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 -

Wade Collins
("Collins")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Hans Suhr

FILE NO.: 1998/804

DATE OF HEARING: April 15, 1999

DATE OF DECISION: April 27, 1999

DECISION

APPEARANCES

Wade Collins	on his own behalf
Murray Fowler	on behalf of Wade Collins
Mark Walsh	on behalf of Wade Collins
Dale Phillips	on behalf of Gear O Rama Supply Ltd.
Robert Joyce	on behalf of the Director of Employment Standards

OVERVIEW

This is an appeal by Wade Collins ("Collins"), under Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination dated November 30, 1998 issued by a delegate of the Director of Employment Standards (the "Director"). Collins alleges that the delegate of the Director erred in the Determination by concluding that compensation for length of service was not owing to Collins.

ISSUE TO BE DECIDED

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

FACTS

The following facts are not in dispute:

- Collins was employed by Gear O Rama Supply Ltd. (the "employer") for more than 8 years as an automotive mechanic;
- Collins was off work for some time on a Workers' Compensation claim resulting from "bi-lateral carpal tunnel syndrome" which necessitated an operation on his right wrist;
- Collins returned to work April 2, 1998;
- Collins was advised by the employer that he was 'laid off' effective April 2, 1998 as business was slow;

- Collins was provided with a Record of Employment ("ROE") on April 7, 1998 which indicated the reason for issuing was "A" - shortage of work;
- Collins took the opportunity and arranged with the WCB to have his left wrist operated on;
- the employer sent a registered letter on June 15, 1998 recalling Collins to work ".....immediately. If you are unable to return to work immediately, please contact me and advise when you are able to return to work."
- Collins and the employer met to discuss the letter and Collins advised the employer that he was still on WCB for his left wrist until June 19, 1998;
- Collins delivered a letter dated June 16, 1998 to his employer wherein he stated "...I then spoke to Derek and told him what I told you. That I would be done therapy with WCB on June 19, 1998 and that I had found another job because of the lay off on April 02, 1998. I cannot return to work immediately as I am still on WCB, which you have been made aware of through our conversations on June 12, 1998 and June 15th, 1998. Due to the fact that I was laid off, I felt it necessary in my state of unemployment caused by the April 02, 1998 lay off to seek employment elsewhere."

Collins asserts that the lay off of April 2, 1998 constituted termination as the employer did not have a valid reason for laying him off. Collins further asserts the fact that the employer had heavy duty mechanics work on automotive repairs is proof that there was enough work to have kept him employed. Collins further asserts that he was not advised by the employer that the lay off was temporary until he requested 'severance pay'. Collins further asserts that as the employer hired a new employee while Collins was on lay off indicates that the business was not slow as claimed by the employer. Collins finally asserts that the recall letter dated June 15, 1998 should be disregarded as it was provided while he was still on WCB.

Collins also expressed some concern with respect to the manner in which his complaint was handled by the Employment Standards Branch. Collins stated that he was advised in August 1998 that his file had been closed earlier but no notification was provided to him. Collins stated that after he indicated he wanted to pursue his complaint, the file was reopened and ultimately the Determination was issued.

Murray Fowler ("Fowler") and Mark Walsh ("Walsh") testified on behalf of Collins and gave evidence with respect to the workload at the employer's place of business while Collins was laid off.

Dale Phillips ("Phillips") testified on behalf of the employer and stated that the only new employee hired was a "clean up boy" to replace the one who had left as the employer could not justify utilizing mechanics at $20 plus per hour to clean up around the shop. Phillips further stated that sales in April 1998 were down 24% and that was the only reason that Collins was laid off. Phillips further stated that the employer wanted Collins to return to work when the recall letter dated June 15, 1998 was sent. Phillips finally stated that Collins advised him that he was not available for work on June 22, 1998 but that he, Collins, was not quitting.

The delegate of the Director testified that Collins filed his complaint April 7, 1998, provided more information April 8, 1998 and visited the office June 5, 1998. The delegate stated that the notes to file indicate that Collins also subsequently advised "that the employer was calling him back to work but he was still on WCB and did not want to go back. Wade was advised that if he did not return to work when recalled, it could be considered that he had quit." The delegate further stated that the notes go on to state " Wade wants severance pay but doesn't want to go back." The delegate further states that he reopened the file and conducted an investigation into Collins complaints. The delegate further states that he advised Collins of the results of his investigation in late October 1998. The delegate finally states that Collins was not happy with the results of the investigation therefore the Determination was issued.

ANALYSIS

The burden of establishing that the delegate of the Director erred in the Determination rests with the appellant, in this case, Collins.

The *Act* defines "temporary lay off" and "termination of employment" in Section 1 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;*** (emphasis added)
>
> *"termination of employment" includes a layoff other than a temporary layoff;*

With regard to the circumstances of April 2, 1998, Collins agrees that he was told he was laid off and the ROE indicates the reason for issuing was "A" - shortage of work. Furthermore, Collins' complaint form of April 7, 1998 contains the statement " I was laid off April 02 without any type of notice written or other. This form supplied is a employers statement that I was laid off with no return dates." It would appear that Collins' belief that he was terminated was founded on the fact that the employer did not include a specific date for recall.

Based on the evidence provided I conclude that the employment of Collins was not terminated on April 2, 1998, rather, Collins employment was merely interrupted by a layoff. That layoff is a temporary layoff pursuant to the definition in Section 1 of the *Act* and would not become a termination until the period defined as a period of temporary layoff was exceeded.

Having concluded that the circumstances of April 2, 1998 did not constitute termination of Collins' employment, I must now consider the circumstances surrounding the events of June 15/16, 1998.

The requirements which set forth the conditions under which an employer must pay compensation for length of service are found in section 63 of the *Act* which states:

> *Section 63, Liability resulting from length of service*
>
> *(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.*
>
> *(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.*
>
> *(4) 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.*
>
> *(5) For the purpose of determining the termination date, the employment of an employee who is laid off for more than a temporary layoff is deemed to have been terminated at the beginning of the layoff.*

The evidence was that the employer provided a letter of recall dated June 15, 1998, a point in time within the period defined as a temporary layoff. The evidence of Collins' letter dated June 16, 1998 confirms that *"....I had found another job..... Due to the fact that I was laid off, I felt it necessary in my state of unemployment caused by the April 02, 1998 layoff to seek employment elsewhere."*

The fact that the letter of recall was provided to Collins while he was still on WCB does not invalidate this letter as the letter clearly states *"....we are recalling you to return to work immediately. If you are unable to return to work immediately, please contact me and advise when you are able to return to work."* The evidence of Phillips was that Collins advised him that he was not quitting although he would not be available for work June 22, 1998, after his WCB claim ended as he, Collins, had found another job.

The liability of an employer to pay compensation for length of service is deemed to have been discharged if, pursuant to Section 63 (3) (c) *supra* , the employee *"(c) terminates the employment, retires from employment, or is dismissed for just cause.*

Based on the evidence provided and on the balance of probabilities, I conclude that Collins terminated his own employment (quit) when he advised the employer he would not be available after the conclusion of his WCB claim as he had found another job. Therefore, pursuant to Section 63 (3) (c) the liability for compensation for length of service is deemed to have been discharged and compensation for length of service is not owing to Collins.

For all of the above reasons, the appeal by Collins is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated November 30, 1998 be confirmed in all respects.

Hans Suhr
Adjudicator
Employment Standards Tribunal