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 -

Southside Delivery Services Ltd.
(“Southside”)

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	John M. Orr
FILE NO.:	97/51
DATE OF HEARING:	June 09, 1997
DATE OF DECISION:	June 10, 1997

DECISION

APPEARANCES:

Daniel Hamill for Southside Delivery Services Ltd

Mathew Watson, Esq. for Brent Acker

Ray Sea for the Director

OVERVIEW

This is an appeal by Southside Delivery Services Ltd. ("Southside") pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) from a Determination dated January 9, 1997 by the Director of Employment Standards (the "Director").

The Determination found that Southside had contravened sections 63 of the *Act* in terminating an employee, Brent Acker ("Acker"), without notice or cause and without compensation for length of service. Southside appeals on the grounds that the Director wrongly concluded on the evidence that Acker was dismissed when in fact he terminated his own employment because he chose not to return to work as a result of an injury. Southside also appeals on the ground that the Director failed to consider S. 65(1)(d) of the *Act* and that the Director failed to deduct from the compensation payable money received by Acker from Workers Compensation Board and Employment Insurance.

ISSUES TO BE DECIDED

The main issue to be decided in this case is whether Acker was laid-off by Southside and finally terminated, whether Acker terminated his own employment, or whether the employment was impossible to perform due to an unforeseeable event.

Secondly it has to be decided whether W.C.B. and U.I.C. payments should be deducted from any compensation payable to Acker.

And thirdly, although not raised initially in the notice of appeal, whether the Director calculated incorrectly the compensation owed on account of basing the compensation on bi-weekly as opposed to semi-monthly pay periods and by including overtime in the calculation of average weekly wage.

FACTS

Southside operates a business which primarily delivers retail furniture to and from stores and employed Acker as a driver and loader for seven years until in February of 1996 Acker hurt his back at work. Acker had to take time off work and was receiving Workers Compensation benefits to replace his lost income. His position at Southside was maintained for some period of time, the exact length of which was one of the points of evidence which was in contention.

Daniel Hamill ("Hamill"), the president of Southside, testified that the company had difficulty keeping in touch with Acker as he would not return telephone calls and failed to show up at arranged appointments. He testified that sometime in April 1996 he learned that Acker was seen driving a U-Haul truck so he contacted Acker to see if he was coming back to work. Acker told him that he was still unable to come back. Hamill testified that he offered Acker alternative work doing light duties which would only include driving an automatic drive truck with no lifting or loading required. He testified that Acker declined this offer. Hamill testified that, in some frustration, he made a comment to Acker that maybe he should lay-off those employees on Workers Compensation for over two months. Southside usually had to lay-off some staff in the late spring and summer. Hamill said that he did not actually ever lay-off Acker and in fact never laid off any staff for that reason. Hamill also notified W.C.B. and was told that Acker was not classified as being yet ready to return to light duties.

According to Hamill the next significant event was that in August he received a copy of a letter from W.C.B. addressed to Acker which indicated that Acker was no longer going to receive compensation benefits. Shortly after this Acker contacted the company and for the first time indicated that he wanted his record of employment (ROE). There was then a meeting in the office about the ROE and Acker indicated that he needed the ROE to ensure that he could transfer from compensation benefits to unemployment insurance without loss of income.

Hamill testified that he again discussed the issue of whether Acker could come back to work and whether he would ever be able to resume his full duties. Acker said that he couldn't because his back was wrecked, that he couldn't even sit in a drivers seat, and that he was going into a retraining situation with W.C.B. It was learned at the hearing that he did in fact take a retraining course for a class 1 driver's licence which he completed and was issued a class 1 licence in early October 1996.

Hamill testified that there were no other positions in the company, other than the light driving previously offered, that could be offered as the only work the company did was driving. Acker was not qualified for an office position. Hamill was adamant that at no time was Acker terminated. He pointed out that Acker's B.C. Medical premiums were paid 100% by Southside up to the month in which Acker asked for his ROE. The extended health and dental plans were normally paid 60/40 by the employer but were discontinued in February when Acker did not wish to pay the employee portion. He testified that he assumed that when Acker asked for the ROE that Acker was choosing to sever the employment relationship and that therefore Acker was not entitled to severance pay (compensation for length of service per S.63 of the *Act*).

Margaret Hale, the bookkeeper for Southside, testified that when Acker came in to discuss his ROE there was some concern about what to put on his ROE as the reason for ending the employment. If she were to put on the form that he "quit" he would be unable to collect U.I.C. and that this would be really hard on Acker as he was being cut off compensation benefits. She testified that she had always been very friendly with Acker at work and that they only wanted to do what was best for him. She said that she telephoned U.I.C. to find out what would be best and decided to put on the ROE:

> "Employee's WCB benefits have been brought to a close effective August 18, 1996. Employee unable to perform duties due to injury".

She testified that this statement reflected the true state of affairs to her knowledge.

Acker testified that he did indeed have a bad back injury and was collecting W.C.B. benefits. He agreed that he did drive a U-Haul on one occasion for his Mother. He agreed that he did get a telephone call from Hamill sometime after that but that the content was quite different to Hamill's version. He said that Hamill told him that Southside had a new policy that any employee who was on W.C.B. for more than two months was to be laid-off.

Acker testified that at the conclusion of the conversation he believed that he had been laid-off. He testified that he told his mother, with whom he was living, at the conclusion of the call that he had been laid-off. He said that his mother told him that Southside couldn't do that and that he should immediately ask for his ROE. Acker did not ask for the ROE until August even though he testified that he attended at the workplace many times to update the office manager on his health situation.

Mrs. Barbara Acker testified that she overheard her son's part of the telephone conversation and confirmed that he told her he was laid-off. She testified that she told him to get his ROE right away. She also testified that sometime shortly after that her son told her that he had made a telephone call and everything was "O.K". Acker did not recall this second telephone call or telling his mother that everything was O.K.

Acker testified that the ROE was not significant to him until he was told that he would be cut-off W.C.B. benefits. Although he agreed that his mother had told him more than once that he should get the ROE right away. His evidence was that he believed he had been laid-off in April and that he went to the office in August just to pick-up his ROE based on his lay-off status.

Acker testified that Hamill did not offer him "light duties" in April nor at any other time. But in any case he said he would not have been able to perform even light duties if it meant driving.

On another issue, Margaret Hale testified that the compensation amount found by the Director was incorrect as it based the average wage on bi-weekly instead of semi-monthly pay periods and incorrectly included overtime in the average weekly wages.

ANALYSIS

The evidence of Hamill and Acker is clearly in conflict about what occurred during the April telephone conversation and thereafter and I am guided by the often quoted test set out in the case of *Faryna v. Chorny* [1951] 4 WWR (NS) 171 @ 174 BCCA,

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognise as reasonable in that place and in those conditions.

Acker testified that he had been laid off but when his mother who was experienced in personnel matters told him that the company could not do that he took no steps to remedy the situation. He continued to visit the work place on occasion to update the office manager on the progress of his injury and had discussions about whether he could return to work. He continued on company paid medical. It is not in harmony with his belief that he was laid off that he never bothered to pick up an ROE until he was told he was to be cut off WCB benefits. Even then when he attended at the office he entered into discussion about the best wording for the ROE and never said anything about his being laid off. Acker's evidence is simply not in accordance with the preponderance of probabilities in all the circumstances.

Hamill's evidence is far more likely in the circumstances. He was frustrated with the fact that he had heard about Acker driving at a time when he was on WCB and the company was continuing to pay his B.C. Medical premiums. It makes sense that he might offer light duties and get frustrated when this was declined.

I find as a fact, after weighing the evidence carefully and being conscious of the onus on the appellant in this case, that Acker was not laid off at any time nor was his employment ever terminated at the initiative of the employer.

To decide whether or not the employee terminated the employment I must find that there was a subjective intention and an objective act consistent with the intention that is clear and unequivocal. The subjective intention to terminate the employment is denied by Acker. He testified that he was laid-off. But having found the allegation of lay-off to be not credible I must look elsewhere to assess his subjective intention. It is clear that Acker believed after August 14, 1996 that he was about to be cut off benefits from WCB. He wanted to ensure that he would not be out of pocket and wanted to transfer his status to U.I.C. He therefore either had to return to work or terminate the employment status and apply to U.I.C. I find that his decision to request his ROE after August 14 was a clear indication of his subjective intention to terminate the employment. In addition the objective act of attending and picking up the ROE is a clear and unequivocal act consistent with this intention.

I therefore find that Acker terminated the employment of his own initiative and therefore the employer's liability to pay compensation is discharged.

If it was necessary, I would also find that the employer offered reasonable alternative employment to Acker in accordance with S.65 (1)(f) of the *Act*. Acker refused light duty driving on the basis that his back was wrecked and that he was unable to even sit in a drivers seat. Yet within weeks of the termination of employment with Southside he enroled in and completed a Class 1 drivers program which is far more strenuous than the duties offered by the employer. Under these circumstances S.63 does not apply and there would be no compensation payable.

I would find that S.65(1)(d) was not applicable to these circumstances as the injury at work in this case could not be said to be an unforeseeable event.

I do not have to decide the issue of the deductibility of the WCB or UIC payments but note that these payments would not be deductible in light of the provisions of S.68(2) of the *Act*.

I note that there was agreement at the hearing that the compensation had been incorrectly calculated by including overtime and using a bi-weekly instead of a semi-monthly pay period. However in light of my findings above it is not necessary to make any order in this regard.

ORDER

I order, under Section 115 of the *Act*, that the Determination be cancelled.

John M. Orr
Adjudicator
Employment Standards Tribunal