Employment Standards TRIBUNAL

An appeal

- by -

Sal's Motors Ltd.
(the “Appellant”)

- 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: W. Grant Sheard

FILE No.: 2003A/145

DATE OF DECISION: July 29, 2003

Employment Standards Tribunal
Suite 650, Oceanic Plaza - 1066 West Hastings Street, Vancouver, British Columbia V6E 3X1
Tel: 604.775.3512 Fax: 604.775.3372
Email: registrar.est@gems5.gov.bc.ca Website: www.bcest.bc.ca

British Columbia

DECISION

OVERVIEW

This is an appeal based on written submissions by Sal's Motors Ltd. (the "Appellant"), pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), of a Determination issued by the Director of Employment Standards (the "Director") on May 9, 2003 wherein the Director's Delegate (the "Delegate") found that Gurdeep Bhatti (the "Respondent") was entitled to compensation for length of service, annual vacation pay, and accrued interest for a total amount payable of $5,650.68.

ISSUE

After the Respondent was temporarily laid off, did he quit such that he was not entitled to compensation for length of service ("CLOS") or was he terminated such that he was entitled to CLOS?

ARGUMENT

The Appellant's Position

In a written appeal form with 4 pages of supplemental written submissions attached dated May 14, 2003 and filed with the Tribunal May 16, 2003 the Appellant says that the Director erred in law in the Determination rendered and seeks to cancel that Determination.

The Appellant submits that the Delegate erred in law in failing to consider crucial evidence given by the Respondent and in failing to give adequate weight to other evidence, all of which should have resulted in the Respondent's claim for CLOS being denied. The Appellant submits that the Delegate misapprehended the evidence which was before him.

The Appellant submits that the Delegate failed to properly conclude that, given the evidence of the Respondent in particular, the Respondent had quit his employment with the Appellant prior to the expiration of 13 weeks of consecutive lay-off and that the Respondent's own actions and evidence confirmed that he quit. The Appellant submits that both on a subjective and objective basis the Respondent quit his employment and took on permanent full-time employment elsewhere. The Appellant says that the Respondent never contacted the Appellant and that the Appellant therefore correctly concluded that the Respondent had quit. The Appellant relies on the case of *Microb Resources Inc. (cob Salt Spring Roasting Co.)* [2000] BCESTD #108 March 30, 2000.

The Appellant further submits that the effect of the Determination is to doubly compensate the Respondent. The Appellant says that the Respondent mitigated his losses and effectively was only unemployed for two weeks. Under these circumstances, the Appellant says that it would be unjust and in violation of the spirit of the statutory provisions to award CLOS and that, in doing so, the Delegate erred in law. The Appellant filed a further written submission dated June 23, 2003 supplying one page statements from a Mr. Robert McFegan and Paul George. Mr. McFegan, of Mr. Transmission, North Vancouver, says "if an employee is laid off and picks his/ her tools up, takes them home or wherever and finds other employment 1/2 weeks later one would assume he/she has quit their previous employer." Mr. George of Short Stock Brake and Muffler, Richmond, B.C., says "we have been in the auto repair

business since 1980. If an employee is laid off temporarily and if he removes his tools we normally understand that he has chosen to quit and seek employment elsewhere."

The Respondent's Position

In a written reply dated June 5, 2003 and filed with the Tribunal June 6, 2003 the Respondent denies that he requested to be fired from his work stating that, if his record of employment had reflected this, this would have impaired his reputation. Further, he denies the Appellant's assertion that, when a mechanic picks up his tools from an employer that there is an industry standard or implied meaning that this indicates such an employee has quit. The Respondent reiterates that he was never recalled to work by the Appellant prior to the expiration of the 13 weeks of temporary lay-off and accordingly, he is entitled to CLOS.

The Director's Position

In a letter dated May 28, 2003 and filed with the Tribunal the same day the Director provides a copy of the record which was before the Delegate and, inferentially, stands on the Determination rendered. In addition, the Director supplied copies of the case relied upon by the Appellant and a case relied upon by the Delegate in the Determination (*Corrigal (cob Chairs Plus Furniture Mfg.)* (*re* [2002] BCESTD #379 BCEST #D379/02 August 20, 2002 (P.E. Love, Adjudicator)).

THE FACTS

The parties signed an agreed statement of facts on April 25, 2003 prior to the hearing before the Delegate held that same date. Those agreed facts are as follows:

Gurdeep Bhatti worked for Sal's Motors Ltd. as an automotive mechanic from January 1, 1992 to May 31, 2002. During his employment, Mr. Bhatti took education, travel or personal leaves that did not exceed 13 weeks. On May 31, 2002 Sal's Motors Ltd. temporarily laid off Gurdeep Bhatti. Sal's Motors Ltd. issued a Record of Employment (which was attached) indicated a lay-off due to "A – Shortage of Work" with return date "unknown". Sometime later, Gurdeep Bhatti started working as a mechanic in Peter Larsen's shop. When he began working for Mr. Larsen, Gurdeep Bhatti went to Sal's Motors Ltd. and collected his tools. (Salindar Parhar of Sal's Motors Ltd. believes the day Gurdeep Bhatti collected his tools was Friday, June 7, 2002. However, Mr. Bhatti believes it was June 24, 2002.)

On the day Gurdeep Bhatti collected his tools from Sal's Motors Ltd., he went with another person from Peter Larsen's shop to gather his tools. While doing so he said nothing, he spoke with no one. Mr. Bhatti was paid $18.00 per hour for 40 hours per week, equal to a weekly salary of $640.00. When Mr. Bhatti picked up his tools the Employer assumed that he had quit his job. The Employer did not communicate with the complainant subsequent to the commencement of the temporary lay-off and did not recall the complainant from the temporary lay-off, prior to the expiration of 13 consecutive weeks of lay-off.

The complainant gave evidence at the hearing that at no time did he quit his employment with Sal's Motor's Ltd.

In issuing a Determination in favour of the Employee, the Delegate said as follows:

> "The *Act* does not require an employee to forfeit the right to earn wages while on a temporary lay-off. Nor does the *Act* mitigate the amount of compensation for length of service payable as a result of wages earned elsewhere by an employee, while on a temporary lay-off."

The Delegate went on to say as follows:

> "The *Act* does require an employer to recall an employee from a temporary lay-off prior to the expiration of 13 weeks of lay-off, or to provide payment of compensation for length of service to the laid off employee. The employer may assume that an employee on temporary lay-off has obtained other employment and quit. However this assumption, as in this case, may prove fatal to the defence of not being liable for the payment of compensation for length of service."

The Delegate made reference to *Corrigal (cob Chairs Plus Furniture Mfg.)* (*re*) (supra) in support of his finding.

ANALYSIS

In an appeal under the *Act*, the burden rests with the Appellant, in this case, the Employer to show that there is an error in the Determination, such that the Determination should be cancelled or varied.

Notwithstanding the Appellant's assertion that the Delegate erred in law in failing to consider crucial evidence, failing to give adequate weight to other evidence, and misapprehending evidence, the Appellant acknowledges in its written submission that it would have recalled the Respondent "but for" the Respondent working elsewhere and collecting his tools from the Appellant's shop. As was acknowledged in the agreed statement of facts filed at the Delegate's hearing, when the Respondent gathered his tools from the Appellant's shop, he said nothing and spoke to no one. The Appellant does not dispute the Delegates finding that the Appellant assumed the Respondent had quit and because of this the Appellant did not recall the Respondent to work within the 13 week temporary lay-off. The Appellant says that in its lengthy experience in the industry, when a mechanic collects his tools they have quit.

In the case of *Microb Resources Inc.* (supra) relied upon by the Appellant, the employee was a cook who worked on a full time basis for the better part of 2 years when the employer cut her hours by more than 50%, after hiring another employee. When that new employee subsequently quit, the subject employee waited to see if her hours were reinstated. When they were not, she quit. This was five weeks before the employee's temporary lay-off period of 13 weeks had expired. The Adjudicator noted that Section 62 of the *Act* provides as follows:

> "In this part, week of lay-off" means a week in which an employee earns less than 50% of the employee's weekly wages, at the regular wage, averaged over the previous 8 weeks."

The Adjudicator found that the Delegate in that case erred in the Determination ruling that Section 66 applied characterizing the reduction in hours to a substantial alteration of a condition of employment amounting to termination. At paragraph 25 the Adjudicator said as follows:

> "When one reads Section 62 with the definition of temporary lay-off it is crystal clear that the employee whose hours are cut back more than 50% for one week will be in exactly the same legal position as the person who is sent home for the week. Both are on a "week of lay-off". Where the lay-off continues for up to 13 weeks in any 20 consecutive week period, the lay-off is temporary

and no statutory termination is recognized. However, where that 13 week threshold is crossed, the person is deemed terminated, and entitled to termination pay, even while they continue to work part time."

At paragraph 37 the Adjudicator said as follows:

> "I have concluded that the employee here was clearly under a period of temporary lay off when she terminated her employment. The employee terminated her employment prior to the expiry of 12 weeks of temporary lay-off. In those circumstances, and for the reasons given above, her quit discharged the employer's liability to pay compensation in lieu of notice under Section 63."

Regrettably and with respect, the case of *Microb Resources Inc.* (supra) does not assist greatly as it involved a case where it was an accepted fact that the employee had quit. Accordingly it does not assist in the present case where the critical issue is whether or not the Employee did, in fact, quit.

In the case of *Corrigal* (supra), the employer had placed an employee on a call in status and had not called her for work within 13 weeks after the date of lay-off. The employer alleged that the employee had quit because she announced that she was looking for other work, had taken other part-time work, and had not called in to see if hours were available to her. At paragraph 13 the Adjudicator said as follows:

> "In my view, the employer's appeal submission does not raise any issue of error in the Delegate's Determination. In this submission the employer admits that it did not recall Ms. Kostiuk to work. If an employer does not recall an employee to work within 13 weeks of the date the employee last worked this is deemed to be a termination of employment. The termination of employment arises by virtue of the effect of the definition of temporary lay-off, and the definition of termination of employment, set out in Section 1 of the *Act*……..".

Further, the Adjudicator said at paragraph 15 as follows:

> "The employer has alleged that the employee should have called in. In my view there is no requirement for an employee on a temporary lay-off to contact an employer regarding a recall to work. *Evergreen Exhibitions Ltd.*, BCEST #D035/96. In my view, there was ample evidence before the Delegate that this was a "deemed termination" by the employer's failure to recall Ms. Kostiuk to work within 13 weeks."

Further, at paragraphs 17 and 18, the Adjudicator said as follows:

> "The Tribunal has developed a body of case law dealing with the issue of quit or termination. This can be summarized briefly, as follows:
>
> > The decision of an employee to resign or quit employment is the decision of the employee, and there must be evidence of the employee's intention to quit as well as some objective evidence of the quit. The burden is on the employer to prove a quit. If the employer does not prove a quit, then a finding of "termination" will follow.
> >
> > If one applies the usual approach in analyzing the issue of quit or termination, it is evident that the employer's assumption, and facts alleged in support of the assumption, falls far short of proof of a quit or resignation. Even if Ms. Kostiuk accepted alternative, part-time employment with another employer, this does not demonstrate a "quit" with Chairs Plus. There is no evidence to suggest that by taking part-time employment with the "other employer" that Ms. Kostiuk limited her availability for work with Chairs Plus,

> or acted in a way that was inconsistent with an on going on-call status with Chairs Plus. There is not evidence that Ms. Kostiuk ever turned down work with Chairs Plus. The evidence was that Chairs Plus did not call her for work."

In the present case, it is clear that the Respondent did not express an intention to quit. The Appellant assumed that when the Respondent had picked up his tools that he had quit, but the Appellant did so at its peril. It is clear that the Appellant never did recall the Respondent to work within the 13 week period. In the letters filed by the Appellant from other operators or managers in the industry, those witnesses indicate that picking up tools would cause one to assume a quit or a normal understanding that one has chosen to quit. However, the evidence of the Appellant and these witnesses in this regard do not establish that there is a standard in the industry that when an employee mechanic picks up tools that they have, in fact, quit. It would have been a simple matter for the Appellant to have enquired into this with the Respondent. There was no onus on the Respondent to communicate with the Appellant. As in the case of *Corigal* (supra), I find that the Appellant's assumption that the Respondent had quit falls far short of proof of quit or resignation. Similarly, there is no evidence to suggest in the present case that by taking alternate employment that the Respondent had limited his availability for work with the Appellant or could not return to work with the Appellant. There is no evidence that the Respondent ever turned down work with the Appellant. The evidence was that the Appellant did not recall the Respondent for work.

I find that the Appellant has failed to demonstrate an error in the findings of fact or law applied by the Delegate. The failure of the Appellant to recall the Respondent with 13 weeks of the last day he worked constituted a termination within the meaning of the *Act* and triggered an entitlement to compensation for length of service under Section 63 of the *Act.*

For all of the above reasons, I dismiss the Employer's appeal and confirm the Determination.

ORDER

Pursuant to section 115 of the Act, I order that the Determination of this matter, dated May 9, 2003 and filed under number ER #117699, be confirmed.

W. Grant Sheard
Adjudicator
Employment Standards Tribunal