Employment Standards TRIBUNAL

An appeal

- by -

Delphi International Academy, Delphi Student Development Inc. and Double D Holdings Ltd. associated companies pursuant to section 95 of the Employment Standards Act

- 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: Kenneth Wm. Thornicroft

FILE No.: 2002/344

DATE OF DECISION: September 19, 2002

DECISION

OVERVIEW

The present appeal proceedings originally came before me on April 9th, 2002. Delphi International Academy ("Delphi Academy"), Double D Holdings Ltd. ("Double D") and Delphi Student Development Inc. ("Delphi Development") all appealed, pursuant to section 112 of the *Employment Standards Act* (the *"Act"*), a Determination that was issued by a delegate of the Director of Employment Standards (the "Director") on October 10th, 2001 (the "Determination"). In addition, two of the respondent employees, namely, Mr. David Tanner and Ms. France Robert, also filed appeals.

The corporate appellants jointly operated an independent school targeted to high school athletes, particularly hockey and baseball players. Delphi Academy was the entity that formally operated the school, the school's athletic programs were operated through Delphi Development and Double D was the "holding company" that owned, *inter alia*, the shares of the other two firms.

Delphi Academy is no longer operating; all of the respondent employees were former members of the teaching staff. By way of the Determination, the Director's delegate issued an order declaring, in accordance with section 95 of the *Act*, that Delphi Academy, Double D and Delphi Development were "associated corporations" and thus jointly and severally liable for $37,510.56 in unpaid wages and section 88 interest owed to nine former Delphi employees.

At the original appeal hearing I heard the testimony of Mr. Alan Decker on behalf of all three corporate appellants. Six of the nine respondent employees appeared at the appeal hearing but only three of the employees, namely, Ms. France Robert, Mr. David Tanner and Mr. Sean Newman, testified before me. No one appeared at the appeal hearing on behalf of the Director.

Following the oral appeal hearing, on May 2nd, 2002, I issued reasons for decision (BCEST # D166/02) confirming the Determination in all respects save with respect to the matter of the employees' individual entitlements to compensation for length of service. I referred this latter matter back to the Director for further investigation.

My original order is reproduced below:

> **ORDER**
>
> Pursuant to section 115(1)(b) of the *Act,* the matter of the employees' entitlement to compensation for length of service is referred back to the Director for further investigation and determination in accordance with these reasons for decision.
>
> In all other respects, the Determination is confirmed.

The Director's delegate has now concluded her further investigation and has prepared a report setting out the amounts that she has determined each employee is entitled to on account of compensation for length of service. These reasons for decision address only the correctness of the delegate's calculations. However, prior to turning to this particular issue it may be helpful to summarize the proceedings to date.

PREVIOUS PROCEEDINGS

As noted above, the Director's delegate initially determined that Delphi Academy, Double D and Delphi Development were "associated corporations" [see section 95 of the *Act*] that were jointly and severally liable for $37,510.56 in unpaid wages and section 88 interest owed to the nine former Delphi employees. The correctness of the section 95 declaration was not at issue in the appeal. The corporate appellants did, however, argue that the delegate erred in calculating the employees' respective entitlements.

In particular, the corporate appellants asserted that the employees were "definite term" employees and thus were not entitled to be paid any compensation for length of service [see section 65(1)(b) of the *Act*]--the delegate had awarded seven of the nine employees such compensation. I held that the employees were not employed under "definite term" contracts and thus were entitled to compensation for length of service based on their tenure with the corporate appellants.

With respect to the matter of compensation under section 63, I held as follows:

> "It appears that on June 29th, 2001 most, if not all, of the employees were given written notice of termination. So far as I can gather the employees received essentially identical letters which stated:
>
> > 'This is to confirm that due to the uncertainties surrounding Delphi International Academy we will not be requiring your services for the summer ESL program. Your contract will therefore be terminated on August 15th instead of August 31st/01.
> >
> > The pay cheques of July 15th and July 31st will be pro-rated to adjust for the two weeks less of work and the usual pay amounts will then be issued for August/01.'
>
> At this point, it should be noted that the employer's unilateral attempt to refuse to pay the employees for the final pay period in August was, in my view, a breach of contract. The employees, under their respective agreements, were entitled to be paid until the end of August--as long as the employees were ready and available to perform their 2-weeks of 'ESL' instruction (and, apparently, all employees were), they were entitled to be paid up to the end of August since wages for July and August would have been earned and were thus payable by the employer.
>
> Assuming that each employee received a form of the above letter (that matter is not entirely clear on the material before me), I am of the view that the letter constituted a form written notice of termination contemplated by section 63(3) of the *Act.* It would appear that each employee received approximately 6 1/2 weeks' working notice. The legal sufficiency (under the *Act*) of that amount of notice depends on each employee's length of service which, in turn, would be calculated as and from their *original date of hire* and not from the date of their most recent contract renewal (in light of my finding that the employees were engaged under indefinite contracts of hiring; note also that compensation for length of service is based on the employee's 'consecutive years of employment').
>
> Therefore, in my view, the delegate erred in determining that each employee was entitled to only one week's wages as compensation for length of service. Each employee's individual notice entitlement should have been calculated based on their entire tenure ('consecutive years of employment') rather than being based on the term of their most recent contract renewal. Thus, for example, a teacher with 5 years' service would have been entitled to 5 weeks' notice and thus would not have been entitled to any compensation because they would have received more notice (*i.e.*, 6 1/2 weeks') than mandated by the *Act.*

There is a further complication, however. The written notice required under section 63(3) is 'working notice'. In other words, during the notice period, the employment relationship subsists--both the employee and the employer are bound to honour the terms of the employment contract. In practical terms, this means that the employee must continue to report for work (but only as required by their contract) and the employer must continue the employee's wages and benefits during the notice period [see *Logan*, B.C.E.S.T. Decision No. D093/96; see also section 67(2) of the *Act*].

The evidence before me indicates that the employees' wages and benefits were *not* continued in the ordinary course during the working notice period (I understand some employees received partial and sporadic payments). Accordingly, although the employer may have given some or all of the employees proper written notice of termination (on June 29th), the employer apparently failed to honour the employees' terms and conditions of employment during the notice period. If an employer does not honour the employee's terms and conditions during the notice period, the employer has, in effect, 'constructively dismissed' the employee (see section 66 of the *Act*). In such circumstances, and at the point of the 'deemed termination' under section 66, the employees were entitled to be paid compensation for length of service pursuant to section 63(2) of the *Act.*

The delegate did not determine the employees' various claims in accordance with the foregoing analysis and, in my view, thus fell into error. I am unable to determine the employees' respective entitlements on the basis of the evidence before me. Accordingly, I propose to refer the matter of the employees' respective entitlements to compensation for length of service back to the Director."

THE DELEGATE'S REPORT

In a report addressed to the Tribunal's vice-chair, dated June 13th, 2002, the delegate advised that she had recalculated the employees' individual entitlements to compensation for length of service, submitted her preliminary calculations to the various parties for their review and comment and, with comments in hand, then finalized her calculations. In total, the delegate has now determined that the employees are entitled to the sum of $45,626.89 on account of all unpaid wages (including compensation for length of service) and section 88 interest accrued as of the date of the Determination (October 10th, 2001).

The delegate's final calculations on account of compensation for length of service are set out below:

Employee	Section 63 Entitlement	Calculated Amount*
Forrest Day	2 weeks' wages	$2,474.43
Ryan Douglas	2 weeks' wages	$1,441.60
Frank Gorringe	2 weeks' wages	$1,717.60
Paul Massie	1 week's wages	$ 367.31
Sean Newman	2 weeks' wages	$1,812.99
France Robert	1 week's wages	$ 663.07
Ara Sagherian	1 week's wages	$ 984.83
David Tanner	2 weeks' wages	$2,137.59
Ken Taylor	1 week's wages	$ 299.99
TOTAL		$11,899.41

* includes vacation pay (s. 58) but not interest (s. 88)

THE PARTIES' POSITIONS

On June 24th, 2002, the Tribunal's Administrator wrote to each of the parties enclosing the delegate's final June 13th report (and supporting calculation schedules) and directed that the parties file any reply they might wish to make by no later than 4:00 P.M. on July 15th, 2002. The Administrator's June 24th letter advised the parties as follows: "In your response, specify your reasons for agreeing or disagreeing with the calculations made by the Director [and you must also]...**include a copy of all records and documents that support your position.**" (**boldface** in original). The parties were also advised that all submissions filed would be cross-disclosed to all other parties.

With respect to the various employees, Mr. Ryan Douglas was the only one to file a submission with the Tribunal; Mr. Douglas accepts the delegate's calculation with respect to his entitlement to compensation for length of service. Mr. Douglas has called into question certain other matters, however, as I noted at the outset of these reasons, the *only* issue now before me is the correctness of delegate's calculations with respect to compensation for length of service.

Mr. Al Decker, on behalf of the corporate appellants, filed two separate submissions, dated June 24th and July 18th, 2002, respectively. The Director's delegate filed a reply (dated July 27th, 2002) with respect to Mr. Douglas' and Mr. Decker's submissions.

In his June 24th submission, Mr. Decker raised several issues--most of which have already been adjudicated--that are not properly before me, including the legal status of the teachers (Mr. Decker says that they were independent contractors, not employees), whether the teachers were employed under definite or indefinite contracts of hiring and whether the teachers were given proper "working notice". Mr. Decker appears to be under the misapprehension that the matter now before me is a "reconsideration" of my earlier reasons for decision (see section 116 of the *Act*) rather than, as is the case, merely a review of the delegate's calculations with respect to the teachers' respective entitlements under section 63 (compensation for length of service). Mr. Decker also raises, yet again, the argument that Mr. Tanner resigned and thus is not entitled to compensation for length of service--this latter issue has already been addressed in my earlier reasons (see page 8). Mr. Decker's June 24th submission does not call into question any of the delegate's *calculations.*

Mr. Decker's July 18th submission deals with yet another issue--Delphi says that it recovered some monies in the form of a GST rebate and forwarded some portion of those funds to some or all of the teachers. This latter question does not bear on the correctness of the delegate's calculations with respect to section 63. If additional monies have been paid to the teachers, that can be accounted for when determining the corporate appellants' final obligations (for all unpaid wages) to the employees. I might add that, on the face of it, I fail to see how a GST rebate would qualify as a payment of "wages" otherwise due under the *Act.*

In light of the foregoing, there is nothing in the material before me to call into question the correctness of the delegate's calculations of the teachers' respective entitlements under section 63 of the *Act.* Accordingly, I propose to confirm the delegate's calculations and vary the Determination to reflect those calculations.

ORDER

Pursuant to section 115(1)(a) of the *Act,* I order that the Determination be varied to reflect the following amounts payable by the corporate appellants on account of compensation for length of service, plus additional interest to be calculated in accordance with the provisions of section 88 of the *Act:*

Employee	Section 63 Entitlement	Amount Payable*
Forrest Day	2 weeks' wages	$2,474.43
Ryan Douglas	2 weeks' wages	$1,441.60
Frank Gorringe	2 weeks' wages	$1,717.60
Paul Massie	1 week's wages	$ 367.31
Sean Newman	2 weeks' wages	$1,812.99
France Robert	1 week's wages	$ 663.07
Ara Sagherian	1 week's wages	$ 984.83
David Tanner	2 weeks' wages	$2,137.59
Ken Taylor	1 week's wages	$ 299.99
TOTAL		$11,899.41

* includes vacation pay (s. 58) but not interest (s. 88)

In all other respects, the Determination is confirmed.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal