

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-

David J. Weibe
(the "Appellant")

-of a Determination issued by-

The Director of Employment Standards
(the "Director")

ADJUDICATOR:	E. Casey McCabe
FILE NO.:	97/433
DATE OF HEARING:	September 12, 1997
DATE OF DECISION:	October 6, 1997

DECISION

APPEARANCES

David J. Wiebe	for himself
Sheri Wiebe	for David J. Wiebe
Jerry Anderson	for Anderson Sod Farm Ltd.

OVERVIEW

This is an appeal pursuant to Section 112 of the Employment Standards Act (the "Act") by David J. Wiebe of a Determination dated May 15, 1997 which dismissed Mr. Wiebe's claim for regular wages, annual vacation pay, statutory holiday pay and overtime. A claim for compensation for length of service pursuant to Section 63 of the Act was also dismissed. Mr. Wiebe appeals that portion of the Determination that dismissed his claim for compensation for length of service.

ISSUE(S) TO BE DECIDED

Was Mr. Wiebe disqualified from entitlement to compensation for length of service due to the provisions of Section 65(1)(b) of the Act because he was employed for a definite term?

FACTS

Mr. Wiebe was employed as a truck driver for Anderson Sod Farm Ltd. ("Anderson"). He commenced employment in 1993; however, the relevant period of his claim is March 16, 1995 through September 9, 1996. The employer concedes that there was no issue of just cause for the termination. It appears that the reason the claim is limited to the period of March 16, 1995 through September 9, 1996 was that the lay-off during the 1994/95 winter season exceeded 13 weeks and was therefore deemed a termination by the Director's Delegate. That meant that Mr. Wiebe, for the purposes of the Act, had a new start date of March 16, 1995.

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It should be noted at this point that Anderson Sod Farm Ltd. is a turf growing operation that grows and sells grass used in residential and commercial landscaping. The company is located in the Fraser Valley and operates throughout the Lower Mainland. The company

employs approximately twenty people in its turf growing, maintenance shop, office and delivery operations. Mr. Wiebe was one of four truck drivers.

There is no dispute about the days or times that Mr. Wiebe worked. The employer's records and Mr. Wiebe's personal calendar are in accord. It is further agreed that Mr. Wiebe received a Record of Employment showing that he was laid off on January 12, 1996. However, he was recalled to work on January 17, 1996 and worked that day plus January 19, February 16, 28, and 29. Commencing March 4, 1996 he worked without interruption until his termination on September 9, 1996.

When Mr. Wiebe commenced employment in June 1993 he was the least experienced driver in the operation. He testified that in August 1995 one of the more experienced drivers, a Mr. Ed Friesen, quit his employment with Anderson. Mr. Wiebe was asked if he thought he was able to assume the duties and responsibilities of operating the equipment that was formerly operated by Mr. Friesen. That equipment was primarily a later model tractor and trailers known as "Super B Trains". Mr. Wiebe testified that when he commenced operating this equipment he felt that he was assuming Mr. Friesen's position with the company. That is, Mr. Wiebe, referring to Mr. Friesen's payroll records, took the position that Mr. Friesen worked throughout the year and although his earnings would fluctuate between the slower winter period and peak summer periods he was, nevertheless, regularly employed. Mr. Wiebe further testified that at no point during his employment was he told that he was being employed for a definite term or for specific work.

Mr. Anderson testified for the employer. He stated that there was no issue of cause for the termination. He took the position that Mr. Wiebe was not entitled to compensation for length of service because of the seasonal nature of his business. He stated that a major dynamic of his business is weather. For example if the ground is frozen his business can stop for up to two months. He also testified that another dynamic is the market itself and his share of that market. He further testified that the trucks are assigned to deliveries based on the needs of the day and the individual driver's fit to the equipment considering the proximity of the delivery. He acknowledged that a driver operating the larger trucks, such as the equipment Mr. Friesen operated, may get more work because of the economics of that truck. However, Mr. Anderson challenged Mr. Wiebe's contention that Mr. Wiebe took over a position that was vacated when Mr. Friesen quit. It was Mr. Anderson's position that Mr. Wiebe was well aware that the nature of his employment was seasonal and subject to lay off each year. Mr. Anderson testified that this was acknowledged by Mr. Wiebe at his point of hire and, in any event, was an implied term of employment in this business.

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ANALYSIS

A Determination dated May 15, 1997 dismissed Mr. Wiebe's claim on the basis that his employment was for a definite term and therefore compensation for length of service was not payable due to the exception listed in Section 65(1)(b) of the Act. That Section reads:

65. (1) Section 63 and 64 do not apply to an employee
(b) employed for a definite term,

The real question in this case is whether Mr. Wiebe was hired for a definite term and thereby excluded from the provisions of Section 63 of the Act. A purposive approach to the interpretation of Part 8 of the Act shows that employees who are hired for an indefinite term of employment are entitled to compensation for length of service or notice in lieu of compensation when employment is terminated and there is no issue of just cause. The provision of compensation or notice in lieu affords the terminated employee either some financial means or an opportunity to make financial arrangements in order to mitigate a loss of employment. That is distinct from an employee who is hired for a definite term where the employee is aware from the commencement of employment that his employment is of a limited duration and will be able to make arrangements to mitigate the loss of that employment from its commencement. In effect employment for a definite period encompasses the concept of notice in the employment contract itself whether that notice is oral or written. Section 65(1)(b) recognizes this effectual notice.

In determining whether an employee has been hired for a definite term one must analyze the understanding of the parties as to the nature of the employment. Mr. Anderson argues that the nature of his business is seasonal. If the ground freezes his business stops. He further argues that the fact that Mr. Wiebe worked periodically during January and February 1996 was due to a mild winter and that the situation was unique. However, he did acknowledge that Mr. Friesen had worked through the winter months in previous years but with reduced hours. The reason why Mr. Friesen quit, according to Mr. Anderson, was because he found another job that provided him with regular year round employment. Mr. Anderson testified that the earnings of the drivers would drop during the winter period.

In assessing the nature of this employment relationship and the wording of the Act I am of opinion that in order to qualify for the exception stated in Section 65(1)(b) the employer must state, at the point of hire, the length of the period of employment. It is not sufficient for an employer to tell a potential employee, or a recalled employee, that there will be a lay off at some indefinite point in the future. In this particular case I find that Mr. Wiebe experienced an interruption in his employment which was consistent with the fluctuation in demand for his employer's product. However, that does not mean that he was employed for a definite term. There is no evidence to indicate that at his point of hire he was given a date upon which his employment would cease. He was informed of the probability of a lay off but was not given the certainty of a specific date. Rather, the evidence indicates that work load fluctuates but does not cease on a predictable basis.

Mr. Wiebe presented evidence of his calculations of the amount that he felt he was entitled to if his claim for compensation is accepted. I neither accept nor reject those figures; however, I refer the matter back to the Director's Delegate for calculation. I find that Mr.

Wiebe's period of employment was March 15, 1995 to September 9, 1996. He was not employed for a definite period and is therefore entitled to compensation pay for length of service.

ORDER

I order under Section 115 of the Act that the Determination dated May 15, 1997 be varied to direct Anderson Sod Farms Ltd. to pay compensation for length of service. I refer the matter back to the Director's Delegate for calculation.

E. Casey McCabe
Adjudicator
Employment Standards Tribunal