

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act

- by -

Cariboo Pole and Piling Ltd.
(" CP&P ")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Hans Suhr

FILE NO.: 96/265

Hearing Date: July 10, 1996

DATE OF DECISION: July 25, 1996

DECISION

OVERVIEW

This is an appeal by Cariboo Pole and Piling Ltd. (“CP&P”) pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against Determination No. CDET 001898 issued by a delegate of the Director on April 10, 1996. In this appeal CP&P claims that no compensation for length of service is owed to Robin Allen (“Allen”).

Consideration of this appeal falls under the transitional provisions of the *Act*. Section 128 (3) of the *Act* states:

If, before the repeal of the former *Act*, no decision was made by the director, an authorized representative of the director or an officer on a complaint, made under that *Act*, the complaint is to be treated for all purposes, including section 80 of this *Act*, as a complaint under this *Act*.

Written submissions were received from CP&P and information was provided by the Director. Subsequently, an oral hearing was held on July 10, 1996.

Persons in attendance at the hearing were:

For the Appellant CP&P	Robert (Bob) Phaneuf, manager
For the Complainant	Robin Allen Gordon Popadinac Melanie Popadinac
For the Director	Betsy Arnott, Employment Standards Officer Ken Copeland, Industrial Relations Officer

FACTS

Allen was employed by CP&P as a labourer from October 19, 1994 to April 28, 1995, at which time he was laid off work.

A Record of Employment (“ROE”) was issued on May 4, 1995 indicating that the reason for issuing was “A” - shortage of work.

Allen filed a complaint with the Employment Standards Branch (“Branch”) on August 31, 1995 alleging that he was entitled to severance pay.

The delegate of the Director investigated Allen’s complaint and, subsequently, determination # CDET 001898 was issued.

ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether CP&P owes compensation for length of service to Allen.

ARGUMENTS

Phaneuf gave evidence on behalf of CP&P and stated that:

- Allen was a pretty good worker;
- prior to his lay off, Allen's work habits began to deteriorate;
- determined that an employee had to be laid off and Allen was judged to be the "least valuable" employee and was therefore laid off;
- he thought that if Allen was laid off for a while, his work habits might improve;
- Allen was laid off instead of being terminated in order to help him with his UIC claim;
- he personally attempted to contact Allen on one occasion and got an answering machine but did not leave a message;
- the foreman attempted several times to contact Allen but was unable to do so;
- he met Allen at a local business and said that he would have his son call him for work;
- Allen made no effort to contact the Company to see if work was available;

Phaneuf conceded under cross examination that:

- he has no documentary evidence to prove when or how many times the foreman attempted to contact Allen;
- Allen was not spoken to with respect to his alleged deteriorating work habits;
- he cannot recall if any attempt to recall Allen was made during the 13 weeks after his layoff but believes that there were some attempts during that period of time;
- the Company did not send Allen any written notice of recall;

Allen testified that:

- he enjoyed working for CP&P during the 6 1/2 - 7 months he was employed;
- started as a labourer but progressed rapidly to operating the loader;
- fixed chain saws etc, on his time off to help the Company;
- he helped to dismantle the old mill and set up the new mill in December 1994;
- he was never spoken to regarding his work habits;
- he did enjoy a few drinks on the weekends but never reported to work in an unfit manner;
- he did meet Phaneuf at a local business and gave him his phone number as Phaneuf said that his son would call him for work;
- as a result of a message on his answering machine on April 30, 1995, he did work on May 1, 1995.
- he never received any calls to return to work nor were there any messages left on his answering machine after April 30, 1995;

- he called Phaneuf to enquire whether he was going to be recalled or if the Company would pay him severance pay and Phaneuf told him to “fuck off”.

Arnott provided information that after concluding her investigation and based on the information she had on file, she felt that CP&P owed 2 weeks wages as compensation to Allen.

ANALYSIS

The *Act* defines a temporary lay off 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 30 consecutive weeks;

Termination of employment is defined as:

“termination of employment”

includes a layoff other than a temporary layoff;

It is clear from the evidence provided that Allen’s lay off exceeded 13 weeks and is therefore deemed to constitute termination of his employment.

CP&P was not able to provide any documentation to substantiate their claim that numerous attempts had been made to contact Allen. The foreman who had allegedly made the calls was not present at the hearing.

Section 63 of the *Act* provides that an employer becomes liable for compensation for length of service. Section 63 (3) states:

Liability resulting from length of service

- 63.** (1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week’s wages 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 week’s wages;
 - (b) after 3 consecutive years of employment, to an amount equal to 3 week’s wages plus one additional week’s wages for each additional year of employment, to a maximum of 8 week’s 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 week's notice after 12 consecutive months of employment;
 - (iii) 3 week's notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 week's 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) totaling 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.

Section 128 of the *Act* provides that an employee such as Allen in this case would be entitled to the amount of termination pay calculated under either the former *Act* or this *Act*, whichever is the greater.

Based on the evidence provided, I therefore conclude that Allen is entitled to 2 weeks compensation wages calculated as follows:

Total earnings last 8 weeks of employment, March 4 - April 28, 1995 (excludes overtime hours)	\$2,680.00
Average weekly wage ($\$2680.00 \div 8$)	\$ 335.00
entitlement 2 weeks ($\$335.00 \times 2$)	\$ 670.00
4% vacation pay ($\$670.00 \times 4\%$)	<u>\$ 26.80</u>
TOTAL COMPENSATION OWED	\$ 696.80

The appeal by CP&P is therefore dismissed.

ORDER

Pursuant to Section 115 of *Act*, I order that Determination No. CDET 001898 be varied to be in the amount of \$696.80.

Hans Suhr
Adjudicator
Employment Standards Tribunal

July 25, 1996

Date

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