EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1995, C. 38

- by -

Sheldon Stratford Operating as Pacific Rim Gardening
("Stratford")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE NO.: 96/469

DATE OF DECISION: October 14, 1996

DECISION

OVERVIEW

The appeal is by Sheldon Stratford operating as Pacific Rim Gardening ("Stratford") pursuant to Section 112 of the *Employment Standards Act* ("the *Act*") against Determination # CDET 003466 of the Director of Employment Standards (the "Director"), a decision dated July 23, 1996. The Determination, issued as a result of a complaint by Keith R. Hambly ("Hambly"), finds that Stratford contravened the *Act* and as a result, owes compensation for length of service plus vacation pay and interest on that compensation, a total of $784.91. The appeal is a claim that severance pay is not owed Hambly.

FACTS

Keith Hambly was employed by Sheldon Stratford as a gardener from January 18, 1995 to November 27, 1995.

On November 27, 1995 Hambly was laid off. Early in December Stratford told him that he would not be hired back.

The Director's Delegate in issuing the Determination, considered whether Hambly's employment was for a definite term and found that no date of termination had been set at the time of hiring. Hambly was found to be owed two weeks compensation for length of service under section 128 of the *Act*, his employment lasting for more than six months. The Determination goes on to order that Stratford cease violating section 63(2) of the *Act*.

Stratford argues in his appeal submission that the job was seasonal. The employer says that Hambly was laid off at the end of the lawn maintenance season because Hambly was not capable of the winter and spring gardening work that Stratford does. Stratford goes on to argue as well that notice of termination was given. It was not in writing, he says, because he thought it unnecessary.

ISSUES TO BE DECIDED

Do sections 63 and 128 of the *Act* govern in Hambly's case?

Should the answer to the first question be in the affirmative, there is a need to answer a second question, Was the required notice of termination given?

ANALYSIS

Under the *Act* an employer is liable to pay compensation for length of service after 3 consecutive months of employment unless written notice of termination is given or the employee terminates the

employment, retires from employment, or is dismissed for just cause, or except as section 65 of the *Act* provides.

Section 65 (1) is of particular relevance. It is as follows:

65. (1) Sections 63 and 64 do not apply to an employee

(a) employed under an arrangement by which

(i) the employer may request the employee to come to work at any time for a temporary period, and

(ii) the employee has the option of accepting or rejecting one or more of the temporary periods,

(b) employed for a definite term,

(c) employed for specific work to be competed in a period of up to 12 months,

(d) employed under an employment contract that is impossible to perform due to an unforeseen event or circumstance other than receivership, action under section 427 of the Bank Act (Canada) or a proceeding under an insolvency Act,

(e) employed at a construction site by an employer whose principal business is construction, or

(f) who has been offered and has refused reasonable alternative employment by the employer.

The fact that employment is of a seasonal nature is not one of the listed exceptions. Section 65 does include persons employed for a definite term or for specific work of less that 12 months.

The Determination is a finding that Hambly was not employed for a definite term. Stratford does not now suggest that he was. On that nothing more needs to be said.

The Determination makes no mention of section 65 (1) (c) and whether Hambly was hired for 'specific work', of less than 12 months duration. I have considered that matter, Stratford portraying Hambly's work as being for a season.

Was Hambly hired for specific work? It is my conclusion that he was not. The evidence supports a conclusion that he performed different kinds of work, there being little if any lawn maintenance work at the time of his being hired, January, he did other work. The employer's submission leads me to conclude that Hambly was hired for more than lawn maintenance, subsequent winter and spring work as well, he just had to demonstrate to Stratford's satisfaction that he had the required knowledge and skills. That too is contrary to the notion that he was hired for specific work, as does the stated reason why his employment was terminated, not because the specific work for which he was hired, came to an end, but as Stratford says, *"... unfortunately for both of us, his gardening knowledge was insufficient ... "*. In summary, I find that Hambly performed various kinds of gardening work, he was led to expect more than lawn maintenance, and he was terminated because his knowledge was found wanting, and given that, that he was not hired for specific work.

Sections 63 and 128 of the *Act* apply. Hambly was entitled to notice of termination.

Stratford says that notice was given, while admitting that it was not in writing. Stratford says he didn't think that was necessary. He is wrong. The *Act* is clear, for an employer's liability for compensation for service to be discharged, notice of termination must be in writing.

Hambly is entitled to compensation for length of service. Hambly's employment began before the new *Act* came into force and ended after that date. As such, as the Director's Delegate correctly points out, Hambly is entitled to two weeks severance by virtue of section 128 of the *Act*. He is owed $784.91 as calculated by the Director's Delegate.

ORDER

I order, pursuant to Section 115 of the *Act*, that Determination # CDET 003466 be confirmed.

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Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal

LDC:jel