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-

Paul Young operating as Sterling Autoworks
("Sterling ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: C. L. Roberts

FILE NO: 98/677

DATE OF DECISION: December 30, 1998

DECISION

The appeal is based on written submissions by Paul Young and Ulf K. Ottho, Barrister and Solicitor, on behalf of Sterling Autoworks and Judy Reekie, on behalf of the Director.

OVERVIEW

This is an appeal by Paul Young operating as Sterling Autoworks ("Sterling"), pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued October 5, 1998. The Director found that Sterling contravened Sections 18(1) and 63 (2)(b) of the *Act* in failing to pay Peter McGregor ("McGregor") compensation for length of service. Pursuant to Section 28 of the Act, the Director Ordered that Sterling pay $5,636.45 to the Director on behalf of McGregor.

ISSUE TO BE DECIDED

At issue is whether the Director erred in her interpretation of the phrase "normal or average hours of work" under Section 63(4) of the *Act* in calculating the wages owed to McGregor.

FACTS

McGregor was employed by Sterling as a bodyman from February 27, 1990 to February 26, 1998. On his last date of employment, his wages were $21.00 per hour. McGregor's normal hours of work were determined to be 7 hours per day, 5 days per week, for a total of 35 hours per week until October 1997. At that time, McGregor's hours were reduced due to a slow down in business. They continued to decline. After Christmas 1997, business did not pick up, and in February 1998, McGregor worked only one day per week. On February 26, 1998, McGregor was laid off, with "not returning" marked on his Record of Employment (ROE). No working notice of termination or compensation for length of service was given to McGregor.

Following an investigation, the Director's delegate found that as there was no just cause to dismiss McGregor, he was owed 8 weeks compensation for length of service. The Director's delegate determined that McGregor was entitled to $5,118.75, based on 30.468 hours per week at $21.00 per hour, plus 6% vacation pay in the amount of $307.13.

In calculating the hours of work, the Director's delegate did not take into consideration any weeks in which McGregor worked less than 17.5 hours. The Director's delegate found that McGregor worked a total of 243.75 hours in the eight weeks prior to his last day of work, in which he worked 50% or more of his regular hours.

During the investigation, Sterling made an offer of settlement. The matter was not resolved between the parties, and on June 18, 1998 the Director's delegate sent a letter to Sterling, which included the following statement:

> "While I appreciate your position....I have determined that Peter McGregor is owed 8 weeks compensation for length of service pay. The amount owing is set out below:..."

The Director's delegate then indicated that the total amount owing was $3,244.40. Further in the letter, the Director's delegate states:

> "In the absence of written working notice, I have determined that $3,244.40 is owed to Peter McGregor. If you are in agreement with my decision, please deliver....If you are not in agreement that the above amount is owed to Peter McGregor, please deliver to our office any evidence or submissions you wish to make in support of your position on or before June 30, 1998. Should I not hear from you by June 30, 1998 a Determination will be written for outstanding compensation for length of service pay, plus 6% annual vacation pay, totalling $3,244.40, plus interest."

Sterling put forward the settlement offer on July 9. On July 23, Sterling was advised that McGregor had rejected the offer. The Determination states that "At that time, Young was advised that the amount of compensation for length of service pay would not be based on the last eight weeks of employment, instead, it would be based on the last eight weeks in which McGregor worked 50% or more of his regular hours."

ARGUMENT

On appeal, Mr. Young contended that the issue on the "second determination" was *res judicata.* He states that the first determination left "...the officer functus of jurisdiction."

Mr. Ottho contends that the Director's delegate erred in her interpretation of Section 63(4) of the *Act.* He states that the June 18 calculation took as the last eight weeks of hours regularly worked as the two week periods ending January 15, 1998, January 30, 1998, February 12, 1998, and February 27, 1998. He contends that the Director's delegate erred in "arbitrarily excluded certain pay periods from her calculation of what the last eight weeks during which the employee worked normal or average hours were." He contends that the "average or normal working hours" varied widely during the last eight weeks. Mr. Ottho suggested that the hours actually worked reflected the normal hours when work was available, and the compensation award ought to be based on those hours.

Mr. Ottho argued that the Director's delegate misapplied Section 62 of the *Act*, rather than relying on the definitions contained in the *Act.*

The Director's delegate suggests that Young misunderstood the letter of June 18 as a determination, rather than a letter using calculations based on records provided to date. She notes that at that time, no daily or weekly hours had been submitted. After McGregor rejected the offer of settlement, she states that she discussed the meaning of "week of layoff", and stated that those dates could not be used in the calculation. Further records were received from Sterling on September 18, which the delegate states she used to base her determination.

DECISION

Although the issue of whether the Determination was *res judicata* was not advanced by Sterling's counsel, I feel it appropriate to address this issue, which was raised by Mr. Young. It appears Mr. Young considered that the letter of the Director's delegate, dated June 18,1998 constituted the Determination. As I understand his argument, the Director's delegate is not entitled to subsequently issue another Determination on the grounds that it is *res judicata*, or already decided.

While the letter of June 18 appears to be framed as a Determination and contains words which suggests it might be so, the final paragraphs indicate that it is not. They indicate that the calculations are based on information obtained to date, and that if Sterling had any information on the award, it was to contact the Director's delegate. The letter states "Should I not hear from you by June 30, 1998, a Determination will be written...." Sterling in fact provided additional information after that date. The Determination, which is headed "Determination", and containing information on appeal procedures, was issued in October.

Consequently, I find that the Director's delegate had the jurisdiction to issue the Determination in October, and the matter was not *res judicata*.

With respect to the second issue raised on appeal, I am unable to conclude that the Director's delegate misinterpreted the *Act*.

Section 63 of the Act provides

(4) The amount the employer is liable to pay becomes payable on termination of the employment and is calculated by

> (a) totalling all the employee's weekly wages, at the regular wage, during the last 8 weeks in which the employee worked normal or average hours of work,
> (b) dividing the total by 8, and
> (c) multiplying the result by the number of week's wages the employer is liable to pay.

Section 62 states

> In this part, "**week of layoff**" means a week in which an employee earns less than 50% of the employee's weekly wages, at the regular wage, averaged over the previous 8 weeks.

Because employment standards legislation is benefits conferring, it is to be given broad and general interpretation. (*Re Rizzo v. Rizzo Shoes Ltd.* [1998] SCJ, 154 DLR (4th) 193).

Courts have repeatedly held that that employment standards legislation is to be given large and liberal interpretation (see *Fenton v. Forensic Psychiatric Services Commission* (1991) 56 BCLR (2d) 170, *Machtinger v. HOJ Industries* [1992] 1. S.C.R. 986). In *Rizzo*, the Court held that as employment standards legislation was a mechanism for providing minimum benefits, any doubts should be resolved in favor of the claimant.

In *Machtinger*, the Supreme Court set out interpretive principles of employment standards legislation:

> ....an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protection to as many employees as possible, is to be favoured over one that does not. In this regard, the fact that many individual employees may be unaware of their statutory and a common law rights in the employment context is of fundamental importance. (at p. 1003)

I find that those weeks in December, January and February in which McGregor worked less than 50% of his previous regular hours, or less than 35 hours per week, was correctly deemed by the

Director's delegate as a week of layoff, and were correctly excluded from the calculation of average hours of work.

McGregor worked for Sterling for approximately eight years. Starting in December 1997, McGregor did not work a full 80 hours in a two week period. Mr.Young stated to the Director's delegate that he was going to lay McGregor off in October, but did not do so since Christmas was coming, and he thought business would pick up in the new year. It is simply not tenable to suggest, as Sterling's counsel does, that the hours worked by McGregor in the last several months of employment represented his normal or average hours of work. They did not represent the hours he worked in the previous eight years, or even the first ten months of 1997.

During the period December 14 - December 20, McGregor worked 17 hours. Under section 63(4), that is considered to be a week of layoff, based on the previous eight weeks of work. That week, and four others, were properly determined to be a week of layoff by the Director's delegate, and not included in the calculation of the compensation.

ORDER

I order, pursuant to Section 115 of the Act, that the Determination, dated October 5, 1998, be confirmed , together with whatever interest might have accrued, pursuant to Section 88 of the *Act,* since the date of issuance.

Carol Roberts
Adjudicator
Employment Standards Tribunal