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 -

Timothy Rundall Wellman
("Wellman")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Hans Suhr

FILE NO.: 98/159

DATE OF HEARING: May 13, 1998

DATE OF DECISION: June 3, 1998

DECISION

APPEARANCES

Timothy Rundall Wellman	on his own behalf
Kristen Page	observer
Tony Morris	on his own behalf
Cecelia Doupe	on behalf of Tony Morris, operating Decker Lake Diesel
Richelle Webber	observer

OVERVIEW

This is an appeal by Timothy Rundall Wellman ("Wellman"), under Section 112 of the *Employment Standards Act* (the *"Act"*), against a Determination dated February 20, 1998 issued by a delegate of the Director of Employment Standards (the "Director"). Wellman alleges that the delegate of the Director erred in the Determination by concluding that Wellman was not entitled to compensation for length of service. The Director's delegate also concluded that Tony Morris operating Decker Lake Diesel, ("Morris") had contravened Section 40 of the *Act* and ordered that Morris pay the amount of $172.52 to Wellman.

ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether Wellman is entitled to compensation for length of service?

FACTS

There is no dispute between the parties with respect to the $172.52 ordered to be paid in regard to outstanding overtime and vacation pay on that overtime. Morris has provided a cheque in that amount to the Director.

The following relevant facts are not in dispute:

- Wellman commenced employment for Morris on October 31, 1993;
- Wellman commenced an apprenticeship as a "Heavy Duty Mechanic" pursuant to an "Apprenticeship Agreement" entered into on November 29, 1993;

- Wellman was laid off after work on December 6, 1996;
- Wellman was issued a Record of Employment ("ROE") which indicated the reason for issuance was "A" - shortage of work and further indicated that the expected date of return to work was unknown at the time of issuing;

Wellman testified and stated that:

- he had not received a letter of recall from Morris dated February 21, 1997;
- he called Morris on March 9, 1997 to inquire about payment of "severance pay" and spoke to Cecelia Doupe ("Doupe") who relayed his message to Morris who later called back;
- the letter from the apprenticeship counselor John Dodd ("Dodd") is incorrect about the telephone conversation alleged to have taken place on February 10, 1997;
- he only decided on March 9, 1997 that he would never work for Morris again;
- he was disgruntled in December of 1996 as after he was laid off, it was some time before Morris paid him outstanding wages;

Morris testified and stated that:

- he had Doupe prepare the letter of recall dated February 21, 1997 which he signed and then Doupe mailed;
- the 1996 T-4 slip which was mailed to Wellman a week later was acknowledged as having been received by Wellman;
- he first received a call from Wellman in regard to severance pay in late January 1997;
- Wellman's call was answered by Doupe who then advised Morris that Wellman had called;
- Morris returned Wellman's call and advised Wellman that he would be recalled to work within the 13 weeks and that no severance pay was owing;
- he telephoned the apprenticeship counselor Dodd on January 30, 31 and finally spoke to Dodd on February 3, 1997 to verify the dates of Wellman's schooling and further to advise him that Wellman had requested severance pay and also that Wellman had been told that he would be recalled to work;
- he expected Wellman to return to work on March 10, 1997 as per the letter of recall;
- he telephoned Wellman on March 9, 1997 as nothing had been heard in response to the letter of recall and it was at that time that Wellman indicated that he would not be returning to work for Morris and demanded severance pay.
- he telephoned Dodd on March 10, 1997 to advise him that Wellman had refused to return to work as recalled and further that Wellman had stated that he wouldn't work for Morris again;
- he did not hear anything in regard to Wellman's employment until September 23, 1997 when he received a letter from the delegate of the Director advising that a

complaint had been filed by Wellman alleging that overtime and severance pay were owing.

Cecelia Doupe ("Doupe") testified and stated that:

- she does the bookkeeping for Morris;
- she shares a common office space with Morris and is able to hear one side of telephone conversations;
- Wellman called in late January 1997 in regard to severance pay and I told him I would have Morris call him back;
- she typed the letter of recall for Wellman dated February 21, 1997 and, after having Morris sign it, she mailed the letter;
- she prepared and mailed Wellman's 1996 T-4 and mailed that to him on February 28, 1997;
- she was present in the office when Morris spoke to Dodd in early February 1997 about Wellman asking for severance pay and then confirming the dates of schooling for Wellman;
- after discussions with the delegate of the Director and upon receiving the Determination, she issued a cheque in the amount of $172.52 and mailed it to the Employment Standards office in Prince George.

John Dodd ("Dodd") Apprenticeship Counselor with the Industry Training and Apprenticeship Commission, provided a chronological outline of events in regard to Wellman's apprenticeship with Morris. The relevant portion of that outline is that in February 1997 Dodd notes that " *received a telephone call from Tim (Wellman) about Tony (Morris) laying off just before Christmas. I told Tim (Wellman) about his options and he indicated to me that he will not be going back to work for Tony (Morris). I phoned Tony (Morris) to see if he could set up a meeting with Tim (Wellman) and resolve their problems. Tony (Morris) indicated that Tim (Wellman) would not talk to him but that he wanted him to return to work for him. He got busy. Phoned Tim (Wellman) to let him know that Tony (Morris) wanted him back to work."*

ANALYSIS

The burden of establishing that the Delegate of the Director erred in the Determination rests with Wellman.

An employer's liability to pay compensation for length of service to an employee is set forth in Section 63 (1) and (2) of the *Act* which provides:

> *(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.

Section 63 (3) sets forth circumstances under which the employer's liability is deemed to have been discharged. Section 63 (3) provides:

(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.

There is no dispute that the lay off of Wellman on December 6, 1996 was intended to be a temporary lay off. The ROE indicates that Wellman was laid off due to a shortage of work.

Section 1 of the *Act* defines "temporary layoff" as:

"temporary layoff" means

(a)in the case of an employee who has a right of recall, a layoff that exceeds the specified period within which the employee is entitled to be recalled to employment, and
(b)in any other case, a layoff of ***up to 13 weeks*** *in any period of 20 consecutive weeks;* (emphasis added)

Section 1 of the *Act* defines "week" as:

"week" means a period of 7 consecutive days beginning,

(a) for the purpose of calculating overtime, on Sunday, and
(b) for any other purpose, on any day;

Wellman was laid off work on December 6, 1996. The period of temporary lay off (**up to** 13 weeks in any period of 20 consecutive weeks) ended on March 8, 1997. I must then determine if, at that point, Wellman's employment was terminated.

Termination of employment is defined in Section 1 of the *Act* which provides:

"termination of employment includes a layoff other than a temporary layoff".

The letter of recall dated February 21, 1997 and sent to Wellman clearly indicates that Wellman is to return to work on March 10, 1997, a date which is beyond the period of "temporary layoff" as defined in the *Act.*

The act of notifying an employee of an impending return to work does not, in and of itself, interrupt the period of temporary layoff. In order to end a period of temporary layoff, it is necessary for an employee to **actually return to work**, not merely be notified of an impending return to work.

I conclude that the period of the layoff experienced by Wellman exceeded the period defined in the *Act* as a "temporary layoff" and I further conclude that, pursuant to the definition of termination of employment, Wellman's employment was terminated when he did not return to work before the end of the period of "temporary layoff", that is, **prior** to March 8, 1997.

Section 63 (5) sets forth how to determine the termination date of an employee whose lay off exceeds a temporary lay off. Section 63 (5) provides:

(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.

The fact that Wellman indicated to Dodd that he would not be returning to work for Morris does not relieve Morris from his liability to pay compensation for length of service.

Pursuant to Section 63 (5), as Wellman did not return to work prior to the end of the period of temporary layoff, his date of termination is deemed to be December 6, 1996.

The telephone conversation of March 9, 1997 in which Wellman advised Morris that he would not work for him again does not constitute a "quit" as Wellman's employment had

already been terminated by virtue of Wellman not returning to work within the period of temporary layoff.

For all of the above reasons and on the balance of probabilities, I conclude that Wellman is entitled to an amount equal to 3 weeks wages as compensation for length of service pursuant to Section 63 (1) and (2) of the *Act*.

No evidence was provided to the panel with respect to the weekly wages of Wellman, therefore it is necessary, pursuant to Section 115(b) to refer the matter of calculating the amount of compensation back to the Director.

The appeal by Wellman is granted to the extent as outlined above.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated February 20, 1998 be varied to include an amount equal to 3 weeks wages. I further order that this matter be referred back to the Director for the purpose of calculating the amount of those 3 weeks wages together with whatever further interest may have accrued, pursuant to Section 88 of the *Act*, since the date of the issuance.

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Hans Suhr
Adjudicator
Employment Standards Tribunal

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