Employment Standards TRIBUNAL

An appeal

- by -

Columbia Dodge (1967) Ltd.
("Columbia Dodge")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 2003/12

DATE OF DECISION: May 14, 2003

DECISION

PREVIOUS PROCEEDINGS

This matter originally came before me as an appeal filed by Columbia Dodge (1967) Ltd. ("Columbia Dodge") pursuant to section 112 of the *Employment Standards Act* (the "*Act*"). Columbia Dodge appealed a Determination that was issued by a delegate of the Director of Employment Standards (the "Director") on October 1st, 2001 (the "Determination") pursuant to which it was ordered to pay its former employee, Brett Jameus ("Jameus"), the sum of $1,369.29 on account of compensation for length of service (one week plus one day's wages) under section 63 of the *Act*, concomitant vacation pay and section 88 interest.

The central issue in this appeal is the interpretation and application of sections 65(1)(f), 66 and 67(2)(a) of the *Act*. These latter provisions are reproduced below:

> **Exceptions**
> 65. (1) Sections 63 and 64 do not apply to an employee...(f) who has been offered and has refused reasonable alternative employment by the employer.
>
> **Director may determine employment has been terminated**
> 66. If a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated.
>
> **Rules about notice**
> 67. (2) Once notice is given to an employee under this Part, the employee's wage rate, or any other condition of employment, must not be altered without the written consent of (a) the employee...

After reviewing the material before me, I concluded that I did not have sufficient information available to finally adjudicate the appeal and, accordingly, I referred the matter back to the Director (see B.C.E.S.T. Decision No. D678/01 issued December 18th, 2001) so that certain issues could be investigated. My order was as follows:

> **ORDER**
>
> Pursuant to section 115(1)(b) of the *Act*, I order that this matter be referred back to the Director so that the following questions can be investigated:
>
> a) Did Columbia Dodge have the express or implied right under the employment contract to reassign Jameus' work location from New Westminster to Richmond?;
>
> b) Did Columbia Dodge offer Jameus the opportunity to complete his working notice period at its Richmond dealership?;
>
> c) If such an offer was made, did it constitute an offer of reasonable alternative employment?; and
>
> d) Did Jameus voluntarily resign his employment on or about November 30th, 2000?
>
> Once the Director has completed her investigation of the above questions, the Determination may be varied or cancelled pursuant to section 86 of the *Act*.

There was some regrettable delay in the Director's further investigation since the original delegate involved in this matter is no longer employed by the Employment Standards Branch. The matter was turned over to another delegate who prepared an investigative report in the form of a 3-page letter to the Tribunal dated February 21st, 2003. The Tribunal's vice-chair wrote to the parties on February 24th, 2003 and sought their submissions with respect to the Director's February 21st report by no later than March 17th, 2003. Legal counsel for Columbia Dodge submitted a 5-page reply; Mr. Jameus did not file any reply.

Prior to addressing the Director's February 21st report, it may be useful to set out the relevant facts (reproduced from my original December 18th, 2001 reasons for decision):

> **BACKGROUND FACTS**
>
> Columbia Dodge is an automobile dealership that was located in New Westminster for several years. On or about November 30th, 2000, Columbia Dodge closed down its New Westminster location and relocated its entire business operations to Richmond. Mr. Jameus was employed by Columbia Dodge from July 1995 to November 30th, 2000 as a mechanic. Given his tenure, and pursuant to section 63 of the *Act*, upon termination Jameus was entitled to 5 weeks' wages as compensation for length of service or, alternatively, 5 weeks' written notice of termination in lieu of compensation.
>
> On or about November 3rd, 2000 Jameus received the following letter from Columbia Dodge:
>
> > Dear Brett Jameus
> >
> > Unfortunately, we are not going to be able to offer you continued employment after our New Westminster location is shut down and our operation is transferred to Richmond.
> >
> > We therefore must give you notice that your employment will be terminated effective January 31, 2001. We will continue to employ you here at the New Westminster location, which will keep operating until approximately mid-January 2001. We will pay your salary and benefits to January 31, 2001 unless you get another job in the meantime.
> >
> > We have already had inquiries from other dealerships seeking to hire some of our employees who will not be moving and we therefore offer to assist you in looking for a new position between now and January 31. We would also ask that if you do find other employment in the meantime, that as a courtesy, you give us a week's notice before you leave.
> >
> > Thank you very much for your service with Columbia Dodge and best wishes for your future career in the business.
>
> Accordingly, Jameus received nearly 3 months' written notice of termination, an amount well beyond his statutory entitlement to 5 weeks' written notice. Although Columbia Dodge indicated that it would continue operating its New Westminster location until mid-January, 2001, the New Westminster location was actually closed down on November 30th, 2000 at which point Jameus' employment ended. Thus, Jameus received one day less than 4 weeks' "working" notice. Accordingly, as noted above, the delegate awarded Jameus an additional 1 week plus 1 days' pay as compensation for length of service under section 63(3)(b) of the *Act* which states that an employer's obligation may be satisfied by way of a combination of pay and written notice.
>
> Columbia Dodge says that Jameus was offered, and he declined, the opportunity to continue working for the balance of the original notice period (*i.e.*, to January 31st, 2001) at the Richmond location. According to the information set out in the Determination (at page 2), Jameus does not recall being offered the opportunity to continue working in the Richmond location until January 31st but, in any event, he says that he would have declined such an offer because of the longer

> commute involved and because the work would only continue until January 31st. It might also be noted that Jameus obtained new employment in Surrey in early December 2000.

In light of the dearth of material before me relative to the arguments that were advanced by the parties, I referred certain matters back to the Director for investigation. As noted above, that report is now in hand. With the benefit of that report and the further submissions filed, this appeal is now being finally adjudicated.

ANALYSIS AND FINDINGS

Constructive Dismissal

Section 66 was referred to by the delegate in the original Determination. This provision, which essentially codifies the common law notion of "constructive dismissal", requires a *repudiatory* change by the employer in the employee's conditions of employment. In *Stordoor Investments Ltd.*, B.C.E.S.T. Decision No. D357/96 I observed that:

> Our Court of Appeal has repeatedly held that, absent an express contractual provision, it is an implied term of an employment contract that the employer be given a relatively free hand to transfer the employee from one position to another, or from one geographic region to another [see *e.g., Longman v. Federal Business Development Bank* (1982), 131 D.L.R. (3d) 533; *Reber v. Lloyd's Bank International Canada* (1985),18 D.L.R. (4th) 122; *Lesiuk v. British Columbia Forest Products Ltd.* (1986) 33 D.L.R. 4th 1; and *Cayen v. Woodwards Stores Ltd.* (1993) 100 D.L.R. (4th) 294].

The delegate concluded that section 66 was "moot" because Columbia Dodge was not legally entitled to reassign Mr. Jameus to its Richmond location since such a reassignment would have amounted to an unlawful "alteration" within section 67(2)(a) of the *Act*. However, as I noted in my earlier reasons for decision, sections 66 and 67(2)(a) are independent statutory provisions.

Section 66 is not triggered unless the employer *repudiates* the employee's employment contract whereas section 67(2)(a) simply states that if an employer wishes to avail itself of the statutory right to give written notice in lieu of paying compensation for length of service, the employee's wage rate and other conditions of employment are, in essence, subject to a statutory "freeze" for the duration of the notice period. During the "working notice" period, the notified employee's wages and other terms and conditions of employment must not be altered without the employee's written consent.

However, if an employer has the express or implied right under the employment contract to reassign the employee's work location, then any such reassignment--even if effected during the notice period--would not offend section 67(2)(a) since the employer would not be *altering* a term of the contract but merely exercising an *existing right* under that contract.

The delegate simply did not address this latter issue and, accordingly, this question (among others) was referred back to the Director for investigation. The Director now takes the position that Columbia Dodge had the presumptive right to reassign Mr. Jameus from its New Westminster to its Richmond location:

> It is recognized that management has the right to direct their work force. This includes the right to transfer employees within their organization and includes transfers to different geographic

> locations...Such a move [New Westminster to Richmond] would be acceptable if one considers the previous decisions of the Tribunal in Stordoor Investments and others cited in the Decision.
>
> (Delegate's February 21st report, pp. 2-3)

Accordingly, I am satisfied that Columbia Dodge had the right, during the working notice period, to reassign Mr. Jameus to its Richmond operations and that such a reassignment would not have contravened either section 66 or 67(2)(a) of the *Act.* However, this begs the question as to whether, in fact, Mr. Jameus was actually reassigned. I now turn to this latter question.

Geographic Reassignment

As recorded in the Determination, Columbia Dodge's position was that Jameus was offered--and refused--the opportunity to complete his working notice period at the Richmond location. Jameus "could not recall the offer to work out his notice period in Richmond" but says that "he could not see himself accepting such a short-term offer in any event" (Determination, p. 2). The delegate did not resolve this conflict in the evidence in view of his interpretation of section 67(2)(a) of the *Act.*

Despite being specifically ordered to investigate and determine whether such an offer was made, the Director's delegate did *not,* in his February 21st report, attempt to resolve this evidentiary conflict. The delegate's February 21st report simply records that Columbia Dodge's service manager states that he verbally offered to reassign Mr. Jameus (who refused the reassignment) and that Mr. Jameus, for his part, "adamantly" denied that such an offer was ever made.

Accordingly, I am left in the unsatisfactory position of having to resolve this conflict without the benefit of the Director's conclusions on this point. I note that Mr. Jameus has not replied to the delegate's February 21st report. It is also clear that sometime prior to the end of November 30th, 2000 Jameus obtained new employment with another dealership (which employment actually commenced in early December 2000). It also seems clear that, on his own evidence, Jameus would have refused any reassignment to work out the last portion of his notice period in Richmond. On the balance of probabilities, I am satisfied that Jameus received, and refused, Columbia Dodge's offer to work out the balance of this notice period in Richmond. This refusal may have been principally motivated by the fact that his employment would have ended by January 31st, 2001 in any event and he had no desire to continue on with Columbia Dodge once he found new employment with another dealership.

Since the reassignment was something the employer was contractually entitled to do, Jameus' refusal of the reassignment constitutes, in law, a quit. The reassignment did not amount to an offer of "alternative employment" under section 65(1)(f) but rather reflected the exercise of the employer's right to reassign under the *existing* employment contract. This was not a situation where the employee was terminated from his or her present position and then offered new "alternative employment". Rather, the right to reassign must be understood as being part and parcel of the parties' original (and subsisting) employment contract.

The delegate, in his February 21st report, suggests that any change to the "notice period" must be given in writing. Without commenting on the correctness of this submission (and it may well be correct), it should be noted that in this case there never was a *change* in the *notice period.* The original notice period was never altered by the employer--the employer did not "change" the *notice period* but rather the *location* where the employee would complete his working notice. As noted above, the employer was entirely within its contractual rights to make such a change. Of course, under the *Act,* Jameus was under no legal

obligation to accept the reassignment. However, having refused the reassignment, the employer was not then obliged to pay Jameus any further compensation under section 63 of the *Act*--the employer's obligation was relieved by reason of section 63(3)(c) of the *Act*.

It follows from the foregoing discussion that the appeal is allowed.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be cancelled.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal