BCEST #D279/99

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 -

Westmount Canopy Kingdom Ltd.
("Westmount Canopy" or the "Employer")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE NO.: 1999/102

HEARING DATE: June 17, 1999

DECISION DATE: July 21, 1999

DECISION

APPEARANCES

Mr. Jim Turney	on behalf of Westmount Canopy
Mr. Steve Hulme	on behalf of himself

OVERVIEW

This is an appeal by the Employer, Westmount Canopy, pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director's delegate issued on January 28, 1999. In the Determination, the Director's delegate found that the Employer had terminated Mr. Hulme's ("Hulme" or the "Employee") employment when it failed to recall him to work following a temporary layoff. The delegate determined that he was entitled to $1,691.65 on account of compensation for length of service (four weeks), after adjusting for wages owed and an overpayment of vacation pay. The Employer appeals the Determination and maintains that Hulme was offered recall within the 13 weeks and refused to return to work.

FACTS AND ANALYSIS

Hulme was employed as an installer with the Employer (and a predecessor company) from June 6, 1993 until his layoff on December 12, 1997, earning $11.00 per hour. Continuity of employment for this period is not at issue. The only issue before me is whether or not the Employer recalled the Employee.

The material facts are in dispute between the parties.

Mr. Jim Turney ("Turney") says he telephoned Hulme in February of 1998, spoke with him and offered him recall to work. He says he told Hulme that "things were picking up and that the Employer should be rolling". He further says that he told Hulme that he should be able to be back "in the next week or so". He says that Hulme told him that he did not want to return because he was working for a welder earning good hourly rate, $60.00 per hour, which was obviously more than he could make at Westmount Canopy. Turney agrees that he did not keep any record of the conversation and says that he does not have any corroborating evidence.

Hulme, on the other hand, says that he went to the Employer's place of business three times after his layoff to inquire about return to work, on January 6, February 12 and March 5, 1998. On those occasions, he spoke with several named employees of the employer. He was not successful. On March 5, he says, he had a conversation with Turney. He says that when he asked Turney about return to work, he was told that things were "still slow". He says he told Turney that he had

telephoned "Labour Relations" and had been told that he was entitled to severance pay if he was not recalled to work after 13 weeks of layoff. According to Hulme, Turney said he would have to check into that and would call him the next day. He did not do so. On March 7, Hulme again called Turney and asked about recall or severance pay and was not that he would get neither. He subsequently filed a complaint with the Employment Standards Branch.

When an employer terminates an employee, the employee is entitled to notice or pay in lieu to a maximum of 8 weeks (see Section 63 of the *Act*). The definition of "temporary layoff" includes a "layoff of up to 13 weeks in any period of 20 consecutive weeks" (Section 1). As well, the *Act* provides that an employee who is laid off for more than a temporary layoff is deemed to have been terminated as of the beginning of the layoff (Section 63(5)).

It is trite law that the burden to prove the Determination wrong rests with the appellant. Moreover, as mentioned by the delegate, the burden is on the employer to prove the recall. For the reasons set out below, I am not satisfied that the Employer has met that burden and, in the result, the appeal must be dismissed.

In this case, the Employer says that it offered Hulme recall. Hulme denies this. I agree with the Employer that it is not required to put an offer of recall to work into writing. However, as a matter of evidence, it is obviously easier to prove if--and when--a recall offer was extended to an employee. In this case, I am of the view, based on the evidence before me, that Hulme's version is the more probable. In his submission to the Tribunal, copied to the Employer, and in his testimony at the hearing, he gave detailed information of the times when he had attended the Employer's business to ascertain when he could expect to be recalled to work, and of his conversations with several named employees of the Employer, including on the last occasion with Turney. His evidence was quite detailed and, in my opinion, believable. If the Employer had wished to dispute that these conversations in fact occurred, these employees could have been called to testify. These conversations, and Hulme's efforts attempts to ascertain a recall date, are at odds with a refusal on his part to return to work. The Employer is not certain when the recall offer was made, except that it was made "some time in early February". As mentioned, on balance, I prefer Hulme's version of the events.

In any event, even if I accept the Employer's version of the events, *i.e.*, that he did telephone Hulme and told him that he should be able to return to work "in the next week or so", and Hulme turned him down due to other work commitments, I am not satisfied that would constitute a valid recall because of the lack of certainty with respect to when the employee is to start work: is it next week, or the following week, or maybe a longer period of time? In my opinion, a recall notice must provide for a specific recall date to be effective.

The appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated January 28, 1999 be confirmed.

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Ib Skov Petersen
Adjudicator
Employment Standards Tribunal