BC EST #D284/96

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 -

Phil Van Enterprises Ltd.
("Phil Van")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	Norma Edelman
FILE NO.:	96/168
DATE OF HEARING:	September 18, 1996
DATE OF DECISION:	**October 7, 1996**

DECISION

APPEARANCES

James Kitsul	for Phil Van Enterprises Ltd.
Phil Vandekerkhove	for Phil Van Enterprises Ltd.
Jim Peters	for Phil Van Enterprises Ltd.
David Luttger	on his own behalf
Christopher Ryan	on his own behalf
Ken Elchuk	for the Director of Employment Standards

OVERVIEW

This is an appeal by Phil Van Enterprises Ltd. ("Phil Van") pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") against Determination No. CDET 001113 issued by the Director of Employment Standards (the "Director") on February 9, l996.
The Director determined that Phil Van owed David Luttger ("Luttger') and Christopher Ryan ("Ryan") compensation for length of service. Phil Van maintains that it owes no compensation to Ryan and Luttger.

FACTS

Ryan and Luttger were employed as gas station attendants at Phil Van's service station in Clearbrook. Ryan and Luttger respectively commenced employment on September 4, l993 and July 10, l994.

On July 7, l995, Ryan and Luttger received written notice that the service station was slated for demolition on July 24, l995. The notice also stated that the demolition was not "100% for certain until July 24th" and, if they desired to continue working they should contact Jim Peters by July 17th and every effort would be made to relocate them in another station.

The service station was demolished at the end of August, l995. Luttger's employment was terminated at the commencement of the demolition. Ryan helped out with the demolition for a few days and then his employment was terminated by Phil Van. Neither Ryan or Luttger received any other notice of termination besides the July 7, l995 letter.

After Ryan and Luttger ceased working, they received Records of Employment which indicated that their start and end dates of work were, respectively, September 4, l993 to August 31, l995 and July 10, l994 to August 28, l995. The Records also indicated that the

reason for issuance was "A" (the code for Shortage of Work), with the comment "business closing".

ISSUES TO BE DECIDED

The issues before me are as follows:

1. whether the notice given July 7, l995 was effective notice;

2. whether Ryan and Luttger were offered and refused reasonable alternative employment; and

3. whether the principle of mitigation of damages is relevant and, if so, whether Ryan and Luttger failed to mitigate their losses by not immediately seeking alternative employment.

ARGUMENTS

Counsel for Phil Van, James Kitsul ("Kitsul") contends that the letter of July 7, l995 provided Ryan and Luttger with the requisite two weeks notice under the *Act*. The notice was clear and unequivocal that after July 24, l995 it was "100% for certain" that the station would be demolished. Further, Ryan and Lutteger were aware the station would be demolished at any time after July 24, l995.

Kitsul argues that the employment relationship between the parties ended as of July 24, l995, and that Ryan and Luttger continued to work after that date with the full knowledge that their contracts of employment were henceforth on a day-to-day basis as the station could be demolished at any time in the future.

Given the above, Kitsul contends that Ryan and Luttger are not entitled to a further two weeks notice as they worked through a two week notice period commencing July 7, l995. Indeed, it is argued that it would be unfair to impose a further notice period on Phil Van as it did everything it could to "cushion the fall" of Ryan and Luttger.

Kitsul further contends that Ryan and Luttger were offered reasonable alternative employment and they made little or no effort to accept the work or follow-up on the offers. Kitsul argues that Ryan and Luttger failed to mitigate their damages as is required by the law. He suggests that if any compensation is found to be owing to Ryan and Luttger, the amount should be reduced to zero as they refused reasonable alternative employment which was offered by Phil Van and they did nothing to mitigate their damages.

Kitsul brought the following two witnesses to the hearing: Phil Vandekerkhove ("Vandekerkhove"), the President of Phil Van, and one of his Supervisors, Jim Peters ("Peters").

Peters testified that after the issuance of notice on July 7, l995, he talked with Ryan and Luttger about continued employment. There were jobs available one and one-half miles away at Phil Van's service station in Abbotsford, which had the same duties, shifts and rates of pay as the jobs in Clearbrook. According to Peters, Ryan said he was going back to school in September, and Ryan never got back to him after this conversation to indicate he was interested in a job. Luttger also never got back to him about alternate work. Peters said that eight employees, including Ryan and Luttger, received notice on July 7, l995 and two of them, with less experience than Ryan and Luttger, went to work at the Abbotsford station. Peters said that he would have preferred to have employed Ryan and Luttger at the Abbotsford station.

Vandekerkhove testified that he asked Ryan if he was going to work for Peters at the Abbotsford station and Ryan replied he wasn't sure, but he was talking to Peters about the matter.

Ryan and Luttger testified that although they knew that the station would be demolished at any time after July 24, l995, they did not know the exact date. They contend they should have received new notices after July 24, l995 indicating a precise end date of employment. Further, they do not agree that their employment contracts changed to day-by-day contracts effective July 24, l995 as they both worked their regular jobs until their last day of work.

Ryan stated that shortly after he received the July 7, l995 letter, Peters told him that he wanted Luttger to work at the Abbotsford station and Ryan to work at either the Scott Road station, the Schellenberg station (which is not a Phil Van operation) or the Abbotsford station. Peters said that the job at the Abbotsford station would be at the same rate of pay and would have the same duties as the job in Clearbrook. Ryan said that after this conversation he continued to work at the Clearbrook station thinking that he would be transferred to another location after the demolition. Periodically, he confronted Peters about re-locating to another station, and Peters told him he would take care of things and not to worry. During one of these conversations, Ryan indicated he might be going to school. Ryan stated that in fact he never did go to school in September, and even if he had, it was his intent to continue working at Phil Van.

Ryan stated that a few days prior to the day the station was demolished, Peters told him there wasn't any place available, but he could work at the Abbotsford station. Ryan said he told Peters he would accept the job. He would have worked anywhere. On August 31, l995, he waited to hear about the new job. He phoned Peters at the Abbotsford station, but Peters was not in. Ryan did not leave a message or actually go to the Abbotsford station in search of Peters. Finally, he got hold of Peters around September 15, l995. At that time, Peters gave him his Record of Employment and said nothing to him about a job. Ryan said he therefore assumed there were no employment opportunities available for him anymore. He figured he had no job.

Ryan said that he did not look for other work prior to September 15, l995 because during this period he still thought Peters would contact him about a job and he would continue to be employed at Phil Van.

Luttger stated that after he got the July 7, l995 letter, he spoke to Peters around July 13, l995 and Peters told him he would look into getting him a job at another station. Luttger said that although he tried to contact Peters after this conversation, he never saw Peters again until he received his Record of Employment. He said Peters was always busy and had other commitments. On August 27, l995, he tried to reach Peters. He did not try to reach Peters on August 28, l995 as he understood Peters was in Kamloops on that day. When he got home on the night of August 28, l995, his roommate told him the wrecking ball would be in on the following day. Luttger said that after the station was demolished, he tried to reach Peters by pager, but was unsuccessful. He left messages on the pager and at the station. He did not go to the station in search of Peters. Shortly thereafter he received his final cheque in the mail. He finally saw Peters again when he received his Record of Employment, which was only in the last few months.

Luttger stated that his roommate got a job at the Abbotsford station. His roommate told him that he had managed to talk to Peters and Peters said that work was available. Luttger said he did not look for other work after the July 7, l995 notice as he assumed he would still have a job with Phil Van after the demolition of the Clearbrook station.

Elchuk argues that notice of termination must be clear and unequivocal as to the exact date of termination. The July 7, l995 letter was not clear that Ryan's and Luttger's employment would end on July 24 and in fact both worked beyond this date. Further, the *Act* states that if an employee works past the notice period, then the notice has no effect. Elchuk contends that neither Ryan or Luttger received proper notice prior to their employment being terminated.

He further argues that Ryan and Luttger were not employed on a day to day basis after July 24, l995. There was no discussion with Ryan and Luttger about such a contract of employment. Further, the information contained in their Records of Employment and the fact that these Records were only issued once, when Ryan's and Luttger's employment finally ceased, supports his position that there was no change in their contracts of employment.

Elchuk also argues there is no requirement under the *Act* on the employee to mitigate any damages by seeking alternate employment. Although there may be a requirement under common law to mitigate, there is none under statute law. Any concept of mitigation of damages does not apply to the statutory minimum standards set out in the *Act.*

In support of his position he cited the following County Court of B.C. decision: **People's Food Market Ltd. v. B.C. (Director of Employment Standards) 1986**.

Elchuk further contends that the onus is on the employer to prove that reasonable alternative employment was offered and refused by the employee. In this case, it is unclear as to what was offered, if anything, and there is no evidence Ryan and Luttger refused jobs. The burden is on the employer to make job offers. An employee is not required to follow-up with an employer and is not responsible for contacting the employer about the specifics of a job offer.

In closing, Elchuk indicated that he wanted to add vacation pay into his calculations. This was strongly objected to by Kitsul.

ANALYSIS

I find that Ryan and Luttger were not given notice of termination as required by the *Act*. Section 67 (1) (b) of the *Act* states that notice given to an employee has no effect if the employee continues to be employed after the notice period ends. If one accepts that Ryan and Luttger received two weeks notice to July 24, l995, then the notice had no effect as both continued their employment beyond that date.

I further find that Ryan and Luttger were not employed on a day-to-day basis after July 24, l995. First, there is no evidence that Ryan and Luttger were advised they were employed on a day-to-day basis. Second, Section 67 (2) (a) of the *Act* prohibits an employer from altering an employee's conditions of employment after notice is given, without the employee's consent. Here, there is no evidence that Ryan and Luttger agreed to be employed on a day-to-day basis after July 24, l995. Third, the Records of Employment issued to Ryan and Luttger indicate they were continuously employed to the end of August, l995 and do not suggest the employment relationship between the parties ended or changed on July 24, l995.

Regarding the issue of reasonable alternative employment, although I am satisfied that it was available at the Abbotsford station, I am not satisfied it was offered to, and refused by Ryan and Luttger. Conflicting testimony was presented on the issue of job offers. