

An appeal

- by -

BNW Travel Management Ltd., operating as Brave New World
("BNW")

- 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

TRIBUNAL MEMBER: David B. Stevenson

FILE No.: 2004A/128

DATE OF DECISION: September 28, 2004

DECISION

SUBMISSIONS

Daniel Burns	on behalf of BNW Travel Management Ltd.
Bruno Fegan	on his own behalf
Lynne Egan	on behalf of the Director

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by BNW Travel Management Ltd. (“BNW”) of a Determination that was issued on June 9, 2004 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that BNW had contravened Part 4, Section 40, and Part 8, Section 63 of the *Act* in respect of the employment of Bruno Fegan (“Fegan”) and ordered BNW to pay Fegan an amount of \$1,604.19.

The Director also imposed an administrative penalty on BNW under Section 29(1) of the *Employment Standards Regulation* (the “*Regulations*”) in the amount of \$1000.00, making the total amount of the Determination is \$2,604.19.

BNW says the Director erred in law by deciding that BNW was not discharged of its liability to pay length of service compensation under Section 63 the *Act* under the concept of “after acquired cause”. BNW seeks to have the Tribunal vary the Determination by cancelling the finding that BNW had contravened Section 63 of the *Act*, by varying the Determination by the amount found owing as length of service compensation and by cancelling the administrative penalty associated with the contravention of Section 63.

The Tribunal has reviewed the appeal and the materials submitted with it and has decided an oral hearing is not necessary in order to decide this appeal.

ISSUE

The issue in this appeal is whether BNW has shown the Director erred in law in concluding Fegan was entitled to length of service compensation under the *Act*.

THE FACTS

BNW operates a travel agency. Fegan was employed by BNW as a travel consultant from February 18, 2002 to October 28, 2003, when he was dismissed for reasons of poor sales production, rudeness and poor file management. The Director found the evidence on those matters did not show BNW had just cause to terminate Fegan and, as there was no other basis on which BNW’s liability under Section 63 of the *Act* was deemed discharged, he was entitled to length of service compensation.

During the complaint process, BNW said there were other matters supporting just cause for dismissal which came to their attention after Fegan was dismissed. The Director did not accept that the employer could rely on those matters to discharge its liability under Section 63 of the *Act*. The Director referred to, and relied on, the Tribunal's decision in *Wendy Benoit and Ed Benoit operating as Academy of Learning*, BC EST #D138/00 in not accepting BNW's evidence or argument on "after acquired cause".

BNW has submitted evidence relating to the "after acquired cause" that is not included in the record.

ARGUMENT AND ANALYSIS

BNW argues the Director should have applied the concept of "after acquired cause" to the question of its liability under Section 63 of the *Act* and considered the evidence supporting just cause for termination that was acquired after Fegan was dismissed.

Implicit in the argument made by BNW is that the concept of "after acquired cause" is, or ought to be, incorporated into the statutory provisions relating to length of service compensation. That argument was specifically considered, and rejected, in the *Academy of Learning* case. In that case, the following reasons were offered for not incorporating the concept of "after acquired cause" into the interpretation and operation of Section 63 of the *Act*:

1. The *Act* should be interpreted in a manner that is consistent with its remedial nature and should be given such large and liberal interpretation as will best ensure the attainment of its purposes and objects. The *Act* sets minimum standards of employment. The following comment, which guides the interpretive approach to the *Act* (set out in *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27), is to read words of the *Act* "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament".
2. Section 63 is part of the legislative scheme to "ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment". Generally speaking, Section 63 of the *Act* contains provisions relating to an employer's liability to pay an employee length of service compensation on termination of employment. 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, where the employee is given written notice of termination equivalent to the employer's statutory liability to the employee; second, where the employee is given a combination of notice and compensation equivalent to the employer's statutory liability to the employee; and third, where the employee terminates the employment, retires from employment or is dismissed for just cause.
3. Length of service compensation should not be equated with common law damages for wrongful dismissal. The main objective of the common law is to adjudicate a breach of contract and to provide appropriate relief for that breach, depending on the Court's view of the circumstances and factors in each case. Developments in the common law in this area have expanded the remedial

authority of the Courts, but the basic objective remains unaltered. The focus in such a case is on the contractual relationship. As such, any factors, including those coming to light after the alleged breach, can have a bearing on the respective rights of the parties under the contract and, in the Courts' view, are properly considered.

4. The objective of Section 63 of the *Act* is different. One of the purposes for length of service compensation is simply to provide the courtesy of notice. It is intended to give an employee a brief period, at a time when that employee's loss of employment is imminent, which the employee can use to seek alternative employment and make adjustments to their personal and financial circumstances unaffected by the immediate financial consequences of unemployment. It is, in a sense, a statutory benefit earned through employment. Payment of length of service compensation can be avoided by the simple expedient of giving notice.
5. Grammatically, paragraph 63(3)(c) of the *Act*, as well as in Section 63 generally, are cast in the present tense: "terminates the employment, retires from employment, or is dismissed for just cause". That structure suggests the legislature intended the statutory liability for length of service compensation, or its deemed discharge, is to be determinable at the time of termination of employment. It would require a clearer statement of intention by the legislature than is indicated by the words used in paragraph 63(3)(c) before interpreting the phrase "or is dismissed for just cause" to include the words "or had just cause for dismissal".
6. That perspective is reinforced by other provisions of the *Act*. Under the *Act*, the benefit and the corresponding liability crystallizes at the time of termination. Subsection 63(4) says, in part,

63 (4) The amount the employer is liable to pay becomes payable on termination of employment . . .
7. The *Act* also includes an employer's liability for length of service compensation in the definition of "wages" and, pursuant to Section 18(1), requires an employer to pay all wages owing to an employee within 48 hours after the employer has terminated the employment. These provisions reflect a basic goal of the *Act*, that wages be paid in a timely way and, as it specifically relates to termination of employment, that all wage obligations existing at the time of termination be paid immediately upon termination. It would be inconsistent with those provisions to suggest, in effect, that they are all conditional on whether the employer might find some reason, after the termination has occurred and the statutory obligations have crystallized, to avoid those obligations.
8. Length of service compensation is a minimum requirement of the *Act*. In *Machtiger v. HOJ Industries Ltd.*, *supra*, the Court noted:

. . . an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protection to as many employees as possible is favoured over one that does not.

It would not be consistent with the above statement if the *Act* was interpreted in a way that, rather than encouraging employers to comply with the minimum requirements, was encouraging employers to begin looking for reasons that would allow them to avoid those requirements.

9. As well, one of the purposes of the *Act* is to “provide fair and efficient procedures for resolving disputes over the application and interpretation of this *Act*”. That purpose is not served by adopting a view which most likely would have the effect of prolonging any final resolution of a complaint while often vague allegations of employee misconduct are investigated and adjudicated.
10. Finally, the administrative scheme of the *Act* was considered. Under Section 79 of the *Act*, the jurisdiction to receive and investigate a complaint alleging a contravention of the *Act* belongs to the Director. In respect of each complaint, the Director must investigate unless there is reason to stop or postpone the investigation. Following investigation, the Director may issue a Determination. The primary jurisdiction of the Tribunal is to consider appeals from a Determination. The Tribunal is not intended to be an investigative body. The administrative scheme is designed to achieve finality to complaints made to the Director in a way that is fair and efficient. The application of the concept of “after acquired cause” impacts that scheme in two ways. First, it forces the Tribunal into an investigative role, requiring it, in a very real sense, to investigate the merits of the respective positions of the parties as a matter of first impression. Second, it raises the spectre of a multiplicity of investigations on the same complaint depending on how long an employer is prepared to continue to allege and investigate potential employee misconduct.

The concept of “after acquired cause” is one which has been developed and applied at common law to adjust rights in the context of breach of contract. The Tribunal has recognized that while common law principles are often helpful in interpreting the *Act*, in the final analysis, the *Act* is not merely an embodiment of common law principles or concepts, but is broad based remedial legislation that must be administered on its own terms in a manner consistent with the legislative intention expressed behind it.

For the above reasons, the appeal is dismissed. BNW has not shown the Director erred in law.

As a result, it is unnecessary to consider whether the Tribunal should accept the additional evidence submitted by BNW with the appeal. That evidence would only be relevant if the Tribunal had accepted the Director erred by finding BNW could not rely on matters coming to their attention after Fegan was dismissed to discharge their statutory liability under Section 63 of the *Act*.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated June 9, 2004 be confirmed in the amount of \$2,604.19, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal