Employment Standards TRIBUNAL

An appeal

- by -

Widney Petroleum Inc.
(the "Employer")

- 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.: 2006A/106

DATE OF DECISION: October 31, 2006

DECISION

SUBMISSIONS

Dean Widney	for the Employer
Joe LeBlanc	for the Director of Employment Standards

OVERVIEW

1. Widney Petroleum Inc. appeals a Determination of the Director of Employment Standards (the "Director") issued June 9, 2006 (the "Determination"), pursuant to section 112 of the *Employment Standards Act* (the "*Act*").

2. In the Determination, a delegate of the Director (the "Delegate") found that the Employer had contravened section 58 of the *Act* when it calculated vacation pay for James Blair at the rate of 4% instead of 6% of total wages. The Delegate ordered the Employer to pay Mr. Blair $791.18, inclusive of interest calculated under section 88 of the *Act*.

3. The Delegate also imposed a $500.00 administrative penalty on the Employer for contravention of section 58 of the *Act*, prescribed by section 29 of the *Employment Standards Regulation* (the "*Regulation*"). The total amount of the Determination is $1291.18.

4. The Employer appeals the Determination on the grounds that there is new evidence that was not available at the time the Determination was made. The Director has filed a response to the appeal and provided a record of the documents that were considered in making the Determination. The Tribunal has decided that this appeal will be decided on the basis of the parties' submissions and the record.

ISSUE

5. Should the appeal be allowed on the basis that there is new and relevant evidence which was not available at the time of the Determination?

BACKGROUND AND ARGUMENT

6. Mr. Blair began working for Garry Limpright Inc. ("Limpright") as a fuel truck driver on June 20, 2000. Limpright had a contract with Shell Canada to distribute fuel in an area based out of Kamloops. In early 2002, the Employer took over responsibility for distributing fuel in this area and entered into an agreement to purchase Limpright's assets with a closing date of April 1, 2002 (the "Agreement"). The Agreement provided that Limpright would terminate Mr. Blair's employment effective the closing date and would "pay all wages, salaries, bonuses or other benefits, severance pay, notice or pay in lieu of notice and holiday pay owed to Blair in respect of any period prior to the time of the Closing Date." Limpright paid Mr. Blair all of the wages, overtime and vacation pay that he had earned with Limpright, but did not give Mr. Blair severance pay or written notice of termination of employment.

7. On April 4, 2002, Mr. Blair began working for the Employer, doing the same work as he did for Limpright. He continued to work for the Employer until February 3, 2006, when the Employer terminated his employment. The Employer's operation was taken over by another company, Westcan, which currently employs Mr. Blair.

8. After the termination of his employment with the Employer, Mr. Blair complained to the Employment Standards Branch that the Employer contravened the Act by paying him vacation pay at an incorrect rate. Mr. Blair says that vacation pay should be calculated at 6% because the appropriate period of employment started on June 20, 2000, when he began working for Limpright. He says that his employment with Limpright was never terminated and that he was an employee at the time Limpright's assets were transferred to the Employer on April 1, 2002. On the other hand, the Employer says that Mr. Blair's employment was terminated by Limpright on or before April 1, 2002 and that the period of employment for the purposes of calculating vacation pay should be considered to begin on April 4, 2002, when Mr. Blair commenced his work with the Employer.

9. The Delegate conducted a hearing of Mr. Blair's complaint on May 30, 2006, attended by Mr. Blair and on behalf of the Employer, Mr. Widney (by teleconference). Both Mr. Blair and Mr. Widney gave sworn testimony and submitted evidence. The Delegate found that Mr. Blair was an employee of Limpright when all or part of the Limpright's assets were disposed of to the Employer by way of the Agreement. The Delegate found that section 97 of the *Act* was triggered and Mr. Blair's employment was deemed to be continuous and uninterrupted by the disposition of assets. The Delegate found that for the purposes of calculating vacation pay owed by the Employer, Mr. Blair's employment commenced on June 20, 2000 and therefore, as of June 20, 2005, he was entitled to have vacation pay calculated at 6% under section 58(1)(b) of the *Act*.

10. The Employer appeals the Determination and submits new evidence which it says has become available and was not available at the time the Determination was being made. The new evidence is contained in a memorandum from Garry Limpright Inc., signed by Garry Limpright (the "Memorandum"). The Employer says in its submissions that Mr. Limpright was not available due to a family vacation to attend the hearing of the complaint on May 30, 2006. The Memorandum states in part: "This letter is to confirm that Jim Blair was given verbal Notice of Termination of Employment with Garry Limpright Inc. in April 2002. . . . A Record of Employment was issued to Jim Blair. I have moved from BC to Manitoba; my copy of the ROE is in storage in BC so I am unable to attach copy of same at this time. I do have Yearend Summary records showing that an ROE was produced for Jim Blair."

11. In reply, the Director says that he agrees that verbal notice was given to Mr. Blair. He says that regardless of any verbal notice given, Mr. Blair did not receive written notice, or severance pay, or a combination of both, before the disposition of the assets on April 1, 2002 and therefore Mr. Blair's employment is deemed to be continuous and uninterrupted from June 20, 2000 for the purposes of calculating vacation pay at the end of his employment with the Employer.

ANALYSIS

12. As the party bringing the appeal, the Employer has the burden of showing that the Determination is wrong and should be varied or cancelled. The Employer appeals the Determination under Section 112(1)(c) of the *Act*, on the ground that evidence has become available that was not available at the time the Determination was being made. When a person appeals a Determination on this ground, all of the following four conditions must be met before the evidence will be considered by the Tribunal:

1. the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;

2. the evidence must be relevant to a material issue arising from the complaint;

3. the evidence must be credible in the sense that it is reasonably capable of belief; and

4. the evidence must have high probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

(Bruce Davies and others, Directors or Officers of Merilus Technologies Inc., BC EST #D171/03).

13. I find that the Memorandum does not meet all four conditions outlined above, specifically, the first and fourth conditions. With respect to the first condition, the Employer states in its submissions that Mr. Limpright was not available to provide a letter stating he had terminated Mr. Blair's employment "until recently" and that Mr. Limpright had not been available to appear at the complaint hearing on May 20, 2006 because of a family vacation. In the Reasons for Determination, the Delegate notes that no one from Limpright testified at the hearing to give evidence about what notice, if any, was given to Mr. Blair, and draws an adverse inference as a result. The Employer does not say why he could not have obtained and presented to the Director the information contained in the Memorandum prior to the complaint hearing, i.e. during the investigation stage of the complaint process. On reviewing the evidence as a whole, I am not convinced that the evidence provided by Mr. Limpright in the Memorandum could not, with the exercise of due diligence by the Employer, have been discovered and presented prior to the Determination being made.

14. Even if I am wrong with respect to my decision on the first condition, the new evidence certainly fails to fulfill the fourth condition. The Memorandum has minimal, if any, probative value. The Memorandum says that Mr. Limpright gave Mr. Blair verbal notice of termination of employment in April 2002. However, this merely confirms the Delegate's finding in the Reasons for Determination that Mr. Blair received verbal notice of termination of employment: "Even though Mr. Blair was somewhat evasive when asked if he received verbal notice I believe he did get verbal notice."

15. In its submissions, the Employer suggests that Mr. Limpright's assertion that a Record of Employment (ROE) was issued to Mr. Blair supports its contention that Limpright terminated Mr. Blair's employment. On the other hand, Mr. Blair stated to the Delegate that he did not receive an ROE. No ROE has been submitted to the Tribunal for consideration. In the absence of an ROE, the contradictory assertions of Mr. Limpright and Mr. Blair on this point do not assist in determining the material issue of whether Mr. Blair's employment with Limpright was terminated.

16. There is no dispute that that Mr. Blair received verbal notice of termination. However, Tribunal jurisprudence has long held that verbal notice of termination is insufficient to discharge the employer's liability for compensation for length of service under section 63(3) of the *Act*. In *Jual Furniture Ltd. operating as United Furniture Warehouse*, BC EST #RD358/01 (reconsideration of BC EST #D025/01), the Tribunal held as follows:

> It is, of course, open to the Legislature to amend the *Act* to permit verbal notice of termination; nevertheless, as matters now stand, an employer's obligation to pay compensation for length of service is discharged only on the giving of appropriate *written*, rather than verbal, notice. The Tribunal has consistently held that it does not have the authority to substitute "verbal" for "written" in section 63(3) of the *Act*—see *Dr. Robert S. Wright Inc.*, B.C.E.S.T. Decision No. D060/96; *JFL Ventures Ltd.*, B.C.E.S.T. Decision No. D230/96; *Frans Markets*, B.C.E.S.T. Decision No. D309/96; *Sun Wah Supermarket Ltd.*, B.C.E.S.T. Decision No. D324/96; *Workgroup Messaging*, B.C.E.S.T. Decision No. D025/97; *G.A. Fletcher Music Co.*, B.C.E.S.T. Decision No. D213/97; *Zaretski*, B.C.E.S.T. Decision No. D214/97; *Venco Products Ltd.*, B.C.E.S.T. Decision No. D052/99.

17. At the end of the day, for the purposes of ascertaining the length of Mr. Blair's employment in order to calculate the correct vacation pay, the only issue that matters is whether Mr. Blair received *written* notice of termination from Limpright before the disposition of the assets from Limpright to the Employer. The Memorandum does not provide any evidence that he received written notice. Therefore, the new evidence put forward by the Employer fails to be of high probative value because, considered alone or with other evidence, it would not have led the Delegate to a different conclusion on the matter of whether written notice was given.

18. As a result, the new evidence cannot be considered. The Employer's appeal is dismissed.

ORDER

19. Pursuant to Section 115 of the *Act*, I order that the Determination dated July 28, 2006 be confirmed in the amount of $1291.18, together with any interest that has accrued under Section 88 of the *Act*.

Yuki Matsuno
Member
Employment Standards Tribunal