EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the *Employment Standards Act* S.B.C. 1995, C. 38

- by -

Phillip Austin

("Austin")

- of a Determination issued by -

The Director Of Employment Standards

(the "Director")

ADJUDICATOR:	Lorne D. Collingwood
FILE NO.:	96/204
DATE OF HEARING:	September 30, 1996
DATE OF DECISION:	October 10, 1996

DECISION

OVERVIEW

The appeal is by Phillip Austin ("Austin") pursuant to Section 112 of the *Employment Standards Act* ("the *Act*") against Determination # CDET 001359 of the Director of Employment Standards (the "Director"), a decision dated February 28, 1996. The Determination, issued as a result of a complaint by Austin, finds that Canadian Oversea Estates Inc., operating as Big Springs Sport Fishing Lodge ("Big Springs"), did not contravene the *Act*, in not paying termination pay and extra moneys for the tying up a barge, and in not hiring Austin as its winter caretaker. Austin argues that the Determination is in error, that he is owed $14,000 for the tying up of the barge and $32,000 as a result of his not being hired as caretaker.

APPEARANCES

Bev Austin	On behalf of Phillip Austin
Susan MacLeod	Manager of Big Springs
Manfred Schauenburg	Owner of Big Springs, witness
Michael Fu	For the Director

FACTS

Phillip Austin was hired by Big Springs as its Mechanic/Maintenance Worker ("mechanic") on May 29, 1995. His last day of work was September 11, 1995.

In applying for the job, Austin asked to be considered for the winter caretaker job, his specific words are, *"I am applying for the mechanic and maintenance job for the summer and would like to be considered for the care-taking job next winter".*

Austin worked through the summer. In August he began work designed to make the barge on which the resort is built, the "Canora", secure in winter storms. Austin says that a company, Stand on Logging, had started the tying up of the Canora, at $1,000 per day. Austin says that he worked a total of 26 days in tying up the Canora but as his 13 year old son was helping, he is claiming for only 14 days at $1,000 a day. He is entitled to the money he says because it was so extensive and because it was over and above the mechanical and maintenance work that he was expected to do.

Austin admits that he was not directed to do the work by Big Springs. He did it, he says, so that his family would be safe during the winter storms, when he was the caretaker.

Big Springs notes that the job description for the mechanic includes, and I quote from it, *"Checking, reporting and maintaining tie-up lines on the Canora, tackle barge and floats"*.

The job description also calls for the mechanic to perform *"other duties as necessary per manager"*. At the bottom of the job description is the message, *"Co-operation, reliability and teamwork are the most important requirements for working in this environment".*

At sometime around midnight on September 11, 1995, a horrific fight broke out between two men employed by Big Springs, Josh and Sandy. Austin became a part of it. The parties differ on the precise nature of his role, Austin's position is that he just tried to break it up, Big Springs says that he was fighting. The fight ended when Manfred Schauenburg ("Schauenburg") and Susan MacLeod ("MacLeod") arrived. They told everyone to attend a meeting on September 12, 1995, so that matters could be settled.

Everyone attended the meeting but Austin and Josh. Austin was found and was asked by MacLeod to attend the meeting. He did not.

Austin left on September 13, 1995 for Shearwater. He says that the trip was a pre-arranged trip to have his boat hauled out. It is the testimony of Schauenburg that while the trip was discussed, definite dates were not. It is the view of Big Springs that Austin left without permission.

Austin returned to the Canora on the 17th. He spotted Sandy and on seeing him, went to see Schauenburg about the winter caretaker job, among other matters. On the 18th Schauenburg told Austin that he would not be the winter caretaker. Austin says that is contrary to his agreement with Schauenburg, that the only reason he continued working as mechanic for $8.61 an hour was because of the prospect of the winter job. He claims breach of contract. Schauenburg testifies that he never told Austin that he had the job, that he only agreed to consider him for it.

On learning that the caretaker job would go to another, Austin again left the resort. Big Springs says that he was still wanted as mechanic for another two weeks or so. Austin says that given the circumstances, he had no choice but to leave, he had to find a source of income for the winter. It is quite clear that the Austin's were banking on the caretaker job and that on finding that it was going to someone else, they were most upset.

The Determination is in part a finding that the tying up of the Canora was within normal working hours, that Austin was paid the rate set by his contract for employment, and that there was no agreement calling for separate compensation for the work. The fact that others might have charged more was found to be irrelevant. His compensation was found to be at the agreed rate and in accordance with the *Act.*

In respect to the matter of the winter caretaker position, the Director's Delegate found that Austin had not been promised the job. Moreover, he found that even if the job had been promised, Austin terminated his employment with Big Springs in leaving as he did, without attending the meeting that had been called as a result of the fight, and that any liability that Big Springs might have had under the *Act* ended with Austin's leaving.

ISSUES TO BE DECIDED

Was Austin compensated for the tying up of the Canora, as the *Act* requires?

Does Big Springs owe Austin moneys as a result of its decision to hire someone else as its winter caretaker?

The appellant also raised the issue of fairness through a claim that he was not given a full opportunity to present information to the Director's Delegate. The appellant's representative was asked to consider whether the hearing itself would not allow for the presentation of the information which Austin wanted to present to the investigating officer but did not, and if that was not a

satisfactory way of overcoming the perceived shortcomings of the officer's investigation of matters. The appellant's representative indicated that the hearing would be satisfactory and with that the fairness of the officer's actions ceased to be an issue.

ANALYSIS

Austin claims compensation as a result of his not being hired as winter caretaker and seeks the full amount that he would have earned as caretaker, and additional wages for his work as mechanic on the basis that he worked at a lower rate with the promise of the caretaker job. Austin also claims compensation as a result of his performing work which he says was quite beyond that expected of him as mechanic, the tying up of the Canora. The question before me as Adjudicator is, What moneys are owed Austin, if any, given the *Act*.

Did Big Springs pay for all work performed by Austin as his contract for employment provides? The Director's Delegate concluded that it did and the Appellant has not shown me that the conclusion is wrong in any way.

Austin says that he was not fully compensated for the tying up of the Canora, the work being well beyond the requirements of his mechanic's job description. I accept that it was extensive but it was not I conclude, beyond what he was to do as mechanic, the job description including as it does, the maintaining of tie-up lines, and other duties as necessary per manager. Given the latter reference the manager could have ordered the work done. Moreover, aside from the job description, it is my conclusion that the work is the sort of work that can be reasonably expected of mechanic/maintenance worker at a remote fish camp.

Austin did the work, the tying of the Canora, and was paid for all hours as the contract of employment provides, that is the evidence. And it is the contract for employment that governs, Austin can point to no other contract, he has no other contract on which to rely. He did not negotiate a separate deal with Big Springs for the work. There is no agreement that the work would be performed at a higher wage rate or that Austin would work as an independent contractor, like Stand on Logging for example, for a set price or on any other basis. Austin on his own decided to do the work, a noble display which shows great initiative and for which Austin is entitled to be paid, but only at the rate set out in the contract for employment, the mechanic's rate in other words. I conclude that in respect to the tying of the Canora, Austin is owed no additional compensation beyond that which he has already been paid.

Austin also says that he toiled away at a lower rate of pay, the $8.61 per hour, only because he was promised the job of winter caretaker, a job that was to make up for his low pay as mechanic. I have considered both the matter of whether compensation might be owed on the basis that Austin accepted a lower rate on being given the job of caretaker, and the possibility that Big Springs might have misrepresented the availability of the caretaker position.

On the first point the Director's Delegate found that Austin had not been promised the caretaker position and the appellant fails to show that there is anything wrong with that conclusion. The appellant claims breach of contract but has not provided me with proof that there was agreement that Austin would be the winter caretaker. There is nothing in writing to that effect. I do not even have his testimony on which to rely, he not attending the hearing. On the other hand, Schauenburg, who Austin says, promised him the job, testifies that he did nothing of the sort, that he only agreed to consider him for it. I found Schauenburg to be a credible witness. As matters are presented to

me, there is no support for concluding that Austin was actually promised the job and accordingly, no basis for the awarding of any compensation for his not getting the job.

I note that the Director's Delegate found that even if Big Springs had promised Austin the job, he quit when he left for Shearwater instead of going to the meeting which had been called, and as a consequence there was no longer any obligation on the part of Big Springs to keep him on as its winter caretaker. It is an important point and one with which I agree.

In respect to the second matter, that Big Springs might have deceived Austin in respect to the availability of the job, section 8 of the *Act* is of importance. Section 8 is as follows,

> 8. *An employer must not induce, influence or persuade a person to become an employee, or to work or to be available for work, by misrepresenting*
>
> *(a) the availability of a position,*
>
> *(b) the type of work,*
>
> *(c) the wages, or*
>
> *(d) the conditions of employment.*

Big Springs admits that it promised to consider Austin for the winter caretaker job. The evidence is that on making that promise it took steps to determine whether Austin was the best person for the job, it writing Austin's immediately previous employer as it did. The evidence is that Austin was in the running for the job right up to the night of the fight and his subsequent decision not to attend the meeting which had been called. Such evidence leads me to conclude that Big Springs did not misrepresent the availability of the caretaker position and that it did not violate section 8 of the *Act.*

In summary, I have considered the appellant's claims in light of the evidence that has been presented and the *Act*, and find that the appellant has not shown that the Determination is wrong in any way or that there has been a failure to apply the *Act.* I therefore have decided to confirm the Determination.

ORDER

I order, pursuant to Section 115 of the *Act*, that Determination # CDET 001359 be confirmed.

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Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal

LDC:jel