Employment Standards TRIBUNAL

An appeal

- by -

Hagensborg Foods Ltd.
("Hagensborg")

- 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: Shafik Bhalloo

FILE No.: 2008A/33

DATE OF DECISION: May 16, 2008

DECISION

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "Act") brought by Hagensborg Foods Ltd. ("Hagensborg") of a Determination of a delegate ("Delegate") of the Director of Employment Standards ("Director") issued on February 15, 2008. The Determination ordered Hagensborg to pay to three former employees, namely Kuldip Bhullar ("Bhullar"), Phuong Lan Bui ("Bui") and Arita Rokni ("Rokni") (collectively the "Complainants") a total of $27,451.02, representing unpaid wages (regular wages, annual vacation pay and overtime pay) and compensation for length of service and accrued interest.

2. The Determination also imposed on Hagensborg three administrative penalties in the amount of $500.00 each for a total of $1,500.00.

3. Hagensborg, in its appeal, asserts that the Director erred in law in making the Determination in awarding the Employees compensation for length of service and is requesting the Tribunal to change or vary the Determination by reversing the Director's Determination in this regard. Hagensborg is not challenging any other awards in the Determination.

4. Hagensborg, in its Appeal Form, also sought a suspension of the Determination in part while the Determination is under appeal. However, the Tribunal denied that request in advance of this decision, particulars which are set out in the Tribunals letter decision dated April 17th, 2008, which was sent to all parties.

5. Hagensborg is not requiring an oral hearing and in my opinion, Hagensborg's appeal can be properly adjudicated on the written submissions of the parties without resort to an oral hearing. Accordingly, this appeal will be decided based on the written submissions of the parties, a Section 112(5) "Record" and the Reasons for the Determination.

ISSUE

6. Did the Director err in law in finding that Hagensborg contravened section 63 of the Act in relation to the Complainants? More specifically, did Hagensborg issue a proper notice of termination to the Complainants under Section 63 of the Act?

FACTS

7. Hagensborg operated a chocolate manufacturing business which closed on or about March 31, 2007.

8. The Complainants filed complaints ("Complaints") under Section 74 of the Act alleging that Hagensborg contravened the Act by failing to pay regular and overtime wages, vacation pay and compensation for length of service.

9. The Delegate investigated the Complaints and issued a Determination on February 15, 2008. As Hagensborg is not contesting the awards made to the Complainants in the Determination relating to regular and overtime wages as well as vacation pay, I will not reference the parties' evidence relating to those awards here. I will, instead, focus on the evidence of the parties relating to the termination notice, which is in issue in this appeal.

10. According to the Delegate, while the Complainants did not individually receive any written notice of termination of their employment Hagensborg held a staff meeting on February 9, 2007 and advised all staff that Hagensborg would cease manufacturing on February 28, 2007. Apparently, the Complainants were in attendance at the said meeting and apprised of this news. Thereafter, on March 1, 2007, Hagensborg posted a letter (the "Letter") throughout the office delineating its intention to extend its operation until March 31, 2007. As the Letter is a very brief one, I have decided to set it out in full below:

> Hagensborg Foods Ltd.
> 1576 Rand Ave.
> Vancouver, B.C.
> V6P 3G2
>
> Mar. 1, 2007
>
> RE: Closing of the operation
>
> To: All employees of Hagensborg Foods Ltd.
>
> This letter serves to re-confirm discussions from our general meeting. On Feb 9, 2007 as Robin Relph, Shelley Miller and all staff members were present at this meeting it was discussed that Hagensborg would cease manufacturing as of February 28. On Feb 22, 07 it became apparent that Hagensborg would extend its operation until March 31, 07 for the sole reason of filling orders for our private label customers.
>
> I understand this is a very difficult time for all of you and I sincerely thank you all for your patience and understanding. If any of you need to address me in private please feel free to stop by my office.
>
> Warm Regards,
>
> *"Shelley Miller"*
>
> Shelley Miller
> President

11. The Section 112(5) "Record" in the appeal also contains a fax from Hagensborg attaching an e-mail from Hagensborg's president sent to all Employees on March 1, 2007 containing almost identical information to that contained in the Letter. The email shows that it was sent on March 1, 2007 and it appears that the email is addressed to, among others, two of the Complainants, namely Rokni and Bhullar (the latter is referred to as "Raja" in the email), although the Delegate only notes that Rokni received the email.

12. In the Determination, the Delegate characterizes the issue of termination notice as follows:

> The Employees were notified in writing on March 1, 2007 that the Employer would cease its operations as of March 31, 2007. The issue here is whether this letter constitutes written notice of termination as required by the Act.

13. The Delegate then goes on to conclude in the Determination:

> The [L]etter does not state that the employment of the Complainants would terminate on March 31, 2007. Ceasing manufacturing or operation cannot be taken to mean termination of employment. The employer might decide to extend operation again as it had done previously. As for the employees, their obligation was to continue working until formally given a written notice of termination which must include a clear statement of when the termination is to be. In my view, the letter of March 1, 2007 is not a written notice of termination. It merely recapitulated the discussions at the general meeting and informed the employees of the further extension of the business operation.
>
> The purpose of written notice of termination is to give the employee an exact date when the employment would end so that they are able to make plans for the future. The Complainants were present at the meeting on February 9, 2007 and were aware of the discussions about the intended closure of the business. However, the discussion or verbal decision does not satisfy the statutory requirement that a notice of termination has to be in writing.
>
> I, therefore, find that the employer has contravened Section 63 of the Act as it did not provide written notice of termination of employment or pay compensation for length of service to the Complainants.

HAGENSBORG'S SUBMISSIONS

14. Hagensborg submits that the Letter that was posted throughout the company and a similar message sent via email to one of the Complainants, Rokni, on the same date constituted written notice of termination as required by Section 63 of the Act. Hagensborg argues that the Director committed an error by concluding that cessation of manufacturing or operation by Hagensborg as described in the Letter and the email Rokni received could not be taken to mean termination of employment of the Complainants. Hagensborg relies on the decision in *Sun Wah Supermarket Ltd.* [1996] BC ESD #D324/96 to support its position.

15. Hagensborg further submits that the Director committed an error in concluding that no clear written statement of termination was provided to the Employees simply because Hagensborg extended the earlier announced cessation date for its business from February 28 to March 31. According to Hagensborg, the Act is not intended to prevent employers from changing or revising termination dates.

16. Hagensborg also points out that the Director, in the Determination, implies that the requirement of providing written notice of termination to employees under Section 63 of the Act would have been satisfied by Hagensborg if the latter simply conveyed its oral decision to cease its operations at the February 9, 2007 meeting in writing to the Complainants. On that basis, Hagensborg questions why the Letter is not proper termination notice when what was conveyed to its staff (including the Complainants) at the February 9, 2007 meeting was similar in substance to what was conveyed to them in writing in the subsequent Letter. According to Hagensborg, both the February 9, 2007 oral communication to the Complainants as well as the subsequent written communication in the form of the Letter was clear statements of when termination of the Complainants employment was scheduled to occur.

DIRECTOR'S SUBMISSIONS

17. The Director submits that the *Sun Wah* decision that Hagensborg relies upon in its submissions can be factually distinguished in this case. In particular, the Director argues that in *Sun Wah*, each employee received a termination letter stating, "the Company will prepare all the separation formalities and documents including the separation slips for all the employees". Hagensborg's Letter did not contain such information and according to the Director, Hagensborg's notice lacked indication or notice of "finality of employment" to the Employees. Furthermore, according to the Director, Hagensborg had previously extended its operations for the "sole reason" of filling orders for customers and therefore, "it is anybody's guess as to whether the operation would be further extended".

18. Finally, the Director disputes Hagensborg's assertion that there was "any indication in (the) determination that if the discussions (with the staff in Hagensborg's meeting) of February 9, 2007 were put in writing, it would satisfy the requirement of written notice". According to the Director, the minutes of Hagensborg's February 9, 2007 meeting with its staff would not have constituted a valid notice of termination.

SUBMISSIONS OF THE EMPLOYEES

19. The Complainants did not make any submissions on the penultimate issue in this appeal-i.e. whether Hagensborg issued a proper notice of termination in compliance with Section 63 of the Act. The Complainants submission are limited to the request of Hagensborg to suspend the Determination in part pending the appeal which, as previously indicated, the Tribunal dealt with in its letter of April 17, 2008.

ANALYSIS

20. Subsections 63(1) and (2) of the Act establish a statutory liability on an employer for length of service compensation to a qualifying employee. This statutory liability is "deemed to be discharged" under Subsection 63(3) of the Act where the employer provides a prior written notice of termination to the employee. More specifically, Subsection 63(3) states:

> (3) The liability is deemed to be discharged if the employee
>
> (a) is given written notice of termination as follows:
>
> (i) one week's notice after three consecutive months of employment;
>
> (ii) two weeks' notice after twelve consecutive months of employment;
>
> (iii) three weeks' notice after three consecutive years of employment, plus one additional week for each additional year of employment to a maximum of eight weeks' notice.

21. Having said this, it should be noted that the onus is on the employer to establish that written notice was provided to the employee as mandated under Subsection 63(3) of the Act, if the employer is to be discharged from its liability for compensation for length of service in Subsections 63(1) and (2) of the Act. In the case at hand, in my view, Hagensborg did not provide an appropriate notice of termination when it orally conveyed to its staff including the Complainants at the February 9, 2007 meeting of its intention to cease manufacturing on February 28, 2007. Oral or verbal communication of cessation of employment would not satisfy the requirement of written notice of termination in Subsection 63(3) of the Act, without commenting on the substance of the communication in question.

22. With respect to the Letter of March 1, 2007 from Hagensborg which was posted throughout Hagensborg's office purporting to extend the date for the cessation of its manufacturing operations from February 28, 2007 to March 31, 2007 as well as the similarly worded email of same date that Hagensborg sent to its staff (which Rokni acknowledges receiving), it is my view that neither documents, substantively speaking, constitute proper termination notice although they meet the formality of writing in a termination notice required under Subsection 63(3). More specifically, both the Letter and the email do not state that each employee would be terminated from their employment effective March 31, 2007. Both these documents simply indicate that Hagensborg will cease its operations as of that date. Hagensborg may argue that its employees including the Complainants could deduce from the substance of one or both these documents that their employment would cease when Hagensborg ceases its operations, however, I am not convinced that the language in the documents is clear and unequivocal in terminating the employment of all employees including the Complainants.

23. While Hagensborg relies on the *Sun Wah* decision to argue that the result in that decision should follow in the case at hand due to the factual similarities in both cases, I find that *Sun Wah* is factually distinguishable in a significant way. In *Sun Wah*, the written notice did not specifically state that each employee was to be terminated effective a specific date, but the Tribunal accepted the notice in that case as a valid written notice of termination within the meaning of Section 63(3) of the Act in light of the specific reference in the written notice to all employees that "separation formalities and documents including separation slips" would be issued to them. It was on that basis that the Director and subsequently, the Tribunal found the Company's notice to be a valid termination notice. In the case at hand, neither the Letter nor the similarly worded email of Hagensborg contains the type of language in *Sun Wah* or other wording that is clear and unequivocal in indicating to Complainants that their employment would come to an end on a date certain. It is important for employers to understand that if they are to rely upon Section 63(3) of the Act and obtain a discharge of the obligation to pay employees termination pay under Subsections 63 (1) or (2) of the Act, the notice of termination has to, in clear and unequivocal terms, inform the employee that his or her employment will terminate on a date certain in the future. A general notice to all employees that the plant or office is ceasing operations will not do. Indeed there are instances where the operations of the employer may cease on a specific date but where one or more employees continue working beyond that date to assist with some necessary work related to closure of a business.

24. Having determined that the Letter and the similarly worded email of Hagensborg was not proper notice under Subsection 63(3) of the Act, I am not required to address the question or issue raised in Hagensborg's submission relating to the ability of an employer to extend the originally scheduled termination date but would like to comment on the subject. I espouse and support the view of the Tribunal in *Re: G.A. Fletcher Music Co.* BC EST #D213/97, that it is permissible under the Act to extend a termination date previously established by lawful written notice. However, for the extension to have any retroactive effect, it must be issued in writing, prior to the expiration of the original notice period. In the instant case, the purported notice which was given orally to staff and the Complainants at the February 7, 2007 meeting was not a lawful "written notice" and therefore could not be extended by a written notice or have any retroactive effect (and besides, as indicated, it was substantively deficient to be considered proper notice of termination).

ORDER

25. Pursuant to Section 115(a) of the Act, I order that the Determination be confirmed as issued, together with any interest, as accrued under Section 88 of the Act.

Shafik Bhalloo
Member
Employment Standards Tribunal