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 -

(Harding Fork Lift Services Ltd.)
("Harding")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 96/766

DATE OF DECISION: February 18, 1997

DECISION

OVERVIEW

This is an appeal by Harding Forklift Service Ltd. ("Harding"), under Section 112 of the *Employment Standards Act ("the Act")*, against Determination No. CDET 004837 which was issued by a delegate of the Director of Employment Standards on November 29, 1996. The Determination found that Harding was required to pay $7,475.27 to a former employee, Frank Hudon ("Hudon"), as a result of its failure to pay him compensation as required by Section 63 of the *Act.* The central issue in this appeal is whether Harding offered Hudon reasonable alternative employment and thereby discharged its liability under Section 63 of the *Act.*

I have made this decision following my review and analysis of the written submissions by Harding and Hudon.

ISSUE(s) TO BE DECIDED

Is Harding liable to pay compensation to Hudon as required under Section 63 of the *Act?*

FACTS

The Determination sets out the following findings of fact:

- Harding Fork Lift Services Ltd., ("Harding") employed Frank Hudon, ("Hudon"), as a mechanic from November, 1987, to May, 1996 (refer to Record of Employment - ROE).
- Harding gave Hudon a "two week lay-off notice on May 13, 1996...due to a shortage of work" - in the form of a letter from Peter Harding, President of Harding to Hudon.
- The ROE issued by Harding to Hudon reads, for "reason for issuing" - "A" - meaning lay-off, and states the "expected date of recall to be "unknown."
- Harding did not recall Hudon.
- Hudon kept his tools at Harding until October 16 - a period in excess of twenty (20) weeks.

After a review of Harding's position that it had offered Hudon reasonable alternative employment ("to work as a mechanic on the road, rather than in the shop"), the Director's delegate sets out the following analysis in the Determination:

- A statement of termination of employment must clearly communicate the cessation of employment; it can not be equivocal. Any statement less than a

clear and definite one does not meet the minimum standards set out in Section 63(3) of the *Employment Standards Act (the "Act").*

- The letter of May 13, 1996, from Harding to Hudon is not a clear, and definite communication of the termination of employment.
- Hudon was laid-off, not let go, in May, 1996.
- Hudon was not recalled from lay-off in a timely manner.
- The burden is on Harding to show an offer of reasonable alternative employment was made.
- Hudon was not offered reasonable alternative employment.
- Harding has not discharged their onus.

In its written reason for its appeal to the Employment Standards Tribunal, Harding states:

> We feel that due to the fact there is mechanical work available on the road for Mr. Hudon, that the Determination is not valid. Harding Forklift Service Ltd. offered two mechanics, during last winter, to work on the road as part of their job description. Brad Baerg willingly accepted the road work and is currently employed today. Frank Hudon said he did not want to work on the road and on May 13, 1996 was given a written lay-off notice when there was not enough work in the shop.
>
> Changing the location where the mechanic is to perform his duties is not changing the position of the employee or his duties or level of difficulty. The wage is the same for both in-shop and on the road, as well, the mechanic is paid during his travel to the customer's location. Therefore, we can not see how anyone would see this as "unreasonable or alternative employment" its simply just a different location.
>
> We are looking for good Road Service Technicians right now and Frank Hudon has a job waiting for him here, effective immediately, as a full time Road Service Technician with the same wage rate. One of the reasons stated by Mr. Hudon for not wanting this position is the demands placed on the mobile mechanic to travel through heavy traffic, but that is a part of our day to day business which almost all of the Harding Forklift employees must endure.
>
> Another fact of the matter is that Mr. Hudon was hired in November of 1987 as a mechanic. The definition of mechanic being "those employed in making and repairing machinery." We did not imply or sign documents guaranteeing that our business would rely on shop work exclusively.

Mr. Hudon's reply to Harding's submission does not challenge the essential point that he declined to "...work on the road" and was, therefore, given written notice of lay-off on May 13, 1996.

ANALYSIS

Section 63(1) of the *Act* creates a liability for employees to pay compensation to employees based on their length of service. Section 63(3) describes how the liability can be discharged. Section 65(1) identifies several circumstances under which the provisions of Section 63 do not apply to an employee. Of particular relevance to this appeal is Section 65(1)(f), which states that Section 63 does not apply to an employee "...who has been offered and refused reasonable alternative employment by the employer."

Thus, the key issue in this appeal is the meaning of the phrase "reasonable alternative employment" as it is used in Section 65 of the *Act.*

The Employment Standards Tribunal dealt with the issue of reasonable alternative employment in a recent decision, *Stordoor Investments Ltd.* [BCEST No. D357/96; December, 1996]:

> **"**In order to bring itself within this exception, the employer need not offer an identical position to the employee, however, the offer must be a "reasonable alternative."

In my view, Harding did offer reasonable alternative employment to Hudon. My review of the evidence leads me to find that Harding offered to continue employing Hudon as a mechanic, performing the same duties, and earning the same wage rate as were in effect while he was employed to work in the shop. The only condition of employment which was to change was the requirement for Hudon to carry out his duties at the customers' premises rather than in Harding's shop.

I also find that there was no condition of employment (express or implied) which would require Harding to employ Hudon only on its premises rather than elsewhere. The British Columbia Court of Appeal has held that, in the absence of an express contract provision, an employer can transfer an employee from one position to another: *[Cayen v. Woodwards Stores Ltd.* (1993) 100 D.L.R (4th) 294].

For all of these reasons, I find that Section 65(l)(f) of the *Act* applies and, therefore, Harding is not liable to pay compensation under Section 63 of the *Act.*

ORDER

I order, pursuant to Section 115 of the *Act,* that Determination No. CDET 004837 be cancelled.

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Geoffrey Crampton
Chair
Employment Standards Tribunal