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 -

L. and T. Loading Ltd.
(“L. and T.” or the “Employer”)

\- of a Determination issued by -

The Director of Employment Standards
(the “Director”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 2000/554

DATE OF DECISION: October 18, 2000

DECISION

OVERVIEW

This is an appeal brought by L. and T. Loading Ltd. ("L. and T." or the "employer") 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 July 20th, 2000 under file number ER 053-239 (the "Determination").

The Determination addresses the complaints of five former employees of L. and T. Loading Ltd. and, in one instance, a former employee of Richlen Holdings Ltd. ("Richlen"). The complainants are Hugh Ashe, George S. MacDonald, Garry L. Seymour, A.J. Taylor and Dwight G. Webster.

The delegate determined that L. and T. and Richlen were "associated corporations" as defined in section 95 of the *Act* and, accordingly, were jointly and separately liable for a total of $20,694.62 on account of compensation for length of service and interest payable to the five complainants (Seymour's award also includes recovery of a $100 unlawful wage deduction).

I should note, at this point, that the award in favour of George S. MacDonald was varied upwards to reflect the fact that his entitlement was incorrectly calculated (see *MacDonald,* BC EST #D428/00, issued concurrently with this decision).

ISSUES ON APPEAL

L. and T., through its principal, Richard Doyle (who also acted on behalf of the appellant during the delegate's investigation), filed a notice of appeal with the Tribunal on August 14th, 2000. Appended to the notice of appeal is a one-page letter, dated August 14th, 2000 addressed to the delegate who issued the Determination. In this letter, which is on "L and T Loading Ltd." letterhead and is unsigned, the following assertions are advanced:

- "When we put our equipment in the auction, all employees were notified that the company would be closing and that if possible we would find other employment for them.";

- "All of the employees were aware that the equipment was being sold at the auction in Grande Prairie...";

- "Dwight Webster has an ROE, a copy of which I am sending, that shows that he quit in January and had only been hired back for the last 3 weeks, knowing when he was hired that it was just a short term.";

- "Everyone was given several different memos, attached, all containing information about L and T Loading Ltd. being sold, we felt this was sufficient written notice. Along with all the verbal notice, I find it hard to believe that someone can sit and talk with you about the company being sold; that there

will be no more work, what their plans for the future are, and then turn around and say, they didn't receive written notice, so they didn't know."; and

- "The letter attached dated Sept 17/99 was given to all employees."

The August 14th, 2000 letter and attached documents (of which there are 7) constitute the *only* submission made by the employer to the Tribunal. It should also be noted that L and T does not challenge the delegate's determination that L. and T. and Richlen were associated corporations.

FINDINGS AND ANALYSIS

The uncontradicted evidence before me shows that the complainants' respective employment terminated on different dates spanning the period March 29th to May 12th, 2000. There is *absolutely nothing* in the material before me to indicate that proper *written* (not verbal) notice of *termination* (not layoff) was given to any of the five complainants prior to the termination of their employment in the spring of this year. Section 63(3) of the *Act* could not be clearer–an employer's obligation to pay compensation for length of service is only discharged if the requisite *written* notice of termination is given to the employee (see *e.g., G.A. Fletcher Music Company Limited,* BC EST #D213/97 and the cases cited therein).

The employer's notice, dated July 14th, *1999,* that purports to give L. and T. employees notice that their work is seasonal and that advance notice of *layoff* will not always be given hardly constitutes written notice of t*ermination* as contemplated by section 63 of the *Act.* Similarly, a September 17th, *1999* notice of *layoff* does not satisfy the section 63 requirement. Finally, an April 7th, 2000 notice with respect to continuance of certain medical and pension benefits does not satisfy section 63.

With respect to the claim of Dwight Webster, I have before me two Records of Employment ("ROE") apparently issued by L. and T. to Webster. The first ROE indicates that Webster "quit" (code "E" on the form) his employment in mid-January 2000. The second ROE indicates that he was rehired in early March 2000 and worked until layoff (due to a "shortage of work"; code "A" on the form") on March 21st, 2000. I note that this information stands in contrast with the delegate's finding that Webster was continuously employed from December 1997 to March 29th, 2000. It may well be that Webster was simply laid off in January 2000 only to be recalled in March 2000 in which case his employment would be continuous as and from his original date of hire in December 1997 until March 29th, 2000. Webster, despite being requested to do so, did not file any submission with the Tribunal in response to his former employer's appeal.

In a submission dated September 5th, 2000, the Director's delegate objects to the admissibility of the "Webster ROEs" since neither this information nor the actual documents were provided to the delegate during his investigation (see *Tri-West Tractor Ltd.*, BC EST #D268/96 and *Kaiser Stables Ltd.*, BC EST #D058/97). Indeed, the record before me shows that the employer's representative appeared to display a defiantly noncooperative attitude toward the delegate and his statutorily-mandated investigation.

In my view, the delegate's objection to the admissibility of the ROEs is well-founded.

Further, even if the ROEs are properly before me, I do not find the ROEs, standing alone, to be sufficiently probative to justify a cancellation of the award made in favour of Dwight Webster. A lawful "quit" consists of both a subjective intention to quit coupled with some objective evidence that is consistent with an employee having quit (see *Valley Alarms and Communications Ltd.,* BC EST #D080/97). It is the employer's burden to raise at least a *prima facie* case that an employee voluntarily quit. I am not satisfied, given the dearth of evidence before me, that the employer has met its burden in this case. The record before me is equally consistent with a temporary layoff.

ORDER

Pursuant to section 115 of the *Act,* I order that the Determination be confirmed as issued with respect to all of the complainants except George S. MacDonald whose entitlement is varied in accordance with my order issued in BC EST #D428/00. In addition, all five complainants are entitled to further interest to be calculated by the Director in accordance with the provisions of section 88 of the *Act* as and from the date of the Determination.

Kenneth Wm. Thornicroft

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal