Employment Standards TRIBUNAL

An appeal

- by -

Big Boy's Toys (Victoria) Ltd.

- 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: John M. Orr

FILE No.: 2002/283

DATE OF HEARING: August 26, 2002

DATE OF DECISION: September 3, 2002

DECISION

APPEARANCES:

Tom Kummerfield and Barbara Kummerfield	On behalf of Big Boy's Toys (Victoria) Ltd.
Garwood Parks	On his own behalf

OVERVIEW

This is an appeal by Big Boy's Toys (Victoria) Ltd ("Big Boys") pursuant to section 112 of the *Employment Standards Act ("*the *Act")* from a determination dated April 29, 2002 by the Director of Employment Standards ("the Director").

Big Boys had employed Garwood Parks ("Parks") as a service technician in their recreational vehicle business for over 6 years. Following the events of September 11th 2001 there was a marked downturn in business and Big Boys found it necessary to layoff some of their employees on a temporary basis. Two other employees returned to work for Big Boys but Parks decided that the layoff exceeded 13 weeks and amounted to termination. He applied to the Director for compensation for length of service.

The Director determined that Parks was not recalled to work within the 13 weeks and therefore his layoff was not temporary and amounted to termination. The Director determined that Parks was entitled to compensation for length of service.

Big Boys has appealed on the ground that Parks was recalled to work within the temporary layoff period but that he chose not to return and in effect quit his employment.

ISSUES

The issue in this case is whether the layoff was temporary or whether it amounted to a deemed termination.

FACTS

Big Boys had employed Garwood Parks ("Parks") as a service technician in their recreational vehicle business for over 6 years. Following the events of September 11th 2001 there was a marked downturn in business and Big Boys found it necessary to layoff some of their employees on a temporary basis. Two other employees returned to work for Big Boys but Parks decided that the layoff exceeded 13 weeks and amounted to termination.

It was not disputed that Parks was laid off without notice and without compensation for length of service on Sept 28 2001. Big Boys intended that the layoff would be temporary and that Parks would be returned to work as soon as business increased or at any rate in the New Year.

On December 21 Parks and his wife attended the Christmas dinner party. Big Boys allege that there were conversations at a dinner party that amounted to notice of recall to Parks effective immediately. I accept the evidence given on behalf of the employer that there were indeed some conversations that indicated that there would be a return to work in January. However, I am satisfied that no specific date was stated as a definite return date for Parks. The employer relied on past practice to show that Parks would have known that he was to return to work on the first working day in the New Year.

It was established practice that the business would close shortly before Christmas each year and reopen on the first working day after the New Year. I heard some inconsistent evidence as to the nature of the employment situation during this period of time. Some employees apparently took the time as vacation, others treated it as a temporary layoff, and some took it as time off in place of overtime. Some employees would receive their vacation pay prior to the Christmas break.

Parks had received his vacation pay on Sept 28th at the time of his layoff. He had used his vacation time.

ANALYSIS

The onus on an appeal is on the appellant to satisfy the Tribunal that the Director's determination is wrong. I am not satisfied that the appellant has met that onus in this case.

Section 63 of the *Act* creates a liability for employers:

> 63. (1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.
>
> (2) The employer's liability for compensation for length of service increases as follows:
>
> (a) after 12 consecutive months of employment, to an amount equal to 2 weeks' wages;
>
> (b) after 3 consecutive years of employment, to an amount equal to 3 weeks' wages plus one additional week's wages for each additional year of employment, to a maximum of 8 weeks' wages.

This liability is deemed to be discharged if an employee is given written notice, terminates his own employment, or is "dismissed for just cause" [see Section 63(3)(c)]. The section also addresses layoff as follows:

> 63 (5) For the purpose of determining the termination date, 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.

Temporary layoff is defined in the *Act* as follows:

> "temporary layoff" means
>
> (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.

Accordingly, as Parks was laid off on Sept 28th the layoff would have ceased to be a temporary layoff if it continued beyond December 28th, 2001. Big Boys asserts that the layoff ended on December 21st when

Parks was told that he would be recommencing work in January. Big Boys asserts that essentially Parks was recalled on December 21st and from that date until the business reopened in the New Year he was on the same status as the other employees.

The problem with this argument is that the other employees were either on vacation, using up overtime, or on temporary layoff. There was no evidence before me to indicate that Parks was on vacation or that he was using up overtime. The only possible status for him during the Christmas break would have been another temporary layoff. Therefore, even if I were to accept the evidence given on behalf of Big Boys that Parks's temporary layoff ended on December 21st (within the 13 weeks) he was essentially laid off again until the New Year. In that case, he would have been on layoff for more than 13 weeks in a 20-week period. The layoff was more than a temporary layoff and therefore, in accordance with section 63 (5) the employment was deemed to have been terminated at the beginning of the layoff.

I conclude that the Director was correct in finding that Parks's employment had been terminated and that he was entitled to compensation for length of service.

I wish to note that, because of the conclusion I have reached above, I have not addressed a significant argument presented by Mr Parks. He submitted that the *Act* does not give the employer a right to temporarily layoff an employee unless there is some specific provision in the employment contract. In the unionized sector of the workforce most collective agreements provide for layoff and recall but very few employment contracts in the non-union sector include such provisions. There was certainly no evidence that the employment contracts at Big Boys contained any such provision.

This argument is supported in law in the decision of the British Columbia Supreme Court in *Collins v. Jim Pattison Industries Ltd.* (1995) 7 B.C.L.R. (3d) 13 but this decision has not generally been applied in the decisions of the Tribunal and there are some decisions of the Tribunal that directly disagree with the findings of the court, e.g. *Microb Resources Inc.* (2000) BCEST #D142/00. As it is not necessary for me to address this issue in this case, with all due respect to Mr. Parks's excellent submission, I will leave this argument for another occasion.

In conclusion, I am not satisfied that Big Boys has met the onus of persuading me that the determination was wrong in fact or in law and therefore the determination will be confirmed.

ORDER

Pursuant to section 115 of the Act I order that the determination date April 29, 2002 is confirmed.

John M. Orr
Adjudicator
Employment Standards Tribunal