Employment Standards TRIBUNAL

An appeal

- by -

Malet Transport Corp.

- 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

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 2003A/163

DATE OF DECISION: August 19, 2003

DECISION

INTRODUCTION

This is an appeal filed by legal counsel for Malet Transport Corp. (the "Employer") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*). The Employer appeals a Determination that was issued by a delegate of the Director of Employment Standards (the "Director") on May 6th, 2003 (the "Determination"). By way of the Determination, the Director's delegate determined that the Employer owed five former employees—Robert Dillon ("Dillon"), Jody Lucas ("Lucas"), Sean McInerney ("McInerney"), Tim Ripka ("Ripka" and Ron Stevens ("Stevens")—a total of $10,505.90 on account of unpaid wages (including statutory holiday pay, compensation for length of service and concomitant vacation pay) and section 88 interest.

By way of a letter dated July 25th, 2003 the parties were advised by the Tribunal's Vice-Chair that this appeal would be adjudicated based on their written submissions and that an oral hearing would not be held (see section 107 of the *Act* and *D. Hall & Associates v. Director of Employment Standards et al.,* 2001 BCSC 575). I note that none of the parties requested that the Tribunal hold an oral hearing in this matter.

ISSUES ON APPEAL

The Employer says that the Determination should be cancelled because:

- The Director's delegate erred in law; and
- The Director's delegate failed to observe the principles of natural justice in making the Determination.

The above grounds are further particularized, in the Employer's appeal form, as follows:

> The Company was employed by DCT Chambers Trucking Ltd. and DCT Chambers Trucking Ltd., without good reason, terminated the contract without any notice thus putting Malet Transport in jeopardy with its employees. If there is any liability it should lay at the feet of DCT Chambers Trucking Ltd.
>
> Further, prior to the termination of the contract, the complainant employees had already made arrangements with DCT Chambers Trucking Ltd. to continue their employment and therefore did not lose any time and it is unjust for them to now make a claim.

The only other submission filed by counsel for the Employer in this appeal is dated July 21st, 2003 and addresses the matter of the Employer's obligation to pay compensation for length of service.

Accordingly, I take it that the Employer does not contest the Determination as it relates to statutory holiday pay. Further, in my view, the above-quoted submission does not raise even a *prima facie* case that the delegate breached the rules of natural justice nor is this issue advanced in counsel's July 21st submission. Thus, I do not propose to address this latter ground of appeal in any fashion.

I now turn to the matter of compensation for length of service.

ANALYSIS

In my view, the delegate did not err in awarding the employees compensation for length of service. The Employer was a subcontractor (transporting wood chips from one mill to another) and the complainant employees (who were truck drivers) were employed by the Employer. It is clear that the employees' employment was tied to the subcontract but the continuance of this contract was not, so far as I can determine based on the material before me, an express condition of their employment.

In any event, the delegate found—and there was ample evidence to support this finding (set out in the Determination)--that the Employer was largely, if not completely, responsible for the loss of the subcontract; the Employer attempted to secure the transport contract directly from one of the mill operators and thus "by-pass" the company with whom the Employer had a transportation subcontract. In light of those circumstances, the Employer's assertion that it is relieved from liability for paying compensation for length of service by reason of section 65(1)(d) of the *Act* is not well-founded. This latter issue was dealt with in some detail in the Determination and I adopt the delegate's analysis on this point.

> The Employer did not provide prior written notice of termination to the employees in accordance with the provisions of section 63(3) of the *Act.* Had it done so, the employees would not have been entitled to any compensation for length of service. Whether or not the subcontract was lawfully terminated is not an issue that I need address in this appeal. If the Employer believes that it has some sort of claim against the party that cancelled the subcontract, then that claim will have to be addressed in separate proceedings.

In his July 21st submission, counsel for the Employer asserts that some other corporate entity (perhaps the employees' new employer) is a "successor" to the Employer and thus the Employer is not liable for any compensation for length of service. Although the delegate did not make any "successorship" declaration under section 97 of the *Act*, even if such a declaration was made (and there does not appear to be any evidence that would have supported such a declaration), that would not have relieved the Employer of its liability—section 97 does not vitiate the original employer's liability; it simply imposes a liability for unpaid wages on the successor employer (of course, the original employer also remains liable for the same unpaid wages).

The Employer also suggests since some or all of the employees did not suffer an actual loss of wages—because they were hired by the firm that took over the transportation contract—they are not entitled to any compensation for length of service. This submission is flawed in two respects. First, compensation for length of service is a statutory entitlement based, as the name suggests, on years of service; it is not a form of damages for breach of contract but rather a form of deferred compensation. Thus, the contractual notion of "mitigation" is simply not applicable. Second, as the delegate quite rightly points out in his June 19th, 2003 submission, the employees *have* suffered a pecuniary loss as a result of having been terminated since their service-based entitlements (*e.g.*, vacation pay, compensation for length of service) with their new employer will not take into account their prior employment with the Employer.

In light of the foregoing, it follows that I would dismiss the appeal

ORDER

Pursuant to section 115 of the *Act,* I order that the Determination be confirmed as issued in the amount of **$10,505.90** together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act,* since the date of issuance.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal