

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 -

Canwest Countertops Ltd.
("Canwest")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 98/689

DATE OF HEARING: October 8, 1998

DATE OF DECISION: January 26, 1999

DECISION

OVERVIEW

This is an appeal by Canwest Countertops Ltd. (“Canwest”), under Section 112 of the *Employment Standards Act* (“The Act”), against a Determination which was issued on October 8, 1998. The Determination was issued by a delegate of the Director of Employment Standards (“The Director”) and requires Canwest to pay the sum of \$3,620.45 plus interest to Giulio Bucceri based on a finding that he is entitled to 5 weeks’ compensation for length of service.

Canwest offers four grounds for its appeal:

- i) Mr. Bucceri’s employment was not terminated - he was laid-off temporarily due to a shortage of work;
- ii) there was no agreement about what Mr. Bucceri’s rate of pay and hours of work would be following his recall;
- iii) Mr. Bucceri declined to return to work on the terms and conditions offered to him and, therefore, should be considered to have resigned;
and
- iv) Canwest relied on information given to it through the “inquiry line” service operated by the Ministry of Labour.

This appeal proceeded by way of written submissions from the parties.

ISSUES TO BE DECIDED

There are two issues to be decided in this appeal:

- 1. Did that Director err in determining Canwest is required to pay compensation for length of service to Giulio Bucceri;

and
- 2. Is the defense of “officially induced error” available to Canwest?

FACTS

Mr. Bucceri was laid off from his employment at Canwest on January 27, 1998. At that time, he was paid \$16.35 per hour. He had been employed at Canwest since October 2, 1992. His foreman, Dean Orfino, advised him that his lay-off would be temporary and was due to a seasonal decline in business.

On April 7, 1998 Mr. Orfino contacted Mr. Bucceri by telephone to offer him a recall but at a wage rate of \$10.00 per hour. These basic facts are not disputed.

Canwest's representative, David Dyck, acknowledges in his appeal submission that when Mr. Bucceri was offered an hourly wage rate of \$10.00 per hour he declined it. Canwest considered that Mr. Bucceri had effectively "quit" by declining the offer of returning to work at \$10.00 per hour.

Approximately 10 weeks elapsed between the date on which Mr. Bucceri was laid off and the date on which Canwest made its offer of returning to work at the reduced hourly wage rate.

Canwest denies Mr. Bucceri's allegation that there was an agreement between him and Mr. Orfino that he would be recalled at "...the same rate of pay and same number of hours".

A central part of Canwest's appeal is that prior to making its offer to Mr. Bucceri on April 7th, Mr. Dyck had contacted the Ministry of Labour "inquiry line" to ask four specific questions about its obligations under the *Act* and, "...based on the information from the four specific questions and answers that we received from the inquiry line and we felt we were right in the way we handled Bucceri in offering him \$10.00 per hour."

In making the Determination, the Director noted:

"The employer believes that because it acted on the advice of an employee of the Ministry of Labour that the company should not be accountable for what may be an unintentional violation of the *Act*. That if any money is owed to Bucceri it should be paid by the Ministry.

The problem with this position of the employer is two fold:

- One is that the employer has offered no evidence to support the position;
- Second, there is not support for such a position in the *Act*."

The Director concluded that Canwest substantially altered Mr. Bucceri's conditions of employment by "...attempting to recall him to work for less than 40 hours per week at the rate of pay of \$10.00 per hour. Therefore, it is determined that the employer terminated the employment of Bucceri." On that basis, the Director also determined that Mr. Bucceri is entitled to 5 weeks' compensation for length of service, together with vacation pay and interest in the amount of \$3,620.45 as of October 8, 1998.

ANALYSIS

The starting point of my analysis is Section 66 of the *Act*, which states:

Section 66. Director may determine employment has been terminated

66. If a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated.

The Director determined that Canwest had substantially altered a condition of Mr. Bucceri employment (his hourly wage rate) when if offered to recall him to work at \$10.00 per hour rather than \$16.35 per hour. Canwest acknowledges that it made Bucceri's recall to work conditional on his acceptance of a reduced hourly wage rate. Therefore, there is no doubt in my mind that the Director determined correctly that Canwest had contravened Section 66 of the *Act*, and, that by substantially altering his hourly wage rate, it had terminated Mr. Bucceri's employment.

Section 63 of the *Act* places a liability on employers to pay compensation for length of service to employees after 3 consecutive months of employment. Mr. Bucceri had been employed by Canwest since October, 1992. The liability to pay compensation under Section 63 is discharged if an employee resigns or retires, is given written notice of termination, or is dismissed for just cause. None of those circumstances are present in the facts of this appeal. Therefore, Canwest is required by the provisions of Section 63(2) of the *Act* to pay compensation in the amount of 5 weeks' wages:

Section 63, Liability resulting from length of service

- (1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.
- (2) The employer's liability for compensation for length of service increases as follows:
 - (a) after 12 consecutive months of employment, to an amount equal to 2 weeks' wages;
 - (b) after 3 consecutive years of employment, to an amount equal to 3 weeks' wages plus one additional week's wages for each additional year of employment, to a maximum of 8 weeks' wages.

Canwest submits that the definition of "temporary layoff" in the *Act* should absolve it of the liability to pay compensation. I disagree. While I acknowledge that a "temporary layoff" is defined as one which can be "up to 13 weeks in any period of 20 consecutive weeks", that does not alter the fact that Canwest substantially altered a condition of Mr. Bucceri's employment when it attempted to recall him approximately 10 weeks after his lay-off began.

Canwest's submission that there was no agreement about what Mr. Bucceri's wage rate and hours of work would be after his recall supports my view that the Determination is correct. In the absence of any agreement to amend his terms and conditions of employment, Mr. Bucceri's pre-lay-off terms and conditions of employment would continue to be in effect.

Without using the specific legal term, Canwest submits that the defense of "officially induced error" should be available to it because, it submits, it relied on information it received from the Ministry of Labour "inquiry line". The concept of "officially induced error" was dealt with by the Tribunal in *Gulbranson Logging Ltd.* (BC EST#D337/97) at page 7 as follows:

The sense of the doctrine of "officially induced error" is if and accused is led to believe by the erroneous advice of an official responsible for the administration or enforcement of a particular regulatory statute that he was not acting illegally, the defense of "officially induced error" is available to a charge of violation of the statute provided the accused has reasonably relied on the erroneous advice.

The significant limitation on the doctrine for the purpose of this case is it applies only to regulatory offenses: *i.e.* to a prosecution under the applicable statute. It does not operate to disentitle individuals for whose benefit the statute exists from enforcing their rights under that statute, see **Libby Canada Inc. V.R. in right of Ontario (Ministry of Labour) and Anne Hoy** (1995) 34 Admin. L.R. (2nd) 276.

I agree with that analysis and, therefore, I find that the defense of "officially induces error" is not available to Canwest in this appeal. Neither the Director nor an employee of the Ministry has the authority to waive a benefit to which an employee is entitled under the *Act*.

ORDER

I order, under Section 115 of the *Act*, that the Determination be confirmed.

Goeffrey Crampton
Chair
Employment Standards Tribunal