Appeals

- by -

366178 B.C. operating as Northern Hotel

- and -

Candace Fox

- 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

TRIBUNAL MEMBER: Matthew Westphal

FILE No.: 2004A/160 and 2004A/161

DATE OF DECISION: November 30, 2004

DECISION

OVERVIEW

366178 B.C. Ltd. operating as Northern Hotel ("the Employer") and Candace Fox have each brought an appeal under section 112 of the *Employment Standards Act* (the "*Act*") of Determination ER # 022259, dated August 6, 2004 (the "Determination"), issued by a delegate (the "Delegate") of the Director of Employment Standards. The Delegate found that the Employer had contravened section 63 of the *Act* and section 46 of the *Employment Standards Regulation*, B.C. Reg. 396/95 as amended (the "Regulation"), imposed two administrative penalties of $500 each for those contraventions, and ordered that it pay nine of its former employees, including Ms. Fox, compensation for length of service. Ms. Fox has appealed the Determination on the basis that the Delegate used an incorrect length of service in calculating her compensation for length of service.

The Tribunal has decided that this case can be decided without an oral hearing. Based on my review of the Determination, the submissions of the Employer, Ms. Fox, the Delegate, and two other former employees, and the record the Delegate has provided to the Tribunal, I am dismissing the Employer's appeal. However, in light of certain gaps in the evidence, I am referring the Determination back to the Delegate for further investigation concerning Ms. Fox's employment.

ISSUES

1. Did the Delegate err in finding that the Employer had failed to provide notice to its employees of their termination of employment?

2. Did the Delegate err in finding that the Employer had failed to comply with a Demand for Employer Records sent under s. 85 of the *Act*?

3. Did the Delegate err in his calculation of the compensation for length of service owed to Ms. Fox?

BACKGROUND

The Employer, whose principal is Mr. Gilles Bouvier, operated the Northern Hotel in Fernie, B.C., but sold the business to another party in March 2004.

Two employees, Kathirina Leavens and Amy Denton, filed complaints with the Director of Employment Standards. The Delegate investigated the complaints, and found that the Employer had also terminated the employment of seven other employees when it sold the Northern Hotel.

There was evidence that the Employer had posted a memorandum on a wall in the workplace indicating that the hotel would be sold as of March 1, but the sale did not proceed, and the employees continued working after that date. Ultimately the Employer did sell the hotel, and terminated the employment of the employees as of March 12, 2004.

Mr. Bouvier had stated to the Delegate that the purchaser of the hotel would re-employ the employees, but a representative of the new owners told the Delegate that they were renovating the hotel and did not

intend to re-hire the former employees. The representative also stated that Mr. Bouvier had agreed to properly terminate the employment of all employees.

In the course of his investigation, the Delegate sent Mr. Bouvier a Demand for Employer Records, dated May 25, 2004 (the "Demand"). The Demand required the Employer to produce employment records for the nine employees for the period January 1 to March 12, 2004, including:

1. All records relating to wages, hours of work, and conditions of employment;

2. All records an employer is required to keep pursuant to Part 3 of the *Employment Standards Act* and Part 8, Section 46 and 47 of the *Employment Standards Act Regulation*; and

3. Copies of the Record of Employment (ROE) for each employee.

The Demand required the Employer to deliver the records by June 8, 2004. Although the Delegate did obtain one ROE for Ms. Leavens (though apparently not from the Employer), the Employer did not deliver to him ROEs for its employees. It also did not provide the start and finish dates of each employee. The Delegate imposed a penalty for failing to comply with the Demand, as required by s. 46 of the Regulation.

Based on his investigation, the Delegate found that the Employer had failed to provide notice of termination, and ordered the Employer to pay each employee compensation for length of service under s. 63 of the *Act*, which he calculated based on the payroll records the Employer did provide. Those records indicated that Ms. Fox's employment began in 2003, and the Delegate found that she was entitled to one week's wages as compensation for length of service. The Delegate also imposed an administrative penalty for a violation of s. 63.

SUBMISSIONS

The Employer appeals the Determination on the basis that evidence has become available that was not available at the time the Determination was being made. It provides the following particulars:

> Phone conversation with Ed Wall [the Delegate]. He told me he would be able to obtain ROE's from Gov't Agencies and told me not to worry about it. We also have a video tape that shows we posted the 2 week notice to the employees.

The Delegate denies that he ever informed the Employer that it did not need to provide him with Records of Employment for its employees, as required by the Demand, and says that such a statement would be inconsistent with the Demand. The Delegate also states that he would not have made the statement imputed to him by the Employer because he does not, in fact, have the power to obtain copies of the Record of Employment from other government agencies. He says that making that the Employer's allegation is inconsistent with his having served two Demands for Employer Records (the second, with a later deadline, after the first went to the wrong address) and having told the Employer ahead of time that he would be sending a Demand.

The Delegate makes four points concerning the Employer's desire to introduce the videotape into evidence:

1. It should not be considered, as it could have been provided to him earlier.

2. Even if the Employer did post a sign stating that the hotel was being sold, that would not have fulfilled its duty under s. 63 of the *Act* to ensure each employee is *given* written notice of termination of employment, particularly since one employee was on sick leave at the time and would not have seen the sign.

3. The Employer has not provided evidence of the content of the notice, and whether it fulfilled the requirements of s. 63 by stating on which date employment would case.

4. The employees worked past the date indicated on the memorandum, so it would be ineffective as written notice under s. 67(1)(b) of the Act.

Two other employees made submissions. Kathirina Leavens, in a submission dated September 30, 2004, states that she was told several different dates on which the establishment was going to be sold: November and December, 2003, and then March 1, 2004. She describes the end of her employment as follows:

> I went to the bar on March 10th. Gilles [Bouvier] then told me that it was the last time that the girls would be working. I asked what he meant and he told me that the bar sold for sure this time. At no time was I given notice written or verbally that the bar had a definate [*sic*] selling date for I was off work on WCB. On the 11th of March I asked Gilles about my severance pay and he told me that he had talked to his lawyers and his accountant and he didn't have to pay me.

Sandy Schawalder provided a submission in an email dated October 26, 2004. She states that she had been told that the bar was being sold in November, 2003, then December, and finally, in March 2004. According to her, there was a sign posted on the wall that the bar was closing on March 1, 2004, but when she arrived for work the following day, the sign had been removed, and all employees continued working.

Following receipt of the Determination, Ms. Fox appealed to the Tribunal, alleging that the Delegate erred in basing his calculation compensation for length of service on her employment with the Employer having begun in 2003. Ms. Fox stated that her employment began in 1998. At the time of the Determination, the Delegate did not have copies of any ROE for Ms. Fox, or records from the Employer indicating each employee's start date.

Since then, Ms. Fox has sent copies of two Records of Employment, and one ROE correction form, for the Employer that she obtained from Human Resources and Skills Development Canada, and that she says show that she had been working for the Employer since 1999. Ms. Fox also states that although the Employer's earning chart lists her wage rate as being $9.50 per hour, during at least the last year she was receiving $11.00 per hour.

The Employer has not made any submission concerning Ms. Fox's appeal.

The Delegate made the following submission:

> I made findings based on the information available at the time. The information provided by the employer did not show the entire length of Ms. Fox's service. I did not contact Ms. Fox to determine her length of service. If there is concrete evidence to support her claim, the determination may well be in error.

ANALYSIS

1. Compensation for length of service

The *Act* provides for the payment of compensation to employees whose employment is terminated, based upon their length of service. Section 63 provides as follows:

Liability resulting from length of service

63 (1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.

(2) The employer's liability for compensation for length of service increases as follows:

(a) after 12 consecutive months of employment, to an amount equal to 2 weeks' wages;

(b) after 3 consecutive years of employment, to an amount equal to 3 weeks' wages plus one additional week's wages for each additional year of employment, to a maximum of 8 weeks' wages.

(3) The liability is deemed to be discharged if the employee

(a) is given written notice of termination as follows:

(i) one week's notice after 3 consecutive months of employment;

(ii) 2 weeks' notice after 12 consecutive months of employment;

(iii) 3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice;

(b) is given a combination of written notice under subsection (3) (a) and money equivalent to the amount the employer is liable to pay, or

(c) terminates the employment, retires from employment, or is dismissed for just cause.

(4) The amount the employer is liable to pay becomes payable on termination of the employment and is calculated by

(a) totalling all the employee's weekly wages, at the regular wage, during the last 8 weeks in which the employee worked normal or average hours of work,

(b) dividing the total by 8, and

(c) multiplying the result by the number of weeks' wages the employer is liable to pay.

(5) For the purpose of determining the termination date under this section, the employment of an employee who is laid off for more than a temporary layoff is deemed to have been terminated at the beginning of the layoff.

Section 97 of the *Act* provides that upon a sale of a business, or of substantially all the assets of the business, the employment of the business's employees is deemed to be continuous and uninterrupted by

the disposition. The Employer appears to have assumed that this section would absolve it of liability for paying compensation for length of service. However, s. 97 only applies if the business's employees continue working for the new owners of the business. Since the new owners of the Northern Hotel did not continue employing the employees, s. 97 has no application. Whether or not they had agreed to do so as part of the purchase, is a matter between them and the Employer, and has no bearing upon the Employer's liability under s. 63.

The basis of the Employer's appeal on this issue is that it did, in fact, provide notice of termination to its employees by posting a written notice on a wall in the workplace informing them of the impending sale. It seeks to proffer a videotape that, it says, proves that it had posted the notice.

The videotape does not provide a basis for appealing the Determination. Section 112(1)(c) provides that one ground of appeal is that "evidence has become available that was not available at the time the determination was being made" (emphasis added). As set out in *Bruce Davies, Dana Epp, Kevin Traas, Chad Northcott, Ross Mrazek and Stephen Hemenway, Directors or Officers of Merilus Technologies Inc*., BC EST #D171/03, the Tribunal only admits fresh evidence when four criteria are met:

> (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
>
> (b) the evidence must be relevant to a material issue arising from the complaint;
>
> (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
>
> (d) the evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue

The Employer has provided no reason why it could not, with due diligence, have provided the videotape to the Delegate during his investigation. For this reason alone, I would not admit it.

Further, the videotape would not have high probative value. Section 63(3)(a) provides that an employer can discharge its liability to pay compensation for length of service if each employee is "given written notice of termination." I agree with the Delegate's submission that posting a sign on a wall does not amount to giving each employee written notice of termination, since there is no assurance that all employees will read the sign, and if so, when. I also note that providing a letter directly to each employee (and having him or her confirm receipt of it) is not an onerous burden. Also, since the uncontradicted evidence of the employees who made submissions is that they continued to work after March 1, 2004, the date which that sign stated would be when the sale of the Northern Hotel would take place, s. 67(1)(b) provides that the notice would have been rendered ineffective in any event.

For these reasons, I deny the Employer's appeal of the Delegate's finding that it breached s. 63 by not paying compensation for length of service to its nine employees.

2. Production of employer records

The *Act* gives the Director of Employment Standards broad powers to investigate and verify compliance with the *Act*, and the ability to delegate those powers, such as to the Delegate. One such power is the ability, under s. 85, to require the production of employer records.

Section 85 provides, in part, as follows:

> **Entry and inspection powers**
>
> 85 (1) For the purposes of ensuring compliances with this Act and the regulations, the director may do one or more of the following:
>
> …
>
> (c) inspect any records that may be relevant to an investigation under this Part;
>
> …
>
> (f) require a person to produce, or to deliver to a place specified by the director, any records for inspection under paragraph (c).

The Demand required the Employer to produce the following records:

1. All records relating to wages, hours of work, and conditions of employment;

2. All records an employer is required to keep pursuant to Part 3 of the *Employment Standards Act* and Part 8, Section 46 and 47 of the *Employment Standards Act Regulation*; and

3. Copies of the Record of Employment (ROE) for each employee.

Part 3 of the *Act* includes s. 28, which specifies what information an employer must keep in its payroll records. Section 28(1)(b) requires an employer to keep a record of "the date employment began."

The Employer argues that it should not be subject to a penalty for not providing ROEs for its employees, on the grounds that the Delegate told it that he did not require any ROEs, because he could obtain them from other government agencies (presumably, Human Resources and Skills Development Canada). As I indicated in setting out the background of this case, the Delegate denies saying this.

The basis for the Employer's appeal on this issue amounts essentially to an argument of officially induced error. The Ontario Court of Appeal described this common law defence as follows in *R. v. Cancoil Thermal Corporation* (1986), 27 C.C.C. (3d) 295, at p. 303:

> The defence of "officially induced error" is available as a defence to an alleged violation of a regulatory statute where an accused has reasonably relied upon the erroneous legal opinion or advice of an official who is responsible for the administration or enforcement of the particular law. In order for the accused to successfully raise this defence, he must show that he relied on the erroneous legal opinion of the official and that his reliance was reasonable. The reasonableness will depend upon several factors including the efforts he made to ascertain the proper law, the complexity or obscurity of the law, the position of the official who gave the advice, and the clarity, definitiveness and the reasonableness of the advice given.

The Tribunal has declined to apply this doctrine in the past on the basis that it is limited to regulatory offences, and is not an excuse that can be used by an employer to evade the minimum standards under the *Act*: *Gulbranson Logging Ltd.,* BC EST #D337/97; *Canwest Countertops Ltd.*, BC EST #D016/99; *550635 B.C. Ltd. (c.o.b. Jack's Towing (1997))*, BC EST #D100/01; *Guthrie (c.o.b. Dianne & Don's Cleaning)*, BC EST #RD398/01; *Anchorage Holdings Co. (Re)*, BC EST #D039/03. In *Gulbranson Logging*, Adjudicator Stevenson held that

> The significant limitation on the doctrine for the purposes of this case is it applies only to regulatory offenses: i.e. to a prosecution under the applicable statute. It does not operate to disentitle individuals for whose benefit the statute exists from enforcing their rights under that statute….

This aspect of the Employer's appeal does not, however, involve the enforcement of rights of individuals for whose benefit the statute exists. It seems to me that the policy behind not applying the defence of officially induced error to employers' liability to employees under the *Act* is a concern that those employees, for whose benefit the *Act* was designed, should not bear the loss resulting from incorrect advice provided by the Director or one of her delegates. By contrast, this aspect of the appeal deals with a mandatory administrative penalty under s. 98 of the *Act*, which is directed not at benefiting employees, but at ensuring the efficient operation of the employment standards regime by providing incentives to compliance with the *Act.* A reconsideration panel of the Tribunal explained the purpose of administrative penalties as follows in *The Director of Employment Standards*, BC EST #RD133/04:

> …[A]dministrative penalties generated through provisions of the *Employment Standards Regulation* are part of a larger scheme designed to regulate employment relationships in the non-union sector. Such penalties are generally consistent with the purposes of the *Act*, including ensuring employees receive at least basic standards of compensation and conditions of employment and encouraging open communication between employers and their employees. The design of the administrative penalty scheme under Section 29 of the *Employment Standards Regulation*, which provides mandatory penalties where a contravention is found by the Director in a Determination issued under the *Act*, meets the statutory purpose providing fair and efficient procedures for the settlement of disputes over the application and interpretation of the *Act*. Such an interpretation and application of the *Act* is also consistent with the modern principles of, or approach to, statutory interpretation noted by Driedger, *Construction of Statutes*, 2nd ed. Toronto: Butterworths, 1983, p. 87 ff. and the nature and purpose of employment standards legislation as explained by the Supreme Court of Canada in *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, which was cited by the Tribunal in *J.C. Creations Ltd. 0/a Heavenly Bodies Sport*, BC EST # RD 317/03 (Reconsideration of BC EST # D132/03).

There is no consensus among past decisions of the Tribunal whether an administrative penalty is an absolute liability offence (*Punjab Labour Supply Limited*, BC EST #D392/98; *CSA Care and Share Agency*, BC EST #D104/04), or permits a defence of due diligence (*Royal Star Plumbing & Heating Sprinklers Ltd. (Re)*, BC EST #D168/98). Indeed, in *Narang Farms and Processors Ltd. (Re)*, BC EST #D482/98, Adjudicator Petersen questioned whether it is correct to characterize administrative penalties as "offences" at all, given that s. 125 of the *Act* expressly creates an offence, although he did conclude that a defence of due diligence could be available. For the purposes of this appeal, I do not need to decide those questions, because the defence of officially induced error is distinct from the defence of due diligence: *Cancoil, supra* at p. 304. Thus, I see no reason in principle why the defence of officially induced error could not apply to an administrative penalty for a contravention of the *Act*, as distinct from an amount owed to an employee under the *Act* in respect of that contravention.

However, since I find that the Employer also breached s. 46 of the Regulation by not providing the start dates for each employee, I need not decide whether the Delegate made the statement alleged by the Employer. I must say that it strikes me as improbable that the Delegate would have a) sent the Demand to the Employer, requiring it to send a variety of records, including copies of ROEs, b) then told the Employer not to send ROEs, c) not have taken steps to obtain copies of the ROEs by other means, and d) imposed an administrative penalty of $500 for not sending ROEs. But even if the Delegate had told this to the Employer (and I make no finding in this regard), and the Employer could thereby be excused from not having provided ROEs in accordance with the Demand (which is not certain, as the defence requires that one reasonably rely upon the advice given), the fact remains that the Employer did not provide other information it was required to produce under the Demand, namely, the date on which each employee's employment began. This information is distinct from the ROEs, and the Employer was required to provide it under the Demand as "records an employer is required to keep pursuant to Part 3 of the *Employment Standards Act* and Part 8, Section 46 and 47 of the *Employment Standards Act Regulation*". As the next section indicates, the Employer's failure to provide the required information appears to have resulted in an erroneous calculation of compensation for length of service for Ms. Fox.

Therefore, the Employer did contravene s. 46 of the Regulation by not providing information it was required to provide under the Demand, and I dismiss the Employer's appeal of the administrative penalty the Delegate imposed in respect of that contravention.

3. Ms. Fox's length of service

Since I have dismissed the Employer's appeal of the Delegate's finding that it is liable to pay all of its employees compensation for length of service under s. 63 of the *Act*, I must now consider Ms. Fox's appeal of the amount of compensation the Delegate ordered the Employer to pay to her.

The Delegate based his calculation of Ms. Fox's compensation for length of service on the payroll records provided to him, which indicated that she was employed from April 11, 2003 to March 12, 2004. Since that information indicated that Ms. Fox had been employed for more than three months, but less then twelve months, he found that the Employer was liable to pay her one week's wages, plus vacation pay. He calculated the amount of a week's wages as Ms. Fox's average weekly pay over the preceding eight weeks.

Ms. Fox submitted three documents she obtained from HRSDC:

1. The first ROE was issued on May 24, 2000. It states that the first day worked was July 19, 1999, and the last day for which she was paid was May 14, 2000. It indicates that the reason for issuing it was that the "employee was told by unemployment office that a R.O.E. was required to verify hours worked."

2. The second ROE was issued on March 13, 2001. It states that the first day worked was July 19, 1999, and the last day for which she was paid was February 18, 2001. The reason for issuing the ROE was illness or injury.

3. The final document provided by Ms. Fox is an "ROE Information Correction", dated June 21, 2001. It states "First day worked" as being June 16, 2000, and explains its corrections as "ER had skipped over the nil PP's and recorded further than required."

I am admitting this new evidence because I find that it meets the test I set out previously in this decision:

a) Ms. Fox could not, with due diligence, have provided it to the Delegate during the investigation because he never spoke to her, and she had no way of knowing what information the Employer had, or had not, provided concerning her dates of employment.

b) The evidence is relevant to a material issue, namely, her length of service for the purposes of calculating compensation for length of service under s. 63.

c) The evidence is reasonably capable of belief.

d) The evidence has high potential probative value, because it could have led the Delegate to a different conclusion on the issue of the amount of compensation for length of service to which she was entitled.

Based on this information, it is clear that Ms. Fox's employment with the Employer began well before April 11, 2003, and that worked for the Employer as long ago as July 19, 1999. What is not clear, however, is whether Ms. Fox's employment from July 19, 1999 to March 12, 2004 was continuous. The ROEs indicate that there was one interruption in her earnings, when she stopped working due to illness after February 18, 2002. In her submission to the Tribunal of September 9, 2004, Ms. Fox stated "…I have never quit the Northern Hotel the whole time I worked there and had taken sick leave for 6 weeks in this 6 year period." It may be that the second ROE, stating that Ms. Fox had to stop working because of illness or injury, refers to this period of sick leave. If that is the case, then her employment would have been continuous during this period, for the purposes of assessing her length of service. However, it is not clear to my why the first ROE was issued in May of 2000, or why the unemployment office needed to verify her hours worked. Also missing is the final ROE issued to Ms. Fox by Northern Hotel.

For this reason, although Ms. Fox has established that the Delegate likely calculated her compensation for length of service based on an incorrect start date, there is not currently sufficient evidence before me to conclude that Ms. Fox was continuously employed by the Employer from July 19, 1999 to March 12, 2004. Thus, although I am satisfied that the Determination needs to be varied to calculate the proper amount of compensation for length of service to which she is entitled, I am not currently in a position to determine that amount. However, since the confusion about the length of Ms. Fox's service is the result of the Employer's failure to produce the employer records in the Demand, I find that it is just to refer this file back to the Delegate to reinvestigate this matter to determine the precise length of service for Ms. Fox, and recalculate the compensation for length of service to which she is entitled.

Section 115(1)(b) empowers the Tribunal to refer a matter back to the Director. As Member Lawson described in *Hub-City Boat Yard Ltd.*, BC EST # D027/04, this is done where a determination cannot properly be confirmed, varied, or cancelled, and where a reinvestigation or reconsideration is required, with directions. He described the practice in which the Director, rather than issuing a new Determination, will report back to the Tribunal outlining the results of the reinvestigation or reconsideration, and the Tribunal will then, with the benefit of the report, confirm, vary, or cancel the Determination.

Ms. Fox also says that her hourly wage was $11.00, rather than $9.50, which is what the payroll records contained in the record provided to me by the Delegate appear to indicate. In light of my decision to refer this matter back to the Delegate, I also direct him to confirm whether the hourly wage contained in those payroll records, and upon which the calculation of compensation under s. 63(4) is based.

ORDER

I order, pursuant to section 115(1)(b) of the *Act*, that this Determination be confirmed as it relates to the Delegate's finding a breach of section 63 of the *Act* and section 46 of the *Regulation*. I further order that the following matter be referred back to the Delegate with the direction that he:

a) reinvestigate to determine

   i) the precise length of Ms. Fox's employment with the Employer; and

   ii) her regular hourly wage during the last 8 weeks in which she worked normal or average hours of work;

b) recalculate the compensation for length of service owing to Ms. Fox based on that reinvestigation; and in the event the matter is not settled by the parties,

c) report the results of that reinvestigation to me.

Once I have received that report, I will decide to what extent the Determination must be varied as it relates to Ms. Fox. I remain seized of this matter until that time.

Matthew Westphal
Member
Employment Standards Tribunal