

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 -

Canadian Pest Control
("CPC")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Barry Goff

FILE NO.: 96/253

DATE OF HEARING: June 18, 1996

DATE OF DECISION: September 27, 1996

DECISION

APPEARANCES

Kevin Lee: For Himself
Wayne Mackie: Director's delegate
Edward Burgess: Counsel for the Employer Canadian Pest Control
Val Helgason: President of Canadian Pest Control
Graham Patterson: Manager of Canadian Pest Control
Lori Lerfold: Office Manager of Canadian Pest Control

OVERVIEW

This is an appeal by Canadian Pest Control ("CPC") against Determination No. CDET 001746 issued by the Director of the Employment Standards Branch (the "Director"). The Director determined that CPC had failed to pay overtime and severance pay to Kevin Lee ("Lee") and issued an order in the amount of \$6,402.96.

The Director's delegate withdrew the overtime component of the determination prior to the commencement of the hearing.

A hearing was conducted in New Westminster, B.C. at which all witnesses provided evidence under oath.

FACTS

Lee was employed in service and sales by CPC from approximately June, 1991 to October 13, 1995. Lee returned September 29, 1995 from a two-week vacation and concluded that his pay cheque for holiday pay was short. Lee called Helgason for an explanation and was referred to CPC's accountant. The accountant returned his call and sorted out a misunderstanding about the length of time Lee was to take for holidays. In addition, the accountant explained to Lee the difference between his current holiday pay and the accumulated holiday pay which appeared on his cheque stub and which included holiday pay accrued since his last anniversary date accumulating for his next year's vacation entitlement.

Lee was eventually informed that his vacation pay included a \$90.00 overpayment. He was not satisfied with this information, tried to work out the vacation pay calculation on his own and attended at the Employment Standards Branch ("ESB") on October 2nd to bring a complaint regarding vacation pay and overtime.

As a result of filing this complaint, Val Helgason ("Helgason") terminated Lee's employment. Helgason was informed by an officer of the ESB that this action was illegal after which Lee was reinstated. On Tuesday, October 3rd, Lee met with Helgason and Patterson to discuss Lee's complaint and the terms of his employment. Patterson set out the details of the meeting in a letter to Lee dated October 5th, 1995, which confirmed the conditions of employment including a provision that Lee would not work overtime. Lee was in agreement with the direction not to work overtime. The parties only disagreed on whether it was Lee's request or Helgason's direction that Lee not work overtime. Lee continued to work until October 13, however, he believed that as a result of his complaint to the ESB he had lost a number of jobs called specials which would have generated additional earnings for him. As a result of what Lee believed was an instruction from CPC management that Lee was not to be given any "specials", Lee left his employment with CPC and alleged he had been constructively dismissed. The ESB subsequently issued an order.

ISSUE TO BE DECIDED

Was Lee constructively dismissed and therefore entitled to severance pay?

ANALYSIS

CPC disputes the basis on which Lee alleged he had been constructively dismissed. Patterson denied having given any instruction that Lee was not to be given specials. In fact, Lee did some of these specials during the time he alleges CPC had restricted his access to them. Exhibit 1 indicates Lee worked three specials: October 4, 6, and 10, 1995, all during the time he alleges access to these jobs was restricted. Lori Lerfold, the office manager and dispatcher for CPC stated she had not been instructed to so restrict Lee. In Lee's submissions, he describes how Lerfold had "begged" him to do a special but he had refused since he felt he needed express permission from Helgason to work the overtime required to do this particular special which would be done outside normal working hours. He did not say whether he had sought such permission.

Patterson's evidence was that the company was complying with the *Employment Standards Act* and Lee was entitled to perform extra work if he wished and if it were available. He provided a copy of a letter (Exhibit 3) written to Lee in which his instructions were set out.

In that letter, Lee is given sales targets which apparently could be met within regular working hours and without requiring any overtime. Nowhere in the letter is it stated that Lee is not permitted to do specials, only that he is not permitted to work overtime. Patterson also stated that Lee had refused three specials.

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Lee also contended that he had been shorted work to which he was entitled because others had performed work within his territory. Patterson provided CPC company records which indicated it was not unusual for a number of employees to do work in the same area.

Helgason testified that there were no assigned territories for sales and service reps and there were often CPC people doing work in the same area.

Mackie confirmed that the termination was properly rescinded by the employer and is not a factor in determining whether a constructive dismissal occurred.

It is not disputed that Lee resigned his employment with CPC. However, there are two kinds of resignation. An employee is free to resign should he/she so choose. However, when an employee resigns because the terms of his employment have been fundamentally changed by his employer without notice to or consent by the affected employee, this is a constructive dismissal and triggers the right to severance pay in the employee. This is Mr. Lee's contention. He complains that after he had complained to the ESB he lost the right to do specials and others were permitted to perform work within his area and as a result the terms of his employment were fundamentally altered.

On the evidence I am not persuaded Lee has been constructively dismissed. He was given the opportunity to perform specials and did so. The only clear change to Lee's working conditions was the agreement not to work overtime.

As for his complaint that he lost work to others in his territory, I am satisfied from the evidence brought by CPC that there are no exclusive territories and it is quite common for a number of CPC employees to be performing work within the same area.

Based on the evidence before me, I find that Lee was not constructively dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that Determination No. CDET 001746 be cancelled.

Barry Goff
Adjudicator
Employment Standards Tribunal

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