Employment Standards TRIBUNAL

An appeal

- by -

Indusol Technologies Inc.
(‘Indusol’’ or ‘‘employer’’)

- 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: Paul E. Love

FILE No.: 2001/301

DATE OF DECISION: July 12, 2001

British Columbia

DECISION

OVERVIEW

This is an appeal by an employer, Indusol Technologies inc. ("Indusol" or "employer"), from a Determination dated March 27, 2001 issued by a Delegate of the Director of Employment Standards ("Delegate"). The Delegate found that the employer failed to give Robert Frederickson, an employee ("employee") a written notice of termination as provided for in the *Employment Standards Act, R.S.B.C. 1996, c. 113* (the "*Act*"). The Delegate found that the employer was liable for compensation for length of service in the amount of two weeks pay, plus vacation pay on the amount due for compensation, and interest. The employer appealed, and claimed that it gave the employee oral notice of the layoff and hoped to be in a position to recall the employee, but had no work available. The employer also argued that it believed that the employee was not available for full time work. The employee was not given a written notice of termination, and therefore was entitled to compensation for length of service, when the employer failed to recall the employee after thirteen weeks of layoff. The employer did not establish any error in the Determination, and therefore I confirmed the Determination.

ISSUE:

The issue raised in this appeal is whether the Delegate erred in finding that Ms. Frederickson was entitled to compensation for length of service, in circumstances where the employer failed to give written notice of layoff, or recall the employee from layoff.

FACTS

Robert Frederickson (the "employee") was employed by Indusol Technologies Inc. as a Director of Computer Generated Imagery (the "employer"). Mr. Frederickson was given an oral notice of a temporary layoff, on or about September 29, 2000, which was followed by a written notice of the layoff on October 13, 2000. Mr. Frederickson worked for two weeks after the "oral layoff notice". Mr Frederickson did not work after October 13, 2000. He was not recalled to work. The employee filed a claim for compensation for length of service and vacation pay. At the time of the issuance of the Determination, the only issue was compensation for length of service.

The Delegate determined that Mr. Frederickson was entitled to the sum of $1,548.37, representing two weeks compensation ($1,440.00), vacation pay on the wages ($57.60) and interest pursuant to s. 88 of the *Act* ($50.77). The Delegate also directed that the employer cease violating s. 63(2) of the *Act*, and to comply with all the requirements of the *Act* and *Regulation*.

There is no issue raised by the employer concerning the arithmetical correctness of the calculation.

ARGUMENT

The employer argues that Mr. Frederickson was laid off, because another employee left the employer's employment giving inadequate notice, and that Indusol did not recall Mr. Frederickson because it had no work for Frederickson and because it believed Mr. Frederickson had started a business and was not available for full time work. The employer points out that the employee had two weeks notice, but not notice in writing. The employer argues that the word temporary was used to denote that it hoped the employee would return to work, if there was work available.

In its written submission the Delegate argues that the employer has alleged no significant new evidence which would alter the Delegate's conclusions. The employee did not file a submission with the Tribunal.

ANALYSIS

In an appeal under the *Act*, the burden rests with the appellant, in this case the employer, to show that there was an error in the Determination such that I should vary or cancel the Determination. It is clear from a review of s. 63, that an oral notice is not effective to discharge the employer's liability for compensation for length of service:

> *63 (2) The employer's liability for compensation for length of services increases as follows:*
>
> *(a) after 12 consecutive months of employment, to an amount equal to 2 week's wages;*
>
> *(3) The liability is deemed to be discharge if the employee*
>
> *(a) is given written notice as follows:*
>
> *(ii) 2 week's notice after 12 consecutive months of employment;*

There is no evidence before me that Mr. Frederickson quit his employment. The evidence is that the employer did not recall him at any time.

Whether the employer erred in characterizing the layoff as "temporary" is not germane to the issue of whether there has been a termination of employment within the meaning of the *Act*. In section 1, "*termination of employment*" is defined as "*including a layoff, other than a temporary layoff*". A "*temporary layoff*" is defined in s. 1 of the *Act*, "*as a layoff exceeding 13 weeks in any period of 20 consecutive weeks",* or a layoff which exceeds the specified period for an employee that has a right to recall. The employer suggests that in characterizing the layoff as a "temporary layoff" it intended to transmit the message that it was the hope of the employer that the layoff period would last a short time period, and that further work could be arranged. There

is no evidence of further work arranged for the employee by the employer at any time. The employee was therefore terminated by the employer's failure to recall the employee to work after 13 weeks of layoff. If the employer does not recall the employee to work after the thirteen week period is expired, the employee is deemed to have been laid off as of the date of the beginning of the layoff period (see s. 63(5)).

For all the above reasons, I dismiss the appeal of the employer.

ORDER

Pursuant to s. 115 of the *Act* I order that the Determination dated March 27, 2001 is confirmed.

Paul E. Love
Adjudicator
Employment Standards Tribunal