grounds of appeal in turn.

Error in law

Although expressed as an "error in law", the substance of the Employer's argument under this ground amounts to an assertion that it was denied natural justice in the proceedings before the delegate [see section 112(1)(b)]. More particularly, the Employer says that it attended the evidentiary hearing before the delegate prepared to address the issue of whether Ms. Bentley was terminated or laid off due to her

pregnancy [*i.e.*, section 54(2)] and that the legal import and/or sufficiency of its November 1st, 2001 letter [*i.e.*, section 63(3)(a)] was not an issue that was raised before, or addressed at, the November 28th, 2002 hearing.

The Employer's argument on this point is reproduced, in part, below:

> "We feel [the delegate] erred as [the Employer] *was never issued a complaint relating to a notice of termination. It was not presented in the original complaint*, in any other meetings or in the Agreed Statement of Facts. *If it had been presented as an issue in a formal complaint* it would have been addressed." (my *italics*)

The above-quoted submission (and particularly the italicized portions) is, in my view, unequivocally false and misleading. I have before me the original complaint that was filed by Ms. Bentley with the Employment Standards Branch office in Courtenay on June 4th, 2002. While it is true that Ms. Bentley formally sought 4 months' wages as compensation for having been terminated due to her pregnancy [*i.e.*, a claim under section 54(2) of the *Act*], the complaint also specifically identifies a claim for 2 months' wages on account of compensation for length of service (*i.e.*, a claim under section 63 of the *Act*).

I might add that the Agreed Statement of Facts referred to by the Employer specifically raises *two* issues (identified in the Agreed Statement of Facts as "Issues in Dispute"), namely, "8 weeks severance" *and* "16 weeks for lost wages due to being laid off 4 months earlier than anticipated for her maternity leave". This Agreed Statement of Facts--which was prepared strictly for the purposes of the evidentiary hearing before the delegate--is appended to the Determination and is signed by both a director/officer of the Employer and by Ms. Bentley.

In light of the foregoing, I am not persuaded that the delegate erred in law or otherwise breached the principles of natural justice.

New evidence

The Employer's second ground of appeal relies, in substantial measure, on the assumption that its first ground is meritorious. The Employer says that since it was not aware that the legal sufficiency of the November 1st, 2001 notice was a matter in issue before the delegate, it never presented evidence with respect to that particular matter.

Clearly, as I have found, the notice question under section 63 was very much in issue before the delegate and, accordingly, it was the Employer's burden to show that proper written notice of termination was issued. I have reviewed the Employer's November 1st, 2001 letter and, having done so, find myself in complete and total agreement with the delegate that it does not constitute a clear and unequivocal notice of *termination*. The Employer's November 1st letter advises Ms. Bentley:

> "...that, effective January 1, 2002 we will be unable to provide you with a set schedule of work hours at the fuel dock. Given the current economic conditions in the Valley, coupled with poor activity in both the fishing and sawmill industries, we have decided to operate the marina on an 'on-call' basis".

In my view, this sort of notice does not clearly and unequivocally communicate to the Ms. Bentley that her employment will *cease* as of January 1st, 2002; it only states that her employment will be reduced to an "on-call" basis as of that date. In other words, it is a notice of impending partial layoff (by way of a

reduction in hours) not a notice of dismissal. Under the *Act*, employers are entitled to give written notice of termination or they can issue a notice of layoff. However, these two options are quite separate and distinct. A notice of layoff does not immediately constitute a notice of termination although the layoff will be deemed to be a termination (effective as of the original layoff date) once the layoff exceeds the maximum permissible "temporary layoff" period--see section 63(5). However, when notice is given an employee is entitled to a sufficiently unequivocal notice so that they may determine, when the notice is issued, whether the employer's intention is to dismiss or merely layoff for a temporary period.

The Employer also says that the delegate erred with respect to Ms. Bentley's length of service. However, in the Agreed Statement of Facts (signed by the same director/officer who appeared at the evidentiary hearing on behalf of the Employer), the parties both confirmed the following fact, namely, that "The complainant [Ms. Bentley] was employed at the Black Fin Marina [the Employer] from September 1, 1993 - December 30, 2001, as Marina Manager". Having acknowledged, in writing, the correctness of that fact, I do not think it appropriate for the Employer to now, in effect, purport to resile from its own admission unless that admission was made under duress, induced by fraud or some other similar circumstance (none of which is the situation here).

Further, the Record of Employment *issued and signed by the Employer* and provided to Ms. Bentley on January 14th, 2002 indicated that Ms. Bentley was dismissed (code "M" on the form), that she would not be returning to work (to be contrasted with the other option on the form--an "unknown" recall date) and that her term of service spanned the period from September 1st, 1993 to December 30th, 2001.

In sum, I do not find that the Employer has presented any material "new evidence" as defined by section 112(1)(c) of the *Act*. If the employer chose not to lead evidence about Mr. Bentley's length of service--and I am not satisfied that this was, in fact, the case--responsibility for that omission rests entirely on the Employer's shoulders.

The Employer's appeal is dismissed.

ORDER

Pursuant to section 115(1)(a) of the *Act*, I am of the view that neither ground of appeal has been met and, accordingly, I order that the Determination be confirmed as issued in the amount of **$2,037.76** together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal