Employment Standards TRIBUNAL

An appeal

- by -

ResortQuest Whistler Property Management Inc.

- 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 Groves

FILE No.: 2007A/110

DATE OF DECISION: December 19, 2007

DECISION

OVERVIEW

1. This is an appeal brought by ResortQuest Whistler Property Management Ltd. ("ResortQuest") pursuant to section 112 of the *Employment Standards Act* (the "*Act*") challenging a determination (the "Determination") of a delegate (the "Delegate") of the Director of Employment Standards issued on August 17, 2007.

2. The proceedings began with a complaint filed pursuant to section 74 of the *Act* by a Lucas J. Fowler ("Fowler"). The Delegate conducted a hearing in respect of Mr. Fowler's complaint on June 7, 2007. In the Determination which followed, the Delegate concluded that ResortQuest had contravened section 63 of the *Act*, and that Mr. Fowler was entitled to compensation for length of service, concomitant annual vacation pay, and accrued interest in the amount of $1,239.86. In addition, the Delegate imposed an administrative penalty of $500.00 pursuant to section 29 of the *Employment Standards Regulation*. The total award against ResortQuest therefore amounted to $1,739.86.

3. ResortQuest's Appeal Form states as its grounds of appeal, first, that the Director erred in law, and second, that the Director failed to observe the principles of natural justice.

4. I have before me the Delegate's Determination, the Reasons for the Determination, ResortQuest's Appeal Form and attached material by way of submission, a submission from Mr. Fowler, a submission from the Delegate, and documents the Delegate has indicated I should consider to be the record that was before her at the time the Determination was made.

5. The Tribunal has determined that I will decide this aspect of the appeal on the basis of the written materials submitted by the parties, pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act* and Rule 16 of the Tribunal's Rules of Practice and Procedure.

FACTS

6. ResortQuest operates a property management business on behalf of property owners for vacation rentals in Whistler. Mr. Fowler was employed from June 8, 2004 until August 16, 2006 as a Sales Coordinator.

7. The record discloses no evidence relating to the quality of Mr. Fowler's performance prior to April, 2006. During that month, however, his superiors became concerned because Mr. Fowler missed two appointments with clients, one because of illness, the other because he noted it incorrectly in his calendar. On April 24, 2006, Mr. Fowler received written notice that he must improve his performance within thirty days. The communication contained no imposition of specific discipline; nor did it warn Mr. Fowler of possible consequences in future. The Delegate received no evidence suggesting that Mr. Fowler did not meet the obligations stipulated in the notice within the requisite thirty days.

8. On August 3, 2006, Mr. Fowler emailed a notice of his resignation to the person to whom he reported. The notice advised that his last day of work would be on August 31, 2006. The Reasons for the Determination state that ResortQuest accepted Mr. Fowler's resignation.

9. On August 16, 2006, Mr. Fowler's superior asked him for a commitment that he would train a new Sales Coordinator. Mr. Fowler agreed. Later that morning, ResortQuest's general manager observed Mr. Fowler sitting beside the new Sales Coordinator while the latter was looking at non-work-related material on his office computer. A decision was then made to terminate Mr. Fowler's employment on the spot. Mr. Fowler was provided with a cheque to cover his wages until the end of the day on August 16. As we shall see, Mr. Fowler also received a ResortQuest cheque for a further day's pay, plus vacation pay, in May 2007.

10. Before the Delegate, ResortQuest argued that Mr. Fowler had been provided with the company's employee guidebook in June, 2004. The guidebook contained an express prohibition against the use of company computers for personal or other non-business related purposes, and a warning that a contravention of the policy would result in "corrective action, up to and including termination." ResortQuest submitted that Mr. Fowler's misuse of the computer on August 16, 2006 was particularly egregious because he was training his replacement to, in effect, breach the company's policies. Moreover, an examination of Mr. Fowler's computer following his departure revealed that he had engaged in numerous, presumably inappropriate, internet and email activities on his computer during the morning of August 16, 2006. ResortQuest did concede, however, that Mr. Fowler never received an express warning as to what might transpire as a result of his misusing his computer at work.

11. In the result, the Delegate determined that since ResortQuest had dismissed Mr. Fowler before the date his resignation would have become effective, the Delegate could award Mr. Fowler compensation for length of service pursuant to section 63. Moreover, the Delegate concluded that the circumstances surrounding the dismissal did not warrant a finding that Mr. Fowler had given cause. Accordingly, the Delegate ordered that ResortQuest pay Mr. Fowler two weeks' by way of compensation for length of service, less the one day's compensation paid by ResortQuest in May 2007.

12. Mr. Fowler filed his complaint with the Employment Standards Branch on February 16, 2007. In its submission attached to its Appeal Form, ResortQuest argues that Mr. Fowler's complaint was filed beyond the six month time limit stipulated in the *Act*. ResortQuest argues that Mr. Fowler should have filed his appeal no later than February 15, 2007.

13. ResortQuest further submits that another delegate of the Director, J. Paul Harvey ("Harvey"), conducted mediation proceedings in respect of Mr. Fowler's complaint. A telephone conference call involving Mr. Harvey and, *inter alia*, Paul Sanderson, ResortQuest's general manager, occurred on April 3, 2007. Of that call, and what followed it, ResortQuest's submission, prepared by Beth Barnes-Fraser, its human resources manager, says this:

> After hearing all of the evidence Mr. Harvey determined the most Lucas would be entitled is an additional day as Lucas was employed between June 8th, 2004 to August 16th, 2006 this would entitle Lucas to two weeks notice. Mr. Harvey asked Mr. Sanderson if he would be willing to pay Mr. Sanderson if he would one additional day which would bring Lucas notice period and entitlement under the ESA to the full two weeks. Mr. Sanderson agreed and Lucas declined the offer saying he thought he deserved more than the act allowed.
>
> I received a letter from Mr. Harvey on May 1st (please see supporting document). Mr. Harvey explains his rational "The employer may owe Lucas Fowler one days pay" and "in order to avoid the possibility of a mandatory penalty" he encouraged us to send the one day owing.

> On May 18th, 2007 I called to Mr. Harvey with respect to Lucas Fowler's claim and Mr. Harvey explained he tried to reason with Lucas and explained quite clearly that Lucas that he was requesting a settlement that was more than the act allowed. Mr. Harvey even went so far as to send a letter to Lucas explaining the decision. Mr. Harvey at that time indicated to me that the evidence we had for just cause "was strong" but suggested we send the one day's pay owing which I did on May 25th, 2007. This check was cashed by Lucas Fowler on June 6th, 2007...

14. A copy of the letter from Mr. Harvey to which Ms. Barnes-Fraser alludes forms part of ResortQuest's submission on this appeal. It is dated May 1, 2007. In it, Mr. Harvey says this, in part:

> If I was an employer and I gave two weeks written notice to an employee and let that employee go after one week I would still owe one week's pay under the Act. If this same two year plus employee had given me three weeks notice and I let him go after he worked only two weeks of that period there would be little more I am required to do under the Act. If I had let him go two days shy of two weeks of that three week notice period I only have to pay him two days pay plus 4% vacation pay on that sum under the Act. The reason is he was let go by me after being permitted to work a notice period and a two week notice period is the minimum I would have to have given him under the Act.
>
> In this matter the employer might owe Lucas Fowler one day's pay and 4% vacation pay on that sum at a hearing if the employer's 'just cause' reasoning for Mr. Fowler's termination is rejected. It is also a possible that some other view might result from the evidence which could go against either party.
>
> In order to avoid the possibility of a mandatory $500.00 penalty at a hearing on this job loss issue my suggestion is to pay one day's pay to Lucas Fowler directly now and send it to him prior to the hearing. This payment would probably negate any penalty for alleged non payment of wages in relation to his termination in a hearing.
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> Mr. Fowler was permitted to work 13 days of a longer notice period he gave the employer. He was paid for that period. Two weeks or 14 days written notice is what he might be entitled to under section 63 based on his length of service for purposes of an employer termination of his employment under the Act. My suggestion here would be to forward a days pay to him...
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> If this matter goes on as expected to a hearing whether this payment is made prior or not and it is found that 13 days notice was accepted, worked and paid and the employer then let him go and subsequently did pay (1) one day's more pay there is little more likely to come from a hearing on this issue. No guarantees here but it is unlikely more money will be required to be paid under the Act. Ensure you retain and can present evidence at the hearing showing the employer paid out and paid all wages including this one day's pay prior to the hearing if this is to be done.
>
> Since mediation I have written to Mr. Fowler to try to reason this matter out. I expected he might possibly withdraw or settle this complaint. To date he has not responded to my letter. Accordingly, it is inherent on the employer to be prepared for the hearing, to attend the hearing and to provide all pay and work records and other evidence as noted to our office by the required date indicated in the hearing documents. This should prove Lucas Fowler is not entitled to or owed any further money under the Act.
>
> Please note, as mediator in this matter I do not have a final say nor do I decide anything concerning this complaint. What has been suggested by me is based on prior experience deciding outcomes and conducting investigations on similar complaint claims with the Branch.

15. The record the Delegate has delivered for the purposes of this appeal contains no reference to the mediation proceedings conducted by Mr. Harvey, save for a copy of a letter from Ms. Barnes-Fraser to Mr. Fowler dated May 28, 2007, in which Ms. Barnes-Fraser stated that as "a follow-up to our offer at mediation and based on the recommendation of the Employment Standards Officer" she was enclosing a cheque for the one day's pay plus vacation pay. It does not appear that the Delegate was otherwise aware of the substance of what transpired during the mediation proceedings, the circumstances under which Mr. Fowler received the cheque for one day's pay and vacation pay, or the correspondence generated by Mr. Harvey during the mediation proceedings to which Ms. Barnes-Fraser has referred in her submissions on behalf of ResortQuest on this appeal.

16. In its submission on this appeal ResortQuest argues that the Determination should be cancelled "based on the differing opinions" of the Delegate and Mr. Harvey, and secondly, the time period for filing a complaint.

ISSUES

17. 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, either because the Director erred in law, or failed to observe the principles of natural justice?

ANALYSIS

Was the complaint filed in time?

18. The time within which a complaint must be filed is set out in section 74 of the *Act*. Section 74(2) states that a complaint must be in writing and must be delivered to an office of the Employment Standards Branch. Section 74(3) requires that a complaint relating to an employee whose employment has terminated must be delivered under section 74(2) within six months after the last day of employment.

19. The application of the time limit within section 74(3) is informed by sections 25(4), 25(5) and the definition of "month" in section 29 of the *Interpretation Act* RSBC 1996 c.238, which read:

> 25(4) In the calculation of time expressed as clear days, weeks, months or years, or as "at least" or "not less than" a number of days, weeks, months or years, the first and last days must be excluded.
>
> 25(5) In the calculation of time not referred to in subsection (4), the first day must be excluded and the last day included.
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> 29. In an enactment:...
> "month" means a period calculated from a day in one month to a day numerically corresponding to that day in the following month, less one day;...

20. In a decision of the Tribunal called *Brad* BC EST #D429/97 a Tribunal Member applied section 29 of the *Interpretation Act* in such a way as to come to a conclusion that a complainant whose last day of employment was September 27, 1996, and who filed his complaint on March 27, 1997, had filed his complaint outside of the six month time limit, by one day. The effect of this decision was that the complainant's complaint was dismissed.

21. The Tribunal revisited this issue in the later decision of *Schermerhorn* BC EST #D205/98. The facts of that case were that a complainant's last day of employment was February 14, 1997, and the complainant filed a complaint with the Branch on August 14, 1997. The Tribunal Member concluded that the complaint was filed within time. In reaching this result the Member decided that section 25(4) of the *Interpretation Act* had no application, because the calculation of time in section 74(3) of the *Act* did not speak of six "clear" months, or "at least" six months, or "not less than" six months. Therefore, section 25(5) of the *Interpretation Act* was the relevant section, for the purposes of the interpretation of section 74(3) of the *Act*. Section 25(5) of the *Interpretation Act* stipulated that the first day of the time calculation, February 14, 1997, must be excluded, and the last day included. In the case before the Member, this meant that February 15, 1997 became the "first day" for the purposes of the calculation of the six month time limit mandated in section 74(3). Applying the section 29 definition of "month" to these facts, the Member concluded that the day that was six months less one day from February 15, 1997 was August 14, 1997, which was the day on which the Branch had received the complainant's complaint. Section 25(5) of the *Interpretation Act* required that August 14, 1997, being the "last day", had to be included in the calculation of the time. Accordingly, the Member found that the complaint had been filed within time.

22. With respect, I find the reasoning in *Schermerhorn* more persuasive than that found in the *Brad* decision. The Member in *Brad* does not appear to have considered the effect of section 25(5) of the *Interpretation Act* in his analysis of the application of section 74(3) of the *Act*. Moreover, apart from his reference to the definition of "month" in the *Interpretation Act*, the Member in *Brad* did not cite legal authority in support of his conclusion. In *Schermerhorn*, on the other hand, the Tribunal Member cited the decision of Southin J.A., for the majority, in *Jim Pattison Industries Ltd. (Overwaitea Foods) v. 1854 Holdings Ltd.* (1991) 52 BCLR 2d 279 at 289. I have reviewed that decision, and I find that it confirms the Member's analysis in *Schermerhorn*.

23. Applying this reasoning to the facts before me on this appeal, I have concluded that the Delegate made no error of law in deciding that Mr. Fowler filed his complaint within the six month time limit. Mr. Fowler's last day of employment was August 16, 2006. An application of section 25(5) of the *Interpretation Act* means that August 16, 2006, must be excluded from the calculation. That means that the "'first day" for the purposes of the calculation was August 17, 2006. Pursuant to the definition of "month" in section 29 of the *Interpretation Act*, the day numerically corresponding to August 17, 2006, six months later, less one day, was February 16, 2007. The operation of section 25(5) of the *Interpretation Act* requires that the "last day" in the calculation, that is February 16, 2007, be included.

24. Mr. Fowler filed his complaint on February 16, 2007. It follows that it was filed within the time stipulated in section 74(3) of the *Act*.

Has there been a failure to observe the principles of natural justice?

25. A plea that the Director failed to observe the principles of natural justice raises a procedural concern that the proceedings which preceded the making of the Determination were in some manner conducted unfairly. Typically, a challenge on this ground asserts that a party did not have an opportunity to know the case against it, or an opportunity to be heard in its own defence. This aspect of the obligation is imported directly into proceedings conducted at the behest of the Director under the *Act* by virtue of section 77, which states that if an investigation is conducted, the Director must make reasonable efforts to give a person under investigation an opportunity to respond.

26. Other aspects of natural justice include the requirements that a decision must be made by persons hearing all the evidence, and that the person who makes a decision must be free of actual, or apprehended, bias.

27. As I interpret ResortQuest's submission on this aspect of the appeal, it is asserting that the proceedings which preceded the Determination were conducted in a way that was unfair in that it was left, after the mediation, with the impression that if the matter proceeded to an adjudication, it was likely that a delegate of the Director determining the matter would find that Mr. Fowler was only entitled to receive one further day's pay, plus vacation pay, over and above the sum ResortQuest had paid him at the time his employment was terminated. On the strength of what it perceived to be a recommendation from Mr. Harvey emanating from the mediation, ResortQuest paid Mr. Fowler a further day's pay, plus vacation pay. To its surprise, the Delegate took a different view, and decided that Mr. Fowler was owed two weeks' compensation for length of service, less the one day already paid.

28. I suppose one way of describing ResortQuest's position is that it considers itself to have been "sandbagged" as a result of the manner in which the representatives of the Director conducted the mediation, and the subsequent adjudication, of Mr. Fowler's complaint.

29. The Delegate has delivered no submission of substance in answer to this concern raised by ResortQuest. Apart from what ResortQuest says in its submission, and the correspondence from Mr. Harvey, both of which I have referred to above, I have no information as to what may have transpired during the mediation process. Having regard to the material to which I have been referred, however, I am not persuaded that it demonstrates a failure on the part of the Director to observe the principles of natural justice in the making of the Determination.

30. My reason for reaching this conclusion emerges from what I consider to be ResortQuest's fundamental misapprehension as to the purpose of Mr. Harvey's attempt to mediate Mr. Fowler's complaint. A mediation is a structured negotiation, in which the parties examine the merits of their respective positions, assess the risks inherent in proceeding to an adjudication, and consider the prospects for settlement. A role of the Branch in a mediation, here manifested in the person of Mr. Harvey, is to facilitate that process, to assist the parties in determining their best, and worst, alternatives to a negotiated settlement, and to explore with them whether a resolution of the complaint by agreement is possible in the circumstances. It is because the parties, and I include here the mediator, are encouraged to communicate candidly in order to fully utilize the settlement opportunity which mediation offers that the communications generated within the process are generally considered to be confidential, and inadmissible in subsequent adjudication proceedings.

31. The mediation process is a settlement process; it is not an adjudication process. It was, therefore, no part of Mr. Harvey's function as mediator to adjudicate Mr. Fowler's complaint; nor did he do so. In his correspondence to ResortQuest referred to above, Mr. Harvey made it clear more than once that if the complaint proceeded to adjudication it was entirely possible the parties might face a different outcome than the one mooted by him for the purposes of encouraging settlement. He said that in his capacity as mediator he had no "final say", nor could he "decide anything" concerning the complaint. He also stated that since Mr. Fowler did not appear to have responded favourably to a settlement based on a payment of a further day's pay, plus vacation pay, ResortQuest needed to be prepared to attend at an adjudication hearing.

32. In the event, the complaint was not resolved by way of a settlement agreement. The disposition of the complaint occurred by way of a hearing before the Delegate, not Mr. Harvey. The Delegate then issued

her Determination. Apart from a letter from ResortQuest to Mr. Fowler evidencing the payment of the day's pay, plus vacation pay, in which ResortQuest alludes to the "recommendation" for such a payment made at the mediation, there is no evidence the Delegate was privy to what transpired during the mediation process. Given the strong presumption against the disclosure of communications made during the course of settlement discussions, it would be highly surprising if the facts were to the contrary.

33. In these circumstances, the fact that the Delegate reached a conclusion that departed from a potential settlement scenario posited by Mr. Harvey does not amount to a failure on the part of the Director to observe the principles of natural justice. While mediation and adjudication are each processes which section 76 of the *Act* authorizes the Director to employ in resolving complaints, they are, as we have seen, very different in their nature. Mediation is essentially a collaborative process, in which the parties themselves negotiate a resolution. Adjudication, on the other hand, is adversarial, and requires a third party, in this case the Delegate, to resolve the complaint on behalf of the parties. When the mediation process foundered, principally because Mr. Fowler believed, correctly as it turned out, that on a proper reading of the *Act* he was entitled to more than ResortQuest was prepared to offer by way of settlement following Mr. Harvey's "recommendation", ResortQuest had to know that there was no guarantee as to the result if the matter proceeded to adjudication. Mr. Harvey said as much in his letter to ResortQuest following the mediation session conducted by conference call. All bets were off, as it were.

34. As for the proceedings before the Delegate, there is nothing in the record to suggest that ResortQuest was unaware of the substance of the complaint Mr. Fowler had lodged against it, or that it was deprived of an opportunity to present a case in reply. The Delegate who conducted the hearing was the Delegate who issued the Determination. There is no suggestion that the Delegate was biased, either in the actual or the apprehended senses.

35. It follows that ResortQuest has failed to persuade me that the Determination should be disturbed.

ORDER

36. Pursuant to section 115(1)(a) of the *Act*, I order that the Determination dated August 17, 2007 be confirmed.

Robert Groves
Member
Employment Standards Tribunal