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 -

Venco Products Ltd
("Venco")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Paul E. Love

FILE NO.: 1998/729

DATE OF HEARING: February 3, 1999

DATE OF DECISION: March 22, 1999

DECISION

APPEARANCES

Geoff Donelly for Venco Products Ltd.

Myron Wallace Director's Delegate

Dave Negrin
Fred Noble

Michael L. Warsh, Counsel for Mr. Nobel

OVERVIEW

This is an appeal by Venco Products Ltd. ("Venco") of a Determination dated October 28, 1998, which held that Venco had dismissed without proper notice Dave Negrin, and Fred Noble. The employer argued that the Delegate erred in his finding of fact, and that it had given an oral termination notice of 8 weeks to Negrin, and that Noble quit after he was offered a recall from a temporary lay-off. The Director's delegate correctly determined that each employee was terminated after the employer failed to recall the employee. The employer failed to give proper written notice of the termination of each employee and therefore is liability to payment of compensation for length of service.

ISSUES TO BE DECIDED

Did the Director's delegate err in determining that Dave Negrin was given a "working notice" of 8 weeks?

Did the Director's delegate err in determining that Fred Noble was terminated by the employer?

FACTS

Venco fabricates fibreglass tubs and showers. Dave Negrin was employed as a truck driver at the Nanaimo operation. Fred Noble was employed as a puller. Both employees had worked for Venco for 6 to 8 years. The employer experienced a slow down in its work during 1997 and 1998, in particular with the orders and deliveries on Vancouver Island. Mr. Geoff Donnelly is the manager of Venco's Nanaimo operation. Venco called its employees Donelly, Jim Nelson, and Rob Zoler to give evidence. I am persuaded by the evidence tendered that Dave Negrin and Fred Noble were "terminated" due to economic circumstances.

Mr. Negrin was given an oral termination notice on or about December 15, 1997. The Delegate found that Mr. Negrin was given two weeks notice of the termination, and continued to work for the employer until February 6, 1998 . Mr. Negrin was not recalled to work by the employer, within the first 13 weeks following the " layoff" on February 6, 1998. He was provided with a record of employment which was marked "not returning".

The parties differ in the facts alleged to have occurred surrounding the termination of layoff:

Negrin - Employer's Version:

The employer says that he provided a "verbal notice"of the termination to Mr. Negrin on or about December 15, 1997. He says that Mr. Negrin was aware that work in the shop had slowed down. He says that the employer kept Mr. Negrin busy with jobs around the shop, in addition to the delivery work, until February 3, 1998 when Mr. Negrin was given his papers.

Mr. Negrin's Version:

Mr. Negrin says that he was given two weeks oral notice of layoff on or about December 15, 1997, and that there were no further discussions directly with him concerning the layoff until February 3, 1998. He indicated while it was slow around the shop, there was no appreciable change in his job duties between December 15 and February3, 1997. He says he was aware of general discussions around the work place with regard to lay-offs. He testified that there had been layoffs in the past, and the employer had coped with shortage of work situations by a shortened work week or temporary layoffs. Mr. Negrin had apparently at some point prior to the termination, placed an employee standards branch poster in the work place. This poster sets out the notice requirements for employees who are to be terminated.

Noble - Employers Version:

The employer says that it gave a temporary lay-off to Mr. Noble, and that it offered to recall him on the Wednesday, following the Friday lay-off. The employer, in effect, says that Mr. Noble quit his employment. The employer says that it was unaware that it had given Mr. Noble a separation paper that had marked as being "employee not returning". He says that it should have been stamped unknown. Mr. Wallace says that this was an error in the computer system.

Noble - Employee's Version

With regard to Mr. Noble the facts appear to be that it was Mr. Jim Nelson who gave notice . The meeting started with Mr. Nelson saying that "Geoff (Donelly) always leaves all the shitty jobs for me". Mr. Noble asked "what shitty job he had to do", and was advised that Noble was being laid off. Mr. Noble raised the point that he had worked for the employer for 8 years, and was advised by Mr. Nielsen that he had not been doing a good job. Mr. Noble says that the layoff notice he received indicated that he was "not returning". Mr. Noble says that with a wife and two kids, he needed to work, and would not have turned down any work offered by the employer.

The employer says that it gave Mr. Noble a temporary layoff. It, however, delivered to Mr. Noble a notice that the layoff was permanent. The notice was delivered by Jim Nelson, a foreman with the employer. At the time that he gave Mr. Noble the notice, he released Mr. Noble 2 hours early from work, so that he could go to the employment insurance office and start his claim. Mr. Noble went to the employment insurance office that day, and started his claim. Mr. Nelson also told Mr. Noble that there were problems with the quality of his work.

Mr. Noble attended at the workplace on the Monday following the termination. His intention was to go back and see whether there was any work for him, as he did years before when he received a layoff. He entered into the workplace and noted that Darren Brown appeared to be performing his job. Mr. Noble then left.

There was a conflict in the evidence between Donelly who said he offered to recall Noble, and that Noble refused to work, and Noble's evidence that he was not recalled at any time. On a balance of probabilities I prefer the evidence of Noble over Donelly, as given Mr. Noble's financial circumstances and family situation, I think it unlikely that he would have refused an offer to return to work. In fact his attendance at the work place following the lay-off illustrates his interest in work.

Both Noble and Negrin testified that on prior occasions when seniority employees were "laid off" and junior employees retained, that the senior employees were never recalled to work by Venco.

The Director's delegate arrived at the following conclusions:

The employer did not give written notice which is required as per Section 63(3). Even if the employer did give notice in writing, Section 67(1)(b) provides that:

> 67(1) A notice given to an employee under this Part has no effect if
>
> (b) the employment continues after the notice period ends.

The Delegate found that each employee was entitled to 6 weeks compensation, plus vacation pay and interest. The amount found to be owing to Mr. Negrin was $3,331.48, consisting of $3,120 for the compensation, 124.80 for vacation pay and $151.37 for interest. At the hearing Mr. Negrin pointed out a calculation error in the Determination, it should have been $3,396.00 plus the vacation pay and holiday pay. Neither the employer nor the Director's delegate took issue with this point, and therefore I find that the correct amount owing is, $3,396.00, plus vacation pay, plus interest calculated in accordance with s. 88 of the *Act.*

The amount found to be owing to Mr. Noble was $3,462.01, inclusive of vacation pay, and interest.

From the whole of the evidence tendered, I am not satisfied that the employer did anything more than warn Negrin of impending lay-offs on the December 15, 1997 date, or alternatively provide him with two weeks notice. Both employees testified that in the past when the employer has "laid off" senior employees, it retained more junior employees, and did not recall the senior employees. This point was not refuted in any material way by the employer.

I note that there is a conflict between some of the letters filed by Venco from its employees and the evidence of Mr. Noble and Mr. Negrin. While this Tribunal will admit into evidence and consider such evidence, as I have done, the weight to be accorded such evidence is at the discretion of the adjudicator. I am not prepared to accord any weight to the written evidence tendered by Venco as being the evidence of employees. This material was untested by cross-examination. The credibility of Mr. Negrin and Mr. Noble was not impeached in any material way during the course of this hearing. There was a conflict between the written letters tendered and the oral evidence of the employees.

I note in particular that there were letters from Dave Griswold, Kim Robicheau in support of the employer's argument that it gave notice to all the employees based on their years of service. It was also apparent from what limited evidence that was tendered by the employer that neither Griswold nor Robicheau were present when Mr. Donelly alleged he gave notice to Dave Negrin. Further, if the notice was given to all employees as the employer alleged based on years of service, it is curious that Negrin, a long term employee was the first, and apparently only employee to be "laid off" in February of 1998.

ANALYSIS

In this appeal the burden rests on the employer to demonstrate that the Director's delegate made an error such that I should cancel or vary the Determination. It is clear that the employer did not adequately prepare for the hearing of this matter, and I found the delivery of the employer's case confusing and disjointed. I permitted two short adjournments during this hearing to permit Mr. Donnelly the opportunity to consult with another employer of Venco, Rob Zoler. The employer did a woefully inadequate job of calling evidence, and cross-examining witnesses. There is therefore no adequate factual foundation for me to

assess much of the submission that was made at the hearing and in writing, prior to the hearing of this matter. It remained entirely unclear to me after hearing the evidence of the employer and reading the employer's documents whether the "layoffs" of these employees were temporary, or permanent on the date each employee received notice. This was an essential fact to be proven as the employer alleged that the Delegate erred in its findings that Noble was terminated, and Negrin alleged that he was temporarily laid off. This was a case which did not call for an answer by the employees, and I would have dismissed the employer's appeal, at the end of the employer's case, if such a motion had been made by any party.

Further, the only issue argued by the employer in this appeal with regard to Mr. Negrin was that he had been given proper oral notice of termination. The employer did not argue any issue related to the six month limitation period for the filing of complaints, which it raised in its written submission. No facts were led by the employer with regard to this issue. It is clear from the evidence of Mr. Negrin that he contacted the Employment Standards Branch immediately after his dismissal, and proceeded with his complaint in a timely manner through discussions with the Branch and the filing of a written complaint.

Issue #1: Mr. Negrin

The one matter that is clear in this case is that the employer failed to give a written notice of termination as outlined in the *Act*. There are at least two inferences that can be drawn from the evidence tendered by the employer. The employer says it gave eight weeks oral notice. It also said that the employees were generally aware of impending lay-offs in the future. At the end of the employers case, it seemed to me that it was relying on two distinct theories e.g. an eight week "oral termination notice" and "general awareness by Mr. Negrin that he might be laid off in the future". I note that neither of these approaches constitutes proper notice of a termination as outlined in section 63(3) of the *Act*. Further the employer seemed to be confused as to whether the termination of the employees was intended to be temporary or permanent. The version proffered by Mr. Negrin is that he got two weeks notice of a layoff on the 15th of December and worked after the two weeks were up, vitiating the notice. It is my view that the most probable view of the evidence is that the employer generally warned Mr. Negrin that there might be lay-offs but failed to clearly outline the ultimate date his lay-off would become effective.

The employer wishes me to draw the inference that proper notice of a termination was given, where no notice was given in writing. The employer admitted in its written submission that it erred in failing to provide with notice. Section 63(3) of the *Act*, provides that an employer may discharge its liability for compensation resulting from termination, by the giving of written notice. There was no written notice given. There was evidence from Mr. Negrin that he felt that there was some chance of recall from layoff, in accordance with the past practice of the employer in previous layoff situations. In my view the Delegate correctly determined this point, and I am not persuaded any error was made.

Issue # 2: Mr. Noble

In my view there was an ample factual foundation for Mr. Noble to conclude that he was dismissed by Venco because of the criticism of his job performance by Nelson, Nelson's offer to release him early to apply for employment insurance benefits, the form of the notice and record of employment, and the transfer of a replacement worker into the position held by Mr. Noble. Further it is my conclusion, that there was an ample factual foundation for the Director's delegate to have concluded that Mr. Noble was terminated from his employment without the giving of any notice.

The *Act* requires written notice for termination of employment, however, on the employer's own evidence it terminated Mr. Negrin without the giving of written notice. It then goes on to say while the documents apparently reflect that Mr. Noble would not be recalled (eg. terminated), that I ought to conclude his layoff was temporary and he was recalled. The employer should not be permitted to take advantage of its own ambiguity and "mistaken" conduct.

ORDER

Pursuant to section 115 of the *Act*, I vary the amount of compensation to Mr. Negrin to $3,396.00 , plus vacation pay and interest calculated in accordance with s. 88 of the *Act*, and otherwise confirm the Determination of October 30, 1998.

Paul E. Love
Adjudicator
Employment Standards Tribunal