

**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-

Donald Ellis Zaretski

(“Zaretski”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

**ADJUDICATOR:** Kenneth Wm. Thornicroft

**FILE No.:** 97/66

**DATE OF DECISION:** June 11th, 1997

## DECISION

### OVERVIEW

This is an appeal brought by Donald E. Zaretski (“Zaretski”) 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 20th, 1997 under file number 75-723 (the “Determination”). The Director determined that Zaretski’s former employer, Blue Note Records and Tapes doing business as Total Sound (“Blue Note” or the “employer”), did not owe Zaretski any monies on account of unpaid termination pay, vacation pay or bonuses.

### FACTS

Blue Note is a western Canadian franchisor and owner-operator of retail music stores (tapes and CDs). In a letter to the Tribunal dated March 5th, 1997, the employer set out Zaretski’s employment history as follows:

“Mr. Zaretski was employed by our company in January, 1992 at our Top Forty Store in Yorkton, Saskatchewan. In November, 1992 Mr. Zaretski was moved to our Head Office in Edmonton, Alberta. In September, 1993 Mr. Zaretski was given notice that his employment would be terminated with our company on January 1, 1994. We actively proceeded to help Mr. Zaretski become re-employed. Due to a search on our behalf we were able to find employment for Mr. Zaretski with a franchisee (customer) in Vernon, British Columbia. Mr. Zaretski left our employment in October, 1993 and began working for our customer in Vernon, British Columbia. In May, 1995 we purchased the assets of our customer in Vernon, British Columbia. We do not dispute the fact that we are responsible for Mr. Zaretski’s continued employment from when he started with the customer in October, 1993 until June, 1996, therefore his term of employment would be one year and eight months with our customer and one year with us for a total of two years and eight months.”

According to the Determination, Zaretski received four weeks’ *verbal* notice of termination. Apparently, no *written* notice of termination was ever given by the employer.

### ISSUES TO BE DECIDED

Zaretski’s appeal is based, in part, on the assertion that he should have been credited with six years’ service and, accordingly, was entitled to four, rather than six, percent vacation pay. Further, Zaretski also says that the employer was obliged to give *written* notice of termination, not merely *verbal* notice. According to Zaretski, the Director also erred in determining that he (Zaretski) had been fully paid for all earned bonuses.

## ANALYSIS

In a recent decision, *G.A. Fletcher* (BC EST No. D213/97), I stated the following regarding an employer's statutory obligation to issue *written* notice of termination:

“Under the *Act*, an employee is entitled to be paid certain monies on termination of employment as “compensation for length of service” [see subsections 63(1) and (2) of the *Act*]-the amount payable, ranging from one to eight weeks' wages, is based on the employee's uninterrupted tenure at the point of termination.

An employer's liability for termination pay is “deemed to be discharged” in certain circumstances, including the giving of prior *written* notice of termination to the employee. Specifically, subsection 63(3) provides as follows:

- (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.*

*(emphasis added)*

Under section 63 of the *Act*, an employee's entitlement to compensation for length of service is, in effect, a form of deferred contingent compensation. An employee's entitlement accrues during the course of his or her employment tenure to a maximum of eight weeks' wages. The employer's obligation to pay compensation for length of service can only be avoided in a few limited circumstances including the giving of the appropriate amount of *written* notice.

The requirement for written notice, quite apart from the statutory mandate, creates certainty by side-stepping the sort of arguments that might arise if verbal notice was deemed to be sufficient (such as whether the notice was given at all; or, if given, when the notice was to take effect). The Tribunal has consistently held that the requirement for *written* notice cannot be satisfied by an equivalent amount of *verbal notice* and I see no reason to depart from that line of authorities (see *e.g.*, *Workgroup Messaging*, BC EST #D025/97; *Dr. Robert S. Wright Inc.*, BC EST #D060/96; *Frans Markets*, BC EST #D309/96; *Sun Wah Supermarket Ltd.*, BC EST #D324/96).”

In light of the foregoing, I am of the view that the instant Determination is in error inasmuch as it is clear that Zaretski never did receive written notice of termination.

Further, Zaretski’s assertion that his employment should have been deemed to have been continuous since January 1992 (see sections 95 and/or 97 of the *Act*) does not appear to have been addressed in the Determination.

Finally, based on the material before me, there seems to be some merit (I do not wish to put the matter any stronger than that) to his assertion regarding unpaid bonuses.

**ORDER**

Pursuant to section 115 of the *Act*, I order that the Determination in this matter, dated January 20th, 1997 and filed under number 75-723, be cancelled. Zaretski’s complaint is hereby referred back to the Director for further investigation and, if appropriate, the issuance of a new Determination consistent with these reasons.

**Kenneth Wm. Thornicroft**  
**Adjudicator**  
**Employment Standards Tribunal**