



BC EST # D076/96

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act

- by -

Finlay Forest Industries Inc.
(" Finlay ")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Hans Suhr

FILE NO.: 96/132

DATE OF DECISION: May 3, 2001

DECISION

OVERVIEW

This is an appeal by Finlay pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against Determination No. CDET 000938 issued by the Director of Employment Standards (“Director”) on January 29, 1996. In this appeal Finlay claims that no compensation for length of service is owed to Gail Bowman (“Bowman”) or alternatively, if it is determined that compensation for length of service is owed, the amount calculated by the delegate of the Director is incorrect.

Consideration of this appeal falls under the transitional provisions of the *Act*. Section 128 (3) of the *Act* states:

If, before the repeal of the former Act, no decision was made by the director, an authorized representative of the director or an officer on a complaint made under that Act, the complaint is to be treated for all purposes, including section 80 of this *Act*, as a complaint under this *Act*.

I have completed my review of the written submissions made by counsel on behalf of Finlay and the information provided by the Director.

FACTS

Bowman commenced employment with Finlay Forest Industries Ltd. on October 6, 1993 and last worked on August 25, 1995.

Bowman filed a complaint with the Employment Standards Branch on October 13, 1995 alleging that her employment was terminated without written notice and therefore she was requesting termination pay.

The Registrar of Companies search reveals that Finlay Forest Industries Inc., (the successor to Finlay Forest Industries Ltd.) was incorporated January 1, 1995 and registered in British Columbia as an “Extra Provincial Company” on September 20, 1995.

The delegate of the Director investigated Bowman’s complaint, determined that compensation for length of service was owed and, subsequently, determination # CDET 000938 was issued for the amount of \$1,034.25.

ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether the employer is liable for the payment of compensation for length of service pursuant to section 63 or whether the employment relationship falls under the exceptions set forth in section 65 of the *Act*.

ARGUMENTS

Counsel for Finlay argues that:

- Bowman was not terminated in June 1995 as she worked for approximately 3 weeks in August 1995;
- Bowman was employed on a series of “definite term” contracts until September 30, 1994;
- Bowman then commenced employment on October 3, 1994 on a “casual” contract pursuant to which the Employer could request her to come into work for temporary periods and she, at her option, could decline to do so;
- the terms of the “casual” contract place it into the exceptions set forth in section 65 (1) (a)
- section 65 (2) cannot be considered in isolation as the delegate of the Director has done;
- in any event, if the Tribunal decides that Bowman is entitled to notice, the amount of notice would be 2 weeks’;
- the calculations performed by the delegate of the Director with respect to the amount of termination pay are incorrect.

The Director contends that:

- Bowman was employed on several definite term contracts which ended September 30, 1994 at which time she was employed on a “casual” contract basis until her last day of work;
- pursuant to section 65(2) of the *Act*, as Bowman was employed for at least 3 months after completing the definite term, her employment is deemed to not be for a specific term and is deemed to have started at the beginning of the definite term;
- the amount of termination pay owing to Bowman is 2 weeks’ wages calculated as 37.5 hrs.(normal hours per week) x \$13.79 (hourly rate) x 2 = \$1,034.25

ANALYSIS

There is no dispute that Bowman worked for Finlay up to August 25, 1995, and in the absence of any evidence to the contrary, it was at that time her employment was terminated.

The purposes of the *Act* are set forth in section 2, which states:

Purposes of this Act

The purpose of this Act are to

- (a) ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment,
- (b) promote the fair treatment of employees and employers
- (c) encourage open communication between employers and employees
- (d) provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act,
- (e) foster the development of a productive and efficient labour force that can contribute fully to the prosperity of British Columbia, and
- (f) contribute in assisting employees to meet work and family responsibilities.

The temporary work employment contract between Bowman and Finlay must be considered in the context of the purposes of the *Act* as outlined in section 2 above.

The temporary work employment contract is undated, does not contain any start date nor does it define the period covered by the contract.

As well, the parties to any contract of employment may not agree to provisions which waive the minimum requirements of the *Act* as set forth in section 4. Section 4 of the *Act* states:

Requirements of this Act cannot be waived

The requirements of this Act or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61 and 69.

A review of the payroll stubs issued to Bowman indicates that Finlay treated Bowman as being terminated at the end of each pay period because they issued vacation pay on each pay cheque. The former Act did not permit an employer to pay vacation pay on each pay cheque, in fact, the only time vacation pay was payable was just prior to an employee's annual vacation or upon the termination of the employee. The vacation pay is itemized on each payroll stub as "vac pay on term".

It is clear that, the temporary work employment contract notwithstanding, that Finlay treated Bowman as if she was terminated at the end of each pay period and ensured that all wages and vacation pay owing at the time of termination were paid. This practice continued for the entire period of Bowman's employment.

For the above reasons, I conclude that Bowman was employed for a series of "definite terms" and therefore, pursuant to section 65 (2) of the *Act*, Bowman's employment is deemed to have commenced on October 6, 1993 and terminated on August 25, 1995.

Bowman is therefore entitled to compensation for length of service, and, as has been stipulated by Finlay, the amount is equal to 2 weeks' wages calculated pursuant to section 63 (4) which states:

- (4) The amount the employer is liable to pay becomes payable on termination of the employment and is calculated by
 - (a) totaling all the employee's weekly wages, at the regular wage, **during the last 8 weeks in which the employee worked normal or average hours of work,**
 - (b) dividing the total by 8, and
 - (c) multiplying the result by the number of weeks' wages the employer is liable to pay. (emphasis added)

As this employee worked an intermittent schedule, I must then consider the last 8 weeks in which the employee worked **normal or average hours of work**. Any week in which the employee earned less than 50% of the employee's weekly wage is, pursuant to section 62, deemed to be a week of layoff. Any week of layoff is not to be included in the calculation of the 2 weeks entitlement.

Based on the payroll records provided, I have concluded that the last 8 weeks in which Bowman earned at least 50% of her normal weekly wage are:

- May 1 - 5
- May 8 - 12
- May 15 - 19(* she only worked 58 hours [7 days] from May 16 - 31)
- May 29 - June 2
- June 5 - 9
- Aug. 7 - 11
- Aug. 14 - 18
- Aug. 21 - 25

The total earnings during these 8 weeks was \$4,199.07 therefore the calculation of the 2 weeks wages is as follows:

$$\$4,199.07 \div 8 \times 2 = \underline{\underline{\$1,049.76}}$$

ORDER

Pursuant to Section 115 of *Act*, I order that Determination No. CDET 000938 be varied to be in the amount of \$1049.76 .

Hans Suhr
Adjudicator
Employment Standards Tribunal

May 3, 2001

Date

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