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-

Edward Ballendine
("Ballendine")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR:	C. L. Roberts
FILE NO.:	96/527
DATE OF HEARING:	January 7,1997
DATE OF DECISION:	January 14, 1997

DECISION

APPEARANCES

Chris Churchill, MacIsaac & Company	For the Appellant
Myron Wallace	For the Director
W. G. Docherty	For Trojan Collision Services Ltd.
Terri Ballendine, bookkeeper	witness

OVERVIEW

This is an appeal by Edward Ballendine ("Ballendine"), pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued on August 15, 1996, in which the Director found that there had been no violation of the *Act*, and ceased his investigation, pursuant to Section 76 (2) of the *Employment Standards Act.*

ISSUE TO BE DECIDED

The issue on appeal is whether Ballendine quit during a period of temporary lay off, or was terminated as a result of a substantial change in his condition of employment, and is owed compensation in lieu of notice.

FACTS

Ballendine is a licensed autobody repair mechanic, obtaining his certification in 1971. He was a part owner of Trojan Collision Services Ltd.("Trojan") from 1980 to 1990, when he sold his share of the business. After that, he was employed by the company as an autobody mechanic. He worked with Trojan continuously in that capacity until August 1996 except for an eight month period in 1992.

When W. G. Docherty purchased Trojan in March 1996, Ballendine was retained as a mechanic at his existing salary level and duties. Those duties included ICBC estimating work as well as autobody repairs.

In early 1996, another autobody repairman was laid off due to a work slowdown, leaving Ballendine as the sole bodyman. On May 29, when it became apparent that there was a work shortage, Ballendine was issued a Record of Employment (ROE), indicating that he had been laid off, in order that he could file an Unemployment Insurance Claim. As it transpired however, bodywork arrived at Trojan the following day, and Ballendine continued to work without a loss of time or wages.

On June 10, Ballendine became injured on the job and was off work until July 8, receiving therapy for that injury.

After Ballendine became injured, Trojan was left without a bodyman. A replacement autobody technician was hired in early June; however , as he was only able to work until the end of June, Trojan hired another mechanic commencing July 2.

On July 7, Ballendine advised his employer that he would be ready to return to work. Ballendine was advised by Docherty that the work would be shared between both mechanics, and that if he was needed, he would be called. Ballendine worked two hours on July 8 and 4.5 hours July 9. On July 10, Ballendine requested and was issued an updated ROE.

Ballendine was called in to work two more days in July and three days in August. He found employment as an autobody mechanic in Campbell River commencing August 15, and advised Trojan of that fact on August 6.

On August 9, Ballendine filed a complaint with the Director claiming compensation for length of service. After reviewing the complaint, the Director determined that no termination pay was owing to Ballendine, as he had found alternative employment within the 13 week temporary lay off period.

ARGUMENT

Churchill argued that Ballendine's job was substantially altered and because of that alteration, he was forced to quit. He contends that in these circumstances, termination should be deemed, and that compensation for length of service is owed. Ballendine alleges that, upon his return to work in July, he was no longer the 'lead hand', or the full time bodyman, having responsibility for estimating and answering telephones in addition to the body work. He also claimed that as the second bodyman was not licensed, he was not qualified to replace him as 'lead hand' bodyman. Ballendine also argued that Docherty had demanded the return of a gas card, which entitled him to $200.00 per month gas expenses, in support of his argument that his position had been substantially altered.

The Director argues that as Ballendine found alternative employment within the 13 week temporary lay off period, as defined in section 1, no compensation is owed.

Docherty contends that when Ballendine became injured, he was forced to hire a second mechanic in order to ensure the viability of the business. Upon Ballendine's return, Docherty's decision was to retain both mechanics, and divide the work between them. Docherty's evidence, which was not disputed by Ballendine, was that Ballendine did not want to share work. Nevertheless, Ballendine was called, and came into work on six occasions prior to informing him that he had found other employment. Docherty stated that he had sought the advice of the Employment Standards office regarding seniority and job requirements and was told that there was no seniority rights in a non union position. Consequently, Ballendine was not given a right of first refusal over the work that came into the yard.

ANALYSIS

On the evidence presented, I am unable to conclude that the Director's decision not to continue his investigation, is in error.

The Appellant's counsel argued that the Director should have examined the employment conditions Ballendine experienced upon his return from medical leave, and deemed termination based on a substantial adverse alteration of his conditions of employment, pursuant to Section 66 of the *Act*.

Some of the factors which may be looked at in making such a determination include a change of location, a reduction in the wage rate, a limiting of authority, a change in responsibility, and a reduction in hours. I am not satisfied that Ballendine's responsibilities were changed. I am unable to conclude, on the evidence presented, that he had any managerial responsibilities. Although Ballendine did some ICBC estimating on Docherty's behalf after the business was purchased, this duty was being assumed by Docherty as he became more familiar with the process. While some emphasis was placed on Docherty's request for the return of the gas card in support of the alteration of the conditions of employment, I accept that the request was made to him approximately 3 weeks earlier, as a result of a business decision, and had no connection to the alleged termination. The only factor which may be relevant in this case is the change of hours.

Ballendine himself gave evidence that work scarcity and temporary layoffs were common in the industry. His evidence was also that that there was a work shortage in May, leading him to request a ROE for UIC purposes, which was issued May 20. Although the ROE was ultimately not needed, the second ROE, dated July 10, was also issued at the Appellant's request, due to a lack of work. Ballendine was available on an on call basis, and in fact was called in on five occasions after July 10.

Although there is no dispute that Ballendine did not work full time after returning from his medical leave, I am unable to find that there was a substantial alteration in a condition of his employment.

Trojan made a business decision to employ two autobody mechanics in order to avoid the situation of having no bodyman on staff, as they found themselves in when Ballendine became injured. It may appear unfair to Ballendine that, during a work shortage, as an employee of Trojan for some 16 years, he was expected to share work with a new, and perhaps junior employee. Nevertheless, there is no obligation under the *Act* for the employer to offer him a right of first refusal based on his length of service with the company, and Docherty's failure to do so cannot be considered an adverse change to Ballendine's employment conditions. I am satisfied that Ballendine was aware of the work shortage and the fact that he was on layoff status. I note that he did not ask Docherty whether he had been dismissed on July 10, leading me to conclude that he understood and relied on the ROE, which indicated layoff.

Temporary lay off is defined in Section 1 as a layoff of up to 13 weeks in any period of 20 consecutive weeks. The provision enables employers to lay off employees for a period without terminating them. It is designed to give some flexibility to employers in their determination of the individual workers who will be affected by the reduction in the employers' operations. (see M. Thompson, Rights and Responsibilities in a Changing Workplace: A Review of Employment Standards in British Columbia, p. 150). I am satisfied that Ballendine was on lay off as of July 10. Had he been on layoff status for greater than 13 weeks, termination would have been deemed, entitling him to severance pay. Ballendine advised Trojan that he had obtained full time employment on August 6, within the 13 week period. As a consequence, he is not entitled to compensation in lieu of notice.

ORDER

I order, pursuant to Section 115 of the *Act*, that Determination No. 28646 be confirmed.

C. L. Roberts
Adjudicator
Employment Standards Tribunal