

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

- by -

Labyrinth Lumber Ltd.
("Labyrinth")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: David B. Stevenson

FILE No.: 2000/406

DATE OF DECISION: October 6, 2000

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by Labyrinth Lumber Ltd. (“Labyrinth”) of a Determination which was issued on May 24, 2000 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Labyrinth had contravened Sections 63 and 64 of the Act, ordered Labyrinth to cease contravening and to comply with the Act and ordered Labyrinth to pay \$83,171.07.

The background to the Determination was set out as follows:

This determination is similar, and in addition to, a determination issued on May 3, 2000 on behalf of 64 employees of which 62 were entitled to group termination pay as well as compensation for length of service. This determination seeks to include all remaining individuals who qualify for compensation for length of service and/or group termination pay under the *Employment Standards Act* but who were not included in the previous determination.

The determination issued May 3, 2000 considered only employees who qualified for length of service compensation and group termination pay. This determination seeks to include all those who may not qualify for individual compensation for length of service but who do qualify for group termination pay.

The determination also includes employees who were laid-off without notice subsequent to November 11, 1999 but who did not fall within the two month period contemplated by Section 64.

Some employees have indicated that they should have been included in the May 3, 2000 determination, and have been included in this investigation instead.

ISSUE

The issue raised in this appeal is whether Sections 63 and 64 of the Act were operative in the circumstances of this case.

THE FACTS

The Determination notes that the employees covered by the Determination were temporarily laid-off from their employment with Labyrinth and were not recalled to work within 13 weeks of their respective lay-off dates. Of the employees covered by the Determination, 38 were temporarily laid-off on November 16, 1999, continued to be temporarily laid-off for a period longer than 13 weeks in a 20 week period and were, by operation of subsection 63(5), deemed terminated as of

that date. In the May 3, 2000 Determination, the Director had concluded that 62 other employees were also deemed terminated on November 16, 1999, bringing the total number of employees terminated on November 16, 1999 to 100.

No notice of termination was given to any of the employees.

Of the employees covered by the Determination, 38 were found not to be entitled to length of service compensation because they had not qualified for that benefit. Three employees were found to be entitled to length of service compensation but were found not to be entitled to group termination pay because their employment had not been terminated during the two month period in Section 64.

ARGUMENT

Labyrinth makes two arguments in support of its appeal. First, Labyrinth says the provisions of Section 63 and 64 do not apply to them because they had signed a draft agreement with a trade union. Second, Labyrinth says Sections 63 and 64 should not apply because the lay-offs were caused by an adverse unilateral ruling by American Customs under the United States/Canada Softwood Lumber Agreement and the immediate impact on their business gave them no opportunity to comply with the requirements of Section 64 of the *Act*.

In reply to the first argument, the Director provides three answers:

1. a “draft agreement”, which is what was alleged by Labyrinth, suggests an incomplete or provisional document and such a document may not satisfy the definition of collective agreement for the purposes of the *Act*;
2. even if there was a collective agreement, it has not been provided by Labyrinth and, consequently, there is no evidence that it contained provisions relating to the individual termination of employment of the affected employees;
3. in any event, subsection 69(3) of the *Act* says that an employee’s entitlement on group termination is in addition to any individual entitlement on a termination of employment, whether such entitlement arises in a collective agreement or under Section 63 of the *Act*.

In reply to the second argument, the Director points out that while Sections 63 and 64 do not apply to an employee who is employed under a contract of employment that is impossible to perform due to an unforeseeable event or circumstance (see paragraph 65(1)(d)), there is no evidence that the “event” was unforeseeable or that, of itself, it rendered the contracts of employment impossible to perform. The Director also says, in any event the decision made by U.S. Customs is not the type of “event” contemplated by paragraph 65(1)(d) of the *Act*.

ANALYSIS

I agree with the position of the Director on both arguments.

In respect of the first argument, I agree completely that the Labyrinth has the obligation to establish the existence of a valid collective agreement and that such agreement contains provisions relating to an individual termination of employment that were both operative and applicable to the affected employees at the time of termination. They have not done so and the absence of some factual basis for this ground of appeal is fatal.

I also agree with the Director that, at best, this argument would only affect entitlement to length of service compensation under Section 63 of the *Act*. It would not affect an employee's entitlement to group termination pay under Section 64 of the *Act*.

In respect of the second argument, I accept the position of the Director that the validity of this argument turns on a consideration of the terms "impossible" and "unforeseeable" in paragraph 65(1)(d). Section 63 and 64 of the *Act* would apply to the employees unless it was *both* impossible to perform the employment contract *and* that impossibility of performance was due to an unforeseeable event or circumstance.

The term "impossible" connotes that something is not capable of occurring or being accomplished or dealt with; or is unable to exist, happen or be achieved. That does not describe the circumstances of this case. Even in the appeal, while asserting that the unilateral ruling under the US/Canada Softwood Lumber Agreement had a significant impact on the profitability of the business, Labyrinth does not indicate that continuing the employment contracts was impossible in the foregoing sense. I accept that it made good business sense for Labyrinth to attempt to reduce its losses by laying-off its employees, but keeping in mind that paragraph 65(1)(d) has the effect of removing a minimum statutory benefit from employees, it is consistent with the objectives and the intention of the *Act* to give that provision a narrow interpretation.

In reply to the appeal, the Director says:

A business failure caused by cancellation of orders, insolvency, eviction by the landlord, or a ruling under the US/Canada Softwood Lumber Agreement, might prevent the continued employment of employees, but these are not acceptable reasons for failing to pay or give notice because they are not unforeseeable.

In its ordinary and grammatical sense, unforeseeable means incapable of being anticipated. There is no evidence, or any other indication, that the ruling under the US/Canada Softwood Lumber Agreement was incapable of being anticipated and I also accept the Director's conclusion on the matter.

As a result, Labyrinth has been unable to meet either element in paragraph 65(1)(d) and has failed to show the Director was wrong to conclude the affected employees were entitled to length of service compensation and/or group termination pay.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated May 24, 2000 be confirmed in the amount of \$83,171.07, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson

David B. Stevenson
Adjudicator
Employment Standards Tribunal