EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the *Employment Standards Act*, R.S.B.C. 1996, c. 113

-by-

J. Miller Enterprises Ltd. and Miller Contracting Ltd.

("the JJM Group" or the "employer")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE NO.: 98/034

DATE OF DECISION: April 2, 1998

DECISION

OVERVIEW

This is an appeal brought by J. Miller Enterprises Ltd. and Miller Contracting Ltd. (the "JJM Group" or the "employer") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*) from a Determination issued by the Director of Employment Standards (the "Director") on January 9th, 1998 under file number 19-203 (the "Determination").

The Director determined that J. Miller Enterprises Ltd. and Miller Contracting Ltd. were associated firms within section 95 of the *Act* and, accordingly, were jointly and severally liable for the sum of $9,987.21 representing 8 weeks' compensation for length of service (plus accrued interest) owed to a former employee, Vernon G. Robinson ("Robinson").

ISSUE TO BE DECIDED

The Director held that Robinson had been continuously employed by the JJM Group since 1987 and accordingly was entitled to 8 weeks' wages as compensation for length of service under section 63(2)(b) of the *Act.* In its letter dated January 15th, 1998 addressed to the Tribunal and appended to its appeal form, the JJM Group does not challenge the Director's finding under section 95 of the *Act*, however, the employer maintains that compensation for length of service should only be calculated as and from January 2, 1995 when Robinson commenced "salaried employment" with J. Miller Enterprises Ltd.

The employer also makes reference in its letter to the question of vacation pay (*i.e.*, section 58), however, that issue is entirely separate and apart from Robinson's entitlement under section 63. Of course, if Robinson is entitled to compensation for length of service, an additional 4% or 6% (as applicable) must be added to the termination pay because termination pay is, by definition (section 1), considered to be "wages" and vacation pay must be paid on all wages earned.

In essence, JJM's appeal will stand or fall depending on whether or not Robinson was continuously employed with the JJM Group since 1987.

FACTS AND ANALYSIS

According to the information set out in the Determination, Robinson commenced employment in 1987 as a surveyor with Miller Contracting Ltd. This was a bargaining unit position and Robinson was paid an hourly wage. In January of 1995 he accepted a promotion out of the bargaining unit to the position of Dredging Supervisor. This latter position was with J. Miller Enterprises Ltd. and provided a monthly salary. Robinson continued in the position until February 28th, 1997, at which time he went on sick leave and eventually was terminated without notice or termination pay.

Contrary to the information contained in the Determination, a Record of Employment ("ROE"), dated January 2nd, 1995, *was* issued at the time of the transfer from Miller Contracting Ltd. to J. Miller Enterprises Ltd. This ROE was issued due to a "shortage of work" (code A on the form). Indeed, a number of ROEs have been issued to Robinson since he commenced his employment in 1987. The particulars of the ROEs issued to Robinson are set out below:

Period of Employment	Employer of Record	Reason for issuance of ROE
Sept. 28, 1987-Jan. 15, 1988	Miller Dredging Ltd.	Shortage of work
Jan. 21, 1988-Dec. 20, 1990	Miller Dredging Ltd.	Transfer to Miller Contracting
Jan. 2, 1991-Feb. 7, 1991	Miller Contracting Ltd.	Transferred to salary payroll
Feb. 11, 1991-June 5, 1992	Miller Contracting Ltd.	Shortage of work
June 8, 1992-July 3, 1992	Miller Contracting Ltd.	Shortage of work
June 8, 1992-Dec. 21, 1992	Miller Contracting Ltd.	Shortage of work
Jan. 11, 1993-Dec. 31, 1994	Miller Contracting Ltd.	Shortage of work
Jan. 2, 1995-Feb. 28, 1997	J. Miller Enterprises Ltd.	Illness or injury
Jan. 2, 1995-Feb. 28, 1997	J. Miller Enterprises Ltd.	Quit

In my view, the above ROEs amply support the Director's postion that Robinson was continuously employed by the JJM Group since September 28th, 1987. There are no significant breaks in employment even on the face of the ROEs themselves and, in some cases, the ROEs appear to be inconsistent--*e.g.*, the two ROEs that show a commencement date of June 8th, 1992 but two separate "end of employment" dates. In my view, the so-called "breaks" in continuous employment are nothing more than bookkeeping entries. Since 1987 Robinson was continuously employed with the JJM Group and accordingly his employment can be dated from September 1987 for purposes of section 63.

There is absolutely no evidence before me that when Robinson went on sick leave on February 28th, 1997 he intended to quit. Indeed, Robinson's position that he did not quit is corroborated by the ROE that was issued at the time (*i.e.*, March 13th, 1997); it was only some time later that the employer attempted to assert that Robinson "quit" (by way of a second ROE issued on July 24th, 1997).

It is uncontroverted that after February 28th, 1997 Robinson was away from work due to illness--his claim for long-term disability benefits was approved effective March 15th, 1997. His doctor indicated that Robinson would be able to return to work no earlier than mid-September 1997 and thus, when the employer purported to confirm, on July 24th, 1997, a "quit", I am of the view that it, in effect, terminated Robinson's employment. It is conceded that no termination pay, or written notice in lieu thereof, was given to Robinson in late July 1997 or at any subsequent time.

As a final point, I should add that any statement that Robinson may or may not have made to his former colleague Bob Rud, whose letter addressed to the employer and dated November 2nd, 1997, was submitted as part of the employer's appeal documents, has no evidentiary value in terms of whether or not Robinson actually communicated an intention to quit to his employer. Statements allegedly made by Robinson regarding his possible post-recovery intentions have little, if any, evidentiary value.

Further, one cannot infer an intention to quit from a refusal to return to work during the period when he was still disabled. Thus, Robinson's alleged refusal to return to work (at an entirely different and lower paying position, I might add) on February 10th, 1997 is not relevant to the issue of the employer's liability under section 63. If the employer did not wish to have Robinson return to work it could have simply issued him appropriate written notice, which would have run

over the course of the disability period--see *Sylvester v. B.C.* (1997) 146 D.L.R. (4th) 207 (S.C.C.)--and thereby would have avoided most, though perhaps not all, of its statutory obligation to pay compensation for length of service.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of **$9,987.21** together with whatever further interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

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Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal