Employment Standards TRIBUNAL

An appeal

- by -

Delphi International Academy, Delphi Student Development Inc. and Double D Holdings Ltd. associated companies pursuant to section 95 of the *Employment Standards Act*

- 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: Kenneth Wm. Thornicroft

FILE No.: 2001/765

DATE OF HEARING: April 9, 2002

DATE OF DECISION: May 2, 2002

DECISION

APPEARANCES:

Alan K. Decker and Todd Decker	for Delphi International Academy, Double D Holdings Ltd. and Delphi Student Development Inc.
Ryan Douglas	on his own behalf
Paul Massie	on his own behalf
Sean Newman	on his own behalf
France Robert	on her own behalf
Ara Sagherian	on his own behalf
David Tanner	on his own behalf

THE APPEAL

This is an appeal filed by Delphi International Academy ("Delphi Academy"), Double D Holdings Ltd. ("Double D") and Delphi Student Development Inc. ("Delphi Development") pursuant to section 112 of the *Employment Standards Act* (the "*Act*"). These latter three firms jointly appeal a Determination that was issued by a delegate of the Director of Employment Standards (the "Director") on October 10th, 2001 (the "Determination"). Notices of appeal have also been filed by two of the respondent employees, namely, Mr. David Tanner and Ms. France Robert.

By way of the Determination, the Director's delegate issued an order declaring, in accordance with section 95 of the *Act*, that Delphi Academy, Double D and Delphi Development were "associated corporations" and thus jointly and severally liable for $37,510.56 in unpaid wages and section 88 interest owed to nine former Delphi employees.

This appeal was heard at the Tribunal's offices in Vancouver on April 9th, 2002 at which time I heard the testimony of Mr. Alan Decker on behalf of all three corporate appellants. Six of the nine respondent employees appeared at the appeal hearing but only three of the employees, namely, Ms. France Robert, Mr. David Tanner and Mr. Sean Newman, testified before me. No one appeared at the appeal hearing on behalf of the Director. In addition to the witnesses' testimony, I have also considered the various documents and submissions submitted by the parties to the Tribunal.

REASONS FOR APPEAL

Mr. Alan Decker filed a single appeal notice on behalf of all three firms named in the section 95 declaration. Mr. Decker does not challenge, in his appeal documents, the correctness of the section 95 declaration. Indeed, based on his testimony before me, it is readily apparent that all three firms were closely interrelated, subject to common direction and control and jointly operated a common business enterprise, namely, an independent school targeted to high school athletes, particularly hockey and baseball players. Delphi Academy was the entity that formally operated the school, the school's athletic programs were operated through Delphi Development and Double D was the "holding company" and "landlord" (Mr. Decker's term) that owned, inter alia, the shares of the other two firms.

Delphi Academy is no longer operating; all of the respondent employees were former members of the teaching staff. So far as I am aware, none of the three firms is in bankruptcy or subject to any other formal insolvency proceeding although Mr. Decker's evidence before me was that all three firms are "insolvent" and not in good standing with the Registrar of Companies (by reason of a failure to file annual reports).

In a letter dated November 1st, 2001 and appended to the notice of appeal, Mr. Decker sought a variation of the Determination: "We believe that the total of $37,510.56 should be adjusted downwards by $11,199.84 to $26,310.72 for three different reasons, outlined in the following." The three reasons are more fully particularized in Mr. Decker's letter as follows:

- "Firstly, we believe that the 'Compensation for length of service' of $5,709.89 is not owed as the complainants were employed for a definite term as outlined in their contracts, in which case no notice or severance pay is required on termination."
- "In the event that the complainants are considered employees rather than contractors, we provided adequate working notice in lieu of same. In a meeting held on May 9, 2001, all of the complainants were in attendance along with the school management, wherein we clearly advised that the school would not be continuing in the fall and consequently that their contracts would not be renewed for the coming year. In this case, the actual amount of notice well exceeded the minimum statutory notice (of one week with tenure of less than twelve months).
- "In addition, all of the complainants were provided written notice (included in their paycheques) on June 29, representing two weeks [sic] working notice. All of the complainants contracts included a provision to work two weeks into the summer (ie to July 13) [sic] and the only one to do so was Sean Newman. As the assessed wages owing reflects the full amount of the individual contracts (to July 13), our liability resulting from length of service is deemed to be discharged recognizing that the complainants did not work through the notice period."
- "Lastly, on this issue, as it specifically relates to David Tanner ($1,027.69), he provided us verbal notice in late April that he was not planning on returning to Delphi as his wife had secured employment in 100 Mile House to which he was relocating. In this case, an employee who voluntarily resigns from employment is not entitled to any compensation for length of service."
- "We also believe that the amounts recorded as due to Ken Taylor and Paul Massie, totalling $2,807.59 (includes 'compensation' of $353.19) is not due as these two individuals were not complainants and accordingly should not be included in the Determination."

The reasons for appeal also refer to two other section 96 determinations (this latter section creates a director/officer personal liability for unpaid wages) that were issued against Messrs. Serge Biln and Marco Hernandez, however, neither of them has any liability under the Determination that is now under appeal. Accordingly, I do not intend to address in any fashion the liability of either of those two gentlemen.

ANALYSIS AND FINDINGS

At the appeal hearing, Mr. Alan Decker, for the appellants, conceded (and properly so) that the teachers were "employees" as defined in section 1 of the *Act*. The first substantive issue I propose to address is whether the employees were "definite-term" employees and, accordingly, not entitled to any compensation for length of service.

Definite term contracts

The Director's delegate awarded one week's wages as compensation for length of service to seven of the nine employees (the exceptions being Messrs. Sean Newman and Ken Taylor). The relevant portions of the Determination dealing with compensation for length of service (i.e., section 63) are reproduced below:

> "The complainants (except Kenneth Taylor) worked on a yearly contract, which consisted of 10 months work from September to the end of June and additional two weeks in the summer. The employees received Easter and Christmas school vacation and 6 weeks vacation in July/August. Kenneth Taylor's contract did not require him to work the two weeks in the summer. The complainants wages were paid over the 12 months...
>
> It was the employer's position that the employees knew in advance that the company was closing because of financial difficulties even though they did not receive written notice until June 29, 2001...
>
> The complainants stated that they were terminated without written working notice on the 29th of June, 2001. The complainants stated that the wages provide [sic] to them for the remainder term [sic] were returned for insufficient funds in the account. The only complainant to work the 2 weeks during the summer month was Sean Newman...
>
> My investigation revealed the following information:
>
> - the complainants worked for a specific term as evidenced by their employment agreements...
> - the complainants were given notice of termination on June 29, 2001 but the notice was not working notice...
>
> Section 63 of the *Act* states that during the employment, employees earn entitlement to compensation for length of service. Unless employees quit, retire, are given written working notice, or are terminated for cause, they are entitled to compensation at the end of their employment. Compensation need not be paid if the employer gives the employee written working notice equivalent to the compensation.
>
> All the complainants worked for the employer on a yearly term of employment. All employees except Sean Newman did not work the two weeks in the summer as required by their contract. The complainants did not receive written working notice of termination. The notice given to them was on June 29, 2001 the last day they worked for the company. I have determined that the employees except, Newman and Taylor, are entitled to one weeks' [sic] compensation for length of service."

Pursuant to section 63 of the *Act*, compensation for length of service must be paid to employees (based on their tenure) if their employment is terminated without just cause. Alternatively, employers can give employees an equivalent amount of written notice of termination in lieu of paying compensation (or an appropriate combination of pay and written notice). Section 63 is set out below:

> **Liability resulting from length of service**
>
> 63. (1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's 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.

(4) The amount the employer is liable to pay becomes payable on termination of the employment and is calculated by
  (a) totalling all the employee's weekly wages, at the regular wage, during the last 8 weeks in which the employee worked normal or average hours of work,
  (b) dividing the total by 8, and
  (c) multiplying the result by the number of weeks' wages the employer is liable to pay.

(5) For the purpose of determining the termination date, the employment of an employee who is laid off for more than a temporary layoff is deemed to have been terminated at the beginning of the layoff.

However, in certain circumstances, an employer need not pay any compensation (or give equivalent written notice) to an employee. Some of these circumstances are set out in section 63, for example, where the employee resigns or retires or if there is just cause for termination. Additional circumstances in which compensation is not payable are set out in section 65 including subsection 65(1)(b): "Sections 63 and 64 do not apply to an employee...(b) employed for a definite term".

The Director's Delegate found that each of the seven of the employees who was awarded compensation for length of service "worked for a specific term as evidenced by their employment agreements". I have before me three separate employment contracts entered into between Ryan Douglas, Frank Gorringe and France Robert (as employee) and, in each case, Delphi Academy and Double D (as employer). While there are some differences, for the most part, the agreements contain essentially identical terms and, I understand, are virtually identical to the contracts of the other four employees who were also awarded compensation for length of service. Mr. Gorringe's and Ms. Robert's agreements are for a 12-month term while Mr. Douglas' agreement is for a 24-month term; in all three cases, however, the term ended as of August 31st, 2001.

