

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C. 113

- by -

Keenan Leigh Moses
("Moses")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Hans Suhr

FILE NO.: 97/634

DATE OF HEARING: October 10,1997

DATE OF DECISION: October 22,1997

DECISION

APPEARANCES

Sabina Bell	on behalf of Delta Whistler Resort
Brad Pinnell	on behalf of Delta Whistler Resort
Stephanie Acker	on behalf of Delta Whistler Resort
Keenan Moses	on his own behalf
Joseph Granton	on behalf of Kennan Moses
Karin Sappford	observer

OVERVIEW

This is an appeal by Keenan Leigh Moses (“Moses”), under Section 112 of the *Employment Standards Act* (the “Act”), against a Determination dated July 24, 1997 issued by a delegate of the Director of Employment Standards (the “Director”). Moses alleges that the delegate of the Director erred in the Determination by concluding that he was not entitled to additional vacation pay, additional statutory holiday pay, and that he was not constructively dismissed by Delta Whistler Resort (“Delta”).

ISSUES TO BE DECIDED

The issues to be decided in this appeal are;

1. Is Moses entitled to additional vacation pay?
2. Is Moses entitled to additional statutory holiday pay?
3. Was Moses constructively dismissed by Delta?

FACTS

Moses was employed by Delta commencing August 1996 as a temporary driver at the rate of \$10.00 per hour.

In October of 1996, Moses worked in the accounting department of Delta at the rate of \$10.00 per hour.

In mid-October of 1996, Delta received the contract to operate the Whistler Convention Centre (“WCC”). Moses was approached by Brad Pinnell (“Pinnell”) operations manager of WCC to work at WCC. Moses was among the first staff to be hired for this location.

Moses was paid at the rate of \$10.00 per hour for each pay period until the rate was adjusted to \$8.00 per hour on the January 11, 1997 paycheque.

Moses and the Human Resources personnel of Delta, Wendy Mah (“Mah”) and Sabine Bell (“Bell”), had intermittent discussions about this change in pay rate.

Moses handed Bell a hand-written letter dated Feb 7, 1997 which states “By mutual agreement, my employment will end as soon as you acknowledge receipt and reconfirm contents of this letter and pay my back dues.”

Approximately 2 or 3 weeks after this meeting, Moses filed a complaint with the Employment Standards Branch alleging he was owed vacation pay, statutory holiday pay and compensation for length of service.

The Director investigated the complaint and determined that Moses was entitled to additional vacation pay. The Director further determined that Moses was not entitled to additional statutory holiday pay nor was he entitled to compensation for length of service.

Moses testified and stated that:

- he started his employment in mid-August as a driver;
- he negotiated a pay rate of \$10.00 per hour;
- throughout his employment with Delta he held three different positions for which he was paid \$10.00 per hour;
- although he was aware of a job postings board he did not apply for any of those postings; he was approached by Delta personnel for the positions in accounting and in the WCC;
- at no time was he made aware by Delta that his hourly rate would be dropped from \$10.00 per hour to \$8.00 per hour;
- he felt his position was one of “head houseman” and not of “houseman”;
- he was among the first employees at the WCC and that there was little structure in place as the move was fairly hectic;
- he provided the letter dated February 7, 1997 to Bell as a negotiating instrument and it was not intended to be viewed as a letter of resignation;
- his first pay period at the Conference Centre shows his rate to be \$10.00 per hour, plus gratuities;
- this rate continued until the January 11, 1997 period when his pay rate was without any notice from Delta adjusted to \$8.00 per hour plus gratuities;
- he first became aware of his reduction in pay when he received the pay statement dated January 11, 1997 on January 18, 1997.

- it is at this time he started discussions with Delta Human Resources personnel, Mah and Bell about this reduction;
- he also had ongoing discussions with Pinnell with regard to this matter;
- it is at this time that he and Bell started to negotiate in regards to this pay reduction;
- he and Bell had a meeting on February 7,1997 at which time he gave Bell the letter which was a “negotiating tool” and not a letter of resignation;
- he points out the following excerpts from that letter: “This letter is to confirm our recent discussions regarding my employment with your hotel, the Delta....By mutual agreement, my employment will end as soon as you acknowledge receipt and reconfirm contents of this letter and pay my dues.” ;
- Delta did not confirm any parts of this letter with him or pay his back dues, but rather had his schedule cleared and his name removed;
- he might have spoken to Pinnell (about no scheduled shifts) and Pinnell said that he wasn’t going to schedule me anymore until something (this pay rate issue) was straightened out;
- he is eligible for compensation for length of service as a result of Delta taking his name off the schedule after he and Bell had discussed his employment and Moses had handed Bell the letter dated February 7,1997;
- at no time after this letter did Delta attempt to contact him;
- he checked the schedule several times and noticed that his shifts had been canceled and his name subsequently taken off;
- at this point he then filed a complaint with the Employment Standards Branch.

Joseph Granton (“Granton”) testified and stated that:

- he was employed at Delta and was Moses’ immediate supervisor;
- he recalls that Moses was indeed among the first employees at the WCC;
- he recalls at various times that Moses had mentioned his rate of pay (\$10.00 per hour), but was not told anything by Delta;
- he had worked at the WCC prior to Delta’s takeover;
- prior to their takeover of WCC, Delta had confirmed to supervisory employees that the majority of positions and pay-rates would remain the same after the takeover;
- he viewed Moses’ position as “head houseman” because he “delegated and directed” other staff and “had keys”;
- he was aware that “head houseman” under the previous operator of WCC were paid \$10.00 per hour plus gratuities;
- he had no reason to doubt Moses was being paid \$10.00 per hour;
- he was aware of the job postings board but paid little attention to it;
- he was not involved in establishing pay rates for employees;
- he was never made aware by Delta management that Moses’ pay rate was to change;

Bell testified and stated that:

- she is the Human Resources Director for Delta;
- Moses was originally hired in mid-August at the rate of \$10.00 per hour as a temporary driver for the purchasing department;
- Delta management approached Moses about a position in the accounting department as they were aware that his temporary position of driver was to end shortly;
- a job posting for the accounting department position was up but is not sure if Moses was aware of it;
- she recalls that Moses' rate was maintained at \$10.00 per hour while working in the accounting department;
- Moses was then asked by Pinnell to work at the WCC in mid-October;
- a job posting was up for the position of "houseman" but is uncertain if Moses was aware of this posting;
- she is not fully aware of all that transpired at this time in regards to Moses' employment as she was away on maternity leave;
- Moses was incorrectly paid \$10.00 per hour from November 1, 1996 until the beginning of January because of a clerical error;
- Moses rate was adjusted as soon as the error came to light;
- she and Moses had several discussions in January and February about Moses' unhappiness
- with this new wage rate;
- she recalls the February 7th meeting at which time she told Moses that his wage would stay at \$8.00 per hour but the Delta would cover his ski pass;
- at this time Moses handed her the letter and after reading the letter, Bell assumed that Moses had quit because the letter said, "By mutual agreement my employment will end as soon as you acknowledge receipt....";
- she told Pinnell that Moses had quit and his name was removed from the schedule.
- she feels that Delta was more than generous in allowing Moses to keep the wages from November and December which were paid at an incorrect amount;
- any calculations in regards to vacations pay or statutory holiday pay should be based upon \$8.00 per hour since that is what Moses was supposed to have been paid;
- there seems to be a lot of inconsistencies in Moses' evidence and has some concerns about accurate recollection of the events because so much time has passed.

Pinnell testified and stated that:

- he is the "Operations Manger" for the WCC;

- he had discussions with Moses about working at the WCC while Moses was still a driver in the purchasing department;
- he told Moses that the rate of pay for the position would be around \$8.00 per hour and also explained that with gratuities, the wage would actually amount to \$10 or \$11 per hour;
- other establishments pay their houseman at \$8.00 per hour;
- he filled out an internal transfer form on November 1, 1996 informing the payroll department that Moses was moving to the WCC and that Moses' new wage would be \$8.00 per hour;
- he is responsible for delivery the paycheques to his employees on each pay period;
- he cannot recall any specific time when he noticed that Moses' paycheque showed an inaccurate wage rate;
- Moses started at the lower pay rate on the December 31/96 pay period;
- he cannot recall any specific times when he and Moses discussed the wage issue, but does recall there was mention of it and that Moses was talking to the Human Resources personnel.

Stephanie Acker ("Acker") who is a payroll coordinator with Delta clarified that the revised calculations performed by Delta with respect to Statutory Holiday pay were performed at the rate of \$8.00 per hour.

ANALYSIS

I must consider the circumstances surrounding the issue of the wage rate and the eventual termination of Moses' employment with Delta.

With respect to the wage rate issue, the evidence indicates that the only negotiations regarding the wage rate to be paid was at the time of Moses' hire in August of 1996. It was agreed at that time that the wage rate would be \$10.00 per hour. Moses worked in three different classifications for Delta, both at the Hotel and at the WCC and was paid at the rate of \$10.00 per hour until the pay statement dated January 11, 1997.

The "Inter-Hotel Job Posting" for houseperson submitted by Delta does not contain any wage rate for that position. Pinnell stated he initiated a "Personnel Action Form" on November 1, 1996 to facilitate the transfer of Moses from the Purchasing Dept. to Whitsler Conference Centre and indicated that the rate was to be \$8.00 per hour. This is an internal document and was not shown to Moses. This document further reveals that the payroll department did not sign it until January 9, 1997. Pinnell stated he advised Moses that rate of the houseman position was \$8.00 per hour, but was unable to recall when this discussion takes place. Pinnell was responsible for distributing all paycheques for his department and took no apparent notice that Moses was still being paid \$10.00 per hour after November 1, 1996.

The first time Moses became aware of his rate being \$8.00 per hour was on the January 11,1997 pay statement.

I am not satisfied that the evidence supports Moses being made aware that his wage rate would be \$8.00 and hour until the January 11th pay statement. An employer who chooses to change the terms and conditions of employment for an employee is, in my view, obligated to ensure that appropriate notice of such a change is provide to the affected employee. Delta’s argument that this was simply a “clerical error” does not relieve them of their obligation to provide adequate notice for a change in terms and conditions of Moses’ employment.

It would have been appropriate for Delta to have provided one week notice of the change in the terms and conditions of employment. This notice should have been provided to Moses **prior** to the change of his wage rate.

I conclude, based on the evidence and on the balance of probabilities, that Moses was not aware that the wage rate for his position at the Whistler Conference Centre was \$8.00 per hour. I am satisfied that Delta did not deliberately set out to mislead Moses in regard to the wage rate for his position at WCC, merely that as a result of the disorganization and confusion in existence around this time, Delta failed to advise Moses that the rate would be \$8.00 per hour. I further conclude that Moses is entitled to be paid at the rate of \$10.00 up to January 25,1997, which is one week after he was first notified that his was wage had been dropped.

I further conclude that the vacation pay and statutory holiday pay should be recalculated to reflect the rate of \$10.00 per hour.

Moses is therefore owed wages calculated as follows:

pay period ending	hours	rate differential	wages owing
Jan. 11/97	62.55	\$2.00	=\$125.10
	1	\$3.00	=\$ 3.00
Jan. 25	55	\$2.00	=\$110.00
	2.5	\$3.00	=\$ 6.00
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stat pay Nov. 11/96	(earned \$66.00 less	amount paid \$48.48)	=\$ 17.52
stat pay Jan. 1/97	(earned \$48.00 less	amount paid \$38.40)	<u>=\$ 9.60</u>
sub total			\$271.22
4% Vac. pay			<u>\$ 10.85</u>
TOTAL			\$282.07

With respect to Moses’ claim for compensation for length of service, I conclude, based on the evidence provided and on the balance of probabilities, that Moses is not entitled to

compensation for length of service. The unilateral change in wage rate established by the employer, in and of itself, does not constitute constructive dismissal. In my view for constructive dismissal to be proven, the intent of the alteration in the terms and conditions of employment must be to encourage the employee to leave the employment. The evidence provided does not support such a conclusion.

ORDER

Pursuant to Section 115 of the *Act* I order that the Determination dated July 24, 1997 be varied to be in the amount of \$282.07 together with interest calculated pursuant to Section 88.

Hans Suhr
Adjudicator
Employment Standards Tribunal