Employment Standards TRIBUNAL

An appeal

- by -

Robert Tower
("Tower")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2001/248

DATE OF DECISION: June 26, 2001

DECISION

OVERVIEW

This is an appeal filed by Robert Tower ("Tower") pursuant to section 112 of the *Employment Standards Act* (the "*Act*"). Mr. Tower appeals a Determination that was issued by a delegate of the Director of Employment Standards (the "Director") on March 5th, 2001 under file number ER91-302 (the "Determination").

Mr. Tower originally filed a complaint with the Employment Standards Branch alleging that his former employer, Reliance Investment Group Ltd. operating as "Begbie's Bar and Bistro" ("Reliance"), contravened sections 8 (false prehire representation) and 21 (unlawful wage deduction) of the *Act*. By way of the Determination, the Director's delegate concluded "that the *Act* has not been contravened" and, accordingly, "investigation has ceased and we have closed the file [and] no further action will be taken" (Determination, page 10).

By way of a letter dated June 5th, 2001 the parties were advised by the Tribunal's Vice-Chair that this appeal would be adjudicated based on the parties' written submissions and that an oral hearing would not be held (see section 107 of the *Act and D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). In addition to a number of background documents, I have before me Mr. Tower's written submissions dated April 5th and May 3rd, 2001 and submissions from the Director's delegate dated April 19th and May 10th and 30th, 2001. Although invited to do so, Reliance did not file any submission with the Tribunal.

ISSUES ON APPEAL

In his appeal form, Mr. Tower set out his reasons for appeal, and the remedy he seeks, as follows:

> "I feel that I was prejudiced from the outset & feel that there may be collusion & possibly conspiracy between the officer in charge & the employer.
>
> If no attempt is made to do a proper investigation, charges of conspiracy shall be laid in the provincial court of BRITISH COLUMBIA against [two delegates and another named individual whom I understand to be associated with Reliance]."

In his subsequent submissions to the Tribunal, Tower challenges the delegate's factual and legal conclusions with respect to sections 8 and 21 of the *Act* in addition to asserting that the delegate failed to conduct a proper and unbiased investigation of Tower's complaint.

FACTS AND ANALYSIS

Reliance operates a restaurant/bar in Quesnel, B.C. In his original complaint filed with the Employment Standards Branch, Tower claimed that he applied for, was offered, and ultimately accepted a "full-time" job with Reliance as a cook. Tower says that the employer made such an offer merely as a ruse to induce him to move from Hope, B.C. to Quesnel to take up the position but that, in fact, he was never given full-time employment. Tower says that Reliance thus contravened section 8 of the *Act* which states that an employer must not "induce, influence or persuade a person to become an employee" by misrepresenting the availability of a particular position or its associated terms and conditions. The matter of an unlawful wage deduction does not appear to have been raised in Tower's initial complaint.

It appears that the delegate facilitated a settlement of Tower's complaint but when Tower unilaterally purported to withdraw from the settlement agreement--after having been paid the settlement funds--the delegate proceeded to issue a Determination. In my view, the delegate may have erred in issuing a Determination; I now turn to that matter.

Settlement of the claim

The record before me discloses that during his investigation the delegate solicited information from both parties, communicated with both parties and, ultimately, facilitated a settlement of the dispute (see section 78). With respect to this latter matter, it would appear as though a settlement was, in fact, reached between the parties prior to the issuance of the Determination:

> • The Employer, during the course of the investigation, was advised of the possibility of settlement pursuant to section 78 of the *Employment Standards Act.* Accordingly, he made an offer of $200.00 in full and final settlement of the Complaint brought against him. He made it clear that this offer should not be viewed as an admission of fault or violation of the *Act*, or for that matter, as a reimbursement of the amount the Complainant claims was deducted from his wages without his consent. He issued a cheque for the amount noted above [i.e., $200] and instructed the undersigned [i.e., the delegate] that this cheque should not be released to the Complainant unless he accepts it as payment in full and final settlement of his complaint, or, a determination is issued concluding that he is entitled to this amount.
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> • The Complainant was advised about the offer and the conditions under which the cheque could be forwarded to him. He accepted the offer with the understanding that this payment brings his claim to a conclusion.
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> • This complaint was therefore thought to have been resolved by way of settlement pursuant to section 78 of the *Act* when, as noted above, the Complainant accepted the offer as payment in full and final settlement of his complaint, and, the cheque was mailed to him as per his request. However, the Complainant wrote a letter after he was told that the cheque was mailed out to him stating that

- the issue pertaining to his claim about "false representation" was not addressed,

- the delegate of the Director of Employment Standards was prejudicial and made "judgement" without looking at all the facts.

• This determination is therefore necessitated by the above noted circumstances and pursuant to Section 78(3) of the *Act*...

(Determination, page 2; my italics)

Section 78(3) states that "if a person fails to comply with the terms of a settlement, the settlement is void" in which case the Director may issue a determination reflecting the complainant's unpaid wages payable under the *Act*. In my view, the delegate incorrectly concluded that Tower, after having agreed to a full and final settlement of his entire complaint filed against his former employer, was permitted to unilaterally withdraw from that concluded settlement agreement. In my view, when Tower indicated that he no longer wished to be bound by the apparently bona fide settlement agreement, the delegate should not have proceeded to determine the merits of Tower's complaint. Section 76(2)(g) of the *Act* states that: "The director may refuse to investigate or may stop or postpone investigating a complaint if...(g) the dispute that caused the complaint is resolved".

In *Alnor Services Ltd.* (BC EST # D199/99) I suggested that uncoerced settlements were entirely consistent with the purposes of the *Act*:

> Two of the stated purposes of the *Act* are the encouragement of open communication between employers and employees and the provision of fair and efficient dispute resolution procedures [see sections 2(c) and (d)]. The settlement of unpaid wage claims is an integral aspect of the *Act*, explicated by the provisions giving the Director specific statutory authority to negotiate settlement agreements and receive and disburse settlement funds. In my view, the entire scheme of the *Act* is undermined if bona fide settlements can be overridden simply because one party--with the benefit of hindsight--subsequently concludes that they made a bad (or at least not an optimal) bargain. If bona fide settlement agreements can be reopened even in the absence of misrepresentation, fraud, undue influence, duress or noncompliance with the agreement, then one has to wonder why any party would want to settle any dispute. In my view, a principle that discourages, rather than encourages, the timely settlement of unpaid wage disputes ought to be very closely scrutinized.
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> (see also *Dacre* BC EST # D306/98).

I recently revisited the legal effect of concluded settlement agreement in *Golden Day Cake House Ltd.* BC EST # D282/01 where I made the following observations:

> As noted in *Small* (BC EST # D032/98), "when parties conclude a settlement in good faith, the terms and conditions of that settlement will be respected by the parties"...
>
> ...subsection 78(3) addresses the situation where the employer enters into a valid settlement agreement from which it later purports to withdraw. The "person" in the introductory wording of subsection 78(3) must be the same "person" referred to in subsections 78(3)(a) and (b); otherwise, the statutory language is rendered meaningless and, indeed, nonsensical. Read in this fashion, section 78(3) makes sense when the employer is the party purporting to withdraw; the subsection, in my view, makes no sense at all if it is interpreted such that the "person" failing to comply with the terms of settlement is the employee...
>
> If a particular complaint is settled, the Director may refuse to continue to investigate the complaint. While this latter authority is a discretionary power, this discretion must be exercised appropriately. Clearly, a delegate would not be obliged to refuse to investigate a complaint that was settled in a manner contrary to the express terms of the *Act* (e.g., overtime being paid on a "straight-time" basis)--see *Takarabe et al.*, BC EST # D160/98.
>
> However, where a Director's delegate facilitates a settlement that is not obviously contrary to the *Act*, the employee, in my view, is not entitled to unilaterally withdraw from that settlement on the basis that, with hindsight, they might have negotiated a better bargain (see *Small*, supra.). Most settlements, by their very nature, involve some sort of compromise with neither party obtaining the maximum that they might otherwise hope to achieve in an adjudicated resolution of the dispute.

Accordingly, it follows that although I do not disagree that Tower's complaint ought to have been dismissed, I do not think that the delegate was obliged to examine the merits of the complaint if, in fact, a *bona fide* settlement was reached between the parties. However, since this particular issue was not argued before me, I do not propose to rest my decision on this ground.

I now turn to the reasons for appeal advanced by Tower in his notice of appeal and supporting documents.

Collusion and conspiracy

Tower's assertions with respect to the delegate's integrity strike at the heart of the entire employment standards adjudicative process. The Director's delegates must be impartial arbiters of the parties' rights under the *Act*. Tower's suggestion that the delegate was possibly involved in a "conspiracy" with Reliance is wholly unsupported by any evidence and, indeed, might well be defamatory. This ground of appeal, namely, that the delegate's investigation was tainted by conspiracy or collusion, is entirely without merit.

Tower's threat to file criminal charges is, in my view, entirely vexatious.

Prehire Misrepresentation (Section 8)

The delegate rejected Tower's position that he had been induced to accept the cook's position by reason of a Reliance misrepresentation with respect to whether it was a full- or part-time position. In reaching this conclusion the delegate noted that during the course of his investigation Tower advanced, on different occasions, conflicting versions as to the nature of the actual misrepresentation that caused him to travel to Quesnel to interview for the position.

Tower stated on one occasion that the misrepresentation related to the nature of the *position* being offered (kitchen manager versus cook) and on another occasion that the misrepresentation related to whether the job was full- or part-time. Further, in a written submission to the delegate, Tower acknowledged that prior to accepting the job he was specifically told that the job was a part-time position but that the working hours might increase (as, in fact, transpired) over the next few months. The delegate also noted that the job offer was made in February--a slow time for the restaurant--thus corroborating the employer's position that it would not have offered full-time employment when it had no need of a full-time employee due to slow seasonal demand. The delegate concluded that, at best, Tower may have misunderstood the terms and conditions of his hiring but that the evidence fell well short of establishing (and it was Tower's burden in this regard) that Reliance *induced* Tower to accept employment by making *material misrepresentations* to him.

In his submissions to the Tribunal, Tower noted that he applied for four separate positions including the position with Reliance. It may well be that Tower believed the Reliance position to be a full-time position when he first contacted Reliance. It may be that Tower confused one potential job situation with another. However, there is simply no evidence before me upon which I could conclude that *Reliance falsely represented* (and this must be established under section 8) to Tower that he was being hired for a full-time position. Indeed, the weight of the evidence before me suggests precisely the opposite. For example, *in Tower's own words* he admitted that he was *not* being hired for a full-time position (April 5th submission to the Tribunal): "I was offered meager [sic] hours with a promise of increased hours as the season approached". Clearly, Tower was not induced to "become an employee" on the understanding that he would be working "full-time" (which I would characterize as something at or near 40 hours per week).

Unlawful Wage Deduction (Section 21)

Tower claimed that Reliance unlawfully deducted the sum of $200 from his July 15th, 2000 paycheque. During his employment, Tower rented residential premises from Reliance at a monthly rent of $400. It would appear that the $200 deduction from his final paycheque was made on account of unpaid rent and cleaning costs incurred by Reliance after Tower vacated the premises. Reliance's position, as noted at page 4 of the Determination, was that Tower endorsed his July 15th paycheque back to Reliance to satisfy Tower's obligations "for rent, cleaning the

house and the carpet". On a "without prejudice" basis, Reliance tendered--and Tower accepted--a $200 payment which was, as noted above, tendered in full and final satisfaction of Tower's complaint. Accordingly, the delegate found (at pages 7-8 of the Determination) that even if there was a contravention of section 21, Tower had previously been reimbursed on that account:

> ...the Complainant claims unauthorized deduction of $200.00 from his wages and the Employer denies having made such deductions from the Complainant's wages. It was also noted that the Complainant accepted the offer of and received $200.00 in full and final settlement of all and any of his claims against the Employer.
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> The reversal of his decision after he cashed the cheque leads one to believe that he may not have entered into the settlement agreement in good faith. However, as far as this issue is concerned, the Complainant has received the amount of money he would have been entitled to had the Employer been found to have contravened Section 21 of the *Act*.

It should also be noted that Tower himself acknowledges that the $200 payment was made on account of whatever liability Reliance may have incurred under section 21 of the *Act*. In his April 5th, 2001 submission to the Tribunal, Tower stated that he accepted the $200 payment "for contravention of section 21 of the *Act*".

In light of the foregoing, I am unable to conclude that the delegate erred in refusing to make an order against Reliance, and in favour of Tower, under section 21(3) of the *Act*.

ORDER

Pursuant to sections 114(1)(c) and 115 of the *Act*, I order that this appeal be dismissed and that the Determination be confirmed.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal