

**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 -

Delta Practice Centre Ltd.  
("DPC")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** Sherry Mackoff

**FILE NO.:** 97/736

**DATE OF HEARING:** December 8, 1997

**DATE OF DECISION:** January 5, 1998

**DECISION**

**OVERVIEW**

This is an appeal by Delta Practice Centre Ltd. (“DPC” or the “employer”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination, dated September 18, 1997, issued by a delegate of the Director of Employment Standards.

In the Determination the delegate found that the complainant, Mr. Grant Pearson, was owed one week’s wages as compensation for length of service. The delegate found that DPC had contravened sections 63 and 18(1) of the *Act* and ordered DPC to pay Mr. Pearson \$631.03, plus interest, for a total of \$703.03.

The employer seeks to have the Determination cancelled. It is the employer’s position that Mr. Pearson is not owed one week’s wages because of the exception contained in section 65(1)(c). That section of the *Act* provides that an employer has no liability resulting from length of service if an employee was “*employed for specific work to be completed in a period of up to 12 months.*”

Mr. Pearson was employed by DPC from November 25, 1996 until May 15, 1997.

A hearing was held at the Vancouver office of the Employment Standards Tribunal on December 8, 1997. Mr. John Walker appeared for DPC. Mr. Walker gave evidence and called one witness, Mr. Loyd Parker. Mr. Grant Pearson appeared on his own behalf and gave evidence. Mr. Morry Levin appeared for the Director of Employment Standards.

**ISSUE TO BE DECIDED**

Does DPC owe Mr. Pearson one week’s wages as compensation for length of service?

**FACTS**

Mr. Walker is the president of DPC. DPC is a golf driving range. It has been in operation for four to four and a half years. It runs twelve months a year, unless there is snow, and is open seven days (and evenings) a week. DPC has a pro shop, offers lessons by golf professionals and has a snack bar.

Mr. Walker has been in business for many years. As well as the driving range he has a bulldozing business and a top soil business.

Mr. Walker placed an advertisement with "Canada Manpower" looking for a manager for the DPC. The advertisement to which Mr. Pearson replied was for a full-time "Golf Centre Manager" at \$14.00 per hour, with range privileges. The ad read in part: "3-5 yrs exp in management, aggressive, ambitious in sales promotion, customer service, strong

interpersonal, phone, computer skills, food & beverage Duties Exp an asset, supervise and schedule staff, snack bar, driving range, sales and promotions and report to proprietors."

Mr. Walker testified that although he received a lot of resumes and spoke to applicants on the telephone he felt no one was capable of running DPC.

However, Mr. Walker asked Mr. Pearson to come for an interview and a lengthy interview took place in early November, 1996. At that interview, according to Mr. Walker, they discussed Mr. Pearson coming to work for DPC to do advertising and promotions.

Mr. Pearson testified that at the first interview many subjects were discussed. Mr. Walker told Mr. Pearson about his areas of concern at DPC and the aspects of the operation that functioned well.

During that first interview Mr. Walker asked Mr. Pearson for his suggestions for promotion and advertising. In response, Mr. Pearson prepared two pages, headed "Thoughts re Delta Golf Centre", dated November 18, 1996 (exhibit #2). This document contains numerous suggestions for increasing business at DPC and for improving revenues. For example, the first paragraph reads: "First priority should be youth programs, this would probably be the largest untapped market that is cost effective to reach." Mr. Pearson characterized this document as merely some thoughts submitted at Mr. Walker's request; not specific goals to be achieved in a given period of time.

Mr. Pearson met with Mr. Walker a second time and at this second meeting he brought his November 18th document. Mr. Walker testified that at that meeting, or shortly thereafter, he hired Mr. Pearson to do some advertising and promotion for DPC. Mr. Walker stated that at the time of hiring he told Mr. Pearson that he was hired for "specific work"; that they both agreed that Mr. Pearson was going to work on advertising and promotions.

Mr. Pearson confirms that he was hired around November 18th, when he delivered his "Thoughts re Delta Golf Centre" to Mr. Walker. At the time he was hired he was not told what his job title would be, nor was he given a list of duties. It is Mr. Pearson's evidence that he was hired as the manager because that was the job he applied for and nothing to the contrary was said.

There was no written contract of employment. Mr. Walker agreed to pay \$14.00 per hour.

Neither at the the time of hiring, nor during the course of Mr. Pearson's employment, did Mr. Walker give Mr. Pearson a time frame in which to complete his work. Nor did Mr. Walker ever tell Mr. Pearson that the work must be completed in a twelve month period.

As Mr. Walker stated: "This could have been a job for a lifetime, this could have been a job for five years, it could have been for twelve months or one week." Again, to adopt Mr. Walker's words: If an employee makes me money they can carry on.

At the time that he was hired Mr. Pearson was working almost full-time at Mark's Work Warehouse ("Mark's") and it was the busy Christmas period. It was agreed that Mr. Pearson would continue at Mark's and work a couple of days a week at DPC until the New Year. Mr. Pearson would then increase his hours at DPC and eventually work full-time.

Mr. Pearson began work at DPC on November 25, 1996. At the beginning he worked part-time and this increased to full-time in the New Year. He did not have set hours or set days of work. He decided when, and how long, to work.

When Mr. Pearson began working at DPC he spent his time on advertising and promotion. However, after approximately two to three weeks he divided his time. He spent half his time in the office on promotion and half his time at the driving range working as a cashier. At the driving range the cashiers (or "seniors" as they are called) rent golf balls, sell pop, coffee, and other food items and attend to maintenance.

Mr. Pearson testified about the work that he did at DPC. His work included organizing meetings with competing driving ranges and meeting with golf equipment retailers at Mr. Walker's request. There were also meetings relating to obtaining stock on a consignment basis. He stated that Mrs. Walker asked him to take care of cleaning supplies and inventories in the snack area. As well, as set out above, he spent half his time at the driving range as a cashier. Mr. Pearson stated that he was involved in negotiations with the teaching professionals that resulted in their agreement to pay a monthly fee to teach at DPC and he was involved in negotiations for the golf simulator. Mr. Pearson stated that, within the guidelines he was given, he attempted to do nearly everything that was set out in his document "Thoughts re Delta Golf Centre". For example, he made a presentation to the Surrey and Delta School Boards about golf lessons at DPC and he negotiated a reduced rate for students' lessons. Mr. Pearson acknowledged that advertising and promotion were an important part of his job.

Mr. Walker also testified that Mr. Pearson acted as the go-between in negotiating a monthly fee with the golf professionals. As well, he stated that through the combined efforts of Mr. Walker and Mr. Pearson a golf simulator was leased by DPC, although as he put it the simulator "ended up a disaster."

On May 15, 1997, Mr. Pearson's employment with DPC was terminated.

Mr. Walker testified that towards the end of Mr. Pearson's employment, it became obvious that "the advertising and promotions were going nowhere." He wanted this "special job" stopped. Mr. Walker testified that at a meeting (which occurred on May 15th) they both agreed to terminate Mr. Pearson's employment. Mr. Walker testified that Mr. Pearson was

going to work for another three to four days or one week to finish up the ads and promotion.

Mr. Pearson's evidence concerning his termination on May 15th is as follows. At the meeting with Mr. Walker, Mr. Pearson was told that he was being terminated. The reason given for the termination was, in essence, the need to cut the overhead. Mr. Walker asked

Mr. Pearson how to proceed with the termination and Mr. Pearson suggested that he would work the following week in order to give the other cashiers time to adjust their schedules. That was agreeable to Mr. Walker.

Mr. Pearson stated that he then cleaned out his desk, went to the range to finish some chores and then signed out on his time sheet. By signing out on his time sheet, Mr. Pearson was claiming no more pay for the day.

Mr. Pearson stated that, on his own time, he then hit a few balls. Mr. Walker stated that Mr. Pearson hit the balls on "company time."

After he finished, Mr. Walker's wife telephoned Mr. Pearson and asked him to bring his time sheet to the office. Mr. Pearson was paid for hours worked up to and including May 15th. Mrs. Walker made out the cheque and Mr. Walker signed it. Mrs. Walker gave him his record of employment which stated "position discontinued". Mr. Pearson stated that there was no mention of why he was being dismissed.

## **ANALYSIS**

On an appeal of a Determination the onus is on the appellant to satisfy the Tribunal that the Determination is wrong.

I have carefully considered all of the evidence and submissions, and in my view the employer has not shown that the Determination is wrong. Mr. Pearson was employed by DPC for nearly six months. He is entitled to one week's wages as compensation for length of service.

Section 63 of the *Act* provides that after three consecutive months of employment, an employer who wishes to terminate an employee becomes liable to pay compensation for length of service. This statutory liability may be discharged if the employer gives the employee adequate written notice of termination, pays wages equal to the notice period to which the employee is entitled, or provides a combination of appropriate notice and wages. The employer may also be discharged from its statutory liability to pay compensation for length of service if the employee quits, retires or is dismissed for just cause.

Section 65 of the Act sets out further situations where an employer is not liable for compensation for length of service.

Mr. Walker relies on section 65(1)(c) of the *Act*. That section reads as follows:

*65(1) Sections 63 and 64 do not apply to an employee*

*(c) employed for specific work to be completed in a period of up to 12 months,*

It is clear that Mr. Pearson does not come within the exception set out in section 65(1)(c). First, he was not employed for “specific work”. Although an important part of his work was advertising and promotion, Mr. Pearson in fact performed many other duties. Mr. Walker’s own evidence showed that Mr. Pearson’s work was not limited to advertising and promotion. He stated that Mr. Pearson was involved in the negotiations with the golf professionals and in the arrangements for the golf simulator. The evidence was very clear that Mr. Pearson spent a substantial part of his time working as a cashier at the driving range. Second, at no time was Mr. Pearson told that his work for DPC had to be completed within a twelve month period or within any time period. That is clear from the evidence of both Mr. Walker and Mr. Pearson. Based on the evidence that I heard, I conclude that Mr. Pearson was hired for an indefinite term.

In my view for the exception in section 65(1)(c) to be applicable, an employee must be told at the time of hire that the specific work that the employee is hired to do will take no longer than twelve months. At the time of hire the employee must know that when the specific work is completed his employment will terminate. The employer is relieved of liability to compensate for length of service because the employee knows at the time that he starts the specific work that employment will end upon its completion.

During the course of the hearing Mr. Walker asserted that he could have dismissed Mr. Pearson for cause on May 15th for hitting golf balls on “company time”. I told Mr. Walker that it was too late to be raising a defence of just cause. A defence of just cause should not be raised for the first time during an oral hearing before the Tribunal. However, even if an employee hit golf balls on company time that would not constitute the type of serious misconduct that is required to establish just cause on the basis of a single incident. Moreover, I would repeat that Mr. Pearson stated specifically that he was hitting balls on his own time after he had signed out.

In concluding, I would note that during the course of the hearing I pointed out to the parties that the calculation of interest in the Determination appeared to be in error as the interest seemed to me to be too large an amount. Mr. Levin agreed with me that the interest calculation in the Determination is not correct.

## **ORDER**

I order, pursuant to section 115 of the *Act*, that the Determination, dated September 18, 1997, be confirmed, subject to the recalculation of the interest. Pursuant to section 88 of the *Act*, Mr. Pearson is entitled to interest on his wages and I refer the calculation of the interest back to the Director.

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**Sherry Mackoff**