Employment Standards TRIBUNAL

An appeal

- by -

M.J.M. Conference Communications of Canada Corp.
(the "Employer")

- 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: Matthew Westphal

FILE No.: 2004A/140

DATE OF DECISION: October 20, 2004

DECISION

SUBMISSIONS

Victor Lee	On behalf of the Director of Employment Standards
Michael J. McGrath	On behalf of M.J.M. Conference Communications of Canada Corp.

OVERVIEW

This is an appeal by M.J.M. Conference Communications of Canada Corp. (the "Employer") under section 112 of the *Employment Standards Act* (the "*Act*") of a Determination dated June 29, 2004 (the "Determination"), issued by a delegate (the "Delegate") of the Director of Employment Standards. The Delegate ordered that the Employer pay wages, vacation pay, and compensation for length of service owed to three of its former employees, and imposed a $500 administrative penalty for a violation of the *Act*.

The Tribunal has decided that this case can be decided without an oral hearing. Based on my review of the Determination, the submissions of the Employer and the Delegate, and the record provided to me, I am dismissing the Employer's appeal.

ISSUES

Did the Delegate err in finding that the Employer did not fall into the exception provided in s. 65(1)(d) of the *Act* to the requirement that it pay compensation for length of service to three of its former employees?

BACKGROUND

The Employer operated a newspaper publication business, whose principal publication appears to have been *Canadian Miner*. It employed Susanne Nielsen, Andrew Scott, and Todd Silver (the "Complainants") in various capacities, and at various rates of pay.

To assist with its cash flow, the Employer had an arrangement with the Interface Financial Group ("IFG") whereby the Employer assigned invoices and accounts receivable to IFG in exchange for funds, at a discount from the invoices' face value. It appears that under this arrangement, IFG did not assume the risk of non-payment of the invoices. Rather, in the event of non-payment the Employer was liable to repay IFG the amounts it had advanced against the invoices, and IFG had the right to assume control over the Employer's financial operations to ensure the repayment of these amounts.

On February 11, 2004, IFG informed the Employer that it was exercising this right. Mr. McGrath has submitted an email to him, dated February 11, 2004, from Alain Chevalier of IFG. In this email Mr. Chevalier writes, among other things:

> According to our original agreement MJM is fully responsible for payments of invoices purchased by IFG. MJM is in default of its obligations to make payment to IFG. For this reason IFG is now taking control of the financial activity of MJM according to the following terms…

The terms essentially provided that until IFG recovered its money, none of the Employer's bank accounts could be used without IFG's approval, and that Mr. McGrath would focus all of the Employer's activity during this time on the publishing and distribution of three outstanding issues of *Canadian Miner*, for compensation that would be determined later.

On February 20, 2004, the Employer closed its business and terminated the employment of the Complainants.

The Complainants each filed a complaint with the Director, alleging that the Employer had failed to pay outstanding wages, vacation pay, and compensation for length of service. The Employer acknowledged that it owed the Complainants wages and vacation pay, but denied that it owed them compensation for length of service, on the basis that it had ceased operations as a result of IFG's assumption of financial control. The Delegate rejected this argument, ordered the Employer to pay all outstanding amounts, and imposed a $500 administrative penalty for violating the *Act.*

ANALYSIS

On its appeal form, the Employer stated that its basis for appealing the Determination was that the Director failed to observe the principles of fundamental justice in arriving at the Determination. However, in explaining this allegation, the Employer stated "Company lost financial control, and had no way to pay." From this statement, and the other submissions the Employer has made, it seems to me that the Employer's true basis for appealing the Determination is not a violation of the principles of fundamental justice; indeed, there is no indication that the Delegate failed to observe those principles. Rather, the Employer's claim is that the Delegate erred in law in finding that that the Employer did not fall into the exception provided in s. 65(1)(d) of the *Act* to the requirement that it pay compensation for length of service to the Complainants, and I am approaching the appeal on this basis.

Wages and vacation pay

The Employer does not dispute that it is liable for paying outstanding wages and vacation pay. It says that it currently has no money to pay what it owes the Complainants, but Mr. McGrath, on behalf of the Employer, says that he is prepared to come to some sort of payment arrangement once he has an income. While Mr. McGrath's willingness to make repayment is commendable, the making of a payment arrangement is a matter between him and the Director, not for the Tribunal. I should say that although the amounts Mr. McGrath says the Employer owes as outstanding wages and vacation pay for each of the Complainants are slightly different from those calculated by the Delegate, Mr. McGrath has provided no basis upon which to prefer his figures to those of the Delegate.

Compensation for length of service

Section 63 of the *Act* provides that after three consecutive months of employment, an employer is liable to pay an employee one week's wages as compensation for length of service. The amount payable increases according to the length of the employee's employment, rising to 2 weeks' wages after 12 consecutive months of employment, 3 weeks' wages after 3 consecutive years of employment, and increasing thereafter to a maximum of 8 weeks' wages after 8 years of employment. Based on the length of their employment, Ms. Nielsen and Mr. Scott were entitled to one week's wages, and Mr. Silver to 3 weeks' wages, as compensation for length of service under s. 63.

An employer's liability to pay compensation for length of service under s. 63 is subject to a number of exceptions, but the only relevant one for the purposes of this appeal is that set out in s. 65(1)(d) of the *Act*, which provides that an employer is not liable to pay such compensation to an employee "employed under an employment contract that is impossible to perform due to an unforeseeable event or circumstance other than receivership, action under section 427 of the *Bank Act* (Canada) or a proceeding under an insolvency Act."

In the Determination the Delegate rejected the Employer's argument that it fell within the exception in s. 65(1)(d) on the basis that "It is clear from the Section that this exception is not applicable here as the employer is insolvent. A business failure does not discharge the employer's obligation to provide compensation for length of service to the complainants." Although I agree with the Delegate's decision, I do so based on slightly different reasoning.

Section 65(1)(d) sets out an exception to the general rule that an employer is liable to pay compensation for length of service, but specifically excludes from its scope a "receivership, action under s. 427 of the *Bank Act* (Canada) or a proceeding under an insolvency Act." It does not refer to an employer's being "insolvent" in the informal sense of the word, but to an employer's being subject to proceedings under "an insolvency Act" (which would likely include statutes such as the *Bankruptcy and Insolvency Act*, R.S. 1985 c. B-3, the *Companies' Creditors Arrangement Act*, R.S. 1985 c. C-36, and the *Winding-up and Restructuring Act*, R.S. 1985 c. W-11), a receivership, or an action under s. 427 of the *Bank Act* (which provides that a bank that has taken security over assets of a debtor may, in certain circumstances, take possession of those assets). As Brenner C.J.S.C. held in *Skeena Cellulose Inc. (Re)* (2003), 10 B.C.L.R. (4th) 174 at para. 12 (S.C.),

> Subsection 65(1)(d) explicitly removes insolvency proceedings as an unforeseeable event or circumstances that renders a contract of employment impossible to perform and which would otherwise trigger the exclusion of an employer's obligation to pay individual and group termination benefits. Simply put subsection 65(1)(d) prevents an employer from arguing that being subject to insolvency proceedings allows it to avoid paying benefits under both section 63 and section 64 to all employees who have been terminated. . .

Given that there is no record of the Employer's being involved in any insolvency proceedings, I do not agree with the Delegate's finding that s. 65(1)(d) clearly does not apply to the Employer simply because it was "insolvent".

Was the Employer in a receivership? A "receivership" is not defined under the *Act* or the *Interpretation Act*, but, according to *Black's Law Dictionary* (7th ed., 1999), it is "the state or condition of being in the control of a receiver," who is a "disinterested person appointed by a court, or by a corporation or other person, for the protection or collection of property that is the subject of diverse claims (for example, because it belongs to a bankrupt or is otherwise being liquidated)". The *Canadian Law Dictionary*, 2nd ed., defines "receiver" as "a person who was appointed to take possession of property which belongs to a third party." Although not all of the relevant documents are before me, there is no indication that a receiver has been appointed over the Employer's business, nor that any action under s. 427 of the *Bank Act* has been taken. On the contrary, the email from IFG suggests that it took, or at least proposed to take, financial control over the Employer pursuant to a financing agreement related to the assignment of the invoices. While the practical result, from the Employer's perspective, may have been similar to a receivership, I find that this was not a "receivership" within the meaning of s. 65(1)(d).

Therefore, I must still determine whether or not IFG's assumption of financial control, and the subsequent closure of the Employer's business, was an "unforeseeable event or occurrence" within the meaning of s. 65(1)(d) of the *Act.* In interpreting this exception to the Employer's liability to pay compensation for length of service, I must bear in mind the following statement of the Supreme Court of Canada in *Machtinger v. HOJ Industries Ltd.* (1992), 91 D.L.R. (4th) 491 at 507, concerning Ontario employment standards legislation, that applies equally to the *Act*:

> . . . 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.

Further, in *Re Rizzo & Rizzo Shoes Ltd*., [1998] 1 S.C.R. 27, at para. 25, the Court held that "the objects of the termination and severance pay provisions are also broadly premised upon the need to protect employees," and interpreted Ontario employment standards legislation (worded differently from ss. 63 and 65 of the *Act*) broadly to requiring payment of severance and termination pay to employees where termination of employment was a result of bankruptcy.

In keeping with the need to give a broad and generous interpretation to employers' obligation under the *Act* to pay compensation for length of service, the Tribunal has given a narrow interpretation to the exceptions to this requirement. In the specific context of s. 65(1)(d) of the *Act,* the Tribunal held, in *Re ARFI Holdings Ltd.,* BC EST #D054/97, that:

> The word "unforeseeable" should be interpreted cautiously. It would seriously undermine the minimum protections given employees by the *Employment Standards Act* to deny them length of service compensation when their employer encounters a difficulty in the marketplace, be it a product market or a real estate market.

The Tribunal has also held that s. 65(1)(d) does not include situations where a contract of employment was unable to be performed because a landlord shut down an employer's business by executing a distress warrant (*MacDonald & Wilson Ltd. (Re)*, BC EST #D497/97) or imposed a steep increase in rent (*Re ARFI Holdings Ltd., supra*). See also *Top Win Café Ltd. (Re)*, BC EST #D629/01, where the Tribunal held that s. 65(1)(d) did not apply where an employer shut down after being evicted from its premises, because "an eviction caused by a failure to reach an agreement on a lease or a dispute over rent is largely foreseeable." Likewise, the Tribunal held in *Pro-Tru-Tec Investments Ltd. (c.o.b. McDonald Trucking) (Re)*, BC EST #D207/00 and *Finlay Contracting Ltd. (Re)*, BC EST #D396/01 that the loss of an important contract, which resulted in an employee's termination, did not constitute an "unforeseeable event or circumstance". In *Pro-Tru-Tec Investments Ltd*., *supra* the Tribunal explained the policy behind a narrow interpretation of s. 65(1)(d) as follows:

> Employers face changes in the marketplace, and employees have little recourse other than to seek other employment if they are terminated. The requirements for notice are intended to shield employees from some of the consequences of changes in an employer's business.

The principle I derive from these decisions is that the exception in s. 65(1)(d) does not apply simply because an employer has ceased operations as a result of a deterioration in its business, because such a misfortune is foreseeable. In this sense, I agree with the Delegate's general statement that "A business failure does not discharge the employer's obligation to provide compensation for length of service to the complainants." On the particular facts of this case, the Employer, in entering into the financing agreement with IFG, knew or ought to have known that, if it were unable or unwilling to fulfil its

obligations under that agreement, IFG had the right to assume financial control over its operations, which could result in the termination of its employees' employment.

For these reasons, I find that IFG's assumption of control over the Employer's financial operations was not "an unforeseeable event or circumstance" rendering impossible the performance of the employment contracts with the Complainants, within the meaning of s. 65(1)(d) of the *Act*. Therefore, it is liable to pay the Complainants compensation for length of service, as found by the Delegate, and I dismiss the Employer's appeal.

ORDER

I order, pursuant to section 115(1)(a) of the *Act*, that the Determination be confirmed.

Matthew Westphal
Member
Employment Standards Tribunal