

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1995, C. 38

- by -

ABM Janitorial Services Company Ltd.
("ABM")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 96/358

DATE OF DECISION: July 24, 1996

DECISION

OVERVIEW

This is an appeal by ABM Janitorial Services Company Ltd (“ABM”), under Section 112 of the *Employment Standards Act* (the “*Act*”), against Determination #CDET 002491. The Determination was issued by a delegate of the Director of Employment Standards on June 5, 1996. ABM argues that it is not liable, under Section 63 of the *Act*, to pay compensation for length of service to Lajos Molnar (“Molnar”).

I have reviewed ABM’s written submission to the Tribunal, the Determination and the information which was provided by the Director’s delegate. My analysis of the facts and my consideration of the arguments made by ABM lead me to conclude that the Determination should be confirmed.

ISSUE TO BE DECIDED

The issue to be decided is whether ABM owes Molnar compensation for length of service under Section 63 of the *Act*.

FACTS

In the Reason Schedule attached to the Determination, the Director’s delegate states:

“There is no dispute that there was an employment relationship for six years; that the complainant (Molnar) was laid off effective January 26, 1996; that there was no recall on or before April 26, 1996; and that the complainant (Molnar) received no notice or pay in lieu of notice.”

The Record of Employment (“ROE”) which was issued by ABM on January 29, 1996 shows Molnar’s last day of work as July 21, 1995. His expected date of recall is shown as “unknown”, and the following comment appears in Box 22: “Transferred to Bradford Building Service”. Bradford Building Services Company Ltd. (“Bradford”) issued an ROE to Molnar on January 26, 1996 showing January 26, 1996 as his last day worked and the expected date of recall is shown as “unknown”. Bradford’s address and telephone number are the same as ABM’s address and telephone number on the ROEs. Molnar’s final paycheque (Cheque # 0000489, dated January 26, 1996) was drawn on ABM’s bank account and reported as insurable earnings on the ROE which was issued by Bradford.

ABM issued layoff notice to Molnar due to the loss of a major contract in August, 1995.

ABM's submission to the Tribunal acknowledges that it issued a temporary layoff notice to Molnar on January 26, 1996 and states that the notice makes "...it quite clear that the company was not severing the relationship". Shortly after Molnar was laid off, ABM's branch manager, Paul Morrison, assisted Molnar to obtain alternative employment with another building management company.

ABM did not recall Molnar and states in its submission that it did not do so "...simply because he was not available any more. As noted in the layoff letter we would recall before the 13 weeks if Mr. Molnar could not obtain employment".

ANALYSIS

Section 1 of the *Act* defines a "temporary layoff" as "...a layoff of up to 13 weeks in any period of 20 consecutive weeks" and defines "termination of employment" as including "...a layoff other than a temporary layoff". Thus, a temporary layoff becomes a termination if the layoff lasts for more than 13 weeks in any period of 20 consecutive weeks.

Section 63 of the *Act* creates a liability for employers to pay compensation for length of service to employees. This liability is discharged under Section 63(3) if the employee is given notice of termination, if the employee resigns or retires, or is dismissed for cause.

The facts of this appeal show that ABM issued a temporary layoff notice to Molnar on January 26, 1996 and did not recall him within 13 weeks. Therefore, Molnar's layoff became a termination for purposes of the *Act*, and Section 63 in particular.

The Determination shows that ABM is liable to pay Molnar 6 weeks' wages under Section 63(2)(b) plus 6% vacation pay under Section 58(1)(b) of the *Act*.

ABM argues that the Determination should be cancelled because it acted in good faith in assisting Molnar to obtain alternative employment. ABM also argues that "it did not recall Mr. Molnar simply because he was not available anymore". It also argues that there is no evidence of wrong-doing on its part.

Section 65 of the *Act* exempts employees from the provisions of Section 63 under certain circumstances. One such circumstance, set out in Section 65(1)(f), is where an employee is offered and refuses reasonable alternative employment **by the employer** (emphasis added). ABM did not offer Molnar alternative employment, although it did assist him to find alternative employment with another employer. Thus, Section 65 does not exempt ABM from its liability, under Section 63, to pay compensation for length of service to Molnar.

I accept that ABM did not intend to contravene Section 63 of the *Act*. I also recognise that ABM's efforts to find alternative employment for Molnar were a genuine effort on its part to minimize the financial consequences for Molnar of his layoff. However, that does not

allow me to ignore the liability which Section 63 creates for ABM. ABM could have discharged that liability either by recalling Molnar within 13 weeks of his layoff, by giving him notice of termination, or by offering him reasonable alternative employment with ABM. If Molnar had declined the recall or had refused reasonable alternative employment with ABM, then ABM's liability under Section 63 would have been deemed to be discharged.

ORDER

I order, under Section 115 of the *Act*, that Determination # CDET 002491 be confirmed.

Geoffrey Crampton
Chair,
Employment Standards Tribunal