Appeals

- by -

Daniel Salvas
("Salvas")

– and by –

Neil Reiswig
("Reiswig")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2011A/117 & 2011A/118

DATE OF DECISION: October 25, 2011

DECISION

SUBMISSIONS

Daniel Salvas	on his own behalf
Neil Reiswig	on his own behalf
Jennifer Redekop	on behalf of the Director of Employment Standards

INTRODUCTION

1. On July 28, 2010, the appellant Daniel Salvas ("Salvas") filed a complaint under section 74 of the *Employment Standards Act* (the "*Act*") alleging that his former employer, a logging company operating through the business corporation Tom Stuart Contracting Ltd. ("TSC"), owed him compensation for length of service (see section 63) plus concomitant 6% vacation pay. On November 26, 2010, the appellant Neil Reiswig ("Reiswig") also filed a complaint against TSC seeking compensation for length of service. In essence, the two complainants were seeking an additional 7 weeks' wages as compensation for length of service beyond the 1 week's wages that each had previously been paid.

2. In due course, a delegate of the Director of Employment Standards (the "delegate") investigated both complaints and on July 22, 2011, issued a determination (the "Determination"), and accompanying "Reasons for the Determination" (the "delegate's reasons"), dismissing both complaints. The delegate concluded that since Mr. Salvas was deemed to have been terminated on March 7, 2009 (when TSC laid him off), and was subsequently recalled on August 2, 2009, his period of new continuous service spanned the period from August 2, 2009, to June 13, 2010, when his employment was terminated. Accordingly, based on a new period of continuous service of more than 3 months but less than 12 months, he was only entitled to 1 week's wages as compensation for length of service.

3. The delegate determined that Mr. Reiswig's employment was also deemed to have ended on March 7, 2009, when he was laid off. His period of new employment commenced on August 24, 2009, and ended at some point in June 2010. Thus, as was the case for Mr. Salvas, Mr. Reiswig was only entitled to 1 week's wages as compensation for length of service.

4. Messrs. Salvas (Tribunal File Number 2011A/117) and Reiswig (Tribunal File Number 2011A/118) both appeal the Determination on the ground that the delegate failed to observe the principles of natural justice in making the Determination (subsection 112(1)(b)). However, as is discussed below, the appellants' assertions are more appropriately characterized as alleged errors of law (subsection 112(1)(a)).

5. I am adjudicating these appeals based on the parties' written submissions and, in that regard, I have submissions from both appellants and from the delegate. Although invited to do so, the appellants' former employer, TSC, did not file a submission. In addition to the parties' submissions, I have also reviewed the section 112(5) record that was before the delegate.

THE DETERMINATION

6. A business corporation known as Van Ommen Contracting Ltd. ("VOC") formerly employed Messrs. Salvas and Reiswig as loggers and their employment with VOC commenced during the mid-1990s. VOC and

Louisiana Pacific Canada Ltd. ("LPC") jointly held a logging contract to log certain provincial lands in a region of the province known as "Malakwa" (in the Columbia-Shuswap Regional District). In June 2008, VOC and LPC agreed that VOC would assign its 50% interest in the logging contract to TSC. The transfer was effective as of June 6, 2008, and the two appellants continued their employment with TSC as of June 10, 2008. The appellants were advised that everything in relation to their employment would "stay the same" (delegate's reasons, page 4) and the delegate determined (at page 8 of her reasons) that the assignment of the 50% interest in the logging contract from VOC to TSC fell within the ambit of section 97 of the *Act*. In other words, TSC became a "successor" employer to VOC and, consequently, the appellants' employment was deemed "to be continuous and uninterrupted by the disposition" of the 50% interest in the logging contact from VOC to TSC. The delegate's finding regarding section 97 of the *Act* is not challenged in this appeal.

7. The appellants' employment continued as and from June 10, 2008, without there being any material changes in their terms and conditions of employment – they were never formally terminated by VOC and continued on doing the same work, at the same rate of pay, and also received 6% vacation pay rather than the 4% rate that would apply to "new" employees. In the spring of 2009 both appellants were laid off – a usual circumstance during their tenure as this is typically the beginning of the "spring break-up", a period usually running from March to June when weather conditions do not allow normal logging activities to continue. Mr. Salvas' layoff period was from March 7 to August 2, 2009, and Mr. Reiswig's layoff period was from March 7 to August 24, 2009.

8. Mr. Salvas returned to work on August 2, 2009, and continued to work until March 23, 2010. His employment was formally terminated on June 13, 2010. Mr. Reiswig returned to work on August 24, 2009, and continued to work until the latter part of March 2010 when he was laid off. Mr. Reiswig's evidence was that he contacted TSC's principal, Mr. Tom Stuart, in June 2010 regarding his return to work only to be told that his services were no longer required but he was never given any formal notice of termination (delegate's reasons, page 5).

9. Since the appellants were laid off for a period of more than 13 weeks (thus exceeding the section 1 "temporary layoff" threshold), under section 63(3) of the *Act* they would ordinarily have been deemed to have been terminated as of the start of the layoff period, namely, March 7, 2009. Accordingly, they would have been entitled to 8 weeks' wages as compensation for length of service based on their entire tenure with both VOC and TSC (in light of the section 97 successorship declaration). However, in this case, the delegate was obliged to consider section 37.7(7) of the *Employment Standards Regulation* which deals with loggers working in the interior of the province (it is conceded that this particular provision applies to the appellants):

> 37.7 (7) The definition of "temporary layoff" in section 1 of the [*Act*] does not apply to loggers working in the interior area who are recalled to work if the temporary layoff is the result of a normal seasonal reduction in activity.

10. The delegate outlined (and, in my view, correctly) the policy underlying this provision at page 10 of her reasons:

> Section 37.7(7) allows for a temporary layoff period that is longer than the usual 13 week period as long as the temporary layoff is the result of a normal seasonal reduction in activity. As the interior area of British Columbia experiences weather conditions which make it impossible to continue logging activities through the spring break-up period, this part of the Regulation ensures that loggers working in the interior area do not have their employment severed each year due to the temporary layoff provisions in the Act. It gives employers the ability to layoff employees for a longer period of time than the 13 weeks if the layoff is due to "normal seasonal reduction in activity". The language "normal seasonal reduction in activity" in the

> section ensures that an employer cannot indefinitely layoff its employees for any number of reasons and leave them in a situation where they are uncertain as to their employment status.

11. The delegate determined, at page 10 of her reasons, that the normal seasonal layoff was from March to June and at page 9 of her reasons found that "it was an implied term of their employment that temporary layoffs were part of the employment relationship". The appellants returned to work in August 2009 following their layoffs on March 7, 2009. Mr. Salvas returned to work on August 2, 2009, and Mr. Reiswig on August 24, 2009. The layoff period from March to August 2009 was longer than the usual "spring break-up" period and the delegate concluded that, absent other considerations, normal logging activities would have ordinarily resumed in June 2009 (delegate's reasons, pages 10 – 11). The delegate concluded that the appellants were not recalled until August 2009 "primarily due to bad market conditions and in small part due to [LPC] attempting to sell its [logging] license" (page 11).

12. The delegate then determined that since the appellants' layoff from March to August 2009 exceeded the "normal seasonal reduction in activity", the appellants were deemed to have been terminated in June 2009. Thus, they were commencing an entirely new period of employment in August 2009. Since this latter period of employment was, in each case, more than 3 months but less than 12 months in duration, each appellant was only entitled to 1 week's wages as compensation for length of service (delegate's reasons, page 12):

> As they were each laid off starting on March 7, 2009, they would have exceeded 13 weeks of layoff as of June 7, 2009. Therefore, when the Complainants commenced back to work in August 2009, they were starting a new period of employment. While neither of the parties acted as though a termination had occurred (there was no discussion of termination, the Complainants continued to receive 6% vacation pay, no Record of Employment stating there had been a final termination was issued), this does not change the effect of the statutory provisions in this case. When a deemed termination occurs due to an employee being on a layoff that exceeds a temporary layoff, being called back to work or continuing to work after the deemed termination does not mean that a termination did not in fact occur.
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> Accordingly, Mr. Salvas' new employment period commenced on August 2, 2009 and therefore he would have been entitled to 1 week of compensation for length of service when terminated in June 2010. The Employer paid the one week of compensation for length of service and as such I find no additional wages are owed to Mr. Salvas for compensation for length of service.
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> Mr. Reiswig's new employment commenced on August 24, 2009. His last day of work was March 23, 2010. As he was never called back for work in June 2010, the "temporary layoff" sections would again apply to him in 2010. Therefore, his 13 weeks of layoff would have been exceeded on June 23, 2010. As per section 63(5), the date of termination for determining length of service is the beginning of the layoff, or March 23, 2010. Accordingly, he would be entitled to one week of termination pay, which the Employer paid to him. Accordingly, I find no additional wages are owed to Mr. Reiswig for compensation for length of service.

THE APPEALS

13. As noted above, each appellant appeals the Determination on the ground that the delegate failed to observe the principles of natural justice in making the Determination. Having reviewed the appellants' submissions and the record, it seems clear that the appellants are not, in fact, suggesting that they were denied a fair opportunity to be heard or that the delegate was predisposed against them or, indeed, any matter that might fall within the ambit of a breach of the rules of natural justice. The record shows that the delegate fully complied with the dictates of section 77 of the *Act* and I am unable to see anything else in the material before me that would raise a natural justice concern. I might add that Mr. Salvas was represented by legal counsel throughout the delegate's investigation and Mr. Salvas' counsel was afforded the opportunity to make submissions and to respond to the evidence and argument the delegate had in hand.

14. Although the appellants' material does not raise any natural justice issues, it does identify issues that can be fairly characterized as alleged errors of law (subsection 112(1)(a)). Accordingly, and consistent with the Tribunal's decision in *Triple S Transmission Inc.*, BC EST # D141/03 (see especially, pages 3 – 4), I propose to address the appellants' submissions under this latter ground rather than as alleged natural justice breaches.

15. Mr. Salvas' material raises several points that may be re-phrased and summarized as follows:

- If his employment were legally terminated in June 2009, TSC's failure to advise him of that state of affairs should not operate to his prejudice. For example, had he been so advised, he could have taken protective action – for example, filing a timely complaint for compensation for length of service relating to this termination (rather than the later termination in June 2010);
- All of the available evidence supports the notion that the parties did not intend to sever their employment relationship in June 2009 or that a wholly new employment relationship commenced in August 2009; and
- In any event, the delegate misinterpreted or misapplied section 37.7(7) of the *Employment Standards Regulation*.

16. Mr. Reiswig's submissions largely track the issues identified in Mr. Salvas' material. In particular, he makes the following points:

- Seasonal layoffs vary with the markets on types of logs and accessibility to them and that has always been. That is normal in logging. The fact we did not return till August [2009] was not a big surprise to me. None of the other logging companies went back before August that year either. In August 2009 I went back to logging with [TSC] after break-up. My medical coverage was uninterrupted and, my vacation pay remained at 6%. [TSC] had not terminated me in 2009…
- In 2010, I again expected to go back to work after attending the fire suppression course and I was told by Tom Stuart that year it looked like things would start to happen in June and he had said I could expect a call then. However when June came and I didn't hear from him and started to see the logging trucks on the highway so I called Tom to discover he had just bought a processer which eliminated the work for me as a bucker on any of the smaller type of wood. He did however say that if he ever got into big wood or if the machine didn't work out he would call me but then it became clear to me that I had been terminated without notice when he did not call me again…

17. The delegate's submissions acknowledge that the appellants' assertions appear to be more appropriately characterized as alleged errors of law rather than natural justice breaches. Nevertheless, the delegate maintains that she correctly interpreted and applied the relevant provisions of the *Act* and the *Employment Standards Regulation*.

FINDINGS AND ANALYSIS

18. In my view, the delegate's reasons are internally inconsistent. The delegate determined that the appellants were, as a matter of statutory and regulatory interpretation, initially terminated sometime in June 2009 (with a retroactive effective termination date of March 7, 2009, by reason of section 63(5) of the *Act*). Even though the appellants were never notified that they were terminated – and all of the available evidence suggests that the parties considered the employment relationship to be ongoing – the delegate nevertheless concluded that there had been a legal termination. However, if this is the delegate's finding, why was no administrative

penalty levied against TSC for having contravened the *Act* by failing to pay compensation for length of service relating to the June 2009 termination?

19. It appears that the delegate considered the appellants, although terminated, were not entitled to claim compensation for length of service relating to the June 2009 termination because their complaints were not filed until July 28, 2010, (Mr. Salvas) and November 26, 2010, (Mr. Reiswig) and thus they were caught by the "6-month complaint period" set out in section 74 of the *Act*. However, even if the appellants cannot claim compensation for length of service relating to their June 2009 terminations, there was, on the delegate's findings, a contravention of the *Act* (namely, a failure to comply with section 63) that should have resulted in a monetary penalty.

20. However, these appeals primarily turn on whether the delegate correctly interpreted and applied section 37.7(7) of the *Employment Standards Regulation*. So far as I can determine, these two appeals represent the first occasion that the Tribunal has been called upon to consider this particular provision. For convenience, I have reproduced this subsection a second time:

> 37.7 (7) The definition of "temporary layoff" in section 1 of the [*Act*] does not apply to loggers working in the interior area who are recalled to work if the temporary layoff is the result of a normal seasonal reduction in activity.

21. At page 11 of her reasons, the delegate observed that this subsection should be interpreted narrowly since is excludes "an employee from a certain benefit under the [*Act*]". In *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, the Supreme Court of Canada held (para. 36) that employment standards legislation should be characterized as "benefits-conferring legislation" and, as such, "it ought to be interpreted in a broad and generous manner" and that "any doubt arising from difficulties of language should be resolved in favour of the claimant". In addition to these broad interpretive principles, section 2 of the *Act* sets out several statutory purposes including a purpose to ensure that employees receive at least the basic entitlements set out in the *Act*, both employees and employers receive fair treatment and the encouragement of open communication between employers and employees. In my view, the delegate's interpretive approach to subsection 37.7(7) undermines, rather than enhances, open communication; it limits rather than extends a basic statutory entitlement (compensation for length of service); and it unfairly penalizes the appellants in this case. Such results may nonetheless pertain if the regulatory language clearly and unambiguously leads one to that result but, in this case, I am unable to so conclude.

22. In my view, the delegate misinterpreted subsection 37.7(7) of the *Employment Standards Regulation*. The evidence is absolutely clear that when the appellants were laid off on March 7, 2009, this was due to the long-standing practice of suspending logging operations during the "spring break-up" period. The evidence was that the "spring break-up" typically spanned the period from March to June although it could vary somewhat from year to year. Employers do not have a general right to temporarily layoff employees – this right must be found, either expressly or by reasonable implication, in the employment contact between the parties (see *Besse v. Dr. A.S. Machner Inc.*, 2009 BCSC 1316 and the other authorities cited in this decision). In the instant case, the delegate concluded there was such a right and this finding is not challenged on appeal.

23. Thus, TSC had a contractual right to lay off the appellants but only to accommodate the spring break-up. The key consideration under subsection 37.7(7) must be the *reason* for the layoff rather than the duration of the layoff. The delegate referred to a 13-week period in finding that there was a deemed termination as of June 7, 2009 (page 12): "As they were each laid off starting on March 7, 2009, they would have exceeded the 13 weeks of layoff as of June 7, 2009. Therefore, when the Complainants commenced back to work in August 2009, they were starting a new period of employment". However, in my view, the delegate erred in

relying on the 13-week period in determining whether or not there was a deemed termination. The 13-week period is referred to in the section 1(1) definition of "temporary layoff" and nowhere else in either the *Act* or the *Employment Standards Regulation*. However, by the express language of subsection 37.7(7), the definition of "temporary layoff" (obviously including the 13-week threshold) "does not apply". The issue properly before the delegate was not whether the layoff extended beyond 13 weeks but, firstly, whether TSC had a contractual right to issue a temporarily layoff notice to the appellants (see *Besse*, *supra*) and, secondly, if so, whether the layoff notice was issued as a "result of a normal seasonal reduction in [logging] activity".

24. The appellants were not formally terminated and the evidence overwhelmingly supports the notion that the parties did not intend to sever their employment relationship in March 2009 when the appellants were laid off. For example, no written termination notices were issued; compensation for length of service was not paid; medical coverage continued during the layoff period; when employment resumed, no new tax forms were prepared and vacation pay continued at the 6% rate. TSC issued two Records of Employment to Mr. Salvas dated March 16 and March 25, 2009, respectively, and a single Record of Employment to Mr. Reiswig dated March 16, 2009. Box 14 on the Record of Employment form gives two options regarding the employee's "expected date of recall". In all three instances, the Records state that the employee's expected date of recall is "unknown" rather than "not returning". The delegate made an express finding (page 9) "that it was an implied term of their employment that temporary layoffs were part of the employment relationship" and, consistent with that finding, it seems clear that the parties' mutual expectations were that the two employment relationships were not intended to be severed as a result of seasonal layoffs to accommodate the annual spring break-up period.

25. Thus, *at the point of layoff* on March 7, 2009, the parties clearly understood that this was a *temporary* layoff and was due to (or, in the language of the regulatory provision, "[was] the result of") the normal seasonal reduction in activity. I believe the delegate erred in focusing on the situation prevailing at the end of the layoff period rather than the circumstance that precipitated the layoff. The delegate wrongly conflated factors relating to the duration of the layoff and the 13-week threshold in concluding that deemed terminations occurred but neither consideration should have been taken into account. Layoffs, based on the delegate's own findings, were part and parcel of the parties' employment bargain. Perhaps, if the layoff period extended beyond that implied in the contract, the appellants could have filed for compensation under section 66 of the *Act* but, in due course, they were recalled to work and thus this issue is moot.

26. The appellants were initially laid off, *on a temporary basis*, due to the *normal seasonal reduction* attributable to the "spring break-up". The appellants *were recalled*, albeit not until August 2009 – a date somewhat later than normal – but the uncontroverted fact is that they were recalled. Since the appellants were temporarily laid off (in March 2009 the parties' mutual expectation was that they layoffs were temporary, not permanent) and later recalled, "the definition of "temporary layoff" in section 1 of the [*Act*] does not apply". As I previously stated, in my view, the delegate erred by importing the 13-week threshold, a threshold that only appears in the statutory definition, to a situation where the definition had no application.

27. Since the 13-week rule has no application to the case at hand, the only issue was whether or not the appellants were terminated in June 2009. In my view, they were not terminated and the delegate erred in finding that they were terminated by operation of law in June 2009. The section 63(5) "deemed termination" provision, based on a layoff beyond the 13-week threshold, does not apply to the situation at hand. Throughout the period from March 7 to August 2/24, 2009, the appellants were on a *temporary* layoff (and this is entirely consistent with the parties' mutual expectations and the evidence). Accordingly, the appellants' employment relationship with TSC subsisted throughout this latter period and they did not commence "new" employment relationships with TSC in August 2009. Although the layoff period may have been longer than usual, it was not, on the evidence, wholly outside past experience for "spring break-up" layoff periods to

extend beyond June. The appellants could have taken steps in late June or July 2009 to formally sever their employment relationships – say, by commencing proceedings for a declaration they there "constructively dismissed" – but they did not do so because they considered themselves to still be on temporary layoff (a view apparently shared by TSC) throughout June and into August when they were both recalled.

28. Further, if TSC misrepresented to the appellants in March 2009 that their employment was not being terminated but, rather, they were only being temporarily laid off, the appellants might have had an avenue of redress under section 8 of the *Act*. Equally, a TSC misrepresentation to the appellants that they were only being temporarily laid off, when in fact they were being terminated, could have triggered the application of the equitable doctrine of promissory estoppel. However, in light of the views I have taken regarding: i) whether the March 2009 layoff was temporary or permanent; and ii) the proper interpretation of section 37.7(7) of the *Employment Standards Regulation*, I do intend to delve into these questions.

29. Following his return to work in August 2009, Mr. Salvas' employment was subsequently terminated on June 13, 2010, and given his period of continuous service (calculated in accordance with the section 97 declaration), he had a subsisting right to 8 weeks' wages as compensation for length of service at the point of termination. Since he has only been paid 1 week's wages, he has a residual claim for 7 weeks' wages.

30. Mr. Reiswig returned to work following a temporary layoff due to a normal seasonal reduction in logging activity on August 24, 2009, and he continued to work until March 23, 2010, when he was again laid off due to a normal seasonal reduction in logging activity. It was an implied term of his employment contact that he would be recalled but TSC, in breach of that contractual obligation, failed to recall him or to provide written notice of termination or payment of compensation of length of service consistent with his tenure (*i.e.*, an 8-weeks' wages entitlement). The only reasonable inference to be drawn from Mr. Reiswig's uncontested evidence is that his employment was effectively terminated sometime in June 2010 or perhaps as late as July 2010 when it became clear that he was not going to be recalled (thus, his November 26, 2010, complaint was timely); essentially, what had started out as a temporary layoff was later converted to a permanent layoff. At this point (in June or July 2010), and in the absence of any written notice of termination, TSC was obliged to pay Mr. Reiswig 8 weeks' wages, rather than merely 1 week's wages, as compensation for length of service.

31. It follows that in my opinion the delegate erred in law in determining that TSC's obligation to pay the appellants' compensation for length of service was fully satisfied upon payment of 1 week's wages to each appellant. Thus, the delegate erred in law in determining that no further wages were owed to them. Accordingly, I propose to vary the Determination by increasing the appellants' respective entitlements to 8 weeks' wages in total and to refer this matter back to the Director for the purpose of calculating each appellant's individual entitlement.

ORDER

32. Pursuant to section 115 of the *Act*, the Determination is varied to reflect the appellants' entitlement to 8 weeks' wages as compensation for length of service. This matter is referred back to the Director for the purpose of calculating the appellants' individual section 63 entitlements consistent with these reasons for decision.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal