Employment Standards TRIBUNAL

An appeal

- by -

Aggressive Roadbuilders Limited
("Aggressive")

- 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.: 2001/712

DATE OF HEARING: January 24, 2002

DATE OF DECISION: January 30, 2002

DECISION

APPEARANCES:

On behalf of Aggressive Roadbuilders Limited:	Matthew Brooks, General Manager Gary Haverty
On her own behalf:	Sonja L. Hamnes

OVERVIEW

This is an appeal by Aggressive Roadbuilders Limited ("Aggressive"), pursuant to Section 112 of the Employment Standards Act ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued September 19, 2001. The Director found that Aggressive contravened Section 63 of the Act in failing to pay Sonja Hamnes compensation for length of service, and Ordered that it pay $6,249.10 in wages and interest to the Director on Ms. Hamnes' behalf.

ISSUE TO BE DECIDED

Whether the Director erred in law in determining that Ms. Hamnes was entitled to compensation for length of service. Aggressive contends that it is exempt from paying compensation as it falls within s. 63(1)(e) of the Act. It also contends that Ms. Hamnes was covered by a collective agreement, and thus, was exempt from the application of s. 63 by virtue of s. 65(3).

FACTS

Ms. Hamnes worked as a flag person for Aggressive, a construction business, from September 22, 1990 to December 2000. She contended that she worked continuously for 10 years, except for Christmas vacations. She received a temporary lay off on December 20, 2000, and was told verbally that she would be called back to work on or about January 15, 2001. She was not called back to work, and contended she was not paid compensation for length of service. Ms. Hamnes did not dispute Aggressive's contention that she was laid off each Christmas for anywhere between 2 weeks and 2 months. She also agreed that, each year, Aggressive would issue her an ROE upon request.

Aggressive contended that, because it was in the construction business, Section 63(1)(e) of the Act operated to exclude it from a statutory obligation (pursuant to section 63(2)) to pay Ms. Hamnes compensation for length of service.

The delegate found that section 63(2) created a statutory liability on Aggressive to pay Ms. Hamnes eight weeks compensation. She concluded that section 65(1)(e) did not apply, since Ms. Hamnes worked at a succession of projects for Aggressive in the 10 years of her employment.

ARGUMENT

Aggressive contends that the delegate erred in both the application of the law, and in the facts. It submits that it is a seasonal company, and lays its employees off each year. Further, it submits that Ms. Hamnes was a member of the Construction and Allied Workers Union, Local #68, and that she was subject to a collective agreement.

Ms. Hamnes argues that, at the time her complaint was filed, she was not covered by a collective agreement. She provided a copy of a letter from the Labour Relations Board dated March 12, 2001, stating that it had granted the application by certain employees to revoke the voluntarily recognized bargaining rights between local No. 68 (Construction and Allied Workers' Union) and Aggressive Roadbuilders Ltd. Ms. Hamnes also indicates that, although Aggressive appeared to have paid union dues of $35.30 on her behalf on January 11, 2001, she had not worked since December 20, 2000. Ms. Hamnes' complaint was filed March 16, 2001.

The Director states that Aggressive did not argue that Ms. Hamnes was covered by a collective agreement at the time of the investigation. She notes that, in any event, Ms. Hamnes was not covered at the time the complaint was filed. She contends that, as Aggressive has presented no new evidence, the complaint should be dismissed.

ANALYSIS

The burden of establishing that a Determination is incorrect rests with an Appellant. I find that Aggressive has met that legal burden.

Section 65 of the Act provides that

> ...
> (3) Section 63 does not apply to
> ...
> (b) an employee covered by a collective agreement who
> (i) is employed in a seasonal industry in which the practise is to lay off employees every year and to call them back to work.
> (ii) was notified on being hired by the employer that the employee might be laid off and called back to work, and
> (iii) is laid off or terminated as a result of the normal seasonal reduction, suspension or closure of an operation.

I find that section 63 was not applicable to Ms. Hamnes, as she fell within the provisions of section 65(3). She was a member of a union at the time her employment ended, and presumably continued to be until the local was decertified. Although the delegate states that Aggressive did not raise that argument during the investigation, it is nevertheless a fact that cannot now be ignored. In any event, I note that although Ms. Hamnes indicated that she was not covered by a collective agreement on her complaint form, she then noted "recently de-certified from CLAC Local 68". That ought to have alerted the delegate to the issue, whether or not it was raised by Aggressive.

Further, there was no dispute that Ms. Hamnes was laid off every year over the Christmas season, and often into February, along with other employees, due to the normal seasonal reduction of Aggressive's operation.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination dated September 19, 2001 be cancelled.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal