

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1995, C. 38

- by -

Andrew Jonathon Downer
("Downer")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: John McConchie

FILE NO.: 96/623

DATE OF DECISION: January 21, 1997

DECISION

OVERVIEW

This is an appeal by Andrew Jonathon Downer pursuant to section 112 of the Employment Standards Act (the "Act") against Determination Number CDET 004274 issued by the Director of the Employment Standards Branch (the "Director") and dated October 8, 1996. The Determination found that Downer was not entitled to 2 weeks pay in lieu of notice.

Downer has appealed the Determination alleging that he was entitled to 2 weeks notice for termination of employment because the employer, Kelly Services (Canada) Ltd. (Kelly) misrepresented to him the availability of a position as a short order cook at the Canadian Forces Base in Chilliwack (CFB).

This matter has proceeded on the basis of the materials on file without the need for an oral hearing.

FACTS

Kelly operates an employment agency in Vancouver, through which it provides organizations with temporary employees. Monica Fung, Service Coordinator for Kelly, received a request from the CFB to supply CFB with 2 short order cooks for a three-month period beginning on May 23, 1996. Fung contacted a number of possible sources of temporary employees, including the Student Placement Centre in Chilliwack, and received some referrals from them. She telephoned Downer and arranged to interview him at Kelly's offices in Vancouver. Although the CFB had initially requested cooks with a certification or diploma, they subsequently agreed that it would be satisfactory if applicants had experience working in a restaurant. Downer's stated qualifications of having worked in a restaurant for 1 ½ years and performed such tasks as baking and making soup from scratch made him a qualified applicant.

Kelly sent Downer and another employee to the CFB on May 23, 1996 and both commenced work for CFB on that day. However, during the day, a representative of the CFB telephoned Fung and advised her that the individuals she had sent did not fulfill the CFB's requirements as they were unable to properly perform the tasks required of them. The CFB representative stated that the CFB needed "cooks with papers". Fung subsequently advised Downer in the evening of May 23, 1996 that he would not be returning to CFB.

Downer was paid for the day he worked, and was later also reimbursed for the cost of his bus fare to and from Vancouver.

In the Complaint filed by Downer with the Employment Standards Branch, he stated that he believed that Kelly had misrepresented the availability of a position to him, and that he was entitled to 2 weeks notice on that basis.

ISSUES TO BE DECIDED

The issue in this appeal is whether Downer is entitled to two weeks pay in lieu of notice as a result of the termination of his employment.

ANALYSIS

The employer is in the business of providing organizations with temporary staff. Downer was placed in such a temporary position, based on the job qualifications provided by the CFB, but was subsequently found by the CFB not to be suitable for the job. His employment with Kelly was therefore ended after one day.

Section 63 of the Employment Standards Act sets out the length of notice or pay in lieu of notice to which an employee becomes entitled upon termination of employment in the absence of just cause. Section 63(1) provides that:

“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.”

The Act does not provide for notice, or pay in lieu of notice, where the employment is for a period of less than 3 months. Thus, under the Act, an employer has an initial period of 3 consecutive months to determine whether or not the employee is suitable for the job. If, during that time, the employment is terminated, the employee does not have a statutory right to notice or pay in lieu of notice. Because Downer only worked for 1 day, he is not entitled, under the statute, to notice or pay in place of notice.

ORDER

Pursuant to Section 115, I order that Determination Number CDET 004274 be confirmed.

John McConchie
Adjudicator
Employment Standards Tribunal

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