

**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 -

Richard Bucknell  
("Bucknell")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** Cindy J. Lombard

**FILE No.:** 1999/656

**DATE OF HEARING:** January 24, 2000

**DATE OF DECISION:** April 14, 2000

**DECISION**

**APPEARANCES**

Richard Bucknell appeared on his own behalf. The Appellant's wife, Lynette Bucknell, also gave evidence.

The Respondent, Gerald Desilet operating as Desilets Trucking, appeared on his own behalf. Also appearing as witnesses for the Respondent were James Major, Lloyd Manweiler, John Watson and Norm Black.

**OVERVIEW**

This is an appeal by the employee, Richard Bucknell ("Bucknell") pursuant to Section 7 of the *Employment Standards Act* (the "Act") from a Determination of the Director of Employment Standards (the "Director") issued on October 12, 1999. The Determination was issued following a complaint by Bucknell that the employer, Gerald Desilet ("Desilet") operating as Desilets Trucking ("Desilets Trucking"):

- a) terminated him without cause and without written notice or compensation in lieu of notice as required by Section 3 of the *Act*;
- b) that Bucknell did not receive overtime owed to him during his employment as required by Section 34 of the *Act*;
- c) that Bucknell did not receive proper pay for statutory holidays; and
- d) that Bucknell was not paid his incentive bonus.

The Director made the following determination:

- a) Bucknell quit his employment and therefore was not due any compensation for length of service in lieu of written notice;
- b) c) and d) the Director dismissed the claim for a bonus and determined an amount owing for overtime and statutory holiday pay in the amount of \$1,947.37 which the employer paid.

The only issue raised by the employee, Bucknell, on appeal is the issue of compensation in lieu of notice.

**ISSUE TO BE DECIDED**

Whether Bucknell quit his employment or was he terminated without cause and without written notice or compensation in lieu of notice as required by Section 63 of the *Act*.

**FACTS and ANALYSIS**

Bucknell was employed by Desilets Trucking from September 11, 1994, to June 30, 1998.

Desilet states that Bucknell was not terminated but that he quit when he refused to work when asked to do so. Bucknell claims that he did not quit.

On June 30, 1998, Bucknell states that he had worked about a twelve-hour day and had returned home at approximately 4:00 in the afternoon. He says that was tired and that he had been suffering from a cold and the flu. Bucknell says that he proceeded to go to bed. A short time later Bucknell says that he was wakened by the telephone. Bucknell says that it was Desilet stating that the truck operated by Bucknell had a broken spring on it and that he wanted him to drive it to Westbank to get it fixed. Bucknell says that after that conversation he called Desilet back and told him that he could not drive the truck to Westbank. Bucknell says that he reminded Desilet that such a trip would put him four or five hours over the legal limit as he had just finished a twelve-hour day. Bucknell states that he did not say that he quit, simply that he was not going to drive to Westbank which was approximately two hours away. Later that same day, Bucknell says that he started trying to call Desilet back. He finally reached him at 7:00 p.m. on his cell and says that Desilet told him at that time that he had already replaced him permanently with another driver.

Desilet says that at 3:40 p.m. on June 30, 1998, his mechanic called him and said that there was a broken spring on the truck operated by Bucknell. Desilet contacted the shop in Westbank who told him that if he had the truck there by 6:30 p.m. that he would fix it. At 4:21 p.m., Desilet says that he called Bucknell and says Bucknell told him that he was too tired, that he had had enough and that he should find someone to replace him. At that time, Desilet says that he had somebody coming around on a regular basis asking to be hired and so he immediately phoned him and hired him. That person was John Watson who also gave evidence.

Desilet says that just fifteen or twenty minutes after he had had the telephone conversation in which he says that Bucknell quit, Bucknell called him back and said "I thought about it, I would like my job back." However, by then Desilet says that he had hired John Watson. The other witnesses who appeared on behalf of Desilet gave the following evidence:

- 1) James Major – was a former driver for Desilet. He was employed by Desilet, he states, from July 1994 to November 1995. Mr. Major stated that he felt that Desilet was a fair employer and never asked him to work more than what was reasonable. After cross-examination by Bucknell, Mr. Major stated that his brother-in-law was the son of Desilet.
- 2) John Watson – was the man who was hired to replace Bucknell. He also gave evidence that Desilet was a fair employer and had no complaints. He recalls Desilet telephoned him mid-afternoon on June 30, 1998, and offered him as a job as a driver and he said yes as he had been seeking work for some time.

- 3) Norm Black has worked part-time for Desilet for three years ie. since 1997. He, too, testified that Desilet always treated him fairly.
- 4) Lloyd Manweiler is the mechanic at Desilets Trucking. He states that he has been employed there for seven years. On June 30, 1998, Mr. Manweiler confirmed that he telephoned Desilet shortly after Bucknell returned his truck advising him that there was a broken spring.

Section 63 of the *Act* provides that in the case of the Appellant, Bucknell, who was employed for more than three years by Desilets Trucking, that a discharge from his employment without cause entitles him to three weeks notice or three weeks wages in lieu of compensation for length of service.

The burden of proving that the employee intended to quit or that his conduct in refusing the employer, Desilet's demand that he drive to Westbank in order to have the truck springs repaired justifies a dismissal is on the employer.

Furthermore, the employee, Bucknell, must have demonstrated a real and continued intention to terminate his employment relationship in order for an employer to rely on the defense provided in Section 3(3)(c) of the *Act* which absolves the employer from liability to give notice or pay in lieu of notice if the employee quits or is dismissed for just cause. It has been repeatedly held that an employee resigning or leaving in the heat of the moment is not necessarily quitting; rather that the employee must clearly communicate by word or deed an intention to terminate his employment relationship and that intention must have been confirmed by some subsequent conduct.

In this case, Bucknell, if he in fact quit his job, did so in the heat of the moment i.e. he had just finished a twelve hour working day which is confirmed by the employer, was in bed asleep when he received the call. It wasn't unreasonable in the circumstances that Bucknell said that he was too tired to do it particularly in the heat of the moment of being tired at the end of a long workday and having been woken up. In any event, it has been confirmed by the employer, Desilet, that Bucknell did call back a short while later and stated in Desilet's words: "I thought about it and I would like my job back".

The above facts do not demonstrate a real and continued intention on the part of Bucknell to terminate the employment relationship. Bucknell had then been employed with Desilets Trucking for nearly four years. Furthermore, Bucknell did not confirm his intention to quit by some subsequent conduct. To the contrary, just fifteen or twenty minutes later, according to the evidence of the employer, he said he didn't mean it.

For the foregoing reasons, I find that Bucknell did not quit and therefore, pursuant to Section 63 of the *Act*, the employer, Desilets Trucking, is liable to pay three weeks' wages in lieu of notice to Bucknell.

**ORDER**

Pursuant to Section 115 of the *Act*, I order that the Determination with respect to the findings that Bucknell quit his employment with Desilets Trucking be cancelled and that this matter be referred back to the Director to determine the amount of money due to the Appellant-employee, Bucknell, for the three weeks' wages in lieu of notice plus whatever interest may have accrued pursuant to Section 88 of the *Act*.

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**Cindy J. Lombard**  
**Adjudicator**  
**Employment Standards Tribunal**