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 -

I.W.A. Canada Local 1-3567
("the Union")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David B. Stevenson

FILE NO.: 1999/492

DATE OF DECISION: October 21, 1999

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) by I.W.A. Canada Local 1-3567 ("the Union") of a Determination which was issued on July 19, 1999 by a delegate of the Director of Employment Standards (the "Director").

The Union had filed a complaint with the Director alleging that International Forest Products Ltd., Fraser Mills Division / Whitewood Manufactured Products Division / Flavelle Cedar Division ("IFP") had failed to provide the notice required by Section 64 of the *Act* to the employees and the Union in the context of a group termination. The Determination concluded that the Union had failed to establish that a group termination had occurred and found no violation of Section 64 had occurred as of the date of the Determination.

The Union contends that the Determination is wrong in fact and in law, arguing that, as a matter of fact, the Union provided sufficient evidence to justify a conclusion that a group termination had occurred or, in the alternative, had provided a sufficient evidentiary basis to warrant that the Director use her investigative powers to establish a more complete factual basis and that, as a matter of law, the Director misinterpreted Section 64.

The Tribunal has concluded that an oral hearing is not required to decide this appeal.

ISSUE TO BE DECIDED

The issue in this appeal is whether the Union has established the Director erred in fact or in law when it concluded there was no evidence that a group termination had occurred.

FACTS

The facts of this appeal are scant. It appears that IFP laid off a substantial number of its employees at three operating divisions, Fraser Mills Division, Whitewood Manufactured Products Division and Flavelle Cedar Division, in the fall of 1998. I will accept for the moment that more than fifty employees were laid off within a 2 month period at each Division and that each Division can be considered a separate location.

All of the laid off employees were, at the relevant time, employed under a collective agreement that provided recall rights.

The Determination set out its analysis of the complaint as follows:

> The director views a temporary lay-off as a suspension rather than a termination of employment. The provisions of Section 64(1) are triggered when 50 or more employees are suspended. A "temporary layoff" for an employee who has a "right of recall", being a right under a collective agreement to be recalled to employment with a specified period after being laid off, expires either upon recall or when the layoff exceeds the specified period within which the employee is entitled to be recalled to employment. If an employee is not recalled within the specified period then the director takes the position that for the purpose of determining the termination date, the employment of the employee who is laid off for more than the temporary layoff is deemed to have been terminated at the beginning of the layoff; (refer to section 63(5). It is possible, therefore, for an employer

> to have contravened section 64(1) some time after the last day of operation, when the recall rights of 50 or more employees expires within a 2 month period, when the suspension of their employment becomes a termination.

The Determination concluded that the Union had not provided any evidence that a group termination had occurred at any of the locations "because recall rights of the employees under the collective agreement have not been exhausted".

The Union has not suggested in its appeal that the Determination is wrong in its conclusion that recall rights under the collective agreement had not been exhausted. The Union simply says:

> . . . it has, in fact, provided sufficient evidence in its applications . . .

The only applications on file from the Union are those filed with the Director on October 22, 1998. If the above comment refers to those applications, I don't accept it, as there was no "evidence" provided in them at all. If the Union is referring to some other "applications", the burden is on them in this appeal to demonstrate some basis, factual or legal, for their position that the Director made an error in reaching her conclusion that no such evidence was provided and they have not done so. The appeal is a 4 page submission unaccompanied by any supporting documents.

ANALYSIS

The substance of the Union's appeal rests on the notion that the definition of termination in the *Act* has no application when considering what is a group termination in Section 64. It is stated in the appeal in the following way:

> In the Union's view, the finding that termination has not yet occurred is based on Mr. Gifford's understanding of recall provisions and does not take into account the fact that group termination provisions serve a different and unique purpose from that of the individual termination provisions. In the Union's submission, the interpretation of the section should not properly involve the consideration of individual recall rights.

That statement ignores that the rights and duties outlined in Section 64 are tied to and conditioned upon a termination of employment. The opening words of the section clearly identify that relationship:

> *64. (1) If the **employment** of 50 or more employees at a single location is to be **terminated** . . .*
> [emphasis added]

Section 1 of the *Act* identifies a "termination of employment" for the purposes of the *Act* as follows:

> ***"termination of employment"** includes a layoff other than a temporary layoff.*

By inference, a temporary layoff is not included in what is a termination of employment under the *Act*. As well, "temporary layoff" is defined:

> ***"temporary layoff"** means*
>
> > *(a) in the case of an employee who has a right of recall, a layoff that exceeds the specified period within which the employee is entitled to be recalled to employment; and*

> *(b) in any other case, a layoff of up to 13 weeks in any period of 20 consecutive weeks.*

The operative paragraph of the above definition is paragraph (a), as all the affected employees had rights of recall. When those two terms are considered together in the context of this case, the only possible conclusion that can be reached is that the employees laid off from IFP with recall rights are not, for the purposes of the *Act*, terminated until their recall period has been exceeded. There is nothing in Section 64 or in any other part of the *Act* that suggests "termination of employment" in the context of a group termination has any different meaning under the *Act* than a "termination of employment" of a single employee.

It is probable that some effect must be give to the words *". . . is to be terminated . . . "* in subsection 64(1) where the facts point to a conclusion there is no likelihood that any employee will ever be recalled. For example, where an employer has clearly demonstrated an intention to permanently close a location and let its work force go, it makes little sense to wait for actual termination of employment to occur before applying the provisions of Section 64. There is, however, no evidence that situation applies here. There is some mention in the appeal of a report saying that the Flavelle Cedar Division site was not "viable", but that is a long way from establishing, as the Union suggests, there is no "realistic chance of recall" for the Flavelle Cedar Division employees. In other words, no evidentiary basis for such an argument has been established by the Union.

In sum, the Union has failed to show any error in the Determination and the appeal is dismissed.

ORDER

Pursuant to Section 115, I order the Determination dated July 19, 1999 be confirmed.

David B, Stevenson
Adjudicator
Employment Standards Tribunal