Employment Standards TRIBUNAL

An appeal

- by -

Sea to Sky Motorsports Inc.
("Sea to Sky")

- 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: David B. Stevenson

FILE No.: 2002/495

DATE OF HEARING: December 11, 2002

DATE OF DECISION: December 17, 2002

Employment Standards Tribunal
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DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by Sea To Sky Motorsports Inc. ("Sea To Sky") of a Determination that was issued on August 21, 2002 by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded that Sea To Sky had contravened Part 3, Section 18 and Part 8, Section 63 of the *Act* in respect of the employment of Emile Perreal ("Perreal") and ordered Sea To Sky to cease contravening and to comply with the *Act* and *Regulations* and to pay an amount of $5,194.28.

Sea To Sky says the Determination is wrong as Perreal 'abandoned' his job and was therefore not entitled to length of service compensation. Sea To Sky asks that the Determination be cancelled or referred back to the Director for further investigation.

The Tribunal has decided that an oral hearing is not required in this matter and that the appeal can be properly addressed through written submissions.

ISSUE

The issue in this appeal are whether Sea To Sky has shown an error in the Determination sufficient to justify the Tribunal cancelling the Determination.

FACTS

There is no dispute on the essential facts. The conclusion drawn from those facts is very much in dispute.

Sea To Sky is an automotive repair business. Perreal worked for Sea To Sky from January 19, 1996 to May 9, 2002 as a mechanic at the rate of $20.19 an hour. On April 25, 2002, Perreal delivered a medical stress leave note to Sea To Sky. The note said:

> "Emile will require a medical stress leave as of April 24/02 for two weeks."

Sea To Sky accepted the note. As of May 9, 2002, Perreal had not contacted Sea To Sky concerning either his status or a return to work. On May 9, 2002, Sea To Sky prepared and delivered a letter to Perreal, which read:

> Re: Employment Status
>
> Dear Emile,
>
> The last correspondence we have regarding your employment with us is dated April 24, 2002. The medical leave note indicates the "2 weeks" stress leave is required. The 2 weeks expired on Tuesday, May 7, 2002. We understand that you were unable to return to work on that day. We expected to hear from you or see you on Wednesday, May 8, 2002.
>
> To date you have not come into work nor have you contacted us. We now view this as you have abandoned your job and have chosen not to return to work with Sea To Sky Motorsports Inc.

> You have been a valued part of Sea To Sky Motorsports Inc. and wish you well with your future employment and the challenges ahead. Please contact us to make arrangements for the pick up of your tool box.

Sea To Sky have filed additional material with the appeal. In reply to the appeal, the Director, justifiably I believe, questioned whether the additional material was an attempt to suggest there was 'just cause' to terminate Perreal. Sea To Sky answered that it was not their intention to raise a 'just cause' issue, and the additional material was provided as further support for the argument that Perreal had abandoned his job and to provide some insight on why that conclusion was reached.

ARGUMENT AND ANALYSIS

The burden is on Sea To Sky the persuade the Tribunal that the Determination is wrong in law, in fact or in some combination of law and fact (see *World Project Management Inc.*, BC EST #D134/97 (Reconsideration of BC EST #D325/96)). An appeal to the Tribunal is not simply an opportunity to re-argue positions taken during the investigation. The specific issue in this case is whether, on all the available facts, the Director erred in concluding Perreal was entitled to length of service compensation.

In several decisions Tribunal has accepted and adopted the following comments concerning length of service compensation:

> Section 63 of the Act places a statutory liability upon an employer to pay length of service compensation to each employee upon completion of three consecutive months of employment. In a sense length of service compensation is an earned statutory benefit conferred upon an employee. The amount of compensation increases as the employee's length of service increases to a maximum of 8 weeks' wages. An employer may effect a discharge from this statutory obligation by providing written notice to the employee equivalent to the length of service entitlement of the employee or by providing a combination of notice and compensation equivalent to the entitlement of the employee. An employee may cause an employer to be discharged from the statutory obligation by doing one of three things: first, self terminating employment; second, retiring from employment; and third, giving just cause for dismissal.

There is no assertion Perreal either retired or was dismissed for cause. If Sea To Sky is to be discharged from its statutory obligation to pay length of service compensation, it will be because they have shown Perreal terminated his employment.

While the *Act* uses the word "terminate" in paragraph 63(3)(c) to describe the action of employee which would discharge the statutory obligation of an employer to give notice and/or compensation, the term is intended to capture any manner by which *an employee* chooses to end the employment relationship. Labour relations concepts such as abandonment, resignation and voluntary termination or severance of employment are all notions caught by the term. To the lay person, however, it is simply known as a "quit". The position the Tribunal takes on the issue of a quit is now well established. It is consistent with the approach taken by Labour Boards, arbitrators and the Ontario Employment Standards Tribunal. It was stated as follows in the Tribunal's decision *Burnaby Select Taxi Ltd. -and- Zoltan Kiss*, BC EST #91/96:

> The right to quit is personal to the employee and there must be clear and unequivocal facts to support a conclusion that this right has been exercised by the employee involved. There is both a subjective and an objective element to a quit: subjectively, the employee must form an intent to

> quit; objectively, the employee must carry out some act inconsistent with his or her further employment.

I have carefully examined the Determination, the appeal and the documents on file, including those submitted with the appeal and, like the Director, can find no evidence (clear and unequivocal or otherwise) that Perreal intended to quit, or 'abandon', his employment. The evidence in fact points against that conclusion. Perreal had done nothing that might normally be regarded as expressing an intention to terminate his employment. As of May 9, 2002 all of his tools and some personal belongs were still at the shop. During the time leading up to his termination, he had not expressed to any representative of Sea To Sky that he was planning to leave their employ. I do not accept that vaguely described past discussions with the company's owners or general comments made to the payroll clerk over a two year period, qualify as statements of his intent in and around May 9, 2002. If there were statements made by him contemporaneously with the events on and around May 9, 2002 reflecting his intention to leave Sea To Sky, none have been shown or indicated in any of the material in the file.

The Determination questions why Sea To Sky was so quick to assume that Perreal, who was on stress leave, had abandoned his position. While it is not expressly stated, it is clear from the analysis relating to that point that the Director did not find the fact of Perreal extending his stress leave by one day and not communicating that to his employer to be an act inconsistent with his continued employment. I would agree with that finding. Certainly there is nothing in the appeal that would compel a different conclusion.

Sea To Sky has failed to meet the burden of showing an error in the Determination. The appeal is dismissed.

For the benefit of Sea To Sky, I would add that nothing in this decision should be interpreted as suggesting that Perreal's conduct in not communicating with his employer was not blameworthy conduct justifying some response. What the Determination concluded, and this decision has confirmed, is that Perreal did not discharge Sea To Sky from its statutory obligation to pay length of service compensation.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated August 21, 2002 be confirmed in the amount of $5,194.28, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal