Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

Tom Stuart Contracting Ltd.
("TSC")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: Robert E. Groves

FILE No.: 2011A/171 and 2011A/172

DATE OF DECISION: February 1, 2012

DECISION

SUBMISSIONS

Daniel Salvas	on his own behalf
Neil Reiswig	on his own behalf
Jennifer Redekop	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an application for reconsideration pursuant to section 116 of the *Employment Standards Act* (the "*Act*"). Tom Stuart Contracting Ltd. ("TSC") seeks a reconsideration of a decision of a member of the Tribunal (the "Member") dated October 25, 2011, (the "Original Decision").

2. The Original Decision was issued because two former employees of TSC, Daniel Salvas and Neil Reiswig (individually, "Salvas" and "Reiswig" and collectively, the "Complainants") appealed a decision of a delegate of the Director of Employment Standards (the "Director") dated July 22, 2011, (the "Determination"). Salvas and Reiswig had filed complaints under the *Act* alleging that when TSC terminated their employment in 2010 it had failed to pay them all the compensation for length of service to which they were entitled pursuant to section 63 of the *Act*.

3. In the Determination, the Director held that TSC had paid the Complainants the compensation to which they were entitled, and that no further action was warranted. On appeal, the Member varied the Determination to increase the amount of compensation for length of service for each of the Complainants to the eight week maximum provided for in section 63. The Member also referred the complaints back to the Director for the purpose of calculating the exact amounts of compensation for length of service each of Salvas and Reiswig should receive.

4. I have before me the Determination, the Director's Reasons for the Determination, the original appeals, the submissions of the parties and the Director on the appeals, the record that was before the Director at the time the Determination was made, the Original Decision, TSC's application for reconsideration, its submissions on the application, the submissions of the Director, and the submissions of the Complainants.

5. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act*, and Rule 26 of the Tribunal's *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings on applications for reconsideration. Having reviewed the materials before me, I have concluded that this application shall be decided having regard to the written materials filed, without an oral or electronic hearing.

FACTS

6. During the mid-1990's, the Complainants commenced to be employed by a company called Van Ommen Contracting Ltd. ("VOC"), as loggers. VOC and Louisiana Pacific Canada Ltd. ("LPC") held joint rights to log provincial lands located near Malakwa, in the Columbia-Shuswap Regional District.

7. In June 2008, VOC and LPC agreed that VOC would assign its 50% interest in the right to log to TSC. As a result of this transfer, the Complainants came to be employed as loggers by TSC. All parties agree that the continuation of their employment was seamless as a result of this transaction, and that TSC became a successor employer to VOC for the purposes of section 97 of the *Act*. By this I mean that the Complainants' employment was deemed to be continuous and uninterrupted, notwithstanding the acquisition by TSC of VOC's interest in the right to log.

8. In the spring of 2009, both Complainants were laid off. This was not an unusual event. During each year's "spring break-up" period, weather normally prevents the maintenance of active logging operations.

9. Spring break-up usually runs from March to June each year. In 2009, however, Salvas was laid off on March 7, and returned to work on August 2. Reiswig was laid off the same day in March, and did not return to work until August 24. During the layoff periods that year TSC gave no indication to the Complainants that their contracts of employment had been terminated. Accordingly, the Complainants assumed that they continued to be employed by TSC throughout.

10. The Complainants then continued to work for TSC until they were both laid off in March 2010. Neither of them returned to work for TSC thereafter. By June 2010, it had become clear that the Complainants' contracts of employment had been terminated. TSC paid each of the Complainants one week's wages as compensation for length of service pursuant to section 63 of the *Act*.

11. The Complainants have argued throughout that since TSC was a successor employer, and their employment with TSC must be deemed to have commenced when they started to work for VOC in the mid-1990's, they should have received the maximum amount of eight weeks' compensation for length of service mandated by section 63.

12. In the Determination, the Director noted that temporary layoffs are common in the logging industry, and that it was an implied term of the Complainants' contracts of employment that they would be laid off from time to time. No one disputes these findings.

13. The Director also noted that the Complainants' layoff period in the spring of 2009 exceeded thirteen consecutive weeks. As a result of the application of the definitions of "temporary layoff" and "termination of employment" in section 1 of the *Act* this ordinarily would have meant that the Complainants would have been deemed to have been terminated in March 2009, and re-hired in August of that year. If so, they would have been entitled to eight weeks' compensation for length of service at that time, and only the one week that TSC actually paid them when they were terminated in June 2010. However, assuming the Complainants were terminated in 2009, they were not in a position to claim the eight weeks' compensation for length of service that was owed to them at that time, because they did not file complaints regarding those terminations within the six month complaint period stipulated in section 74(3) of the *Act*.

14. In this instance, however, the Director, rightly in my view, concluded that the effect of the 2009 layoffs was governed by section 37.7(7) of the *Employment Standards Regulation* (the "*Regulation*"), which reads:

> The definition of "temporary layoff" in section 1 of the [*Act*] does not apply to loggers working in the interior area who are recalled to work if the temporary layoff is the result of a normal seasonal reduction in activity.

15. Where section 37.7(7) is applicable, its effect seems to be that interior loggers who are temporarily laid off for more than thirteen weeks may not be deemed to have been terminated.

16. That said, in this case the Director observed that the 2009 layoff period exceeded the normal March to June period, and extended into August. In addition, the Director determined that the layoff period was longer in 2009 "primarily due to market conditions" and "in small part" due to LPC's attempting to sell its logging licence.

17. For the Director, these were reasons that could not fall within the meaning of the words "normal seasonal reduction in activity" that were present in section 37.7(7). In the result, the Director concluded that section 37.7(7) could not protect the Complainants in the circumstances. This meant that the default position relating to temporary layoffs set out in the definitions in section 1 of the *Act* were engaged for the purposes of analyzing the legal effect of the Complainants' temporary layoffs they experienced in 2009. In turn, that meant that the Complainants' contracts of employment were deemed to have been terminated in June 2009, thirteen weeks after their layoffs began. As the Complainants were not recalled to work for TSC until August of that year, by operation of what the Director construed to be the relevant provisions of the *Act* it was impossible to characterize their commencing work at that time as anything other than their entering into new contracts of employment with TSC. As the period of employment for both of them with TSC thereafter was longer than three months but less than twelve months in duration, the Complainants were only entitled to one week's compensation for length of service when they lost their employment in June 2010.

18. In his Original Decision, the Member took a different view of the proper construction of section 37.7(7) of the *Regulation*. For the Member, the point of attack for interpreting the section was the *reason* for the temporary layoff, not its *duration*. Given that the evidence supported a conclusion that the reason for the Complainants' layoffs in 2009 was "normal seasonal reduction in activity," a conclusion the Director accepted, it mattered not that the layoffs were extended due to other factors. That being so, and since the Complainants were in fact recalled to work in 2009, section 37.7(7) applied to the Complainants, and the thirteen week threshold referred to in the definition of "temporary layoff" in section 1 of the *Act* was of no moment. In the result, the Member decided that there had been no termination of the Complainants' contracts of employment in 2009, and so they should be entitled to eight weeks' compensation for length of service when those contracts of employment came to an end in 2010.

19. On this application for reconsideration, TSC argues, in essence, that since the Complainants' layoffs in 2009 were extended by two and half months due to factors unrelated to normal seasonal reductions in activity, the thirteen week threshold should apply, and the Complainants' temporary layoffs that year should be deemed to have become permanent before they re-commenced work later in the year. TSC acknowledges that it was unaware of the thirteen week threshold at the time, but that it should be applied nevertheless.

20. The Director concurs with this approach, but states it somewhat differently. The nub of the Director's position is captured in the following excerpts from the submission delivered on her behalf:

> Even if the temporary layoff begins as a result of a normal seasonal reduction in activity (i.e. for spring break-up), the nature of that layoff may change. If the temporary layoff goes beyond the normal period for seasonal reduction in activity, such as what occurred in the present case, it is at that point that the temporary layoff is no longer as a result of the normal seasonal reduction in activity and the definition of temporary layoff in section 1 of the [*Act*] will then apply ...
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> ...
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> Based on the findings of fact I made in the Determination with respect to the reasons the temporary layoff extended until August 2009, the requirement of "if the temporary layoff is the result of a normal seasonal reduction in activity" was not met and therefore the definition of temporary layoff under section 1 of the [*Act*] applied. Findings of fact were made in the Determination that the temporary layoff, while it

> may have started for reasons of the spring break-up period, morphed into a layoff for reasons not related to a normal seasonal reduction in activity ...

ISSUES

21. There are two issues which arise on an application for reconsideration of a decision of the Tribunal:

1. Does the request meet the threshold established by the Tribunal for reconsidering a decision?
2. If so, should the decision be confirmed, cancelled, varied or referred back to the original panel, or another panel of the Tribunal?

ANALYSIS

22. The power of the Tribunal to reconsider one of its decisions arises pursuant to section 116, the relevant portion of which reads as follows:

> 116 (1) On application under subsection (2) or on its own motion, the tribunal may
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> (a) reconsider any order or decision of the tribunal, and
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> (b) confirm, cancel or vary the order or decision or refer the matter back to the original panel or another panel.

23. The reconsideration power is discretionary, and must be exercised with restraint. The attitude of the Tribunal towards applications under section 116 is derived in part from section 2 of the *Act*, which identifies as purposes of the legislation the promotion of fair treatment of employees and employers, and the provision of fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*. It is also derived from a legitimate desire to preserve the integrity of the appeal process described in section 112 of the *Act*. A party should not easily have available to it an avenue for avoiding the consequences of a Tribunal decision with which it is unhappy. Nor should it be entitled to an opportunity to re-argue a case that failed to persuade the Tribunal at first instance. Having regard to these principles the Tribunal has repeatedly asserted that an application for reconsideration will be unsuccessful absent exceptional circumstances, the existence of which must be clearly established by the party seeking to have the Tribunal's original decision overturned.

24. The Tribunal has adopted a two-stage analysis when considering applications for reconsideration. In the first stage, the Tribunal asks whether the matters raised in the application warrant a reconsideration of the Tribunal's original decision at all. In order for the answer to be "yes" the applicant must raise questions of fact, law, principle or procedure flowing from the original decision which are so important that they demand intervention. If the applicant satisfies this requirement the Tribunal will go on to the second stage of the inquiry, which focuses on the merits of the original decision. When considering the original decision at this second stage, the standard applied is one of correctness.

25. In my opinion, the Original Decision warrants reconsideration. The issue before me relates to the meaning to be ascribed to section 37.7(7) of the *Regulation*. As the Member noted in the Original Decision, the appeals in this case appear to represent the first occasion that the Tribunal has been called upon to consider this particular provision. In my view, it behooves the Tribunal to provide guidance as to its proper interpretation.

26. I have reconsidered the Original Decision on the merits. I have determined that the Member came to the correct conclusion, and so the Original Decision must be confirmed.

27. In my opinion, section 37.7(7) of the *Regulation* is ambiguous. Reasonable persons reading it could conclude that it means several different things. Two of these interpretations are at issue in these proceedings. One plausible interpretation of the words of the section is the one that was accepted by the Member. That interpretation requires that the section be construed to mean that so long as the *reason* for the temporary layoff is normal seasonal reduction in activity, it makes no difference that the duration of the layoff was extended due to other factors. Another plausible interpretation is that offered by the Director, who says that the language should be construed to mean that if the *duration* of the layoff is prolonged as a result of factors that would not precipitate or extend a normal seasonal reduction in activity, the section is inapplicable.

28. In order to resolve the ambiguity, one must pay heed to the comments of the court in *Re Rizzo & Rizzo Shoes Ltd.* [1998] 1 SCR 27. Both the Director and the Member referred to this decision, but I agree with the Member that the Director does not appear to have applied it correctly to the circumstances of this case when preparing the Determination. In so doing, the Director erred in law.

29. As the Member pointed out, in *Rizzo* the Supreme Court of Canada seized the opportunity to provide guidance as to the way statutes such as the *Act* should be construed, and then applied. The court stated that such statutes are "benefits-conferring legislation" and so they should be interpreted in "a broad and generous manner" to ensure that the benefits they make available are in fact conferred. In order to achieve that goal the court made it clear that "any doubt arising from difficulties of language should be resolved in favour of the claimant."

30. Applying these instructions to the circumstances in the case before me, the ambiguity in section 37.7(7) must, I believe, be resolved so as to bring about a result that favours the Complainants. That means that I should confirm the Original Decision. On the other hand, if I were to accept the Director's interpretation of section 37.7(7), it would have the effect of denying the Complainants a benefit provided for in the *Act*. I am of the view that I cannot do that in this case without diverging unacceptably from the principles expressed by the court in *Rizzo*.

31. I agree, as did the Member, with the Director's comments in the Determination to the effect that temporary layoffs under section 37.7(7) must result from normal seasonal reductions in activity. This ensures that employers cannot indefinitely lay off employees for any number of reasons and leave them in a situation where they are uncertain as to their employment status. That being said, there is no dispute in this case that TSC laid off the Complainants in March 2009 for reasons relating to the normal seasonal reduction in activity. In addition, it is clear that at no time during the layoff periods they experienced in 2009 did the Complainants feel uncertain as to their employment status. Indeed, the record shows that all parties, including TSC, appear to have thought that the Complainants' employment was continuous throughout the layoff period from March to August 2009. In the circumstances of this case, I fail to see that a confirmation of the Original Decision must act in a manner that fails to vindicate the policy the Director indicated was meant to inform the interpretation of section 37.7(7) of the *Regulation*.

ORDER

32. Pursuant to section 116 of the *Act*, I order that the Original Decision of the Member dated October 25, 2011, be confirmed

Robert E. Groves
Member
Employment Standards Tribunal