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 -

Bill Sitter
("Sitter")

-and-

Tara Capital Corporation
("Tara")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 2000/538 (Sitter Appeal) &
2000/579 (Tara Appeal)

DATE OF HEARING: November 20, 2000

DATE OF DECISION: December 13, 2000

DECISION

APPEARANCES:

F. William Sitter	on his own behalf
James C. Gopaulsingh, Barrister & Solicitor	for Parvez Nadeem Tyab
Julie Anne Brassington, I.R.O.	for the Director of Employment Standards

OVERVIEW

I have before me two appeals, both filed 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 August 1st, 2000 under file number ER 078-897 (the "Determination"). By way of the Determination, the delegate ordered Tara Capital Corporation ("Tara") to pay the sum of $13,887.36 to Mr. F. William Sitter ("Sitter") on account of the following items:

• Auto Allowance for May and June 2000	$500.00
• Computer lease paid for May and June 2000	$512.00
• Wages from May 15th to 31st, 2000	$3,325.00
• Compensation for length of service	$7,000.00
• Vacation pay	$4,550.36
• Less credit for repayment of moving allowance	($2,000.00)
TOTAL AWARD	$13,887.36

These two appeals were heard concurrently on November 20th, 2000 at the Tribunal's offices in Vancouver. Sitter appeared as the sole witness on his own behalf; Tara, who was represented by legal counsel and by Mr. Parvez Nadeem Tyab (a Tara officer and director), elected not to call any *viva voce* evidence. The Director's delegate did not call any evidence but did make final submissions, as did Sitter and Tara's legal counsel.

After hearing the evidence and submissions, I indicated that I was inclined to exercise my jurisdiction to refer Sitter's complaint back to the Director for further investigation [see section 114(2)(a) of the *Act*]. All three parties acknowledged that, in all the circumstances, a referral back to the Director was a proper disposition of these appeals.

ISSUES ON APPEAL

Both Sitter and Tara have appealed the Determination. In essence, Sitter (EST File No. 2000/537) claims that he ought to have been awarded nearly $30,000 whereas Tara (EST File No. 2000/579) claims that the delegate exceeded her statutory authority and that Sitter ought to have been awarded approximately $6,200.

FINDINGS AND ANALYSIS

Sitter commenced his employment with Tara on or about August 3rd, 1999 as a "vice-president" with primary responsibility for Tara's sales and marketing activities. Sitter's employment ended on or about May 30th, 2000 when he was terminated without cause or prior written notice. Sitter's employment was governed by a written employment contract which provided for a $7,000 base monthly salary and other perquisites.

I have several concerns about the correctness of the Determination which leads me to conclude that this matter ought to be referred back to the Director. I will now briefly detail my principal concerns.

Compensation for length of service

As noted above, Sitter was employed by Tara for approximately 10 months. Accordingly, pursuant to section 63(1) of the *Act,* his entitlement to compensation for length of service was limited to 1 week's wages (*i.e.,* approximately $1,615). Sitter's written employment contract contains the following termination provision:

> "TERMINATION:
> Three months notice, by either party to this agreement"

In his appeal documents, Sitter claims that he should have been awarded 3 months' wages (*i.e.*, $21,000) as "payment in lieu of notice". The delegate awarded Sitter 1 month's wages ($7,000) because:

> "Although the written contract of employment calls for three months compensation for length of service pay, the parties have agreed to one month's compensation for length of service".

For his part, Sitter denies any such agreement to limit his claim to 1 month's wages. However, regardless of whether there was or was not such an agreement, I am of the view that the delegate exceeded her authority by making an award of $7,000 as "compensation for length of service".

It must be recognized that the *statutory entitlement* to compensation for length of service is a separate concept from that of *damages* for failure to give proper notice of termination. In the latter case, proper notice will be determined by either an express notice provision (*i.e.,* an amount of notice specifically agreed to between the parties) or, in the absence of an express contractual term, by the principles of "reasonable" notice (*i.e,* an implied contractual term).

Compensation for length of service payable under section 63 of the *Act* is a form of deferred contingent compensation that is intended "to compensate long-serving employees for their years of service and investment in the employer's business and for the special losses they suffer when their employment ends" (see *Re Rizzo & Rizzo Shoes Ltd.* [1998] 1 S.C.R. 27). Consistent with it being a service-based benefit, the amount of compensation for length of service payable by an employer increases in lockstep with an employee's tenure. However, "an amount payable in lieu of [contractual] notice does not flow from services performed for the corporation, but rather from the damage arising from non-performance of a contractual obligation to give sufficient notice" (see *Barrette v. Crabtree Estate* [1993] 1 S.C.R. 1027).

In an indefinite contract of employment where there is no express notice clause (or where the clause is unlawful--see *Machtinger v. HOJ Industries Ltd.* [1992] 1 S.C.R. 986), the employee is entitled to "reasonable" notice of termination. "Reasonable" notice depends on various factors including the employee's age, length of service, position, prevailing labour market conditions etc.--see *Wallace v. United Grain Growers Ltd.* [1997] 3 S.C.R. 701--and may amount to 24 months' or more notice. If, as appears to be the case here, there is a lawful express notice of termination clause in the governing employment contact, damages may be awarded for breach of that clause. The damages payable in the latter instance will be predicated on the terms of the express notice clause subject to any deduction for the employee's failure to mitigate their loss.

Although an employee may well be entitled to claim damages for breach of an express or implied notice of termination provision, I cannot find any proviso in the *Act* which gives the Director, or her delegates, the jurisdiction to make such a damages award. Under the *Act,* the Director's authority is limited to awarding *compensation for length of service* and, in my view, the Director does not have the authority to make a *damages* award based on an employer's failure to abide by an express or implied notice of termination provision.

"Wages", as defined in section 1 of the *Act,* includes monies payable as compensation for length of service. Since compensation for length of service represents compensation for "years of service" (see *Rizzo, supra.*) it is, in fact, deferred compensation that is paid for "work" (see definition, section 1). On the other hand, damages for breach of a contractual notice provision are not paid for "work" but, rather, are paid (subject to mitigation) for "non-performance of a contractual obligation to give sufficient notice" (*Barrette, supra.*). An employee's right to sue for damages for breach of contract, even though the proper amount of compensation for length of service has been paid to the employee, is preserved by section 118 of the *Act.*

The amount of compensation payable under section 63 is based entirely on service and is "capped" at a "maximum of 8 weeks' wages" (or equivalent written notice or combination of pay and notice) after 8 or more consecutive years of employment. Sitter, given his 10 months' tenure, was only entitled to 1 week's wages as compensation for length of service. It thus follows, in my view, that the delegate erred in awarding Sitter one month's wages as compensation for length of service.

In summary, if the $7,000 award simply reflects *compensation for length of service,* then this award cannot stand as it exceeds the amount payable under section 63(1) of the *Act--i.e.,* 1 week's wages. If the $7,000 award is intended to represent *damages* for breach of contract, the award similarly cannot stand since the Director does not have any jurisdiction to award damages for breach of a contractual (whether express or implied) notice of termination provision.

As I previously observed, Sitter may well be entitled to a sum greater than 1 week's wages as damages for breach of contract. However, that particular claim will have to be adjudicated in the civil courts. A noted above, Sitter's right to pursue such a civil claim is preserved by section 118 of the *Act.*

Expenses and Allowances

Allowances and expenses are not considered to be "wages" [see definition of "wages", section 1(h) of the *Act*] for purposes of calculating, say, overtime pay, vacation pay, statutory holiday pay or compensation for length of service. On the other hand, an employer is not entitled to "offload" ordinary costs of doing business on to its employees. In the latter event, any such costs paid by an employee are recoverable as if they were wages--see sections 21(2) and (3).

Sitter's written employment contract obliged Tara to pay "all reasonable travel, office and business expenses" including a $250 per month automobile allowance designed to compensate Sitter for the business use of his private automobile. In addition, the uncontested evidence before me (recall that Tara elected not to call any witnesses at the appeal hearing) is that at the outset of Sitter's employment, Tara and Sitter entered into a "co-lease" agreement for a computer with Dell Financial Services Canada Limited. In essence, this "lease" was a installment purchase given the $1 buyout at the end of the 24-month term. Although both Sitter and Tara are co-lessees under the agreement, Sitter alone paid the monthly payments ($224.58 plus taxes) and he now has sole possession of the computer and is, apparently, continuing to make the monthly payments. The computer in question was used exclusively by Sitter while serving as Tara's vice-president and, for the first 8 months of his employment, Tara reimbursed Sitter for the monthly lease payments he made to Dell.

The delegate awarded Sitter $500 on account of the unpaid automobile allowance and $512 for the unpaid computer lease payments (being the respective amounts due for May and June, 2000). Sitter claims that he is also entitled to recover his automobile allowance for July and August 2000 and the computer lease payments from July 2000 to the end of the lease term. In light of section 21(2) and (3) of the *Act,* I am of the view that Sitter is entitled, at the very least, to recover the July and August car allowance payments and in regard to the computer lease, Sitter may well be entitled to reimbursement for any payments made up to the end of the lease term so long as he is prepared to surrender possession of the computer to Tara upon full reimbursement.

Vacation pay

Sitter's vacation pay entitlement under the written employment contract is ambiguous. The contract states that Sitter is entitled to "Four weeks, paid vacation per year, (5% of personal earnings)". Four weeks paid vacation represents an amount greater than 5% of earnings. Furthermore (and leaving aside the employment contract), under the *Act,* given his service, Sitter was not entitled to any *vacation leave* and only 4% of earnings as *vacation pay*. The basis upon which Sitter's vacation pay entitlement was calculated is not clearly set out in the Determination. In my view, this issue requires further clarification.

Interest

Sitter seeks an additional award on account of interest at the rate of "8% compounded on unpaid balance". Sitter is entitled to be paid interest, although not necessarily at an 8% compounded rate, in accordance with the provisions of section 88 of the *Act.*

ORDER

Pursuant to section 115(1)(b) of the *Act*, I order that Sitter's unpaid wage complaint be referred back to the Director for further investigation and, consistent with these reasons and as otherwise appropriate, further determination.

Kenneth Wm. Thornicroft

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal