

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 -

Portside Holdings Ltd.
operating as Newport Restaurant-By-The-Sea

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: April Katz

FILE No.: 2000/523

DATE OF HEARING: October 4, 2000

DATE OF DECISION: December 8, 2000

DECISION

APPEARANCES:

Curtis Wrobel and Tricia Andrews on behalf of Portside Holdings Ltd.
Adam Turner on his own behalf

OVERVIEW

The Employer, Portside Holdings Ltd. (“Portside”), appealed the findings of fact in the Determination from the Director of Employment Standards issued on July 6, 2000 resulting from a complaint from Adam Turner, the Employee, (“Turner”). The Determination stated that Portside had terminated Turner’s employment without paying compensation for length of service. Portside’s appeal is based on its assertion that Turner quit his employment and therefore no compensation for length of service was payable.

The Determination also found that Portside had contravened the *Employment Standards Act* (the “Act”) in failing to pay overtime. Portside’s appeal argues that no overtime was owed as Turner was paid more than his banked overtime earned. The Determination ordered Portside to pay Turner \$507.42.

ISSUES

There are two issues arising in this appeal.

1. Did the Director error in finding that Turner’s employment was terminated by Portside?
2. Did the Director error in finding that Portside owed Turner overtime?

ARGUMENT

Portside argues that Turner quit his employment and was not fired. Portside further argues that Portside operated a time bank for overtime earned and that Turner was not owed any overtime at the end of his employment with Portside.

Turner argues that he wanted to continue working for Portside and had no intention of leaving except for temporary employment with BC Ferries Corporation. He acknowledges that he had told Portside of his long term intention to take work with BC Ferries for the summer but he denies any intention of leaving his employment with Portside in May 1999.

Turner was not aware of any overtime bank and denies receiving credit from this source.

THE FACTS

Portside hired Turner as a cook starting in October 1998. Turner was paid \$10 per hour. He had worked for BC Ferries as a cook in the past and wished to continue to take work with BC Ferries whenever it was possible. BC Ferries paid him significantly more per hour and he hoped to find a permanent position with them. Turner told Portside management and staff about his plans with BC Ferries early in his employment. Portside staff and management acknowledge that Turner had disclosed his plans to them. Portside and Turner had an agreement that Turner would give Portside two weeks notice before he left for BC Ferries.

Turner intended to work for BC Ferries during the summer and return to Portside when BC Ferries no longer had work for him. His evidence is that he has a family and financial commitments, which meant he must stay fully employed. The work at BC Ferries did not become steady until mid June 1999.

In February 1999 Turner sought leave from the chief chef, Curtis Wrobel, to take a Marine Evacuation Chute training course and was granted the necessary time off. In March 1999 Portside hired a new chief chef, Mike Rielly, from whom Turner received instructions for his work. Curtis Wrobel became the General Manager.

Turner was normally scheduled to work Wednesday to Sunday and had Mondays and Tuesdays off according to the posted schedule. The schedule was normally posted two weeks in advance.

On May 20, 1999 Turner was offered work with BC Ferries from Friday, May 21, 1999 until May 24, 1999. He was scheduled to work at Portside from Friday to Sunday. It was a busy weekend at the restaurant. Turner called Mike Rielly at 2 PM on May 21, 1999, 2 hours before his shift was scheduled to start, and asked if he could have the weekend off to go to BC Ferries. Mike Rielly said he could.

Based on the posted schedule, Turner was expected to start work at Portside at 3 PM on May 26, 1999. Sometimes the chef wanted him to come in early to prepare something. Turner telephoned Mike Rielly at noon on May 26, 1999 to ask if he needed him any earlier. Turner was told that he was not expected in that day, that his name had been taken off the schedule. Mike Rielly suggested that Turner call Trish Andrews to discuss the situation. Mike Rielly indicated to Turner that he did not want to be in the middle of any dispute. Turner left a message for Trish Andrews.

Portside argues that Mike Rielly had no authority to allow Turner to miss a shift and that it was very difficult to do all the necessary work without Turner on the long weekend. Curtis Wrobel's evidence was that Portside thought Turner had left his employment to go to work at BC Ferries for the summer and Portside took him off the schedule.

Turner was surprised at the confusion. He decided to tape record any further conversations with Portside. Turner tried to talk to someone in management and left more than one message after speaking with Mike Rielly. He finally spoke to Curtis Wrobel, who kept insisting in the conversation that Turner had quit no matter what Turner tried to say about what had happened. At one point in the conversation in sheer frustration, Turner said "OK I quit" and then continued with his the point he was trying to make. Turner went back after a couple of sentences to say no

he had not quit and he wanted to make that clear. The conversation was antagonistic and non productive at clarifying what had happened.

There was a subsequent conversation about pay and arrangements were made for Turner to pick up his last cheque and his record of employment. Portside had completed the Record of Employment by marking that Turner had quit.

Turner filed a complaint with the Director.

At the hearing of this appeal Portside was insistent that Turner did not really want to continue his employment on May 26, 1999 and had already started working for BC Ferries full time. They stated that the Delegate had Turner's record for work with BC Ferries and that it showed that Turner was working for BC Ferries on May 26, 1999.

The record referred to was not in the materials before me but was supplied with them at my request. The Tribunal sent out the additional material to the parties for comment after the hearing. I did not receive any further comments on the information provided. The record shows that Turner was not working for BC Ferries on May 26, 1999 or May 27, 1999, when he planned to work for Portside.

Many people work for more than one employer at the same time and the evidence in this respect would not have effected the outcome unless it challenged a witness's credibility.

ANALYSIS

The onus is on the appellant in an appeal of a Determination to show on a balance of probabilities that the Determination ought to be varied or cancelled. To be successful the evidence from the appellant must demonstrate some error in the Determination, either in the facts accepted, the factual conclusions reached or in the Director's analysis of the applicable law.

The first issue is whether the Director erred in finding that Turner's employment was terminated by the Portside. The appellant, Portside, has argued that Turner quit his employment without notice. The question of whether Turner quit or was fired is a question of fact. The Delegate interviewed the witnesses in person and concluded that Portside had ended Turner's employment and that Turner had not quit.

I did not hear any evidence from Portside or Turner that would suggest that Turner quit.

Portside acknowledges in their letter of appeal that Turner was not fired when he asked Mike Rielly for permission to not show up for work on May 21, 1999. There is no evidence to suggest Turner was not prepared to meet his shift responsibilities on May 26, 1999 when he was scheduled to be at work. There is no evidence that he indicated he would not be back. The phone calls demonstrate that Turner tried to clarify his willingness and desire to go to work at Portside. Portside told him not to come in because there was no work for him

From this evidence I conclude that the Delegate's finding was correct and that Turner's employment ended at the initiation of Portside not Turner. Portside did not allow Turner to

return to work after he was permitted to take the weekend off. Portside ended the employment but did not pay any compensation for length of service.

The parties did not dispute the amount owing for compensation after finding that compensation for length of service is owed. The formula for this calculation is set out in section 63 of the Act.

I find no basis on which to vary or cancel the Delegate's award of compensation for length of service and the related vacation pay.

In the last materials provided by the Director's Delegate, Mike Taylor, he indicates that the calculation of overtime in the Determination is in error. He states that Portside paid Turner on December 5, 1998 for 8 hours at regular wages when he worked 10.5 hours, on December 30, 1998 for 8 hours when Turner worked 8.25 hours, on December 31, 1998 for 8 hours when Turner worked 10 hours and on January 1, 1999 for 8 hours when Turner worked for 8.25 hours. He makes no finding about whether an overtime bank existed because there were no records provided to him. He accepts the credit of 2.75 hours shown as drawn in December 1998 from this bank in his calculations. He states that the amount owing to Turner should be reduced by \$17.50 not \$22.50. This material was sent to the parties for comment. The parties have not disputed the Delegate's submission. I therefore find that Portside owes Turner \$57.50 for overtime.

CONCLUSION

I find based on the evidence presented that Portside has not discharged the onus of proof required to set aside the Determination with respect compensation owed for length of service. The Determination is confirmed in this respect with vacation pay as \$420.38.

I vary the Determination by deleting \$52.50 and inserting \$57.50 for overtime plus interest.

The Determination is varied and the amount owing from Portside to Turner is \$477.88 plus interest under section 88 of the Act.

ORDER

Pursuant to section 115 of the Act, Determination ER#: 01961 dated July 6, 2000 is varied to show that Portside Holdings Ltd. owes Adam Turner \$477.88 plus interest pursuant to Section 88 of the Act.

April D. Katz _____

April D. Katz
Adjudicator
Employment Standards Tribunal

ADK/bls