Although the three agreements are stated to be for a 12- or 24-month term, in my view, these agreements cannot be fairly characterized as creating a "definite term" employment relationship. I note that several of these employees had ongoing employment relationships (reflected in a continuous and uninterrupted series of term contracts) with the school lasting, at least in some cases, for several years (e.g., 4 years in Mr. Tanner's case)--section 65(2) of the *Act* would appear to undermine any suggestion that such employees were "definite term" employees.

Further, the actual terms of the employees' employment agreements are not at all consistent with a definite term contract of hiring (where, at the end of the term, the parties' mutual expectation is that their relationship will end). For example, the salaries set out in the contracts were "subject to review on an annual basis"; vacation time was "not cumulative from year to year" (i.e., vacation time could not be "carried forward" even though the employment relationship might continue past the term of the agreement); the level of health benefits increased for "each year employed at Delphi Academy"; the employer's pension contributions were subject to a three-year vesting rule; and finally, the agreements contain a termination provision obliging the employer give two weeks' notice (or two weeks' wages in

lieu) for each year of service and two months' notice (or two months' wages in lieu) after three years' service.

Lastly, I note that Mr. Tanner gave notice of his intention not to return to the school in the fall of 2001 even though his agreement would have expired at the end of August the same year. I think it can be reasonably inferred that Mr. Tanner advised the employer he would not be returning in the fall because there was a mutual expectation that, in the ordinary course of events, he would have otherwise continued to be a member of the teaching staff (albeit under a new agreement).

In view of the foregoing, I am satisfied that the employees were not employed for a definite term but, rather, were employed under indefinite contracts of hiring. The circumstances here are remarkably similar to those in *Ceccol v. Ontario Gymnastic Federation*, [2001] O.J. No. 3488 (Ont. C.A.) where Ms. Ceccol, whose terms of employment were set out in a series of 1-year contracts, was nonetheless held to be employed under an indefinite contract of employment. The comments of MacPherson, J.A., for the court, are particularly apposite here:

> "Fixed term contracts of employment are, of course, legal. If their terms are clear, they will be enforced...
>
> However, the consequences for an employee of finding that an employment contract is for a fixed term are serious: the protections of [Ontario's *Employment Standards Act*] and of the common law principle of reasonable notice do not apply when the fixed term expires...
>
> It seems to me that a court should be particularly vigilant when an employee works for several years under a series of allegedly fixed term contracts. Employers should not be able to evade the traditional protections of the *ESA* and the common law by resorting to the label of 'fixed term contract' when the underlying reality of the employment relationship is something quite different, namely, continuous service by the employee for many years coupled with verbal representations and conduct on the part of the employer that clearly signal an indefinite term relationship."

Section 65(1)(b) creates an exception to the general rule that employees are entitled to compensation for length of service, or written notice in lieu of compensation, upon termination without just cause. As an exception, the provision ought to be interpreted narrowly (see *Daryl-Evans Mechanical Ltd.*, BC EST # D442/00; petition for judicial review dismissed [2002] BCSC 48). The approach taken by the Ontario Court of Appeal in *Ceccol* is also reflected in Tribunal decisions such as *Finlay Forest Industries Inc.*, BC EST # D286/96 (Reconsideration panel affirming D076/96); *Munro*, BC EST # D318/98 and *Fraser-Fort George Museum Society*, BC EST # D292/01.

Inasmuch as the respondent employees were not engaged for a "definite term" but, rather, were employed under indefinite contracts of employment, each of them was entitled, pursuant to section 63 of the *Act*, to compensation for length of service or, alternatively, written notice in lieu of compensation. I now turn to that matter.

Notice of Termination

The school's teachers were paid over 12 months and taught the regular school curriculum during the academic year (early September to the end of June). In addition, the teachers were obliged by contract to provided two further weeks of instruction in the summer (typically, the first two weeks of July). As I understand the situation, the teachers' two-week "summer" teaching was in an "english as a second language program" offered to foreign students; the "ESL" instruction was a supplementary program offered by the school in order to generate additional revenue. The balance of the summer (6 weeks) was, by contract, set aside as vacation time. Accordingly, any wages that were not paid to the employees for

the July and August pay periods were nonetheless earned and payable under the terms of the employees' respective employment contracts.

With respect to the May 9th meeting at which, allegedly (there is a dispute in the evidence on this point), the employees were given verbal notice of termination, such verbal notice--even if given--would not have complied with the dictates of section 63(3) of the *Act* which requires written notice [see e.g., *Sun Wah Supermarket Ltd.*, BC EST # D324/96; *G.A. Fletcher Music Co. Ltd.*, BC EST # D213/97; *Zaretski*, BC EST # D214/97; *Venco Products Ltd.*, BC EST # D052/99; *Jellybean Park Playcare Inc.*, BC EST # D027/01].

It appears that on June 29th, 2001 most, if not all, of the employees were given written notice of termination. So far as I can gather the employees received essentially identical letters which stated:

> "This is to confirm that due to the uncertainties surrounding Delphi International Academy we will not be requiring your services for the summer ESL program. Your contract will therefore be terminated on August 15th instead of August 31st/01.
>
> The pay cheques of July 15th and July 31st will be pro-rated to adjust for the two weeks less of work and the usual pay amounts will then be issued for August/01".

At this point, it should be noted that the employer's unilateral attempt to refuse to pay the employees for the final pay period in August was, in my view, a breach of contract. The employees, under their respective agreements, were entitled to be paid until the end of August--as long as the employees were ready and available to perform their 2-weeks of "ESL" instruction (and, apparently, all employees were), they were entitled to be paid up to the end of August since wages for July and August would have been earned and were thus payable by the employer.

Assuming that each employee received a form of the above letter (that matter is not entirely clear on the material before me), I am of the view that the letter constituted a form of written notice of termination contemplated by section 63(3) of the *Act*. It would appear that each employee received approximately 6 1/2 weeks' working notice. The legal sufficiency (under the *Act*) of that amount of notice depends on each employee's length of service which, in turn, would be calculated as and from their original date of hire and not from the date of their most recent contract renewal (in light of my finding that the employees were engaged under indefinite contracts of hiring; note also that compensation for length of service is based on the employee's "consecutive years of employment").

Therefore, in my view, the delegate erred in determining that each employee was entitled to only one week's wages as compensation for length of service. Each employee's individual notice entitlement should have been calculated based on their entire tenure ("consecutive years of employment") rather than being based on the term of their most recent contract renewal. Thus, for example, a teacher with 5 years' service would have been entitled to 5 weeks' notice and thus would not have been entitled to any compensation because they would have received more notice (i.e., 6 1/2 weeks') than mandated by the Act.

There is a further complication, however. The written notice required under section 63(3) is "working notice". In other words, during the notice period, the employment relationship subsists--both the employee and the employer are bound to honour the terms of the employment contract. In practical terms, this means that the employee must continue to report for work (but only as required by their contract) and the employer must continue the employee's wages and benefits during the notice period [see *Logan*, BC EST # D093/96; see also section 67(2) of the *Act*].

The evidence before me indicates that the employees' wages and benefits were not continued in the ordinary course during the working notice period (I understand some employees received partial and sporadic payments). Accordingly, although the employer may have given some or all of the employees proper written notice of termination (on June 29th), the employer apparently failed to honour the employees' terms and conditions of employment during the notice period. If an employer does not honour the employee's terms and conditions during the notice period, the employer has, in effect, "constructively dismissed" the employee (see section 66 of the *Act*). In such circumstances, and at the point of the "deemed termination" under section 66, the employees were entitled to be paid compensation for length of service pursuant to section 63(2) of the *Act*.

The delegate did not determine the employees' various claims in accordance with the foregoing analysis and, in my view, thus fell into error. I am unable to determine the employees' respective entitlements on the basis of the evidence before me. Accordingly, I propose to refer the matter of the employees' respective entitlements to compensation for length of service back to the Director.

Other reasons for appeal

I am not satisfied that the remaining reasons for appeal are meritorious.

With respect to Mr. David Tanner, the uncontradicted evidence before me is that Mr. Tanner met with Alan Decker, Todd Decker and with the school's principal, Mr. Forrest Day, on or about May 7th, 2001. During the meeting, Mr. Tanner advised that he was not planning to return to the school in the fall since his wife had accepted a teaching position in 100 Mile House and he would also be relocating to join his wife. Mr. Tanner clearly indicated that he fully intended to serve out the balance of his current employment contract. In other words, Mr. Tanner simply gave notice that he would be resigning effective August 31st. In the ordinary course of events, Mr. Tanner's employment would have continued until August 31st, 2001 and, had that occurred, the employer would not have had any liability to Mr. Tanner on account of compensation for length of service. However, since the employer unilaterally decided to terminate Mr. Tanner's employment well before August 31st, section 63(3)(c) of the *Act* does not apply.

With respect to the claims of Messrs. Taylor and Massie, even if they did not file formal written complaints under section 74 of the *Act*--and I am unable to decide that matter based on the material before me--the Director's delegate was nonetheless entitled to investigate and determine if either of them had a valid claim for unpaid wages [see section 76(3) of the *Act*].

ORDER

Pursuant to section 115(1)(b) of the *Act*, the matter of the employees' entitlement to compensation for length of service is referred back to the Director for further investigation and determination in accordance with these reasons for decision. In all other respects, the Determination is confirmed.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal