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 -

Kispiox Forest Products Ltd.
(“ Kispiox ” or the “employer”)

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 2000/262

DATE OF DECISION: June 20, 2000

DECISION

OVERVIEW

This is an appeal brought by Kispiox Forest Products Ltd. ("Kispiox" or the "employer") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*) from a Determination issued by a delegate of the Director of Employment Standards (the "Director") on March 16th, 2000 under file number ER 027-872 (the "Determination").

THE DETERMINATION

According to the information set out in the Determination, Kispiox closed its mill in December 1998 after having previously advised its employees on October 19th, 1998 that the mill would be closed and that the mill employees would be terminated. Between 50 and 100 employees were given notice of termination thus triggering both the individual (section 63) and group (section 64) termination provisions of the *Act.*

The seven employees named in the Determination were all given termination notices effective as of January 1st, 1999, however, the delegate found that two of those employees–Greg Johnson and Robert Lewis–were on medical leave when they received their notices of termination and remained on leave throughout the notice period. Accordingly, and for only those two employees, the delegate applied section 67(1)(a) of the *Act* and concluded that the termination notices were of no effect. The delegate also concluded that since these two employees "would not have received any notice as required by the Act" they "would not fall within the 2-month window set out in section 64" and thus "would only have a claim to compensation for length of service payable under Section 63" (see Determination, pp. 4-5).

The Director's delegate determined that Kispiox owed the seven former employees a total of $28,568.81 on account of unpaid compensation for length of service (section 63) and group termination pay (section 64) and concomitant vacation pay. The particulars of the seven employees' individual awards are as follows:

Employee	*ss. 63 & 64 Entitlement*	*Notice Received*	*Shortfall*	*Award ($)*
S. Anderson	16 weeks	11 weeks	5 weeks	$3,236.50
R. Blackstock	16 weeks	11 weeks	5 weeks	$5,090.44
J. Bolger	16 weeks	11 weeks	5 weeks	$4,554.40
L. Wookey	15 weeks	11 weeks	4 weeks	$3,692.32
S. Harper	12 weeks	11 weeks	1 week	$1,195.39
R. Lewis	8 weeks	None	8 weeks	$5,844.33
G. Johnson	6 weeks	None	6 weeks	$4,955.43
Total =				$28,568.81

ISSUES ON APPEAL

Legal counsel for the employer has advanced two principal grounds of appeal which may be summarized as follows:

- the seven employees did not commence employment with Kispiox until February 1996 and, accordingly, the delegate erred in calculating their respective length of service and concomitant entitlements to individual and group termination pay; and
- The delegate erred in applying section 67(1)(a) of the *Act* with respect to Robert Lewis; Lewis did not commence his medical leave until November 12th, 1998 and thus the termination notice given to him on October 19th, 1998 was a valid notice.

ANALYSIS

Length of Service

Counsel for the employer says that all seven employees named in the Determination were originally employed by a firm known as Stege Logging Ltd. which was incorporated on March 23rd, 1967. Stege Logging Ltd. effected a legal change of name to Isolite Stege Forest Products Co. Ltd. on August 7th, 1991. On February 8th, 1996 Isolite Stege Forest Products Co. Ltd. changed its name to Kispiox Forest Products Ltd. The original incorporation and the two subsequent name changes are documented by appropriate certificates issued by the B.C. Registrar of Companies, copies of which have been filed with the Tribunal.

The above sequence of events shows that there has been a *single* corporate entity since March 23rd, 1967 which is now known as Kispiox Forest Products Ltd. However, counsel for Kispiox submits that the seven employees' length of service should date from February 1996 because:

> "...the 7 workers were first employed by the appellant in or about February, 1996, at which time the appellant became the majority shareholder in Isolite Stege. The mill operated by Isolite Stege had been destroyed by fire and was not operating at that time. The appellant submits that its employment relationship with the 7 workers began in February, 1996 and the length of service for the purpose of the Determination should be February, 1996 to January 1, 1999." (Appendix B to the notice of appeal)

In the Determination the delegate noted that due to a fire, the mill was "shut down from mid-1995 through mid-1996" but that some employees–including Anderson, Blackstock, Bolger, Harper and Wookey–continued to work during the shutdown and were not laid off for a period in excess of 13 weeks (*i.e.,* at best, they were only given a temporary layoff and thus their employment was deemed to be continuous through the shutdown). There is nothing in the material before me calling into question this latter finding of fact.

A change in shareholding has no impact on the *identity* of the employer and though there may well have been a change in corporate control (through a transfer of shares) in February 1996 that change in control did not affect the subsisting employment contracts between Isolite Stege Forest Products Co. Ltd. (renamed in February 1996 to Kispiox Forest Products Ltd.) and its employees. Accordingly, I reject the notion–advanced by the delegate in his May 2nd, 2000 submission–that section 97 of the *Act* ought to apply in order to deem the employees' service continuous and uninterrupted by the share transfer. As previously noted, this was not, apparently, a transfer of

assets, but rather a *share* transfer. In such circumstances, there is no need to resort to the statutory device embodied in section 97 in order to preserve the employees' tenure as and from the date of their initial hire since, in a share transfer, there is no change in the *identity* of the parties to the employment contract. Thus, despite the change in shareholders, the employees' subsisting contracts of employment continued unaffected by the share transfer.

Only two of the seven employees filed submissions with the Tribunal in response to Kispiox's appeal, namely, Bolger and Lewis. Bolger's uncontradicted evidence is that he was originally employed by Stege Logging Ltd. in 1981 and continued to work with the firm throughout its various name changes. Given this uncontradicted evidence, Bolger was entitled–as determined by the delegate–to a combined 16 weeks' notice given both his individual (8 weeks) and group (8 weeks) termination notice entitlements.

There is nothing before me to show that the delegate erred with respect to his determination of the length of service of any of the other six employees named in the Determination–for example, evidence showing that the delegate erred with respect to their initial hiring dates.

Accordingly, the Determination is confirmed insofar as the findings relating to the seven employees' respective lengths of service are concerned.

The award in favour of Robert Lewis

As for the situation regarding Robert Lewis, it should be recalled that he was not awarded any compensation on account of group termination pay (neither was Greg Johnson). Based on Lewis' date of hire–February 1988–he was entitled, pursuant to section 63 of the *Act,* to 8 weeks' wages as compensation for length of service or, alternatively, 8 weeks' written notice of termination. Although Lewis did receive, apparently, 11 weeks' written notice of termination, the delegate held that the notice given was of "no effect" by reason of the fact that Lewis was on medical leave when the notice was given [see section 67(1)(a) of the *Act*] and he continued on medical leave throughout the notice period.

The employer says that a notice of termination was given to Lewis on October 19th, 1998 prior to the commencement of his medical leave on November 12th, 1998. Lewis, in his submission to the Tribunal, concedes that he did receive notice on October 19th and did not go on medical leave until November 12th, 1998. Thus, it would appear that the delegate erred in finding that the notice given to Lewis was invalid by reason of section 67(1)(a).

Given the uncontradicted evidence that Lewis' employment commenced on February 1988, it would appear that Lewis was entitled to a total of 16 weeks' notice (combined individual and group termination notice entitlements). In fact, Lewis was apparently given only 11 weeks' written notice and is, accordingly, seemingly entitled to a further 5 weeks' wages as termination pay in lieu of notice (rather than the 8 weeks' wages that were awarded to him in the Determination).

Ordinarily, I would simply vary the Determination as it relates to Lewis to reflect 5 weeks' wages. However, given the incomplete and somewhat confusing material before me, I am of the view that the most prudent course here is to refer Lewis' claim back to the Director for further investigation.

The claim of Greg Johnson

Unfortunately, I do not have any submission before me relating to Mr. Johnson's entitlement. Nevertheless, appears that the delegate may have incorrectly calculated his entitlement. I am assuming that Mr. Johnson was, as is indicated in the Determination, on medical leave when he received written notice of termination–along with the other employees–on October 19th, 1998.

By virtue of the fact that he was on medical leave, the notice of termination given to him was of "no effect" [see section 67(1)(a) of the *Act*]. However, section 67(1)(a) only speaks to the efficacy of the *notice;* this subsection cannot change the fact that on October 19th, 1998 Johnson was advised that his employment was being terminated effective January 1st, 1999.

Inasmuch as the written notice given was–by statute–of "no effect", the employer was thus obliged to pay termination pay in accordance with section 64(4)–*i.e.,* 8 weeks' wages. Similarly, and given Johnson's length of service, it would appear that he was also entitled to an additional 6 weeks' wages payable pursuant to section 63 of the *Act.* In summary, it would appear that Johnson was entitled to 14 weeks' wages rather than the 6 weeks' wages awarded to him by way of the Determination.

ORDER

Pursuant to section 115 of the *Act,* I order that the claims relating to Robert Lewis and Greg Johnson be referred back to the Director for further investigation. The awards set out in the Determination in favour of Sean Anderson, Robbie Blackstock, Jim Bolger, Steve Harper and Leonard Wookey are confirmed as issued together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act,* since the date of issuance

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Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal