An appeal

- by -

Dynamic Concrete Pumping Inc.
(“Dynamic Concrete”)

- 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.: 2001/738

DATE OF DECISION: January 3, 2001

DECISION

OVERVIEW

This is an appeal filed by Dynamic Concrete Pumping Inc. ("Dynamic Concrete") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*). Dynamic Concrete appeals a Determination that was issued by a delegate of the Director of Employment Standards (the "delegate") on September 27th, 2001 (the "Determination"). The Director's delegate determined that Dynamic Concrete owed its former employee, Keith C. Goodkey ("Goodkey"), the sum of $11,226.35 on account of overtime pay (section 40), vacation pay (section 58), eight weeks' wages as compensation for length of service (section 63) and accrued interest (section 88).

Further, by way of the Determination, the Director also levied a $0 penalty pursuant to section 98 of the *Act* and section 29 of the *Employment Standards Regulation.*

Although an oral hearing was originally set in this matter, counsel for both Dynamic Concrete and Goodkey requested that the appeal be adjudicated based on the parties' written submissions. Accordingly, and in accordance with section 107 of the *Act,* the oral hearing was cancelled and this appeal is being adjudicated on the basis of the parties' written submissions.

ISSUES ON APPEAL

In her appeal documents, counsel for Dynamic Concrete advanced three separate grounds of appeal, namely:

- although not specifically mentioned, it would appear that counsel submits that the delegate failed to comply with section 77 of the *Act* ("...the delegate did not permit [Dynamic Concrete] sufficient time to reply to Mr. Goodkey's statement or to the Delegate's initial conclusions");

- "The Employment Standards Branch did not have jurisdiction to make the Determination because the employee, Mr. Goodkey, was covered by a collective agreement at all material times."; and

- Dynamic Concrete had just cause for termination and thus Goodkey was not entitled to any compensation for length of service.

I shall address each issue in turn.

ANALYSIS

The delegate's investigation

Section 77 of the *Act* states that "If an investigation is conducted, the director must make reasonable efforts to give the person under investigation an opportunity to respond."

The Director's delegate contacted Dynamic Concrete in early July 2001 requesting certain information. Dynamic Concrete replied to the delegate by way of a letter dated July 18th, 2001 in which it set out its position with respect to Goodkey's claim for overtime pay, vacation pay and compensation for length of service.

The delegate wrote to Dynamic Concrete once again on August 22nd, 2001 setting out her preliminary findings with respect to the above-mentioned three issues and, in particular, she requested further submissions regarding Dynamic Concrete's assertion that Goodkey was terminated for cause. Counsel for Dynamic Concrete says that "approximately one month later, without any warning and before Dynamic had submitted further information, the Delegate issued the Determination" while Dynamic Concrete was still in the process of gathering further information.

In my view, and especially in light of the dictates of section 2(d) of the *Act*, I cannot conclude that section 77 was breached in this case. Surely, if Dynamic Concrete had further submissions to make, it could have easily contacted the delegate within the month and simply advised the delegate that further information was being gathered. Further, and in any event, to the extent that Dynamic Concrete was unable to present all of the information it wished to put before the delegate, that situation can be cured by way of the present appeal proceedings.

The jurisdictional issue

In the background facts set out in the Determination, the delegate noted that Goodkey "worked from January 1987 to August 2000 as a pump operator at rates established by a collective agreement in place between [Dynamic Concrete] and the International Union of Operating Engineers Local 115" but that from August 2000 to April 2001 Goodkey worked for Dynamic Concrete in an exempt sales position (Determination, page 1).

The delegate did not award Goodkey any overtime pay that may have been earned prior to August 2000 because "the collective agreement between the employer and IUOE Local 115 covers this period of employment and any issues would properly be dealt with by the grievance procedure set out in the collective agreement" (Determination, page 3).

Counsel for Dynamic Concrete says that, in fact, Goodkey continued to be a member of the bargaining unit (and subject to the collective agreement) even after August 2000 although Dynamic Concrete and the union reached an agreement with respect to varying Goodkey's wage rate for any sales work undertaken after August 2000. Indeed, by way of the union's letter dated

April 19th, 2001 to Dynamic Concrete, the union filed a grievance regarding Goodkey's termination. However, in her submission to the Tribunal dated November 14th, 2001, the delegate notes that the union subsequently accepted that Goodkey was terminated from a non-bargaining unit position and thus did not pursue the grievance that had been filed on Goodkey's behalf.

Unfortunately, the actual situation regarding Goodkey's bargaining unit membership is somewhat ambiguous. It would appear that Goodkey moved into a sales position (outside the bargaining unit) after August 2000 in order to offset a slowdown in pumping work (bargaining unit work). Nevertheless, Goodkey continued to work as a pump operator from time to time and was paid under the collective agreement (and had union dues deducted from his pay) as and when pumping work was available. I understand that Goodkey was not able to vote in a decertification election. Goodkey's employment was terminated on April 10th, 2001, however, time records before me indicate that Goodkey worked as a pump operator on March 20th to 23rd and March 28th and 30th, 2001. Nevertheless, it would appear that the bulk of his employment after August 2000 was in a nonunion sales position and he was terminated from this latter position on April 10th, 2001. The fact that union dues were not regularly deducted from his pay (dues were deducted only when he worked as a pump operator and only for that work) suggests that, on balance, Goodkey was primarily employed outside the bargaining unit after August 2000.

Thus, and particularly since the claim for unpaid overtime and vacation pay stems from Goodkey's employment as a sales representative, I am not satisfied that his claim "arose from the collective agreement" and thus fell within the exclusive jurisdiction of a grievance arbitrator within the *Weber* doctrine.

Compensation for length of service

The Determination was issued on September 27th, 2001. On September 26th, 2001, unbeknownst to the delegate at the time, Goodkey filed a "wrongful dismissal" action in the B.C. Supreme Court. I understand that this latter action does not encompass either of Goodkey's overtime or vacation pay claims as determined by the delegate.

In her submission dated November 14th, 2001, the delegate indicated she was unaware that Goodkey had commenced a wrongful dismissal action when she issued the Determination and that, had she known, "I would have exercised discretion pursuant to Section 76(2)(e) of the *Act* to stop the investigation of the compensation [for length of service] part of the [Goodkey's] complaint". This latter subsection states that an investigation can be stopped or postponed if the subject matter of the complaint is before a court or other competent tribunal.

Both Goodkey and his legal counsel advised the delegate that Goodkey wished to withdraw that part of his complaint dealing with compensation for length of service. The delegate has indicated that she would have varied the Determination accordingly but for (I assume) the Tribunal's decision in *Devonshire Cream Ltd.* (B.C.E.S.T. Decision No. D122/97). The delegate

appears to be of the view that if the award for compensation for length of service stands, Goodkey will not be able to obtain from the courts any greater sum by way of severance pay in lieu of reasonable notice. I am not at all certain that is so (especially in light of sections 4 and 118 of the *Act*) given that the statutory entitlement under section 63 of the *Act* is legally quite distinct from an award of damages for breach of contract (*i.e.*, severance pay in lieu of notice).

Although any compensation for length of service paid to Goodkey would be properly deductible from any court-ordered damages--see *e.g., Lefebvre v. Beaver Road Builders Ltd.* (1993), 49 C.C.E.L. 207 (Ont. H.C.); *Wednesday Enterprises Inc. v. Modern Building Cleaning Inc.*, [1999] Civ.L.D. 422 (B.C.S.C.)--the fact that certain monies were paid or claimed under section 63 would not bar any additional award of severance pay.

Counsel for Dynamic Concrete says that the award of compensation for length of service creates an estoppel with respect to Goodkey's claim for severance pay. I do not agree. An award of severance pay is not legally equivalent to an award under section 63; to the extent that issue estoppel may arise in this case, the only "issue" that might be subject to an estoppel is the issue of "just cause"--see *Rasanen Rosemount Instruments Ltd.* (1994), 17 O.R. (3d) 267; *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44.

In light of the foregoing, I do not think it appropriate to "cancel" the award of compensation for length of service or otherwise "vary" the Determination to the same effect. Goodkey filed a complaint seeking, *inter alia,* compensation for length of service; that claim was determined and that determination is now subject to appeal. I do not think that it would be proper, at this stage of the proceedings, to allow Goodkey to simply "withdraw" that aspect of his claim considering that his entitlement to an award under section 63 is one of the principal issues now before the Tribunal.

I should also note, simply for the sake of completeness since the matter was raised in the parties' submissions, that in my view section 82 of the *Act* has no application here. Goodkey's claim for damages for breach of contract (*i.e.*, the employer's alleged failure to give reasonable notice of termination) is not a claim for "wages" (see section 1 definition of "wages") that is caught by section 82. Neither the Director nor this Tribunal has any authority to make an award on account of severance pay in lieu of reasonable notice of termination. Further, and in any event, the undisputed fact is that the court action was commenced *before*, not after, the issuance of the Determination--on a plain reading of section 82, it is inapplicable.

I now turn to the question of whether or not Dynamic Concrete had just cause to terminate Goodkey and was, therefore, not obliged to pay him any compensation for length of service [section 63(3)(c) of the *Act*].

Just Cause

The event giving rise to Goodkey's termination occurred on Saturday, March 24th, 2001 when Goodkey, by his own admission, arranged for a 32 meter concrete pump to be used by a fellow

employee, Jack Radu, for a private job. This work order was not recorded in Dynamic Concrete's records either before or immediately after March 24th. Another employee, Glen Pollard, also worked on the job site and was apparently dissatisfied with the $75 "cash" payment he received and thus he recorded 5 hours on his time card. Since Pollard was not scheduled to work on March 24th, the company's dispatcher, Denise Shroeder, questioned Messrs. Pollard and Goodkey and shortly thereafter Goodkey submitted a "pump ticket" with respect to the job. The invoiced amount on the pump ticket ($200) represented less than what should have been billed for the job.

I have before me a written statement from the dispatcher, Ms. Shroeder. She states that in her 6-year tenure with Dynamic Concrete, pumps have never been sent to a job site without prior authorization and documentation.

As previously noted, a third employee, Jack Radu, was also involved in this matter. Mr. Radu told Dynamic Concrete's president (Joe Delehay) that the job in question was a "cash job" about which Delehay was not supposed to be informed. Subsequently, Mr. Radu wrote a personal cheque to Dynamic Concrete for $200 being the amount that was to be paid in cash to Goodkey for the use of the pump.

In his own statement, Goodkey confirms that on March 23rd he verbally authorized the release of the pump to Radu for a job to be undertaken on March 24th. Radu wanted Goodkey to be the operator but since Goodkey was too busy, Mr. Pollard was recruited for the job. As previously noted, Radu paid Pollard $75 cash for the latter's services. Radu stated that he was originally expecting to pay Goodkey $200 cash but after the job was discovered by the dispatcher (and only because Pollard claimed additional hours for this job on his time card), Radu submitted a $200 cheque to Dynamic Concrete at Goodkey's request since the "dispatcher had found out about the job". Goodkey does not deny that the proper documentation with respect to the job was not prepared. The $200 payment is less than the amount that would ordinarily have been billed for such a job. It turns out that the job in question was undertaken for one of Dynamic Concrete's major competitors.

The above circumstances strongly suggest the inference that Goodkey intended to personally profit from this transaction. The lack of prior disclosure, proper documentation and the overall surreptitious nature of Goodkey's activities cannot be easily ignored or explained away. If this was a *bona fide* transaction, why would Pollard be paid in cash by a third party rather than by his employer? Goodkey's *ex post facto* attempt to to "regularize" the transaction raises a further concern about whether this was a *bona fide* transaction. One cannot help but wonder whether this subterfuge was undertaken because not only was Goodkey personally profiting at his employer's expense but, in addition, the job was ultimately for the benefit of a Dynamic Concrete competitor. However, even if one did not conclude that Goodkey intended to personally profit at his employer's expense, it remains the case that he authorized the release of expensive company equipment improperly, without authority or the appropriate documentation.

Whether one characterizes Goodkey's conduct as an attempted misappropriation, breach of trust, insubordination, or conflict of interest (indeed, Goodkey's conduct may be all of those things), I am satisfied that Dynamic Concrete had just cause for termination. Accordingly, Goodkey is not entitled to any compensation for length of service.

Summary

Dynamic Concrete does not appeal the awards on account of vacation pay and overtime (and, in any event, it would appear that those awards were entirely proper). However, I am of the view that Dynamic Concrete had just cause to terminate Goodkey's employment and, accordingly, the award for compensation for length of service cannot stand.

Inasmuch as I have confirmed a contravention of the *Act* by Dynamic Concrete with respect to sections 40 and 58, the $0 penalty stands.

ORDER

Pursuant to section 115 of the *Act,* I order that the Determination be varied by cancelling the award for compensation for length of service. Thus, and in accordance with the calculations set out in the delegate's November 14th submission--which have not been questioned by either party--Dynamic Concrete is hereby ordered to pay Goodkey the amount of **$2,494.68** (including interest to September 27th, 2001) together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act,* as and from September 28th, 2001.

The $0 monetary penalty levied by way of the Determination is confirmed.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal