Employment Standards TRIBUNAL

An appeal

- by -

Preston Enterprises Ltd.
("Preston")

- 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: Ib S. Petersen

FILE No.: 2001/331

DATE OF HEARING: August 13, 2001

DATE OF DECISION: September 12, 2001

DECISION

APPEARANCES:

Mr. Michael Doerksen on behalf of Preston

Mr. Randall Goddard on behalf of himself

OVERVIEW

This matter arises out of an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director issued on April 3, 2001. The Determination concluded that Goddard was owed $3,254.50 by the Employer on account of overtime wages, compensation for length of service and unauthorized deductions.

FACTS AND ANALYSIS

The Employer appeals the determination. The Employer, as the appellant, has the burden to persuade me that the Determination is wrong.

The Delegate's written submissions take issue with the Employer's participation in the investigation and, therefore, the Employer's right to appeal the Determination. From the correspondence, it appears that the Employer did not respond to the requests for information and documentation, particularly with respect to the overtime wages and the improper deduction. Doerksen did, however, eventually, respond with respect to the issue of lay off or termination. Those submissions are dealt with in the Determination. Doerksen explained that Goddard never contacted him during his absence from work on Workers' Compensation benefits and that he did not contact him when he was cleared to return to work. In the result, Doerksen says that he should not have to pay compensation for length of service. Doeksen stated at the hearing that his main disagreement with the Determination is the award for compensation for length of service. On the issue of the termination of Goddard's employment, I am of the view that the Employer did not fail to participate in the investigation.

I agree with the Delegate's submission that, having failed to participate in the investigation on those points, it would be improper to allow the Employer to appeal the conclusions with respect to overtime wages. The Employer's arguments why it should be allowed to deal with these aspects are, in my view, not valid. Basically, the Employer says that it had closed its operation, had difficulty receiving its mail (though there is no dispute that it did, in fact, receive the relevant mail), was not aware of the serious nature of the Determination and, I think, in particular, was not aware of the potential liability for directors and officers.

Even if I were to consider the Employer's appeal on the overtime and unauthorized deductions, I am not persuaded that the delegate erred. I hasten to add that Doerksen did not seriously pursue

these issues. In any event, there is nothing before me to show that the Delegate erred in his conclusion that the Employer improperly deducted $100 from Goddard's wages. Doerksen says that Goddard in 1999 was paid an advance of $1,000 to cover overtime wages. There is little in the way of documentary evidence to support this. There is very little in the way of particulars to lend credibility to this assertion. Goddard says that $1,000 was a bonus in lieu of a raise. Moreover, Doerksen does not seriously question the number of hours used by the Delegate to calculate the award. In my view, the Employer has not met the burden on appeal on these points.

From the testimony provided by the parties at the hearing, it appears that the background facts relevant to the termination issue are not in dispute. Preston operated a roofing company and Goddard was employed as a roofer from March 1996 to July 25, 2000 as a roofer. On July 25, Goddard injured himself at work and went on Workers' Compensation benefits. He was on compensation until December 12, 2000. Apparently, in early December the Employer closed its business permanently.

The factual dispute with respect to Goddard's entitlement to compensation for length of service turns on what happened after he went on Workers' Compensation benefits in July. Doerksen says that Goddard never contacted him to let him know that he was available for work. Goddard does not dispute that. He does say, however, that he had a conversation with Doerksen in September 2000 because he wanted the paystubs for the last few months of his employment which he needed for Workers' Compensation. WCB had advised Goddard to speak with his Employer and to let him now that he would complain to the Employment Standards Branch if he did not get his paystubs. Apparently, Doerksen told him "not to threaten me." Doerksen says that the last time he spoke with Goddard was in July and that he expected Goddard to contact him for work and that Goddard did not do that. Goddard says that when he spoke with Doerksen in July, he was told that "if he didn't come back, if [Doerksen] had to find someone else, he would be out of a job." Doerksen does not recall his saying that. Goddard agrees that he did not contact the Employer after September, though he says he is aware that the rehabilitation worker at WCB attempted unsuccessfully to make contact with the Employer in the first week of December. Doerksen says that the first he knew of the claim for termination was when he received the correspondence from the Delegate.

In December Goddard was ready to return to work. However, around that time it appears that the Employer's business closed. It is not clear to me if the business was, in fact, closed when Goddard was able to return to work. In my view, that is not material. It certainly had closed by the time the Employer was informed of the potential claim for compensation for length of service, which would appear to be on February 21, 2001. As noted by the Delegate, the Employer could terminate the employment either for cause or by giving notice (or pay in lieu) in accordance with the *Act*. It is clear that Preston did not take any active steps to bring Goddard's employment to an end. Employment can also be brought to an end by the Employee through a resignation. The Delegate concluded that Goddard did not resign. The letter from the Delegate to the Employer, dated February 21, 2001, notes that Goddart was cleared to return to work on December 12 and that "[t]o date he has not been returned to work." The letter then states that if "the temporary lay off exceeds 13 weeks then Goddard will also be owed compensation for

length of service of approximately four weeks." The Delegate concluded that because the Employer's business closed, it was not able to provide further employment for Goddard, who was then entitled to compensation.

The Delegate's analysis has a certain intuitive appeal. However, it ignores the fact that Goddard had not informed the Employer that he was cleared to return to work. I accept the fact that the business closed around this time and that Goddard would not have been able to return to work. However, on the evidence, the Employer did not know that Goddard was able to return to work. In my view, an employee has an obligation to inform his or her employer that he or she is able to return to work after an absence on Workers' Compensation benefits. As Goddard was never laid off by the Employer, no obligation to recall him arose. In the circumstances, Goddard quit his employment when he failed to alert his Employer to the fact that he was cleared to return to work. Had he done that, he would, in my view, have been entitled to compensation for length of service.

In short, I do not accept the delegate's conclusions. I am of the view that the Employer has discharged the burden on the appeal.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated April 3, 2001, be confirmed except with respect to the award for compensation for length of service.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal