



An appeal

- by -

Michelle Hutchinson

- 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 (as amended)

TRIBUNAL MEMBER: John Savage

FILE No.: 2006A/103

DATE OF DECISION: January 23, 2007

DECISION

SUBMISSIONS

Michelle Hutchinson (the “Employee”)

G. James Baugh, McGrady & Company
Counsel for certain other Employees

David T. MacDonald, Fasken Martineau DuMoulin LLP
Counsel for Nanaimo Seniors Village Partnership & Well-Being Seniors Services Ltd. (“Well-Being”).

Ian MacNeill
Michelle J. Alman, Ministry of Attorney General
Counsel for the Director of Employment Standards (the “Director”).

INTRODUCTION

1. The Employee appeals a Determination of the Director dated July 24, 2006. The Determination found that the Employment Standards Act, R.S.B.C. 1996, C. 113. (the “Act”) had been contravened and ordered Well-Being to pay various sums, on account of unpaid annual vacation pay (section 18), group termination pay (section 64), accrued interest (section 88), and an administrative penalty (of \$500).
2. The general facts and circumstances germane to this appeal are fully set out in my companion decision in #D010/07 and will not be repeated here.
3. The Employee Hutchinson was a full time employee on maternity leave during much of the time when the Director undertook his investigation. She says that the Director erred in calculating the amount payable to her because he used her maternity leave top up amount and not her wage amount.
4. The Director supports her application and provided a recalculation of her entitlement, which included a calculation based on group termination entitlements in the Determination. Well-being opposed the application on grounds that are considered in my companion decision in #D010/07, and with additional argument in this appeal.

ISSUES

- Is the Employee owed wages arising out of her termination of employment?
- What is the proper calculation of the amount of wages owed?

ANALYSIS

5. I have considered fully the position of Well-Being on the general issues in my companion decision in #D010/07. For those reasons I reject the position of Well-Being that section 97 applies.

6. The position of Well-Being is that such employees could not have been properly terminated because they were on leave at the time these events took place. Well-Being relies on section 67(1) of the *Act*:

67.(1) A notice given to an employee under this Part has no effect if

(a) the notice period coincides with a period during which the employee is on annual vacation, leave, temporary layoff, strike or lockout or is unavailable for work due to a strike or lockout or medical reasons, or

(b) the employment continues after the notice period ends.

7. Well-Being says that because these employees were on leave they did not receive effective notice of termination. In my opinion section 67(1) has no application in the circumstances here.
8. Under section 67(1) the notice has no effect for the purposes of reducing an employer's liability under section 64(4) where notice ordinarily, and consistent with common law principles, operates as a credit to the employer in calculating liability, and under section 63(3)(b) where it has the same effect. In such circumstances the notice is ineffective.
9. Thus, under this Part, the notice is not effective to reduce the liability of the employer in these circumstances. The absence of effective notice does not, however, abrogate the termination of the employees. I am reinforced in this interpretation of section 67(1)(a) by section 67(1)(b) that clearly contemplates this situation applying where the employer is continuing, not a termination and change of employer as occurred here. The on-leave employees are included in the group.
10. This analysis is consistent with the decision of the Tribunal in *Re Rupert Title Search Ltd.*, BCEST #D070/03 and *Re Campbell*, BCEST #D230/98 although neither of those cases deals with the precise situation before me here.
11. For these reasons and the reasons given in #D010/07 I find that the Employee is owed wages.
12. Because of my findings with respect to the casual employees, the amount of group termination pay must be calculated based on 8 weeks not 12 weeks. The amount of wages is improperly calculated based on the top up amounts and not the employee's average wages. The amount of wages should be calculated as follows:

Group Termination

\$539.83 X 8 = \$4318.64

AVP @ 6% = \$259.12

Individual Compensation

\$539.83 X 3 = \$1619.49

AVP @ 6% = \$97.17

Total **\$6,294.42**

13. In addition to these amounts the Employee is entitled to interest calculated in accordance with the *Act* and *Regulation*.

14. If the parties cannot agree on the amount of interest payable I remain seized of the matter and they may make their submissions to me.

ORDER

15. Pursuant to section 115 of the *Act*, I order that the Determination be referred back to the Director to amend in accordance with the conclusions outlined above.

John Savage
Member
Employment Standards Tribunal