Employment Standards TRIBUNAL

An appeal

- by -

Port Renfrew Lumber Ltd.
("Port Renfrew")

- 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.: 2015A/105

DATE OF DECISION: October 7, 2015

DECISION

SUBMISSIONS

Joseph Earl Graham on behalf of Port Renfrew Lumber Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), Port Renfrew Lumber Ltd. ("Port Renfrew") has filed an appeal of a determination issued by a delegate (the "Delegate") of the Director of Employment Standards on June 25, 2015 (the "Determination").

2. The Delegate determined that Port Renfrew had contravened sections 63 and 58 of the *Act* when it failed to pay compensation for length of service and annual vacation pay to the complainant, Luke S. Phye (the "Complainant"). The Delegate found that wages, including interest, in the amount of $6,214.67 were owed to the Complainant pursuant to section 79 of the *Act*. The Delegate also imposed an administrative penalty of $500.00.

3. Port Renfrew appeals, claiming that the Delegate erred in law and failed to observe the principles of natural justice.

4. I have before me Port Renfrew's Appeal Form, together with its submissions, the Delegate's Determination and her Reasons supporting it, and the record the Director has delivered to the Tribunal pursuant to section 112(5) of the *Act*.

5. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act*, and Rule 8 of the Tribunal's *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic, telephone and in person hearings when it decides appeals. I find that the matters raised in this appeal can be decided on the basis of a review and consideration of the materials now before me, and that it is unnecessary for me to be provided with submissions in reply from the Director or the Complainant.

FACTS

6. Port Renfrew is a logging company. Its principal is one Joseph Earl Graham ("Graham"). Graham also owned, or was a directing mind in, another company called Trigon Trucking Ltd. ("Trigon"). The Complainant was hired by Trigon in 2009, as a swamper/labourer.

7. In 2012, Graham sold Trigon to a third party. The purchaser breached terms of the sale agreement. Later in 2012, Trigon ceased operations. The Complainant and others employed by Trigon were laid off. Graham then obtained Trigon's equipment and carried on logging operations through his company, Port Renfrew.

8. The Delegate's Reasons for the Determination state that all the employees of Trigon, including the Complainant, were "transferred" to Port Renfrew within weeks of Trigon ceasing operations. The Delegate then states that the Complainant started work for Port Renfrew on December 3, 2013, a year later. Given that the Delegate concluded that the Complainant's employment, for the purposes of calculating compensation for length of service, was continuous from 2009, the December 3, 2013, date of hire cannot be correct and, indeed, further investigation reveals that it is not.

9. A review of the record, and in particular a work schedule for the Complainant for the period 2012 – 2014, shows that the Complainant was hired by Port Renfrew on or about December 5, 2012. He continued to work on a regular basis until April 2013, when the schedule indicates he was "off work" due to a motor vehicle accident. The Complainant returned to work for Port Renfrew on December 3, 2013. A record of employment dated May 9, 2014, indicates that the Complainant remained employed thereafter until April 24, 2014. The Complainant then sought compensation for length of service and annual vacation pay.

10. Port Renfrew's response to the complaint was to argue that the Complainant was not entitled to compensation for length of service, either at all or, if entitled, for no more than a short period of service, because he had "quit twice."

11. The Delegate decided that the Complainant was entitled to compensation for length of service having regard to the entire period from the time the Complainant was hired by Trigon in 2009 until his permanent departure from Port Renfrew in the spring of 2014. The Delegate justified this approach on the basis that the Complainant's employment was but briefly interrupted by way of layoff when Trigon ceased its operations, and he was hired by Port Renfrew a few weeks later. That being so, and given that Port Renfrew had acquired Trigon's assets, the Delegate concluded that section 97 of the *Act* rendered the Complainant's employment continuous.

12. The Delegate also determined that the Complainant's layoffs were temporary and did not signify any permanent end to the Complainant's continuous period of employment from 2009 to 2014.

13. The Delegate also rejected Port Renfrew's submission that the Complainant had ever quit.

14. Port Renfrew alleged that the first instance of quit was when the Complainant was on a seasonal layoff, and he advised Graham that he was going to Alberta to look for work. The Delegate declined to find that the circumstances established an intention to quit, as the Complainant returned to work for Port Renfrew at the end of his layoff period, the company could provide no particulars as to when this incident occurred, and no Record of Employment was issued to the Complainant indicating that he had quit.

15. The second alleged instance of a quit was in March 2014, at a time when the Complainant felt he was being bullied by another employee at Port Renfrew's logging operation.

16. Graham's version of what followed was that the Complainant told him he quit, and that he left the camp via water taxi. The Complainant's father, another employee at the camp, was on vacation at the time, and when the father returned to work days later he asked Graham if the Complainant could come back to work. Graham agreed.

17. The Complainant's version of events was that when he raised the issue of bullying Graham suggested he leave the camp until his father returned from vacation. When his father returned to work, the Complainant also went back to work.

18. Again, no Record of Employment was issued indicating that the Complainant had quit. Port Renfrew asserted that the reason for this was that the Complainant's time sheets were not available at the time the incident occurred.

19. The Delegate decided that there was no effective quit on this second occasion. Her Reasons state that while the Complainant may have initially formed the intent to quit, his subsequent actions, occurring within days after he left camp, supported a conclusion that he did not objectively carry out the intent to quit.

ISSUES

20. Is there a basis on which the Determination should be varied or cancelled, or referred back to the Director, either on the basis that the Delegate erred in law, or failed to observe the principles of natural justice?

ANALYSIS

21. 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.

22. 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.

23. As I have stated, Port Renfrew argues that the Determination is flawed because the Delegate erred in law, and failed to observe the principles of natural justice. In my view, neither of these assertions have been established by Port Renfrew, having regard to the material now before me.

24. It is important to remember that the purpose of an appeal is not to re-investigate a complaint that has been determined by a delegate at first instance. An appeal is an error correction process, and the burden of showing error is on the appellant (see *M.S.I. Delivery Services Ltd.*, BC EST # D051/06).

25. A challenge to a determination on the basis that there has been a failure to observe the principles of natural justice raises a concern that the procedure followed by the Director was somehow unfair. Two principal components of fairness are that a party must be informed of the case it is required to meet, and offered an opportunity to be heard in reply. A third component is that the decision-maker be impartial.

26. There is nothing in the submissions of Port Renfrew which address, squarely, a defect in the process followed by the Delegate, so as to raise a concern that the Determination is tainted on the grounds of fairness. Port Renfrew was apprised of the basis for the complaint. It was provided with ample opportunity to respond, and it did so. Port Renfrew disagrees with the conclusions reached by the Delegate, to be sure, but its disappointment with the result, standing on its own, is insufficient to establish a failure to observe the principles of natural justice.

27. Port Renfrew also submits that the Delegate committed errors of law.

28. It argues that when its obligation, if any, to pay compensation for length of service to the Complainant is calculated, it should not be responsible for the period from 2009 until 2012, during which time the

Complainant was employed by Trigon. Port Renfrew asserts that Trigon was an entirely separate company, and that any payments owed to the Complainant when it ceased to do business are its sole responsibility.

29. Port Renfrew's argument on this point misconstrues the legal effect of section 97 of the *Act*. That section reads as follows:

> 97. If all or part of a business or a substantial part of the entire assets of a business is disposed of, the employment of an employee of the business is deemed, for the purposes of this Act, to be continuous and uninterrupted by the disposition.

30. The reach of section 97 is extremely broad. It applies to any transfer of all or a part of a business or a substantial part of the assets of the business from one entity to another. It follows that it matters not, and indeed it will normally be the case, that the transfer involves legally distinct actors. It is also no impediment to the application of section 97 that the transfer occurs in circumstances where the entity from whom the transfer occurs was operating at a loss, had incurred significant debt, or was effectively of no value (see *Western Everfresh Bakeries Ltd.*, BC EST # D363/02).

31. The Delegate found, and Port Renfrew does not dispute, that the Complainant was laid off by Trigon in the fall of 2012, and commenced to work for Port Renfrew a few weeks later. Port Renfrew admits that it was not actively carrying on operations prior to its acquisition of Trigon's equipment. In Graham's words, appearing in his submission on the appeal, Port Renfrew, through him, then elected "to continue to use the equipment and managed to get a contract for a logging operation to continue." Graham's reason for taking this action was that he had "a long term relationship with the employees of Trigon... [and] did not want to have all of the employees unemployed...." The Delegate concluded that the Complainant's employment was continuous throughout, notwithstanding that the entity that employed him had changed from Trigon to Port Renfrew, and he was on layoff for a short period at the time the change occurred.

32. These are precisely the types of circumstances in which section 97 is meant to apply. It follows that Port Renfrew's obligation to pay compensation for length of service must incorporate the period during which the Complainant was employed by Trigon.

33. Port Renfrew also states that the Complainant was employed from December 5, 2012, through to April 3, 2013, and again from December 3, 2013, through April 24, 2014, for a total of eight months. Port Renfrew submits that "[t]here should be no severance payable for this period at all."

34. I confess I have difficulty ascertaining the legal position that underlies these statements. If, however, Port Renfrew is suggesting that the benefits under the *Act* to which the Delegate found the Complainant to be entitled should be reduced or eliminated because of interruptions in his employment due to periods of layoff, I have decided that such an assertion is without merit.

35. The Delegate determined that any layoffs did not exceed the statutory definition of a "temporary layoff" period set out in section 1 of the *Act*, after which the Complainant's employment would have been deemed to have been terminated. The Delegate therefore concluded that the Complainant's employment was continuous.

36. Port Renfrew has failed to persuade me that the Delegate erred on this point.

37. As I have noted, a significant part of the case submitted by Port Renfrew was concerned with the assertion that the Complainant was not entitled to compensation for length of service because he had quit and then, later, he was rehired. The Delegate rejected these arguments for the reasons I have set out earlier. Port

Renfrew does not appear to attack the Delegate's conclusions on this issue in its appeal submissions. For my part, I see no basis for a challenge to the Determination on this ground.

38. For these reasons, I have concluded that there is no reasonable prospect that the appeal will succeed.

ORDER

39. Pursuant to section 114(1)(f) of the *Act*, I order that the appeal be and is hereby dismissed. Accordingly, pursuant to section 115(1)(a) of the *Act*, the Determination dated June 25, 2015, is confirmed.

Robert E. Groves
Member
Employment Standards Tribunal