Employment Standards TRIBUNAL

An appeal

- by -

Britco Structures Ltd.
("Britco")

- 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

ADJUDICATOR: David B. Stevenson

FILE No.: 2001/884

DATE OF DECISION: April 4, 2002

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) by Britco Structures Ltd. ("Britco") of a Determination that was issued on December 3, 2001 by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded that Britco had contravened Part 3, Section 18 and Part 8, Section 63 of the *Act* in respect of the termination of the employment of George Stacey ("Stacey") and ordered Britco to cease contravening and to comply with the *Act* and to pay an amount of $7,582.74.

Britco says the Determination wrongly concluded that Stacey was entitled to length of service compensation. Britco alleges errors of fact and law.

The Tribunal has decided this appeal can be decided without an oral hearing.

ISSUE

ERROR! BOOKMARK NOT DEFINED.The issue in this appeal is whether Britco has shown the Determination was wrong in a manner that justifies the intervention of the Tribunal under Section 115 of the *Act* to cancel or vary the Determination, or to refer it back to the director.

FACTS

Britco manufactures modular buildings. The Determination records that Stacey worked for Britco as a lead hand in the floor department at a rate of pay of $22.38 an hour from 1981 until November 25, 1999. On July 21, 1999, Stacey was injured on the job site and received Workers' Compensation Benefits from the time of his injury until July 27, 2000, when his claim was discontinued by the WCB.

Britco issued Stacey a Record of Employment on September 27, 2000. In that area of the Record of Employment provided for "Comments", the employer stated:

> Employee has been on & off WCB for back injury since July 21, 1999. Employee given letter by Britco's plant mgr. stating that the return to employment would greatly jeopardize his personal health & safety & would be a direct violation of our responsibilities.

The Record of Employment was accompanied by a letter dated August 14, 2000 over the signature of Jeff Wright, Plant Manager.

During the investigation, Britco took the position that any liability under Section 63 of the *Act* had been discharged and Stacey had received his severance pay from the WCB. Britco said there was an understanding between Stacey, the WCB and themselves that the final 8 weeks of benefits that Stacey received was to be considered compensation in lieu of notice of termination.

The following findings of fact were made in the Determination:

1. Stacey's employment was terminated;

2. Stacey did not receive working notice;

3. Stacey was not terminated for "just cause"; and

4. Stacey did not receive compensation in lieu of notice.

There is no dispute with the first three findings of fact.

ARGUMENT AND ANALYSIS

Britco has listed the following five points in the appeal:

1. The director failed to make any finding of fact in regard to the assertion by Britco that Stacey expressly agreed to accept eight weeks continuance of WCB benefits in lieu of notice of termination;

2. The amount paid to Stacey as WCB benefits was equal to his employment income less statutory deductions;

3. There was an understanding between Stacey, the WCB and themselves that the final 8 weeks of WCB benefits was paid on the basis that Stacey would not be required to attend any further rehabilitation and could look for other employment;

4. The Director was wrong to have concluded there was no jurisdiction to make a finding concerning the fact and purpose for the final eight weeks of WCB benefits; and

5. There is no requirement in subsection 63(3) that length of service compensation may not be paid by someone other than the employer.

In reply, Stacey asserts, once more, that there was no discussion or understanding that the final eight weeks of WCB benefits was severance pay. He says the amount received was wage loss benefits paid by WCB and was related to his injury and not to his termination of employment from Britco.

The Director has also filed a submission on the appeal, noting the provisions of Section 63 of the *Act* set out the specific circumstances where the liability of an employer for length of service compensation may be deemed discharged and submitting that none of those circumstances are present in the facts of this case.

The relevant portions of Section 63 of the *Act* state:

63. (1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one weeks' wages as compensation for length of service.

(2) The employer's liability for compensation for length of service increases as follows:

(a) after 12 consecutive months of employment, to an amount equal to 2 weeks' wages;

(b) after 3 consecutive years of employment, to an amount equal to 3 weeks' wages plus one additional week's wages for each additional year of employment to a maximum of 8 weeks' wages.

(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 3 consecutive months of employment;

(ii) 2 weeks' notice after 12 consecutive months of employment;

(iii) 3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice;

(b) is given a combination of notice and money equivalent to the amount the employer is liable to pay, or

(c) terminates the employment, retires from employment, or is dismissed for just cause.

As the Tribunal has stated in many cases, length of service compensation is, from the employee's perspective, a statutory benefit earned with continuous employment. It is a minimum statutory benefit. From the employer's perspective, it is a statutory liability that accrues to each employee with more than 3 consecutive months of employment. While length of service compensation is often referred to as "termination" or "severance" pay, it is related to termination only to the extent that a termination of employment, actual or deemed, triggers the benefit or liability, depending on the perspective. Subsection 63(3) identifies three circumstances where the statutory liability of the employer to pay length of service compensation is deemed to be

discharged: first, if the employee is given written notice of termination equivalent to the employer's statutory liability to the employee; second, if the employee is given a combination of notice and compensation equivalent to the employer's statutory liability to the employee; and third, if the employee terminates the employment, retires from employment or is dismissed for just cause. If the findings of fact made by the Director are sustained, there is no validity to the appeal.

It is common ground that Stacey was not given written notice, he did not terminate his own employment and his termination was without cause. Britco disagrees only with the finding of fact that Stacey did not receive compensation in lieu of notice and, in my view, the only question raised in this appeal is whether that finding of fact was wrong and the final eight weeks of WCB benefits should have been found to be compensation in lieu of notice. On that question, I agree completely with the finding made by the Director. There is no basis in fact for concluding Stacey was paid compensation in lieu of notice or that Britco's statutory obligation to pay Stacey length of service compensation under the *Act* was discharged.

I do not disagree with the general proposition suggested by Britco that the obligation to pay length of service compensation may be satisfied by someone other than the employer, but it would require the clearest of evidence that the third party was assuming that statutory obligation. No such evidence exists in this case. It is evident from the material in the file that the eight weeks' paid to Stacey was viewed, and stated, by the WCB to be wage loss benefits related to the administration of benefits for an injured worker, Stacey, under the *Workers' Compensation Act* and not severance pay or length of service compensation under the *Act*. As well, it is problematic that the WCB has the authority under their governing legislation to be discharging the responsibility of Britco under the *Act*.

I will comment on the specific errors alleged by Britco in the appeal: first, it is implicit in the Determination that the Director did not accept Stacey had agreed to accept the final eight weeks of wage loss as compensation in lieu of notice and no evidence that this amount was paid as anything other than wage loss benefits; second, even if the amount paid to Stacey was equivalent to his employment income (that is not agreed by Stacey and there is otherwise no evidence in support of that statement), that assertion has no relevance; third, even if it is correct that there was an understanding between Stacey, the WCB and Britco that the final 8 weeks of WCB benefits was paid on the basis that Stacey would not be required to attend any further rehabilitation and could look for other employment it does not discharge Britco from it statutory obligation under Section 63 of the *Act*, which is only discharged in one of the three circumstances identified above; fourth, even if the Director had jurisdiction to make a finding about the purposes of payments made by the WCB, the Director was entitled to, and did, find that the final eight weeks' of payment made to Stacey was not made for the purpose of discharging the obligation of Britco to pay length of service compensation under the *Act*; and fifth, the Director made a finding of fact, which has not been disturbed by anything in this appeal, that there was no compensation paid to Stacey in respect of Britco's liability under Section 63 of the *Act*.

Britco has not demonstrated any error in the Determination and the appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated December 3, 2001 be confirmed in the amount of $7,582.74, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal