Employment Standards TRIBUNAL

An appeal

- by -

Finlay Contracting Ltd.
("Finlay")

- 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: Norma Edelman

FILE No.: 2001/202

DATE OF HEARING: July 5, 2001

DATE OF DECISION: July 20, 2001

DECISION

APPEARANCES:

Sandra Sundby on behalf of Finlay Contracting Ltd.

Mel Harper on his own behalf

OVERVIEW

This is an appeal by Finlay Contracting Ltd. ("Finlay") pursuant to Section 112 of the Employment Standards Act (the "Act") from a Determination issued by a Delegate of the Director of Employment Standards (the "Director") on December 1, 2000.

The Delegate determined that Finlay owed its former employee, Mel Harper ("Harper"), the sum of $1,904.67 representing unpaid wages and interest.

This appeal was heard by way of an oral hearing held on July 5, 2001 in Prince George at which time I heard evidence from Harper and Finlay's bookkeeper, Sandra Sundby ("Sundby").

ISSUES TO BE DECIDED

Is Harper entitled to wages and interest in the amount of $1904.67?

FACTS AND ANALYSIS

Finlay is a logging contractor. Harper commenced employment at Finlay on or about November 18, l999 as a log truck driver at the rate of 30% of the gross of the truck. His last day of work was March 31, 2000.

Harper filed a complaint with the Director alleging that he was owed regular wages, statutory holiday pay, a bonus, and compensation for length of service. He also alleged that an illegal deduction was taken from his wages.

On December 1, 2000 the Delegate issued a Determination in which he concluded that Harper was not owed regular wages and a bonus, but he was owed statutory holiday pay and compensation for length of service, and was entitled to be reimbursed for an illegal deduction.

Finlay appealed the Determination on January 8, 2001, after the appeal deadline had expired. In a Decision issued on March 7, 2001, the Tribunal extended the appeal deadline and allowed the appeal to proceed on its merits (*Finlay Contracting Ltd.* BCEST #D114/01).

Finlay does not appeal the Determination as it relates to statutory holiday pay and the illegal deduction. It has paid these outstanding amounts to Harper. Finlay does appeal the Determination as it relates to compensation for length of service.

Finlay says it is not liable for compensation for length of service by reason of Section 65(1)(d) of the Act which states that an employee is not entitled to compensation for length of service (or notice) if that employee was "employed under an employment contract that is impossible to perform due to an unforeseeable event or circumstance other than receivership, action under section 427 of the Bank Act (Canada) or a proceeding under an insolvency Act."

Harper was laid off work on March 31, 2000. He was never recalled back to work. Sundby said that Harper would have been recalled in June 2000, after his seasonal temporary layoff, if Finlay had not lost the contract with the Ingenika band to haul logs for the Slocan mill. The term of the contract was June l999 to March 31, 2000. Sundby said that it was assumed that the contract would be renewed but, for a reason unknown to her, Finlay lost the contract overnight. She said that Finlay learned at the end of April/beginning of May that it would not get another contract with the band. She said Finlay did not drop the contract on its own, as suggested by Harper.

Since log hauling for the Slocan mill did not resume, Finlay was unable to fulfill its employment contract with Harper. Not getting the contract was a circumstance beyond Finlay's control and completely unforeseen. Therefore, Finlay should not be held liable for compensation for length of service. To penalize any company in a situation like this, says Sundby, is unfair and must violate the spirit of the Act.

Harper says when he got paid on April 12, 2000 he was told Finlay was not going to haul logs for the Slocan mill anymore, so he did not have a job. Harper believes Finlay dropped the contract on its own, but he offered no evidence to support this view. He says although Finlay lost the contract, it was not unforeseen because receiving and losing contracts is part of normal business practices. As a result, he is entitled to compensation for length of service.

In a written submission to the Tribunal, the Delegate says that the fact Finlay lost the contract to continue certain aspects of its operations do not relieve it of it obligations under Section 63 of the Act. The Delegate says that either obtaining or losing a contract is a normal occurrence in the business cycle and while, not palatable, it certainly cannot be construed as "unforeseen" in the context of this section of the Act. Had the legislature intended to exclude employees from entitlement to compensation for length of service as a result of an employer losing a contract, it would have done so. The delegate says his conclusions do support the intent of the Act.

I agree that Harper is entitled to compensation for length of service.

Harper was laid off work on March 31, 2000 and as he was never recalled back to work he is deemed to have been dismissed by Finlay. Under Section 63 of the Act an employee is entitled to compensation for length of service after 3 months of employment unless the employee has received written notice or a combination of notice and pay, quits, retires or is dismissed for just cause. None of these exceptions are applicable in this case. Section 65 of the Act lists additional

exceptions to an employee's entitlement under Section 63 of the Act. Finlay argues that Harper is not entitled to compensation for length of service by reason of Section 65(1(d) of the Act. It did not get another contract with the Ingenika band to haul logs and therefore it was unable to recall Harper back to work. It was impossible for Harper to perform his employment contract and that impossibility of performance was due to an unforeseeable event or circumstance, which was the loss of the contract.

In my view, although it may have been impossible for Harper to perform his job given the loss of the contract, the fact that Finlay did not get another contract is not an unforeseeable event or circumstance.

In the past, the Tribunal has held, and I concur, that sections of the Act which have the effect of removing a minimum statutory benefit from employees are to be given a narrow interpretation (see *Fraser-Fort George Museum Society* BCEST #D292/01)and the exception to entitlement to compensation for length of service contained in Section 65(1)(d) is to be used cautiously (*Pro-Tru-Tec Investments Ltd* BCEST #D207/00).

In *Labyrinth Lumber Ltd*. BCEST #D407/00, the Adjudicator said that in its ordinary and grammatical sense, unforeseeable means incapable of being anticipated. I agree that unforeseeable means that the event or circumstance is not expected or could not have been reasonably anticipated.

In this case, I do not accept that losing the contract was an unforeseeable event or circumstance. The contract had an end date. The contract expired and Finlay was advised it would not be renewed. There is no evidence that Finlay was guaranteed a renewal and no evidence that the non-renewal was incapable of being anticipated by Finlay. In my view, Finlay was in a position to know that the contract may not be renewed. The possibility of only getting the one contract was not a circumstance or event that could be said to be outside the realm of reasonable foreseeability.

For these reasons, I conclude Finlay cannot rely on Section 65(1)(d) to escape its obligations under the Act. Finlay has failed to show that the Delegate was wrong to conclude Harper is entitled to compensation for length of service.

ORDER

Pursuant to Section 115 of the Act, I order that the Determination be confirmed.

Norma Edelman
Vice-Chair
Employment Standards Tribunal