Employment Standards TRIBUNAL

An appeal

\- by -

Westcoast Tire and Wheel Ltd.
("Westcoast")

\- 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: John M. Orr

FILE No.: 2000/646

DATE OF DECISION: January 10, 2001

DECISION

APPEARANCES:

Jeff Seabrook	President, Westcoast Tire and Wheel Ltd.
Dustin Coates	on his own behalf

No one appeared on behalf of the Director

OVERVIEW:

This is an appeal by Westcoast Tire and Wheel Ltd. ("Westcoast") pursuant to section 112 of the *Employment Standards Act ("the Act")* from a determination dated August 24 2000 (#ER 100958) by the Director of Employment Standards ("the Director").

In the determination the Director found that Dustin Coates ("Coates") was owed compensation for length of service on account of a deemed termination following a temporary layoff. The Director found that Coates was entitled to two weeks wages because he had been employed for more than 12 consecutive months of employment.

Westcoast appeals on the basis that Coates had terminated his own employment prior to the expiration of the temporary layoff. Westcoast also submits that Coates did not have more than 12 consecutive months of employment because there was a six-week break in the employment in July and August 1999.

ISSUES

There are two clear issues raised in this appeal. The first is whether the Director's delegate properly considered the evidence put forward by the employer that Coates had terminated his employment prior to the expiration of the temporary layoff. This second issue is whether the six-week absence from work constituted a break in the consecutive months of employment.

FACTS AND ANALYSIS

Coates was employed by Westcoast from February 6th, 1998 until he was laid off on January 30, 2000. He was not recalled to work at any time during his layoff. A "temporary layoff" is defined in the *Act* as a layoff of up to 13 weeks in any period of 20 consecutive weeks. Section 63 (5) provides that:

> (5) For the purpose of determining the termination date, the employment of an employee who is laid off for more than a temporary layoff is deemed to have been terminated at the beginning of the layoff.

The employer concedes that Coates was not recalled to work within the 13 weeks referred to above. However, the employer says that Coates terminated his own employment when he notified another employee that he had found other employment and would not be able to cover that other employee's holiday time.

The facts found by the Director's delegate deal with the conversations between Coates and the other employee but the delegate appears to deal with the conversations as if they occurred on one occasion. It was clear on the evidence before me that Coates and the other employee both agreed that there were two significant conversations. In the first conversation both agree that Coates said that he had found other work but that he wanted to keep his options open and was not giving up his position at Westcoast if he was recalled. However it is the second conversation upon which the employer relies.

The other employee testified that the first telephone call occurred on April 16th, 2000. Coates confirms this date. The other employee said that their second telephone call was one week later which would make it April 23rd. It is significant that this date is before the expiration of the 13 weeks. Coates believes that the second conversation occurred sometime later but cannot recall the specific date. The Director's delegate said that during her interview the other employee could not recollect dates or specific details. While that employee's evidence before me was not specifically clear about the date being April 23rd he was sure that the conversation occurred one week after the first conversation. It was agreed by a both parties that the first conversation occurred on April 16th.

The other employee testified that in the second conversation Coates said that he would not be available to work during the employee's holiday time as he was now working full-time with another company. This was passed on to Seabrook, the President of Westcoast, who then assumed that Coates would not be returning to work for Westcoast and assumed that Coates had terminated his employment with Westcoast.

The onus is on the employer to establish that the employee has terminated the employment contract. In this case the conversations between Coates and the other employee were not a reasonable basis for the employer to jump to the conclusion that Coates would have refused a recall to work at Westcoast if it had been offered. The fact is that no such offer was made before the expiration of the 13-week period.

The employer says that the other employee was a manager and therefore the indication by Coates that he would not be available to cover holidays was a clear indication to management that he would not accept work even if he were recalled. However, I accept the evidence of Coates, which was corroborated by the other employee, that these conversations were

informal and between friends. There was no intent by Coates to close off the possibility of a return to work at Westcoast if it were offered.

I conclude that Coates did not terminate his employment during these conversations or at any time prior to the expiration of the 13-week period. In such case Coates's employment was deemed to have been terminated by the employer on January 30th, 2000. He was therefore entitled to compensation for length of service.

The question remains as to the quantum of compensation required to be paid. Compensation is based on the number of consecutive months of employment. Section 63 of the *Act* provides that after three consecutive months of employment an employee is entitled to one weeks' wages. After 12 consecutive months of employment an employee is entitled to two weeks' wages.

However, the question arises as to whether Coates was employed in "consecutive months" for the full period of his employment, which commenced in February 1998. In July 1999 Coates injured his shoulder and had some difficulty performing his duties at work. His employer's wife drove Mr. Coates to see his doctor. As a result of a subsequent ultrasound scan he was told that he would have to be absent from work for six weeks. He discussed this problem with Mr. Seabrook, the President of Westcoast, and he believes that he was granted a leave of absence for that period of time.

Mr. Seabrook denies that a leave of absence was granted. He says that he told Mr. Coates that if he were unable to come to work that Westcoast would have to hire a replacement. He says that he told Coates that when he was able to return to work he would be welcome back provided that there was a vacancy. He says that he told Coates that there was no guarantee, but that it was normal for the company to hire an extra employee in September for the winter season.

Six weeks later on August 31st Coates did in fact return to work. Seabrook says that Coates was hired in addition to another employee, "Rick", who had taken over Coates position during the summer. Seabrook says that Coates was rehired for the winter position and was laid off at the end of January when work slowed down. Coates says that he returned to his normal job and that "Rick" was the winter employee.

Seabrook says that the company had no policy for medical leaves of absence and that it was not a term of the employment contract. Coates does not deny this but points out that his employment was not terminated either by Westcoast or by himself. He never intended to quit his job nor did he ever say that he was quitting his job. He says that he was never informed that he was fired. He was given a record of employment indicating that the reason for issuing it was Code "D" - illness or injury.

The Director's delegate analyzed this issue as follows:

> "The most important element is whether the employment relationship was severed by the employee or the employer. It is clear that the employee was off on a medical leave during his employment with the company. The evidence indicated that the employee returned to work on August 30 1999. There is no evidence to suggest that the employee quit or abandoned his position at the time he commenced leave or at any time while off on leave. In addition the mere fact the employee returned back to work suggests that the employment relationship was not terminated nor was he dismissed."

The problem with the delegate's analysis is that she simply assumes that there was a "leave". It must be remembered that the *Act* provides for only certain very specific mandatory forms of "leave" such as pregnancy, parental, family responsibility, bereavement, jury duty, and of course vacations. There is no mandatory injury leave. This means that the onus is on the employee to show that such a leave was permissible because of an employer's policy or a specific term of the employment contract. In the absence of such a policy or term in the employment contract the employee has no unilateral right to take a medical leave. The onus then is firmly on the employee to establish that the employer granted a leave.

In this case the employee did not clearly establish with the employer that he had a "medical leave". The employer issued a separation slip indicating that the last day of employment was July 14 1999. The employer also advised Coates that his position would be filled by another employee. He was told that there with no guarantee of being able to return but that there might be an opening in September. In fact there was no evidence to support the delegate's finding that a medical leave had been granted.

Knowing the above facts Coates chose not to return to work and requested the separation slip so that he could collect employment insurance. It was clear that Coates intended not to report to work and did not do so. This is inconsistent with a continuation of the employment contract in the absence of a specific grant of leave by the employer. It is consistent with the employee terminating the employment with the reasonable likelihood of being able to regain his position sometime in the future when he was once again fit to return to work.

Compensation for length of service is based on the number of consecutive months of employment. When Coates decided not to work in the summer of 1999 the consecutive months of employment were broken. His employment recommenced on August the 30th, 1999. Therefore at the time of termination of his employment in April 2000 he did not have twelve consecutive months of employment. He was therefore entitled only to one week's wages as compensation for length of service.

As shown in the delegate's calculation sheet Coates's normal weekly wage was $490.00. Added to this would be 4% holiday pay which would be $19.60 less wages already paid of one day @ $98.00 for a total amount owing of $411.60 plus interest pursuant to Section 88.

ORDER:

Pursuant to section 115 of the *Act* I order that the determination is varied to show that Dustin Coates is entitled to outstanding wages in the amount of $411.60 plus interest from January 30, 2000 to date of payment.

JOHN M. ORR

John M. Orr
Adjudicator
Employment Standards Tribunal