Employment Standards TRIBUNAL

An appeal

- by -

Mato's Consulting Ltd.

- 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: Yuki Matsuno

FILE No.: 2008A/84

DATE OF DECISION: October 16, 2008

DECISION

SUBMISSIONS

Kevin Wilkinson	for Mato's Consulting Ltd.
Tyler Siegmann	for the Director of Employment Standards

OVERVIEW

1. The Employer appeals a Determination of the Director of Employment Standards (the "Director") issued June 26, 2008 (the "Determination"), pursuant to section 112 of the *Employment Standards Act* (the "*Act*"). The Determination arose from complaints (the "Complaints") filed with the Employment Standards Branch by Carolyn Bodin and David Bodin (the "Employees") on April 3, 2008. A delegate of the Director (the "Delegate") found in the Determination that the Employer had contravened sections 63 and 58 of the *Act* when it did not pay the Employees compensation for length of service and annual vacation pay upon the termination of their employment. The Delegate ordered the Employer to pay the Employees a total of $12,255.08, inclusive of interest in the amount of $383.08 calculated under section 88 of the *Act*.

2. The Delegate also imposed an administrative penalty of $500.00 on the Employer, as prescribed by section 29 of the *Employment Standards Regulation*, for contravening section 63 of the *Act*. The total amount of the Determination is $12,755.08.

3. The Employer now appeals the Determination. Because a finding of credibility is not essential to the disposition of this appeal and no viva voce evidence is otherwise required, I will decide this appeal on the basis of the submissions of the Employer and the Director, as well as the s. 112(5) Record. I have reviewed and carefully considered these documents in coming to my decision.

BACKGROUND

4. According to the Determination, the employer operates a small transport business, the sole purpose of which is to carry out a contract (the "Contract") with Brink Forest Products Ltd. ("Brink") by coordinating the collection of bulk trim blocks at AbitibiBowater ("Abitibi") planer mills in Mackenzie, B.C. for delivery to Brink. The Employees were both employed by the Employer as truck drivers for over 8 years, and their primary duty was to perform the services outlined in the Contract. On November 29, Abitibi announced it would idle its operations in Mackenzie in January 2008 due to poor market conditions in the lumber industry. As a result, Brink temporarily suspended the Contract. On November 30, 2008, the Employer temporarily laid off the Employees. The Employees filed their complaint to the Employment Standards Branch on April 3, 2008 and had not been recalled back to work as of the date of the Determination.

5. The Delegate found that 13 consecutive weeks of layoff for the Employees started December 1, 2007 and ended February 29, 2008. As a result, on March 1, 2008, the Employees' temporary layoff became a termination by virtue of the definitions of "temporary layoff" and "termination of employment" in section 1 of the *Act*, with the date of termination being December 1, 2007 by operation of section 63(5) of the

Act. Next, the Delegate went on to consider the Employer's argument that it should not be liable for compensation of length of service under section 63 of the *Act* because it is exempted under section 65(1)(d) of the *Act*, which states:

> 65(1) Sections 63 and 64 do not apply to an employee . . .
>
> (d) employed under an employment contract that is impossible to perform due to an unforeseeable event or circumstance other than receivership, action under section 427 of the Bank Act (Canada) or a proceeding under an insolvency Act . . .

6. The Employer argued that Abitibi's decision to idle its operations in Mackenzie was unforeseeable and uncontrollable on its part. It provided two witnesses who provided the Delegate with statements that supported its argument. In the Determination, the Delegate found that the temporary loss of the Contract as a result of the Abitibi shutdown was not an unforeseeable event or circumstance within the meaning of section 65(1)(d).

7. The Employer now appeals the Determination on the grounds that the Director (represented by the Delegate) erred in law in making the Determination because of his findings with respect to section 65(1)(d). The Employer also complains in his final reply that the Self-Help Kit was not used by the Employees and that there are factual errors in the Complaints. The Employer says that the Determination should be cancelled as a result.

ISSUE

8. Did the Delegate err in law in making the Determination?

ARGUMENT AND ANALYSIS

Error of Law

9. The Tribunal has established jurisprudence on how to determine whether an error in law has been made. In *Britco Structures Ltd*., BC EST #D260/03, the Tribunal noted that panels have used the following definition of "error of law", set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia* (Assessor of Area #12 – Coquitlam), [1988] B.CJ. No. 2275 (B.C.C.A.):

1. a misinterpretation or misapplication of a section of the *Act*;
2. a misapplication of an applicable principle of general law;
3. acting without any evidence;
4. acting on a view of the facts which could not reasonably be entertained; and
5. adopting a method of assessment which is wrong in principle.

Section 65(1)(d)

10. The Employer argues that the Delegate erred in law when he found that the temporary suspension of the Contract was not an "unforeseeable event or circumstance" within the meaning of section 65(1)(d) of the *Act*. The Employer says the suspension of the Contract was not foreseeable by him:

> I have been in this business since 1980 and have weathered many difficult times and in this respect I do agree with you that there is an ebb and flow of business within the Forest Industry. I have, in fact, weathered curtailments, strikes, effects of the Softwood Lumber Agreement / Quota system and bad weather on many occasions which is to be expected and is definitely foreseeable in this Industry, but none of these curtailments lasted longer than a few weeks. I was able to foresee these previous curtailments based on media, word of mouth of employees in the community, and own perceptions of the industry, as I was not privy to financial reports from the operations nor was I invited to the meetings which preceded these curtailments/shutdowns which is the case here.
>
> The events that were NOT foreseeable were the collapse of the US mortgage system, the drop of the US dollar, and the merger of Bowater with Abitibi Consolidated Ltd and their ultimate decision to dismantle the papermill. These situations caught thousands of people by surprise as you can well imagine.
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> . . . . I maintain that this operations was not ceased by myself, nor was it ceased by a misfortune, but as a result of a merger between two companies which is certainly not a foreseeable event. If Mackenzie was one of the worst producing mills in the Abitibi family, this decision would have made much more sense and would have given us all the ability to foresee the eventual loss of our jobs.

11. In contrast, the Delegate argues:

> The Director takes the position that the deterioration of the Appellant's business due to a suspension in a contract cannot be construed as [an] unforeseeable event or circumstance within the context of section 65(1)(d) of the *Act*. Although a collapse in the BC forest industry and its effects on mills are difficult to predict, it is not incapable of being anticipated. Whether marketplace conditions are good or poor, it is not uncommon during the ebbs and flows of a business cycle for contracts to be won, lost or even temporarily suspended. As a result, the events and circumstances the Appellant experienced cannot be interpreted as unforeseeable.

12. Previous decisions of the Tribunal have dealt with section 65(1)(d). As expressed by the Delegate in the Determination, the first principle that must be kept in mind is that:

> . . . the Act is remedial legislation and an interpretation that extends its protection to as many employees as possible is favoured over one that does not (see Machtinger v. HOJ Industries Ltd. (1992) 91 D.L.R. (4th) 491 (S.C.C.)). This approach is consistent with the purpose of section 2 of the Act which is to ensure employees in British Columbia receive at least the basic standards of compensation and conditions of employment.

13. Because of the larger remedial approach of the *Act*, any exceptions to the entitlements it provides should be interpreted narrowly. With respect to section 65(1)(d) in particular, the Tribunal held in *Pro-Tru-Tec Investments Ltd*, BCEST #D207/00:

> The exception to compensation for length of service contained in Section 65(1)(d) is to be used cautiously. Employers face changes in the marketplace, and employees have little recourse other

> than to seek other employment if they are terminated. The requirements for notice are intended to shield employees from some of the consequences of changes in an employer's business, See [*sic*] *Re ARFI Holdings Ltd.* BC EST #D054/97. . . .

14. This passage recognizes that employers face changes in their business situation where they are no longer in a position to offer employment to their employees. In those cases, the notice requirements are in place to protect employees to a limited extent from these consequences. Any provision which limits such protection for employees must be interpreted narrowly. The Tribunal held in *Labyrinth Lumber*, BCEST #D407/00 that the key to the interpretation of section 65(1)(d) is the interpretation of the terms "impossible" and "unforeseeable":

> . . . the validity of this argument turns on a consideration of the terms "impossible" and "unforeseeable" in paragraph 65(1)(d). Section 63 and 64 of the *Act* would apply to the employees unless it was *both* impossible to perform the employment contract *and* that impossibility of performance was due to an unforeseeable event or circumstance.
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> . . . .
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> The term "impossible" connotes that something is not capable of occurring or being
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> accomplished or dealt with; or is unable to exist, happen or be achieved. . . . In its ordinary and grammatical sense, unforeseeable means incapable of being anticipated. . . .

15. In *ARFI Holdings Ltd.*, BCEST #D054/97, the Tribunal held with respect to the meaning of "unforeseeable":

> The word "unforeseeable" should be interpreted cautiously. It would seriously undermine the minimum protections given employees by the *Employment Standards Act* to deny them length of service compensation when their employer encounters a difficulty in the marketplace, be it a product market or a real estate market.

16. The Delegate found in the Determination that the "it was impossible for the Complainants to perform their jobs given the Abitibi shutdown". I agree with that finding. I also agree with the Delegate's finding that the temporary suspension of the Contract was not "unforeseeable":

> Mato's operation relies solely on the Contract. Its business was neutralized by Brink when the Contract was suspended. In essence, Mato's experienced a decline to its business. A deterioration to a business cannot be construed as a unforeseeable event or circumstance in the context of section 65(1)(d). The Tribunal has held in past situations that the loss of a contract which leads to the termination of employees is not an unforeseeable event or circumstance that is incapable of being anticipated (see *Finalay [sic] Contracting Ltd.* BCEST #D396/01 and *M.J.M. Conference Communications of Canada Corp.* BC EST #D182/04).

17. When parties enter into a contract, the end of the contract is something that is capable of being anticipated by the parties and is usually provided for in the terms of the contract. For instance, a contract may have an end date; it may have provisions for renewal; or it may outline circumstances in which the contract ends automatically. In this case, the Contract between the Employer and Brink, titled "Bulk Trim Collection Agreement" and made as of September 1, 2004 provides in part:

> Termination
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> - The parties agree that at any time either party can terminate this agreement by giving 30 days written notice.

18. Clearly, the Employer and Brink contemplated in the Contract that the Contract itself could come to an end upon 30 days written notice by either party at any time. The Employer and Brink chose not to limit the reasons for which the Contract could be terminated; therefore, presumably, the Contract could be terminated by either party for lack of work. The language of the Contract itself shows that the parties to the Contract, including the Employer, contemplated or foresaw a possible end to the Contract, and by extension, a possible end to the work that the Contract covers. There is no guarantee in the Contract that it will continue in perpetuity.

19. The Employer says that it has encountered curtailments of work before, but not to the length that has occurred with the Contract. The Employer appears to still hold out hope for more work to come its way and emphasizes that Contract is still in good standing, even if at this time it is impossible to fulfil the Contract because of the mill closure. In its submissions, the Employer alludes to the circumstances of the communities that are affected by the deterioration of the forest industry; clearly the Employer and others are facing difficult times. However, this situation does not relieve the Employer from the obligation to compensate the Employees for length of service under section 63 of the *Act*. As the Tribunal held in *ARFI Holdings Ltd.*, above, "It would seriously undermine the minimum protections given employees by the *Employment Standards Act* to deny them length of service compensation when their employer encounters a difficulty in the marketplace". In this case, the Employer has encountered a difficulty, albeit a serious difficulty, in the marketplace that cannot be said, in all the circumstances, to have been unforeseeable. In this case, I find that there has been no misinterpretation or misapplication of the *Act* and I find that the Employer is not exempted under section 65(1)(d) to pay compensation for length of service.

Self-Help Kit

20. The Employer argues that the Self-Help Kit was not used by the Employees and that there are factual errors in the Complaints to the Employment Standards Branch and that the Determination should be cancelled as a result. I note that the Employer brought up the argument only in his final reply. The Director did not get a chance to reply to the argument, nor is it necessary given my conclusions. I note that the Complaints both indicate: "I have been advised by the Employment Standards Branch not to use the self-help kit for the following reason: former employer refused contact on this matter." The Employer denies in its final reply that it ever refused contact or refused to return the Employees' calls.

21. With respect to how complaints are filed with the Employment Standards Branch, section 74 applies:

> **74**(1) An employee, former employee or other person may complain to the director that a person has contravened
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> (a) a requirement of Parts 2 to 8 of this Act, or
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> (b) a requirement of the regulations specified under section 127 (2) (l).
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> (2) A complaint must be in writing and must be delivered to an office of the Employment Standards Branch.
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> (3) A complaint relating to an employee whose employment has terminated must be delivered under subsection (2) within 6 months after the last day of employment.
>
> . . . .

22. The Employees' complaints satisfied the requirements of this provision. Once the Director receives a complaint made under section 74, section 76 applies:

> **76** (1) Subject to subsection (3), the director must accept and review a complaint made under section 74.
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> (2) The director may conduct an investigation to ensure compliance with this Act and the regulations, whether or not the director has received a complaint.
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> (3) The director may refuse to accept, review, mediate, investigate or adjudicate a complaint or may stop or postpone reviewing, mediating, investigating or adjudicating a complaint if
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> . . . .
>
> (d) the employee has not taken the requisite steps specified by the director in order to facilitate resolution or investigation of the complaint . . . .

23. Under section 76(1), the Director is obliged to accept and review a complaint made under section 74, subject to section 76(3). Under section 76(3)(d), the Director may refuse to accept or review or may stop and postpone accepting or reviewing a complaint "if the employee has not taken the requisite steps specified by the director in order to facilitate resolution or investigation of the complaint". In my view, the Branch policy of requiring self-help kits is the general way in which the Director's discretion under this section is exercised. The legislation gives the Director discretion to accept and review a complaint without a self-help kit having been used and with respect to the Complaints, that is the path the Director chose. With respect to the alleged factual errors in the complaints, there is no obligation in the legislation that the Complaint must be free of errors. Once the Director accepts a complaint he is obliged to review the complaint and may conduct an investigation. Any relevant facts will be determined by the Director during the review and/or investigation, as was done in this case.

24. The Employer's arguments do not point to any misinterpretation or misapplication of the law. I find that there was no error of law when the Delegate accepted the Employee's complaints with alleged factual errors and without requiring a Self-Help Kit.

Result

25. The appeal does not succeed.

ORDER

26. Pursuant to Section 115 of the *Act*, I order that the Determination dated June 26, 2008 be confirmed.

Yuki Matsuno
Member
Employment Standards Tribunal