Employment Standards TRIBUNAL

An appeal

- by -

Queenship Marine Construction Ltd.
("Queenship")

- 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:** Ian Lawson

**FILE No.:** 2003A/242

**DATE OF DECISION:** November 24, 2003

# DECISION

## SUBMISSIONS

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|---|---|
| Judy Tiefenbach | on behalf of Queenship Marine Construction Ltd. |
| Richard E. McBride | on behalf of himself |
| Dennis Foster | on behalf of himself |
| Ted Crittenden | on behalf of himself |
| Victor Lee | on behalf of the Director of Employment Standards |

## OVERVIEW

This is an appeal by Queenship Marine Construction Ltd. ("Queenship"), under s. 112 of the *Employment Standards Act* ("Act"). The appeal is from a Determination issued by Victor Lee as a delegate of the Director of Employment Standards on August 22, 2003, under ER #71913. The Determination required Queenship to pay compensation for length of service, wages, vacation pay, holiday pay and interest to nine former employees in the total amount of $35,646.65. Queenship filed an appeal on September 5, 2003. The appeal is now decided without an oral hearing, on the basis of written submissions.

## FACTS

Ted Crittenden, Dennis Foster, Richard McBride, Steven McBride, Jorn Neilsen, Duane Penner, Joe Tschida, David Wainwright and Clive Wright ("Complainants") were employed by Queenship in its yacht manufacturing business. The Complainants were laid off on April 25, 2003, save only for Steven McBride who was laid off on December 5, 2002, and Joe Tschida who was laid off on March 8, 2003. All of the Complainants, except Steven McBride, were owed wages when they were laid off, and these wages remained unpaid as of the date of the Determination.

Queenship called each of the Complainants prior to the expiry of 13 weeks of layoff, and offered each of them further employment to replace other workers who were on vacation. It is not disputed by Queenship that it was unable to pay the outstanding wages when it called the Complainants. None of the Complainants returned to work and alleged instead they had been terminated by Queenship. Queenship does not dispute it owes wages and vacation pay to the Complainants (save for Steven McBride), but says the Complainants refused to return to work when recalled, had thereby quit their employment and therefore are not entitled to compensation for length of service.

## ISSUE

Whether Queenship is liable to pay compensation for length of service to the Complainants.

**ANALYSIS**

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

(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.

Section 63(5) of the Act states:

63. (5) For the purpose of determining the termination date under this section, 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.

As these provisions have been interpreted by this Tribunal, an employer need not give notice of a temporary layoff, nor need it specify an expected date of recall. But, if an employee does not have a right of recall and has had more than 3 consecutive months of employment, a layoff that exceeds 13 weeks in a period of 20 consecutive weeks is deemed to constitute termination of employment (see *Re Slumber Lodge Motel Corp*., BCEST #D171/97 and *Re Victoria Limited Editions (Nanaimo) Ltd.*, BCEST #D366/98).

Sections 17(1) and 66 of the Act state:

17. (1) At least semimonthly and within 8 days after the end of the pay period, an employer must pay to an employee all wages earned by the employee in the pay period.

66. If a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated.

It is well-established in this Tribunal's interpretation of these provisions that an employer's failure to pay wages in a timely manner amounts to constructive dismissal: *Re H.L.N.T. Network (Canada) Inc.*, BCEST #D274/02; *Re Star Touch Enterprise Inc.*, BCEST #D032/03; and *Re 582195 B.C. Ltd.*, BCEST #D049/03.

It follows from logic and general principles that an employee cannot quit employment from which he or she has already been dismissed. The Director's delegate found as follows:

> The employer is in breach of the most basic term of the employment agreement by not paying its employees the wages they had earned when due. This breach is so serious and fundamental that it destroys the employment relationship. This, in my view, is a substantial alteration in the conditions of employment between the parties. The complainants could not be expected to return to work when they have not been paid their regular wages. It is my determination, therefore, that the complainants' employments were terminated on the days that they were laid off without being paid for work already performed. Consequently, the complainants were not obligated to return to work when recalled. The complainants are, therefore, owed compensation for length of service.

Queenship filed no argument at this appeal, and the sum total of its submissions is found in an attachment to its Notice of Appeal, which states *verbatim*:

> The employer contends that the complainants refused to return to work when recalled and therefore, are not entitled to compensation for length of service.
>
> Each layed off employee was requested to return to work to perform duties that they had done previously. Some were to replace employees that were on vacation but they had done this in the past.
>
> Each employee who was called back to work and did return to work was paid wages owed in the next two payperiods.

In its appeal, therefore, Queenship presents no argument or evidence that was not already presented to the delegate.

I find the Director's delegate made no error of law in his Determination, which is well-reasoned and connected soundly to basic principles in the Act. The Complainants had been constructively dismissed prior to the putative recall on account of nonpayment of wages. Although the complainant Steven McBride was not owed wages by Queenship at the time of recall, I agree with the delegate that McBride's refusal to return to work was justified. McBride's knowledge of Queenship's inability or refusal to pay wages owing to the other complainants could be characterized as a fundamental breach of his employment contract that was anticipatory in nature, along the lines of the ancient employment case of *Hochster v. De La Tour* (1853), 118 E.R. 922 (Q.B., where the employer breached a contract of employment before the employee commenced work). In any event, it seems the recall to McBride may well have fallen outside his 13 week layoff period and so the Determination in his regard can stand without a finding he had been constructively dismissed. This Tribunal's jurisprudence amply supports the Determination in all other respects and the appeal should be dismissed.

## ORDER

I find the Determination made by Victor Lee on August 22, 2003 to be correct and the appeal therefrom is dismissed. Pursuant to s. 115, I order that Determination ER#71913 be confirmed, together with interest pursuant to s. 88.

**Ian Lawson**
**Adjudicator**
**Employment Standards Tribunal**