Employment Standards TRIBUNAL

An appeal

- by -

Carlo Magno

- 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.: 2008A/120

DATE OF DECISION: December 17, 2008

DECISION

SUBMISSIONS

Carlo Magno	on his own behalf
Sherri Wilson	on behalf of the Director of Employment Standards
Fadia Sorial	on behalf of New Vision Enterprises Ltd.

OVERVIEW

1. This is an appeal by Carlo Magno, pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued September 19, 2008.

2. Mr. Magno worked as a front desk clerk for New Vision Enterprises Ltd. carrying on business as the Quality Hotel ("New Vision"), from January 23, 2007 until February 4, 2008. Mr. Magno filed a complaint alleging that New Vision had contravened the Act in failing to pay him overtime wages, vacation pay and compensation for length of service.

3. The Director's delegate held a fact finding session into the complaint on April 17, 2008.

4. After investigating the complaint, the delegate concluded that New Vision had contravened Sections 27, 40, and 45 of the *Act* and section 46 of the *Employment Standards Regulation* (the "*Regulations*") in failing to pay Mr. Magno overtime, statutory holiday pay and vacation pay. She found that he was not entitled to compensation for length of service. She determined that Mr. Magno was entitled to wages and interest in the total amount of $628.37. The delegate also imposed administrative penalties on New Vision for the contraventions pursuant to section 29(1) of the *Regulations*.

5. Mr. Magno argues that the delegate erred in law in failing to exercise entry and inspection powers to obtain employer records, in concluding that New Vision had just cause to terminate his employment, and in determining that New Vision had paid his final pay on time.

6. Section 36 of the *Administrative Tribunals Act* ("*ATA*"), which is incorporated into the *Employment Standards Act* (s. 103), and Rule 17 of the Tribunal's Rules of Practise 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 decided on the section 112(5) "record", the submissions of the parties, and the Reasons for the Determination

ISSUES

7. Did the delegate err in law in

   a. finding that Mr. Magno was not entitled to compensation for length of service,

b. failing to exercise entry and inspection powers in order to establish whether he was entitled to overtime wages, and

c. failing to find that New Vision had not paid his final pay in accordance with the Act.

FACTS AND ARGUMENT

8. Mr. Magno claimed that he worked long shifts, often between 10 and 12 hours in length, and occasionally 15 hours in length. He said he was obliged to work both day and overnight shifts and alternated between them without a sufficient break and that he rarely received a day off. He said there was no averaging agreement in place, and that often he was unable to leave his job to take his unpaid breaks because there was no one to replace him. He argued that time for unpaid breaks should not be deducted from his hours if he did not have the opportunity to take them.

9. Mr. Magno also said that he did not receive wage statements from the employer. He did not provide his own record of hours broken down on a daily basis.

10. Mr. Magno said that he found working at the hotel quite stressful, and in early February decided he could not continue working there. On February 5, 2008, he sent a fax to New Vision stating he would not be able to work for three weeks commencing February 6, 2008. On February 6, Ms. Sorial called him to tell him that his employment was terminated.

11. Mr. Magno sent a self-help kit to New Vision on February 8, 2008 in which he claimed outstanding wages. Mr. Magno received a cheque dated February 15, 2008 for $784.75, which Mr. Magno asserted was insufficient.

12. New Vision advised the delegate that Mr. Magno had left his place of work unattended on two occasions. The first occasion was March 4, 2007, when Mr. Magno went to pick up his dinner at a restaurant outside the hotel. Ms. Sorial telephoned the hotel and was unable to reach him and when she arrived at the hotel, she was unable to find him. Upon his return, Mr. Magno had an argument with Ms. Sorial after which he went home. New Vison said that Mr. Magno was absent without permission for two days following this incident. Mr. Magno telephoned Ms. Sorial March 6, 2007 and apologized, and returned to work on March 7, 2007. New Vision issued Mr. Magno a warning letter on March 7, 2007.

13. Mr. Magno walked out in the middle of his shift again on September 19, 2007 and was again absent for two days. On September 21, 2007, Mr. Magno wrote a letter of apology to New Vision, acknowledging his act was irresponsible and promised not to do it again. He returned to work on September 22, 2007, at which time New Vision accepted Mr. Magno's apology but issued him a memo indicating that it would not tolerate such an action again.

14. Mr. Magno faxed his letter of February 5, 2008 to Ms. Sorial on the evening of the 5th. He was scheduled to work at 8:00 a.m. the following morning and had received all his vacation pay four days earlier. Ms. Sorial attempted to reach Mr. Magno by telephone within five minutes of receiving the fax but was unable to do so. She left a message indicating that this was the third incident and indicating that she was terminating his employment.

15. New Vision argued that Mr. Magno was not entitled to compensation for length of service on the grounds that he absented himself from the workplace without permission for a third time, which justified the termination of his employment.

16. New Vision provided the delegate with documents outlining all payments made to Mr. Magno between August 1, 2007 and February 15, 2008. It indicated that it paid its employees semi monthly, not biweekly. It indicated that it compensated Mr. Magno at straight time for the first 87 hours of each pay period and at time and one half for all other hours worked during the pay period. It argued that Mr. Magno was not entitled to additional wages.

17. The delegate determined that Mr. Magno had not been paid one and one half times his regular rate for at least seven hours each pay period. She determined that New Vision had contravened section 40 by failing to pay overtime and calculated that he was entitled to an additional $585.00. In her imposition of administrative penalties, she noted that New Vision did not produce Employer Records as demanded and that "New Vision's failure to provide these records pursuant to Section 46 of the *Regulation* may have resulted in Mr. Magno not receiving wages pursuant to the *Act*".

18. The delegate also calculated vacation pay of 4% on those wages.

19. The delegate determined that Mr. Magno's act of taking three weeks leave without prior authorization and in the absence of any reasonable justification, such as illness, to constitute significant misconduct. She set out factors the courts considered in assessing whether absenteeism would constitute cause for termination and concluded that he was not entitled to compensation for length of service.

20. In his appeal, Mr. Magno says that the delegate erred in not exercising powers of entry and inspection under section 85 of the *Act* to secure New Vision's payroll records and that her decision on overtime wages and vacation pay was based on assumptions rather than facts. Mr. Magno submitted his own calculations and compared those with New Vision's calculations, and claims he is entitled to overtime wages of $6,071.00.

21. Mr. Magno also contends that the delegate erred in finding that there was just cause to terminate his employment.

22. Finally, Mr. Magno argues that the delegate erred in not finding that New Vision failed to pay all wages owing within 48 hours after his employment was terminated. The delegate says that she did impose a penalty on New Vision for its contravention of section 27. She notes that although she imposed a penalty for New Vision's contravention of section 18 (the payment of wages within 48 hours) that was imposed for New Vision's contravention in respect of another employee who filed a complaint jointly with Mr. Magno.

23. The delegate relies on the record and the Determination and submits that the appeal is without merit. She says that section 85 is discretionary in nature and that, even had she exercised her powers to enter the premises, the result would have been the same. She says that while she issued a Demand for Employer Records, New Vision was unable to comply as a result of a computer malfunction. New Vision provided the delegate with evidence in the form of a receipt for computer repair that indicated that the computer's memory had been compromised.

24. Ms. Sorial submits that she provided the delegate with her own computer records of regular and overtime hours for each semi-monthly pay period as well as the employee work schedules. She argues that most of the pay period records of overtime and regular wage calculations match or exceed Mr. Magno's EI claim, filed one day after his termination. New Vision also notes that in his request for payment, Mr. Magno sought unpaid overtime of 576 hours and that he worked an average of 64 hours per week. In his EI claim, Mr. Magno said that he worked 24 hours per week of overtime. New Vision says that it paid Mr. Magno for 579 hours of overtime, or more than his original overtime claim. New Vision says that Mr. Magno later claimed 90 hours of overtime. It contends that Mr. Magno has been paid what he was entitled to.

25. Ms. Sorial agrees with the delegate's conclusion that Mr. Magno's employment was terminated for cause. She says that she contacted Mr. Magno at 7:40 p.m. on February 5, 2008 regarding two reservations. At 9:29 p.m. Mr. Magno faxed her regarding his intended vacation. She immediately attempted to contact him, without success, as noted above. She says that Mr. Magno was aware of the important role he played given that the hotel had only four staff members and the effect of his leave without prior arrangement.

ANALYSIS

26. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

(a) the director erred in law

(b) the director failed to observe the principles of natural justice in making the determination; or

(c) evidence has become available that was not available at the time the determination was being made

27. The burden of establishing the grounds for an appeal rests with an Appellant. Mr. Magno must provide persuasive and compelling evidence that there were errors of law in the Determination, as alleged, or that the delegate failed to observe the principles of natural justice.

Error of Law

28. The Tribunal has adopted the factors set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)* (1998] B.C.J. (C.A.) as reviewable errors of law:

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 be reasonably entertained; and

5. Exercising discretion in a fashion that is wrong in principle

Compensation for length of service

29. I will first address Mr. Magno's argument that the delegate erred in finding that New Vision had cause to terminate his employment.

30. What constitutes just cause has been addressed by the Tribunal on many occasions. Generally speaking, what constitutes just cause falls into two categories. The first category is unsatisfactory conduct, or minor infractions of workplace rules that are repeated despite clear warnings to the contrary, and progressive discipline measures.

31. The second category is that of exceptional circumstances where a single act of misconduct may justify dismissal without the requirement of a warning. This single act must constitute a fundamental breach of the employment relationship.

32. The Tribunal is guided by the common law on the question of whether the facts justify a dismissal in these circumstances. Situations which have been held to constitute misconduct include failure to attend work, gross incompetence, a significant breach of a material workplace policy, criminal acts, and insubordination. (see *Kruger, Re: Glenwood Label and Box Manufacturing*, BC EST # D079/97). It is under this category that the delegate found that New Vision had substantiated Mr. Magno's dismissal.

33. In my view, the delegate did not err in her conclusion, which was that New Vision had just cause to terminate Mr. Magno's employment for an act that constituted a fundamental breach of the employment relationship. Mr. Magno had a duty to his employer to attend work. The delegate reviewed the following factors the courts examine in determining whether absenteeism constituted grounds for termination:

- It must be misconduct of significance
- Failing to return promptly after a leave of absence, without advising one's employer, or taking time off despite a direct order not to do so
- The employee took time off under false pretences
- Prejudice to the employer's interest
- Generally, two instances of absenteeism are required, particularly where the employee is of long service and has acted faithfully in all other respects
- It must result for intentional misconduct, rather than just a misunderstanding
- It must be the fault of the employee
- Where warnings are provided, they should specify that the employee will be terminated if his absences continue
- Whether there is a reasonable defence, such as illness
- The type of employment
- An employee's history of long service without a record of significant absenteeism can be used as a mitigating factor
- The onus of proof is on the employee to establish that he has received permission to take a leave of absence

34. Mr. Magno gave his employer approximately eight hours notice that he would be absent from work for three weeks. He had no prior authorization for this significant "leave" and his absence was not later

justified by medical or other reasons. His action prejudiced his employer's interest as his position was a crucial one for a hotel and he knew from his previous unauthorized absences that his employer considered his presence important. The absence did not arise from a misunderstanding; rather, it was a deliberate act of misconduct. I find no basis for the appeal on this ground.

Overtime wages

35. In assessing Mr. Magno's overtime claim, the delegate concluded that "New Vision did not pay Mr. Magno 1 ½ times his regular rate for *at least seven hours each pay period*" (my emphasis).

36. It is difficult to discern how the delegate arrived at her conclusion on this issue. In her reply, the delegate notes that New Vision was unable to provide her with payroll records due to a computer malfunction. Although the delegate noted in the Determination that the Employer's failure to provide payroll records "may have resulted in Mr. Magno not receiving wages", she does not explain how she calculated Mr. Magno's overtime wages. No calculation sheet is attached to the Determination and there is no analysis of the records provided. The record shows that New Vision provided the delegate with the details of Mr. Magno's total regular and overtime hours each semi monthly pay period as recorded by Ms. Sorial, the operations manager of the hotel. In addition, New Vision provided Mr. Magno's daily work schedule and his EI claim.

37. I allow the appeal in this respect. I conclude that the delegate erred in law in failing to provide adequate reasons. In *R. v. Walker*, [2008] 2 S.C.R. 245, 2008 SCC 34, Binnie J. summarized the duty to give adequate reasons:

> To justify and explain the result;
> To tell the losing party why he or she lost;
> To provide for informed consideration of the grounds of appeal; and
> To satisfy the public that justice has been done. (at para 19)

38. I am unable to determine, from either the Determination or the section 112 record, how the delegate determined Mr. Magno's overtime wage entitlement. Therefore, I refer the matter back to the delegate for a reasoned analysis of his claim in this respect.

ORDER

39. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated September 19, 2008, be referred back to the delegate for an explanation of Mr. Magno's overtime wage calculation.

Carol L. Roberts
Member
Employment Standards Tribunal