

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 -

Heartland Motors Ltd.
("Heartland")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	Hans Suhr
FILE No.:	98/059
DATE OF HEARING:	March 27, 1998
DATE OF DECISION:	April 7, 1998

DECISION

APPEARANCES

Ed Leidl on behalf of Heartland Motors Ltd.

OVERVIEW

This is an appeal by Heartland Motors Ltd. (“Heartland”), under Section 112 of the *Employment Standards Act* (the “Act”), against a Determination dated January 20, 1998 issued by a delegate of the Director of Employment Standards (the “Director”). Heartland alleges that the delegate of the Director erred in the Determination by concluding that Robert Paul Jenkins (“Jenkins”) was entitled to compensation for length of service in the amount of \$439.68.

ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether Jenkins is entitled to compensation for length of service.

FACTS

The following facts are not in dispute:

- Jenkins was employed by Heartland as a “detailer”;
- Jenkins commenced employment on March 13, 1995 and his last day worked was November 22, 1996;
- Jenkins rate of pay was \$10.00 per hour;
- Jenkins provided verbal notice of resignation to Heartland prior to November 22, 1996.

Ed Leidl (“Leidl”) states that Jenkins approached him approximately 3 - 4 weeks prior to his last day of work and advised that he, Jenkins, would be resigning. Leidl further states that after some discussion it was decided that November 22, 1996 would be Jenkins last day of work. Leidl further states that after the discussion with Jenkins, he advised his partner Colin Rolston who is also the Sales Manager and Rolf Kulesa who was the Service Manager (Jenkins immediate supervisor). Leidl further states that just prior to his last day of work, Jenkins requested that Leidl adjust Jenkins’ Record of Employment (“ROE”) to reflect a lay-off rather than resignation so that Jenkins would be able to collect Employment Insurance benefits. Leidl further states that he refused this request as Jenkins had resigned. Leidl further states that this refusal prompted Jenkins to make “false

accusations”. Leidl finally states that he could not afford to bring Rolston or Kulesa to this hearing.

Leidl also expressed concern about the “hearsay” nature of the evidence relied upon by the delegate of the Director in making the Determination.

In response to a question from the Panel, Heartland provided a copy of the ROE issued to Jenkins on November 25, 1996. Leidl testified that the ROE was prepared by the bookkeeper for Heartland and the information on the ROE was based on instructions provided by Leidl. Leidl was unable to explain why, if Jenkins had actually quit, the ROE indicated “laid-off for shortage of work”.

The information provided by Jenkins is from his complaint form submitted to the Employment Standards Branch on November 25, 1996. Jenkins stated that approximately 2 months prior to his last day of work, he advised Heartland that he would be resigning effective November 29, 1996. Jenkins further stated that on November 22, 1996 he was advised by Heartland that he would be laid-off at the end of the day.

The delegate of the Director interviewed a number of Jenkins’ co-workers, Jenkins fiancée and received information from Heartland. The delegate concluded that the evidence obtained from the interviews indicated that the information from Jenkins “appears to be more accurate and reliable” On the basis of that information and on a balance of probabilities, the delegate concluded that Jenkins was “terminated one week before he intended to leave his employment”. The delegate determined that Jenkins was entitled to 1 weeks pay as “termination pay/compensation for length of service”.

ANALYSIS

The obligation of an employer to pay compensation for length of service is found in Section 63 (1) and (2) of the *Act* which provides :

“(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.”

This liability may be deemed to have been discharged pursuant to the provisions of Section 63 (3) which provides:

(3) The liability is deemed to be discharged if the employee

(a) is given written notice of termination as follows:

(i) one week's notice after 3 consecutive months of employment;

(ii) 2 weeks' notice after 12 consecutive months of employment;

(iii) 3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice;

(b) is given a combination of notice and money equivalent to the amount the employer is liable to pay, or

(c) terminates the employment, retires from employment, or is dismissed for just cause.

An issue in deciding this appeal is the credibility of the evidence provided by all the parties. In assessing credibility, a number of factors are to be considered. These include:

- the demeanour of the witness
- opportunities for knowledge
- powers of observation
- judgment and memory
- ability to describe clearly what has been said and heard
- the probability of the event happening in the manner suggested

The evidence provided by Leidl was that Jenkins had served notice of resignation effective November 22, 1996 in a meeting attended by only Leidl and Jenkins.

The evidence of Jenkins was that he had served notice of resignation effective November 29, 1996 but that he was laid-off by Heartland on November 22, 1996.

Not surprisingly, there is a conflict in the evidence provided by the respective parties. I must then review all of the material to see if there is any supporting evidence for either one version or the other.

The ROE, dated November 25, 1996 and completed by the bookkeeper of Heartland indicates that Jenkins was laid off due to a shortage of work on November 22, 1996. Leidl was unable to explain why the ROE, completed based on his instructions to Heartland's bookkeeper indicates laid off due to a shortage of work when Heartland's position is that Jenkins quit his employment.

The evidence of the ROE clearly supports the version of events proffered by Jenkins.

Based on the above and on the balance of probabilities, I conclude that Jenkins was laid off by Heartland on November 22, 1996.

The laying off of an employee does not automatically trigger the payment of compensation for length of service unless the lay off exceeds the period defined in Section 1 of the *Act* as a “temporary lay-off” and is then deemed to constitute termination of employment. Section 1 defines “temporary lay-off” and “termination of employment” as:

"temporary layoff" means

(a) in the case of an employee who has a right of recall, a layoff that exceeds the specified period within which the employee is entitled to be recalled to employment, and

(b) in any other case, a layoff of up to 13 weeks in any period of 20 consecutive weeks;

"termination of employment" includes a layoff other than a temporary layoff;"

The evidence of the ROE was that Jenkins would “not be returning” to work and in fact the lay-off exceeded the 13 week period. This lay-off has therefore become a termination of employment pursuant to that definition as outlined above.

Heartland is not alleging that just cause for termination of Jenkins employment exists.

I conclude therefore, that Jenkins is entitled to be paid compensation for length of service as calculated by the delegate of the Director and set forth in the Determination.

The appeal by Heartland is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated January 20, 1998 be confirmed in the amount of **\$439.68** together with whatever further interest has accrued pursuant to Section 88 of the *Act* since the date of issuance.

Hans Suhr
Adjudicator
Employment Standards Tribunal