Employment Standards TRIBUNAL

An appeal

- by -

Perfect Waterproofing & Restoration Ltd.
("Perfect")

- 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: Carol L. Roberts

FILE No.: 2001/700

DATE OF DECISION: January 16, 2002

DECISION

This is a decision based on written submissions by Tom Wong on behalf of Perfect Waterproofing & Restoration Ltd., Glenn Festing, and Debbie Sigurdson on behalf of the Director of Employment Standards.

OVERVIEW

This is an appeal by Perfect Waterproofing & Restoration ("Perfect"), pursuant to Section 112 of the Employment Standards Act ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued September 30, 2001. The Director found that Perfect contravened Section 63 of the Act in failing to pay Glenn Festing compensation for length of service, and Ordered that Perfect pay $1,827.37 in wages and interest to the Director on Festing's behalf.

The Director also imposed a zero dollar penalty under section 98 of the Act and 29 of the Regulations for Perfect's failure to bring itself into compliance after being advised of its obligations.

ISSUE TO BE DECIDED

Whether the Director erred in law in determining that Festing was "an employee of some permanence", and thus entitled to compensation for length of service. Perfect also disputes the imposition of a penalty.

FACTS

Festing worked for Perfect, a waterproofing business, as a site foreman. He was employed continuously from January 8, 1998 to March 9, 2001, at three different building sites.

Perfect did not dispute that Festing was laid off on March 15, 2001, but contended that Section 63(1)(e) of the Act operated to exclude it from a statutory obligation (pursuant to section 63(2)) to pay him compensation for length of service. Perfect argued that, because it had no control over whether it could secure additional work at the completion of a project, it should be exempt from section 63. Perfect also argued that the circumstances of Mr. Festing's employment differed from those set out in Tribunal decisions #D153/00 and #D442/00, and thus, those decisions should not be followed.

Perfect acknowledged that it was aware, at least three weeks prior to Mr. Festing's termination, it was unlikely that there would be additional work available, and did not give him written notice of termination because it was of the view it had no obligation to do so. Perfect also submitted

that Mr. Festing was not recalled to work because it believed that Mr. Festing had secured alternative employment.

The delegate found that Mr. Festing received one week's written notice of the termination of his employment. She also found that Mr. Festing worked for Perfect continuously for three years and two months on more than one job site location during his employment, and that he was employed to work at construction sites.

The delegate further found that Perfect's principal business was construction, as defined in section 1 of the Act.

The delegate found that section 63(2) created a statutory liability on Perfect to pay Mr. Festing three weeks compensation. She concluded that section 65(1)(e) did not apply, in reliance on the Tribunal's decision in Daryl-Evans Mechanical Ltd. (BC EST #D442/00) ("Daryl-Evans").

On July 20, 2001, the delegate notified Perfect in writing of the application of section 65(1)(e) and her interpretation of the facts in light of that section, as interpreted in Daryl-Evans and John Tyler(BC EST #D153/00), copies of which she enclosed with the letter. She indicated the amount determined owing to resolve the complaint, and, in closing stated:

> If you intend to dispute this complaint, please provide any further information and documentation you may have, including copies of Mr. Festing's wages and hours of work from January 1, 2001 to March 15, 2001 and a copy of Mr. Festing's Record of Employment, to this office by August 3, 2001. After August 3, 2001, all information will be reviewed and a Determination may be issued.

Having received no further information, the delegate issued her decision on September 20, 2001. The Director also imposed a zero dollar penalty, pursuant to section 98 of the Act and section 29 of the Regulations for Perfect's contravention. The delegate stated:

The purpose of penalties is to put an employer on notice of the importance of compliance with the Act.... The Director recognizes that contraventions may occur unintentionally as a result of misinterpretation or misapplication of the Act. The exercise of discretion is not arbitrary, rather it is predicated on an assessment oft the corrective nature of a penalty on the behaviour and conduct of an employer, in this instance I am issuing a penalty because the employer was provided with the information, including copies of recent Employment Standards Tribunal decisions, regarding the limitations of the exclusion of section 65(1)(e), and advised that it did not apply to an employee that works at multiple site locations over time. The employer was requested to provide payment, however, the employer refused.

Based on the above the Director is of the view that a disincentive is needed to promote compliance with the Act and to prevent a repeat contravention.

ARGUMENT

Perfect contends that the delegate erred in both the application of the law, and in applying Daryl-Evans to the complaint. Perfect submits that the facts of this case differ from those in Daryl-Evans.

Perfect disputes the delegate's conclusion that Mr. Festing was "an employee of some permanence". Although Perfect concedes that Mr. Festing was employed continuously for three years and two months, it says that this was only the case because Perfect was able to secure a project as a previous one ended. When Perfect was unable to secure another project after the completion of the third project, it terminated Mr. Festing's employment. Perfect argued that Mr. Festing was not an employee of some permanence, rather, that his employment ended when the construction project was completed.

Perfect also disagreed with the Tribunal's decision in Daryl-Evans, arguing that the Tribunal misinterpreted the legislation because:

> if the legislation was intended to not apply to multiple construction sites, then the legislation would state that. Instead, the Employment Standards Tribunal reconsideration panel in BCEST #D442/00 seem to have exceeded their mandate and altered the legislation by their statements in BCEST #D442/00.

Perfect further submits that the facts of this case differ from those in Daryl-Evans, which involved an employee laid off for reasons other than the completion of a project. Perfect argued that the delegate should have relied upon the Supreme Court decision in Honeywell Ltd. v. British Columbia (Director of Employment Standards) [1977] B.C.J. No 2290 (B.C.S.C.) ("Honeywell").

Perfect argues that because the exemption in section 65(1)(e) is restricted to those construction employees who work at construction sites; it does not apply to those construction employees who work at the office or those construction employees who perform maintenance work.

Further, Perfect argues that the implications of the Daryl-Evans decision are not reflected in the Ministry's fact sheets. It says that, had it known that section 65(1)(e) did not apply to an employee who has worked at more than a single construction site for a construction company, it would have given Mr. Festing adequate notice. It suggests that the Ministry is liable for any liability based on the misinformation it provided.

The Director argues that the facts of this case fall squarely within the Daryl-Evans decision, and that the Honeywell decision is not applicable. She argues that the determination should be confirmed.

The Director further submits that fact sheets are produced and provided to the public for general information purposes only. She contends that they do not take the place of legal advice, and

cannot be substituted for references to the legislation itself and/or Tribunal decisions that interpret and apply the statutory provisions.

Further, the Director contends there is no duty on the Director to notify the public of the Tribunal's decisions, and the impact they might have on an employer's workplace or business practises.

Finally, the Director argues that the penalty determination be confirmed. She states that Perfect was provided with the requirements of section 63 and the limits of the exclusion in section 65(1)(e) by telephone and writing on July 20, 2001, as well as relevant Tribunal decisions. She states that, rather than bring itself into compliance, Perfect chose to deny liability and refused to provide payment for length of service.

Mr. Festing's submission related to the type of work he did, and the dates of his employment, which I need not recite here.

ANALYSIS

The burden of establishing that a Determination is incorrect rests with an Appellant. I am unable to find that Perfect has met that legal burden.

There is no dispute to the essential facts. Mr. Festing was employed by Perfect, a company whose principal business is construction, continuously for three years and two months at three different construction sites. The argument that Mr. Festing's employment ended after each project is not supported by the evidence.

Perfect argues, in essence, that the delegate erred in concluding that section 65(1)(e) and the Tribunal's decision in Daryl-Evans applied to these facts, and that, even if they did, the Daryl-Evans decision is incorrect. The Tribunal's decision in Daryl-Evans was recently upheld by the Supreme Court of British Columbia (Daryl-Evans v. Empl. Standards [2002] BCSC 48). As such, it is authoritative on the interpretation of section 65(1)(e), and is binding upon me.

Although the facts of Daryl-Evans differ from the facts before me, the interpretation of section 65(1)(e) as set out in that decision is applicable to the facts of this case. Given that the interpretation and application of section 65(1)(e) was set out extensively in that decision, there is no need to restate it here. Suffice it to say that, where statutory exceptions exist to rights granting provisions, those exceptions are to be narrowly contstrued.

I am unable to conclude that the delegate erred in finding that, on the facts of this situation, section 65(1)(e) did not apply, and deny the appeal.

I do not accept Perfect's argument that the Ministry ought to bear responsibility for the liability imposed upon it. As the Director notes, the fact sheets issued by the Ministry are for information only, and are not to take the place of legal advice.

Finally, I find no error in the delegate's imposition of a zero dollar penalty. Perfect argued before the delegate, as it did on appeal, that section 65(1)(e) did not apply to it. The delegate clearly set out the law, and its application to Perfect prior to issuing the determination. Perfect continued to dispute the Director's interpretation, and the correctness of the Tribunal's decision. This is not the forum to reargue Daryl-Evans, and, in any event, disagreement with a law is not a reason for refusing or failing to comply with it. I find that the delegate properly exercised her discretion in imposing the penalty.

The appeal is dismissed.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination dated September 20, 2001 be confirmed in the amount of $1,827.37, plus whatever interest might have accrued since the date of issuance.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal