Employment Standards TRIBUNAL

An appeal

- by -

Invermere Hotel Corp. operating as Best Western Invermere Inn
(the "Appellant")

- 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

ADJUDICATOR: W. Grant Sheard

FILE No.: 2002/92

DATE OF HEARING: June 10, 2002

DATE OF DECISION: July 15, 2002

DECISION

APPEARANCES:

W. J. MacDonald	on behalf of the Appellant Employer
Linda McCully	on behalf of the Estate of the Employee
Joe LeBlanc	on behalf of the Director

OVERVIEW

This is an appeal by the Employer, Invermere Hotel Corp. operating as Best Western Invermere Inn (the "Appellant") based on written submissions and an oral hearing, pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), of a Determination issued by the Director of Employment Standards (the "Director") on January 31, 2002 wherein the delegate ruled that the complaint had been filed within the six month period of Section 74 of the *Act* and that the Appellant had contravened Section 40 of the *Act* regarding overtime. Further, the delegate ordered the Appellant to pay $12,264.81, inclusive of interest. In a separate Decision another delegate issued a zero dollar penalty as a disincentive to prevent contraventions of the *Act.*

ISSUE

Was the Director's delegate correct in finding that the complaint had been filed within the six month period set out in Section 74 of the *Act*?

ARGUMENT

The Appellant's Position

In a written appeal form dated February 25, 2002 and filed with the Tribunal on the same date the Appellant says that the delegate erred in law in several significant ways. The Appellant says that the delegate failed to give adequate and proper weight to the evidence of Mr. Mitchell the general manager and witness called on behalf of the Appellant regarding the termination of employment by the Employee who later passed away. The Appellant says that the Employee voluntarily terminated his employment effective March 15, 2000. The Appellant says that this evidence is corroborated by documentary evidence from the deceased's own written statement, a payroll document of March 15, 2000. The Appellant further states that the delegate erred in law in giving undue evidentiary weight to the evidence of the complainant (the Employee's sister and executrix) as being both hearsay and self-serving. The Appellant reiterates that the delegate failed to give proper weight to the evidence of Mr. Mitchell to explain the informal arrangement that the Appellant entered into with the Employee after his resignation effective March 15, 2000 to the effect that the Employee would provide transition services to help the new night manager take over the night manager duties. The Appellant says that the complainant's complaint is statute barred as being beyond six months and requests that the Determination of January 31, 2002 be set aside in its entirety.

In a further written submission dated April 17, 2002 and filed with the Tribunal on the same date the Appellant objects to the Director's delegate having received hearsay evidence. The Appellant says that the delegate erred when he said there was no evidence to establish who typed the word "Quit" on a payroll document which was Exhibit 5 to the Determination. The Appellant says that there was evidence that this document was prepared in the normal course of business by the Employee himself. The Appellant further states that the Employee simply returned to work on a part-time "ad hoc" basis after March 15, 2000 for four days up to March 27, 2000 to complete the March 31st year end and to supervise the progress of his replacement employee. The Appellant further states that the Employee was not invited to live at the hotel after his heart attack on April 3rd to continue his work, but only out of compassion to allow him to convalesce there. The Appellant says that it is unable to explain why a Record of Employment ("ROE") or Vacation Pay was not issued or paid to the Employee after he quit on March 15, 2000.

At the oral hearing the Appellant abandoned an argument that the Employee was a "Manager" as defined by the *Regulation* and for whom there is an exclusion of the application of the *Act* regarding overtime and holiday pay. The Appellant took the position at the oral hearing that the only issue was whether the complaint had been filed within the six month limitation period set out in Section 74 of the *Act*. The Appellant submitted that the complaint had not been filed within this time and therefore the Determination should be cancelled as the complaint was statute barred.

The Respondent's Position

In a written submission dated March 15, 2002 and filed with the Tribunal March 18, 2002 the Respondent submitted copies of letters written by the Employee prior to the dates in question to his sister, the executrix of the Employee's estate and his representative in this hearing, establishing a pattern of constant communication between them regarding his employment. She also submits a copy of her phone bill confirming a telephone call with her brother of over two hours shortly before his death in which she asserts (and repeated in oral evidence at the hearing) that he never told her he quit. The Respondent submits that several facts support the Determination including that her brother was at the Employer's premises on April 3, 2000 dropping off current work, the Employer offered for her brother to move into the hotel after that date, no Record of Employment or a final cheque with holiday pay was ever issued for her brother until after she requested them, written statements of Scott McCully and Lynn Othen regarding her brother's anxiety about getting back to work, and that the Employee's accountant was never told that he had quit his job.

In a further written submission dated May 21, 2002 and filed with the Tribunal a few days later the Respondent replies to the Appellant's submission of April 17, 2002 and concludes with a submission that the Determination is correct and ought to be confirmed.

The Director's Position

In a written submission dated March 26, 2002 the Director's delegate responds to the two issues raised by the Appellant with respect to hearsay and Exhibit 5 to the Determination, an employment document where on it is written in typed letters next to the Employee's name "Quit" as of March 15, 2000. The delegate says that, with respect to the hearsay evidence, the evidence of Mr. Todd Mitchell on behalf of the Employer is hearsay regarding what the Employee said to him just as are the statements of witnesses on behalf of the Employee. Secondly, the delegate says that the employment document which was marked Exhibit 5 to the Determination was not signed and does not show anywhere that it was prepared

by the Employee. The delegate says that there is no way to establish who typed the word "Quit" there. The delegate says that it is apparent from the records that the Employee's situation changed on March 15, 2000 and that he went from a salary rate of $1,250.00 semi-monthly to $15.00 per hour and that he was gong to be working for the hotel at home because of his failing eyesight which made it impossible for him to drive at night. The delegate says that the absence of an ROE cannot be disregarded. The delegate says that the Branch does not accept that this was an oversight but rather it is a reflection of the truth which was that there was no reason to issue the ROE because the employment relationship had not ended but merely changed to the Employee working from his home. The delegate says that termination of employment did not take place until after the Employee died on April 23, 2000.

THE FACTS

The Appellant Employer operates a hotel in Invermere, BC. The Employee was employed at the hotel when the current Employer purchased it in 1990. The delegate found that the Respondent was owed $10,968.70 in unpaid wages and $1,296.11 in interest for a total due by the Appellant to the Respondent of $12,264.81. These figures were based on a wage calculation summary which were attached to the Determination and were not disputed by the Appellant.

The Employee, Mr. Lantz, worked as a Night Auditor at the Appellant's hotel at the rate of $2,500.00 per month. Mr. Lantz suffered from diabetes and in March 2000 his eyesight had deteriorated to the point he could no longer see well enough to drive to and from work at night time. Mr. Todd Mitchell, the Manager of the Appellant's hotel, gave evidence that sometime prior to March 15, 2000 Mr. Lantz approached him and told him of his difficulty and that he would, therefore, be resigning effective March 15, 2000. Mr. Mitchell gave evidence that arrangements were then made for the existing Front Desk Manager, Ginger Potts, to take over Mr. Lantz's payroll duties and a new employee, Donna Millard, was hired to take over as the Night Auditor. Ms. Millard was hired five days per week rather than the seven days or nights per week which Mr. Lantz had been working. In support of his assertion that Mr. Lantz resigned, Mr. Mitchell produced a payroll sheet which he states was prepared in the ordinary course of business by Mr. Lantz and marked Exhibit 5 to the Determination with the words "Last day March 15/00 Quit" typed after Mr. Lantz's name.

Mr. Mitchell also refers to a document titled "Invermere Inn payroll March 1 to March 15, 2000" which was submitted by his counsel with the written submission of April 17, 2002 as another document which was prepared by Mr. Lantz in the ordinary course of business where, under his own name, he has typed an X for the abbreviations for Holiday Pay and Record of Employment earnings ("ROE"). Mr. Mitchell says that he does not know why the holiday pay and ROE of earnings were not prepared as a result of this document which would have been sent by Mr. Lantz to the Appellant's accountants who would then normally have prepared a holiday pay cheque and ROE. Mr. Mitchell says that he can only assume that Mr. Lantz telephoned the accountants to advise them to hold off on this as Mr. Mitchell and Mr. Lantz agreed after Mr. Lantz's resignation that he would work for a few more days on an ad hoc basis at $15.00 per hour to finish the month end books to March 31, 2000 and to supervise the performance of the new Night Auditor they had hired.

No one from the Appellant's accounting firm was called as a witness or provided any evidence with respect to receipt of these employment documents or to provide any indication as to whether or not Mr. Lantz had telephoned them or otherwise contacted them with respect to holiday pay or an ROE. When asked in direct examination if there were any stipulations where the payroll would then be completed, Mr. Todd Mitchell answered "No, it didn't have to be done at the hotel, but the training of Donna Millard had

to be". However, Mr. Mitchell went on to say in his oral evidence that no arrangement was ever made for Mr. Lantz to continue working at home.

In a document titled "Attendance Card" which was filed as Exhibit 2 at the oral hearing by the Appellant it is noted that on March 16, 19, 20, and 27, 2000 Mr. Lantz worked 8 hours each day. Ms. McCully gave evidence that she recognized the hand written portions of this document whereon her brother had written his name "Dean" the month "March", and the numerals "8" for each of the days worked. On the "Invermere Inn Payroll" document marked Exhibit 5 to the Determination there were two other employees after whose names were typed the words "Quit"; they were Ruth Smith and Sharon Smith whose last days were noted as March 16, 2000 and March 12, 2000. There was no "Invermere Inn Payroll document" produced for the period March 1 to 15, 2000 whereon holiday pay and Record of Employment of earnings are checked in respect of those two employees.

On April 3, 2000 Mr. Lantz was dropping off the month end books for the Appellant with Mr. Todd Mitchell, when he suffered a heart attack. He then drove himself to the emergency at the Invermere hospital and was subsequently airlifted to a hospital in Calgary, Alberta. Approximately 3 days later Mr. Lantz had open heart surgery in Calgary and was released from hospital a few days after that when he stayed with his nephew, Scott McCully.

Mr. Bryce Mitchell also gave evidence on behalf of the Appellant. He is the President of the Appellant corporation. He lives in Edmonton and, when he travels to Invermere, he stays at the Appellant's hotel. After he learned of Mr. Lantz's heart attack and, while on his return trip to Edmonton, he stopped at the hospital to see Mr. Lantz. Due to concern for Mr. Lantz being released by the hospital before he was sufficiently recovered to live on his own at home, he offered for Mr. Lantz to stay at the hotel where people could monitor his diet and provide him any assistance if he required it. He stated that this was not offered to Mr. Lantz to enable Mr. Lantz to continue working at the hotel.

Mr. Scott McCully gave evidence by telephone at the oral hearing. Mr. McCully said that when he visited his uncle, Mr. Lantz, in the hospital and when Mr. Lantz stayed at his home immediately after his release from the hospital, that Mr. Lantz repeatedly expressed concern about what effect his working for the Appellant would have on his health. Mr. Lantz was concerned that he may not be able to do everything at work that had previously been required of him. Mr. McCully said that Mr. Lantz never said that he had quit his employment with the Appellant and that, quite the opposite, his uncle said that he and the Appellant were working on ways to work around his deteriorating health and eyesight. Mr. McCully gave evidence that, regarding his letter of April 30, 2001 attached as Exhibit 7 to the Determination, he was not present in the room when management from the Appellant visited his uncle in the hospital. He says that his comments in that letter relating to the management at the Appellant's hotel were comments relayed to him by his uncle in the hospital and in Mr. McCully's home immediately after his uncle's release from the hospital.

Ms. Linda McCully gave evidence at the oral hearing adopting the factual assertions in her written submissions of March 15, 2002 and May 21, 2002 as true. She notes that she talked to her brother on numerous occasions following his heart attack and prior to his death on April 23, 2000 and that he never told her he had quit his job. She says that they were very close and frequently discussed his employment and that he would have told her if he had quit his job. She indicates that in their discussions following his heart attack and before his death he also expressed concern on several occasions as to how he was going to continue to do his work with the Appellant in his poor health. She says that he even spoke of taking the Greyhound from his home in Radium to the Appellant's hotel in Invermere. In cross examination she

acknowledges that her brother may have been mildly sedated during this time period following his heart attack and before his death but she says that he was completely lucid.

ANALYSIS

The onus is on the Appellant to establish on a balance on probabilities an error in the finding of the delegate.

Section 74 of the *Act* provides the time limit within which one may file a complaint under the *Act*. That section reads as follows:

> *"74. (1) An employee, former employee or other person may complain to the director that a person has contravened*
>
> *(a) a requirement of Parts 2 to 8 of this Act, or*
>
> *(b) a requirement of the regulations specified under section 127 (2) (l).*
>
> *(2) A complaint must be in writing and must be delivered to an office of the Employment Standards Branch.*
>
> *(3) A complaint relating to an employee whose employment has terminated must be delivered under subsection (2) within 6 months after the last day of employment.*
>
> *(4) A complaint that a person has contravened a requirement of section 8, 10 or 11 must be delivered under subsection (2) within 6 months after the date of the contravention."*

At page 7 of the Determination the delegate stated as follows:

> "I do not accept the employer's statements that: "Mr. Lantz quit his employment on March 15, 2000 and then worked hourly on March 16, 19, 20 and 27, 2000 to check the new night manager's work. …..there was no obligation on Mr. Lantz' part to check in with the hotel, to show up at any given time and there was no agreement at all that he would ever work again beyond the 27th of March, 2000". The payroll document provided by the employer (Exhibit 5) indicates that Mr. Lantz quit on March 15, 2000. However, Mr. Lantz continued to work beyond March 15, 2000 up until March 27, 2000 and was dropping off work to the employer on the day of his heart attack on April 3, 2000.
>
> The evidence provided by Ms. Othen appears to be a more credible explanation of events. I accept that sometime during March, 2000 Mr. Lantz entered into an arrangement with the employer to continue working out of his home on a part-time basis rather than go in to the hotel every evening. I believe this arrangement was made due to Mr. Lantz' decreased eyesight. If Mr. Lantz had quit as the employer states why would he not have mentioned this to his family or friends? Why would he still be worrying about getting the work to and from his home after he recuperated and why would the employer be discussing this arrangement with him while he was in the hospital (i.e. offering him a room at the hotel so that he would not have to drive to and from work)? Why wasn't a Record of Employment issued and why was the annual vacation pay only paid out when Ms. McCully requested it after Mr. Lantz' death? If Mr. Lantz was the person in charge of completing the payroll it would only seem reasonable he would have taken care of these two things prior to his leaving.

> Based on the evidence provided and on a balance of probabilities I believe that Mr. Lantz was still employed with the employer at the time of his death on April 23, 2000 and therefore the complaint filed on his behalf and received by the Branch on October 20, 2001 was within the time frame allowed under Section 74 of the *Act*.
>
> The *Interpretation Act* directs how to interpret "month" as used in the *Employment Standards Act.* In computing the 6 month period, the applicable section of the *Interpretation Act,* s. 25(5), directs that the first day must be excluded and the last day must be included. This being the case the last possible day to file a complaint on behalf of Mr. Lantz would have been October 23, 2000. Ms. McCully filed the complaint on October 20, 2000 therefore the complaint is in time."

In *Employment Standards in British Columbia Annotated and Legislation Commentary*, The Continuing Legal Education Society of British Columbia, Vancouver 2001 it is said at page 13-13 as follows:

> The Tribunal is not a forum for second guessing the conclusions in the Determination. The burden of proof is on an appellant to show some factual or legal error has been made in the Determination. The error must be shown to arise either from the material on file or from the Determination itself. (*Re Alstad Brothers Logging Ltd.*, [1999] BCESTD#142 (QL), (7 April 1999), BCEST #D143/99 (Stevenson, Adj.)).

While I might not have reached the same conclusions as the delegate regarding the reliability of Mr. Todd Mitchell's evidence during the investigation, his oral evidence at the hearing and the document produced at the oral hearing with an "X" under the heading of HP (holiday pay) and ROE do not demonstrate, on a balance of probabilities, that the delegate erred in his findings of fact or in his application of the law. At the hearing, Mr. Todd Mitchell said "we" didn't know that Mr. Lantz had diabetes. However, his father, Mr. Bryce Mitchell, gave evidence that they did know this. There was no detail whatsoever given by Mr. Mitchell of when or where his conversation with Mr. Lantz occurred wherein Mr. Lantz allegedly resigned his position effective March 15, 2000. The fact is that Mr. Lantz did remain on working after March 15, 2000 for four days to and including March 27, 2000 and dropping off the books for the Appellant's month ending March 31, 2000 on April 3, 2000 when Mr. Lantz suffered his heart attack. Further, no witness was called from the office of the Appellant's accountants to confirm they received the document that Mr. Lantz is alleged to have typed with the word "Quit" after his name and the other document wherein he is alleged to have checked a "X" under the headings of Holiday Pay and ROE or to explain why Holiday Pay and ROE were not issued by them if they did receive this document.

I note that the Appellant did not pursue the argument advanced in its written submissions with respect to hearsay evidence. However, I note at page 13-16 of the *Employment Standards in British Columbia Annotated Legislation and Commentary* the following:

> In appropriate circumstances, the Tribunal may accept such evidence as it considers proper and relevant, whether or not that evidence would be admissible in a court, and may weigh it accordingly. (*Re Agro Harvesting Ltd.*) [1998] BCESTD#519 (QL), (6 November 1998), BCEST #D509/98 (Crampton, Adj.)).

I note that the employee here had passed away such that the hearsay evidence of his statements were declarations of a deceased person and were necessary. Further, as there does not appear to be any suggestion that he contemplated this complaint at the time, his statements made to the witnesses called by the Appellant are reliable.

ORDER

Pursuant to section 115 of the Act, I order that the Determination of this matter, dated January 31, 2002 and filed under number 030-998, be confirmed.

W. Grant Sheard
Adjudicator
Employment Standards Tribunal