Employment Standards TRIBUNAL

An appeal

- by -

Michael J.F. Neylan
(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.: 2002/77

DATE OF HEARING: May 27, 2002

DATE OF DECISION: June 10, 2002

DECISION

APPEARANCES:

Michael J.F. Neylan	on behalf of the Appellant
Keith Ekman	on behalf of the Respondent
Joe LeBlanc	on behalf of the Director

OVERVIEW

This is an appeal based on written submissions and with an oral hearing by Michael Neylan (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 January 30, 2002 wherein the Director's delegate found that the Appellant had been temporarily laid off and that the Appellant constructively resigned from his employment when he failed to return telephone messages which the Respondent had left for him such that the Respondent did not owe compensation for length of service.

ISSUES

1. Was the Appellant temporarily laid off or terminated by the Respondent?

2. If the Appellant was temporarily laid off, did the Appellant constructively resign in failing to return calls to the Employer?

ARGUMENT

The Appellant's Position

In an appeal form and written submission dated February 18, 2002 and filed with the Tribunal on February 20, 2002 the Appellant appeals the Determination on the basis that:

1. he was terminated rather than temporarily laid off and,

2. in the alternative, if he was laid off, he was never recalled to work.

In support of his submission that he was terminated rather than laid off the Appellant alleges the following:

a) the pattern of his work leading up to his termination was not consistent with a layoff;

b) another employee, formerly the Appellant's assistant, began performing the Appellant's duties several days prior to his termination;

c) one or two days after the Respondent informed the Appellant that he was laid off, the Appellant went to the Respondent's office and found that his desk had been cleared out and his belongings left in a pile for him to pick up. This was not done the previous winter when he was also laid off temporarily;

d) when the Appellant picked up his belongings he found a Record of Employment ("ROE") on top of his belongings with a written request from the Respondent that he "advise of any address changes", which request the Appellant complied with. As the Appellant believed he'd been terminated he intended to and subsequently did move to Vancouver. It was a Vancouver address which he then provided to the Respondent; and

e) the locks on the Respondent Employer's business were changed immediately after the Appellant's termination.

In support of the Appellant's alternative submission (that, if he was temporarily laid off he was never recalled to work) he acknowledges that, after he was advised of the layoff or termination on about September 21, 2000 he received two telephone messages from the Respondent Employer on October 16 and 17, 2000 on his cell phone simply requesting he call back. He notes that he was not asked to return to work in these messages. The Appellant says that he did not have an obligation to respond to a message that was not a recall to work and, as he was upset about the circumstances surrounding his termination, he did not wish to speak with the Respondent if it was not necessary. The Appellant notes that he was never requested in writing to return to work.

The Appellant says that there were errors in the findings of fact in the Determination where it was found that the Respondent had attempted to contact the Appellant at his last known address and that the Appellant had failed to advise the Respondent of his change of address or phone number so that there was no way to contact him. The Appellant notes that the Respondent acknowledges in a letter dated February 23, 2001 of having received the Appellant's Vancouver address. No attempt was made to contact the Appellant at that address.

At the oral hearing the Appellant gave evidence under oath and adopted the factual assertions in his written submissions as true. In addition, the Appellant gave evidence that about one week before he was laid off or terminated "there was an issue" about who had damaged a radio and "a question about (his) credibility". The Appellant says that he informed the Respondent's Mr. Keith Ekman ("Mr. Ekman") that Mr. Ekman's son had damaged this radio. The Appellant says that he believes the radio was a factor in him being terminated as well.

The Respondent's Position

In a letter dated March 15, 2002 and filed with the Tribunal on March 18, 2002 the Respondent says that the Appellant was laid off due to a shortage of work and approximately three to four weeks later, on October 16 and 17, 2000, the Respondent left telephone messages for the Appellant to call. The Respondent further attempted to call the Appellant on October 23 and 24 when he found that the Appellant's phone, a cell phone in the Cranbrook area, was no longer in service. In addition, by October 25, 2000 the Appellant was not at the last address that the Respondent had known the Appellant to live at.

The Respondent also filed letters which he had written to the Branch on February 19, 23, and 26 and June 14, 2001 in support of his submission that the Appellant was temporarily laid off due to shortage of work

and subsequently constructively resigned when he failed to return the two telephone messages which were left for him to call and which the Respondent had left with a view to contacting the Appellant to return to work.

The Respondent says that the assistant which the Appellant complains of having taken his place a few days before his layoff was Mr. Ekman's son and simply assisted Mr. Ekman with field work which had to be done on the weekend when the Appellant was not working. The Respondent acknowledges that the Appellant's belongings were stacked on a chair after his layoff because Mr. Ekman was not in the office when he expected the Appellant to come for them. The Respondent notes that, in a telephone conversation about one to two weeks after the Appellant was laid off, the Respondent advised him that he would be entitled to termination pay or compensation for length of service "only if it goes on for so many weeks". The Respondent says that this confirms that the layoff was not intended to be permanent and that the Appellant was aware of this.

The Respondent says that the nature of his work is such that he had to be able to contact the Appellant on short notice to be able to confirm the company's immediate availability for further work prior to providing prospective clients confirmation that they could proceed. He says that it was not possible for him to simply state in a telephone message "come back to work" or to write to the Appellant in Vancouver hoping that he would return shortly.

Mr. Ekman gave evidence under oath at the oral hearing adopting the factual assertions in the written submissions as true. The Respondent acknowledged there had been some issue with respect to damage to a radio but did not feel there was any lingering ill feeling about this. The Respondent reiterated his position that the Appellant was laid off due to shortage of work and, when the Appellant failed to return two telephone messages which the Respondent had left for him (intending to recall him to work), the Appellant constructively resigned such that he is not owed compensation for length of service.

The Director's Position

In a written submission dated March 20, 2002 and filed with the Tribunal March 21, 2002 the Director's delegate notes that the Respondent issued a Record of Employment to the Appellant on September 21, 2000 indicating that the Appellant was laid off due to a shortage of work. Further, the delegate notes that when the Appellant telephoned the Respondent a few weeks after the layoff and suggested to the Respondent that he, the Appellant, was owed compensation for length of service ("CLOS"), the Respondent advised him that he would only be owed CLOS if the layoff lasted a certain number of weeks. The delegate says that this shows that the Employer was availing himself of the availability under the *Act* to layoff an employee for limited periods of time and maintain the employment relationship.

The delegate says that, although the Respondent did not specifically state to the Appellant in his telephone messages of October 16 and 17, 2000 that he wanted him to return to work, the Appellant's position that he was therefore never recalled is absurd. The delegate says that the purpose of recalling him to work was a logical assumption which should have been made. The delegate says that "It is the Branches position that the complainant had an obligation to call the Employer back at the possibility that he was being recalled to work." The delegate notes that, after these two telephone messages, the Appellant had his cell phone reprogrammed for a different number in the Vancouver area without advising the Employer of this. The delegate says that "This was an Employee that did not want to be found and simply waited for the thirteen week clock to time- out before he resurfaced and made his claim

for compensation for length of service." The delegate submits that the appeal should be dismissed and the Determination confirmed.

THE FACTS

The Respondent Employer operates a land surveying business in Cranbrook, BC. The Appellant was employed with the Respondent from March 9, 1999 to September 20, 2000 as a Survey Technician at the rate of $18.50 per hour. There was no written contract of employment between the parties. In the first year of the Appellant's employment the Appellant was temporarily laid off for one or two weeks in about December and for several weeks in February or March. Temporary seasonal lay-offs are common in the surveying industry, particularly in the interior, but it was unusual for this to occur and for there to be so little work this early in autumn.

On September 21, 2000 the Respondent Employer company, acting through it's representative, Mr. Ekman, telephoned the Appellant advising him that he was being laid off. Neither party can recall the exact words spoken, but the word termination was not used. The Appellant was given a Record of Employment ("ROE") dated September 21, 2000 which he received on about September 22, 2000 wherein the reason for issuing the ROE was indicated as code "A" which is explained on the back of the document as "shortage of work"; however, the expected date of recall was not completed on the form and nor was the box indicating whether such a date was "unknown" or "not returning". The Employer subsequently submitted an amended ROE to the Human Resources Development Canada office indicating that the expected date of recall was unknown, but this was not given to the Appellant.

The Respondent Employer had no further work for the Appellant to do when he was "laid off" on September 21, 2000. The Appellant telephoned the Respondent a few weeks after his "layoff" and requested compensation for length of service. Mr. Ekman advised the Appellant that he was only entitled to severance pay if the layoff continues for "so many weeks". Within a few days of this phone conversation, on about October 13, 2000 the Respondent secured work which the Appellant could have returned to do. The Respondent telephoned the Appellant on October 16, 2000 and October 17, 2000 leaving a message with the Respondent's phone number and a request to contact the Respondent's office. The Appellant received these messages but, as he felt he had been treated poorly by the Respondent and he was not advised in the message that this was a recall to work, he chose not to return the calls. The Respondent attempted to telephone the Appellant again on October 23 and 24, 2000 but the number was no longer in service. Mr. Ekman drove to the last address that the Appellant had been known to physically reside at on October 25, 2000 but found that he no longer lived there.

The Appellant left his forwarding address in Vancouver with the Respondent at the Respondent's request, on September 22, 2000 when the Appellant picked up his belongings from the Respondent's office. The Respondent asked for this address because it "didn't expect him to sit here while he's laid off". The Respondent never wrote to the Appellant at that address requesting him to return to work as he felt he needed to advise prospective employers more quickly than mail permitted as to their availability for work.

The weekend before the Appellant was laid off Mr. Ekman went into the field and performed the Appellant's duties as an Instrument Man with the assistance of Mr. Ekman's son. This had never occurred before. Mr. Ekman gave evidence that he was required to do this work on a weekend because he did not have confidence in the data which had been previously generated by the Appellant and which Mr. Ekman had to use to make certain calculations. Mr. Ekman worked in the Appellant's position to reshoot and check this data. The Appellant was not asked to do this work.

In the week or so before the Appellant's layoff there had been "an issue" between Mr. Ekman and the Appellant over damage to a radio which the Appellant had told Mr. Ekman was the fault of Mr. Ekman's son. The day after the Appellant was laid off the Respondent piled the Appellant's belongings on a chair in the Respondent's office - this was not done when the Appellant was temporarily laid off the year before.

In the day or two after the Appellant was laid off the Respondent changed the locks on its premises. The Respondent explains that the locks were changed due to a change in the tenancy arrangements on the premises such that the Respondent had to go through another tenant's space to access the Respondent's storage room. The other tenant had moved in to the building about three months earlier. Mr. Ekman and his landlord "decided we didn't want all the keys floating around out there". However, the other tenant couldn't access the Respondent's storage room and the Respondent gave evidence that the Appellant was "probably the only one" who had a key that wasn't actively working there at that time.

The Respondent said in a letter to the Branch dated February 19, 2001 that, "He had at no time advised me of a change of phone number or address and I had no way to contact him". However, in a letter to the Branch dated February 23, 2001 the Respondent acknowledged that "He provided us with his mother's address in Vancouver as a forwarding location if necessary."

ANALYSIS

The onus is on the Appellant to establish on a balance of probabilities an error in the findings of fact or application of the law by the delegate.

"Temporary Lay-Off" is defined in Section 1 of the *Act* as follows:

> *a) In the case of an employee who has a right of recall, a lay-off that exceeds the specified period within which the employee is entitled to be recalled to employment, and*
> *b) In the other case, a lay-off of up to thirteen weeks in any period of twenty consecutive weeks;*

Section 63 of the *Act* provides for liability resulting from length of service. Section 63 provides as follows:

> *Section 63*
> *(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 1 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) two 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.

I note that there is no written contract of employment providing a right of layoff. In the case of *Collins vs. Jim Patterson Industries Ltd* (1995) 7 BCLR (3rd) 13 (BCSC) (Sigurdson J.) it was said at page 18 as follows:

> *"The position at common-law therefore appears to be that unless there is a term of the employment contract that is express, implied in fact, or implied by law that allows the employer to temporarily layoff the plaintiff, such a layoff is in fact a termination of employment."*

Sigurdson, J. went on to say at page 19 as follows:

> *"In my view the Act does not grant all employers the statutory right to temporarily layoff employees regardless of the terms of their employment contract. Rather than creating new rights, the Act appears to qualifying employment arrangements in which the right to layoff already exists. Therefore, unless the right to layoff is otherwise found within the employment relationship, the above cited sections of the Act are not relevant."*

In the present case I find that, although the *Act* does not provide for an automatic right of layoff up to thirteen weeks in a twenty week period and there is no written contract, the parties had agreed to a temporary layoff the year before and temporary layoffs were common in the industry such that it was an implied term of this contract of employment.

Was the Appellant temporarily laid off or terminated?

Although there are several facts which raise a suspicion that the Employee was terminated due to friction between the Appellant and Respondent or issues with the Appellant's performance at work, the fact is that the Respondent did not have sufficient work to continue to employ the Appellant. Further, the Respondent did give the Appellant an ROE saying "shortage of work" as the reason for issuing the ROE and the Respondent told the Appellant in a phone call a couple of weeks after the layoff that it would be a

termination "only if it goes on for so many weeks". On these facts I can not find that the delegate erred in determining that the Appellant was temporarily laid off.

Did the Appellant constructively resign by not being available for or responding to a recall to work?

As a preliminary point, there is authority to the effect that an employee's refusal to report for work when recalled from temporary layoff constitutes a "constructive resignation" and that, where such a resignation occurs within the thirteen week temporary layoff period the employer is not obliged to pay compensation for length of service: see *Re Wong*, [1999] BCEST D80 (QL), (18 February 1999) BCEST D048/99 (Thornicroft, Adj.).

In the case of *Re Evergreen Exhibitions Ltd. ("Re Evergreen")* [1996] BCEST D293, BCEST D305/96 (Roberts, Adj.) it was found that there is no onus on an employee to contact an employer regarding a recall following a temporary layoff.

In *Re Evergreen* the employee was laid off temporarily with an expected recall date of October 2, 1995. The employer contended that a telephone call was made to the employee to resume work but that call was not returned. The employee denied receiving such a telephone call or any indication that she was expected to return to work. The adjudicator found, on the evidence, she was unable to conclude that the employer had made a sincere effort to recall the employee. The employer in that case acknowledged that there had been no attempt made to contact the employee in writing. The employee acknowledged not making any attempts to call the employer although her separation slip had indicated " temporary layoff, expected week of return October 2, 1995". The adjudicator also noted that the employee had not provided a letter of resignation and was unable to find that, on the facts, it could be inferred that the employee resigned.

In the case of *Re Kant Holdings Ltd.* ("*Re Kant"*), [1997] BCEST D401, BCEST D373/97 (Wolfgang, Adj.) it was found that, leaving a message on an answering machine is insufficient notice of a recall to work after a temporary layoff, that an employee is entitled to reasonable notice of a return to work, and that one or two days notice of recall is insufficient.

In *Re Kant*, the employee was laid off on December 21, 1996. The employer found that it had too many staff and this employee, being pregnant, was the logical one to go. The employee's Record of Employment was originally issued as "F" (Maternity Leave), but this was later changed to "A" (Shortage of Work) by a letter from the employer to the Human Resources Development Canada ("HRDC"). On March 18, 1997 the employee met the manager of the employer enquiring about her temporary layoff which had nearly expired. The employer claimed they then called the employee on March 20, 21, 22 and 23 leaving messages on her answering machine and that she was scheduled to work the weekend of March 22 and 23. The employee claimed that she did not receive the employer's message until the afternoon of March 22, 1997. The employer acknowledged that the relationship between it and the employee was "at odds" but claimed that there was a job for the employee following her maternity leave. March 22, 1997 was the first day of the fourteenth week following layoff. The employer acknowledged that at no time did they make their intention of rehiring the employee known in writing, at least until after the period of thirteen weeks layoff.

The adjudicator in *Re Kant* stated at paragraph 25 of the decision "As there is no assurance if and when the person receives a message left on an answering machine it is at best an unreliable method of

notification. As time appears to have been so important to Kant I feel a greater effort should have been made to notify Clifford, if it was their intention to rehire her." The adjudicator continued at paragraph 26 saying "A person is entitled to a reasonable notice for a return to work after an extended layoff. One day or at most a two day notice would appear to fall far short of meeting that obligation." The adjudicator upheld the Determination which found that the employee was entitled to compensation for length of service.

Having reviewed all of the evidence I find that the delegate erred in finding as a fact at page 4 of the Determination, Item 7, that the Respondent drove to the Claimant's "last known address". This was the last address for a residence in the area of employment where the Appellant had been known to reside, but it was not the address that the Appellant had provided, at the Respondent's request, at the time the Appellant was advised of his layoff.

Further, I find that the delegate erred in law in finding that the Appellant was obliged to contact the Respondent after telephone messages were left for the Appellant without the messages indicating that they were for the purpose of a recall to work and that the Appellant had therefore "abandoned his job" or, as the Director stated in written submissions, that the Appellant had constructively resigned.

I find that the Appellant was not recalled to work when the Respondent left telephone messages for him to call on October 16 and 17, 2000. Although one may have assumed that the purpose of these calls was for a recall, it would have been an easy matter for the Respondent to leave a message specifically stating that was the purpose of the call. It is apparent that there was some friction and difficulty between the Appellant and the Respondent immediately before and after the layoff such that the Appellant was displeased with what he perceived to be ill treatment by the Respondent and it was not necessarily unreasonable for him not to wish to speak with the Respondent unless it was clearly required. The Respondent did not write to the Appellant at the address he had asked the Appellant to supply at the time of his layoff and, presumably, a letter would have reached the Appellant at that address between the dates of October 16, 2000 when the Respondent began to call the Appellant and October 25, 2000 when the Respondent went to the Appellant's last known physical residence in the area prior to the changed address the Appellant had provided. Although there was need for the Respondent to contact the Appellant quickly for recall, as noted in the case of *Re Kant*, supra, leaving a message on an answering machine is insufficient notice of a recall to work after a temporary layoff and one to two days notice is not sufficient either.

Although I am sympathetic to the Respondent's need to contact the Appellant as quickly as possible, some of the difficulty in doing so appears to arise from the fact that the Appellant was laid off and his need to pursue other employment and make other living arrangements. The Respondent appeared to acknowledge this when he explained having asked the Appellant for any change of address because he "didn't expect him to sit here while he was laid off". As in *Re Kant*, I feel a greater effort should have been made to notify the Appellant if there truly was an intention to rehire him. There is no evidence that the Respondent attempted to find any other phone number for the Appellant by telephoning directory assistance for a phone number at the Appellant's forwarding address or a new listing for the Appellant's cell phone. When the Respondent was able to leave two telephone messages for the Appellant he could easily have left a message specifically notifying the Appellant that the purpose of the call was to recall him to work. The Respondent could have sent a letter to the Appellant at the address he had requested from the Appellant and such a letter would likely have reached the Appellant's forwarding address within the dates that the Respondent indicates he continued his efforts to locate the Appellant.

I find that the Respondent did not make a diligent and genuine effort to contact and recall the Appellant to work.

ORDER

Pursuant to section 115 of the Act, I order that the Determination of this matter, dated January 30, 2002 and filed under number ER105-718, be varied to provide that the Appellant is entitled to compensation for length of service and I refer the matter back to the Director to calculate that entitlement.

W. Grant Sheard
Adjudicator
Employment Standards Tribunal