

**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 -

JCI Technologies Inc./JCI Jobs Canada Inc.  
("JCI")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Geoffrey Crampton

**FILE NO.:** 96/750

**DATE OF HEARING:** February 10, 1997

**DATE OF DECISION:** February 18, 1997

## DECISION

### OVERVIEW

This is an appeal by JCI Technologies Inc./JCI Jobs Canada Inc. (“JCI”), under Section 112 of the *Employment Standards Act* (the “Act”), against a Determination which was issued by a delegate of the Director of Employment Standards on December 5, 1996. The Determination requires JCI to pay the sum of \$612.16 plus interest arising out of an underpayment to Brian P. O’Loughin related to his time bank (\$20.00) and compensation resulting from length of service (\$592.16). JCI argues that no monies are owed to O’Loughin.

### ISSUE(s) TO BE DECIDED

Does the calculation of wages owing to O’Loughin comply with the requirements of the *Act*?

### FACTS

The following facts are set out in the Determination and are not disputed by JCI or O’Loughin:

- O’Loughin was employed by JCI from September 3, 1992 to September 13, 1996
- O’Loughin’s duties were those of a “manager” as defined in Section 1(1) of the *Employment Standards Regulation* (BC Reg 396/95).
- O’Loughin was initially paid \$173.07 per day (later reduced to \$153.84 per day).
- O’Loughin and JCI agreed to terminate the employment relationship effective September 13, 1996 with the payment of 4 week’s wages as compensation.
- JCI paid O’Loughin \$3,076.92 as “severance pay”.
- JCI also paid O’Loughin a total of \$3,960.61 during the months of August, 1996 and September, 1996 pertaining to 23 days of banked time.

In its appeal, JCI states: “it came as a great surprise, however, to our payroll department when they were presented with a banked time demand by Mr. O’Loughin JCI also states that a written request to establish a time bank was not made by O’Loughin, nor would such a request have been granted.

JCI also states that O’Loughin worked only three days of the two week notice period given to him on September 10, 1996 concerning the termination of his employment. JCI paid O’Loughin “severance pay” on his last day of work (September 13, 1996).

The following calculation supports the Determination made by the Director’s delegate:

Gross wages owed for 23 days of banked time = 23x173.07	= \$3,980.61
Gross wages paid	= <u>\$3,960.61</u>
Owing	= \$20.00
Compensation entitlement = 4 weeks	
Gross wages owing (4x \$865.35/week)	= \$3,461.40
Vacation pay (6% x 3,461.40)	= <u>\$207.68</u>
Total	= \$3,669.08
Gross wages paid	= \$3076.92
Owing	= 592.16
<b>Grand Total Owing</b>	= \$612.16 plus interest

## ANALYSIS

Section 34(1) of the *Regulation* excludes a “manager” from the hours of work and overtime requirements (Part 4) of the *Act*. This exclusion includes Section 42 of the *Act* (Banking of overtime wages). The Director’s delegate found that O’Loughin was a “manager” for purpose of the *Act* and *Regulation*. For that reason, the Director’s delegate cannot rely on Section 42 of the *Act* to establish O’Loughin’s entitlement to be paid wages credited to a time bank.

Section 63 of the *Act* creates a liability for employers to pay compensation for length of service. In particular, Section 63(2)(b) defines the employer’s liability as follows:

*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.*

Thus, O’Loughin was entitled to four weeks’ wages unless he was given four weeks notice, he terminated his employment, retired or was dismissed for just cause (Section 63(3) of the *Act*).

Section 63(4) defines the amount of compensation payable in the following way:

*The amount the employer is liable to pay becomes payable on termination of the employment and is calculated by*

- (a) totalling all the employee's weekly wages, at the regular wage, during the last 8 weeks in which the employee worked normal or average hours of work,*
- (b) dividing the total by 8, and*
- (c) multiplying the result by the number of weeks' wages the employer is liable to pay.*

The issue of an employer's liability to pay compensation when an employee resigns during the notice period was decided by the Tribunal in *Liana Elizabeth Gray, et al* [BCEST #D151/96]:

Employment standards legislation (e.g., section 63 of the *Act*) establishes minimum notice periods, but such legislation only creates a notice "floor", the actual amount of notice called for may well dramatically exceed the minimum statutory notice [e.g., in an appropriate case, as much as twenty-four months' notice may be required, cf. *Sorel v. Tomenson Saunders Whitehead Ltd.* (1987) 15 B.C.L.R. (2d) 38 (B.C.C.A.)].

Thus, if either the employer or the employee gives notice, and such notice is accepted by the other party, both parties are obliged to honour the "notice agreement". If no "notice agreement" is concluded, then either party is nonetheless entitled to terminate the employment agreement by giving proper notice. An employer cannot respond to an employee's notice of termination by immediately terminating that employee without giving notice, or severance pay in lieu of notice, unless that employer has just cause to terminate [cf. e.g., *Oxman v. Dustbane Enterprises Ltd.* (1988) 23 C.C.E.L. 157 (Ont. C.A.)].

When I apply those principles to the facts in this appeal I find that I agree with the conclusion reached by the Director's delegate vis-a-vis O'Loughin's entitlement to compensation under Section 63 of the *Act*.

## **ORDER**

I order, under Section 115 of the *Act*, that the Determination be varied to show the amount owing as \$572.16 plus interest calculated in accordance with Section 88 of the *Act*.

---

**Geoffrey Crampton  
Chair  
Employment Standards Tribunal**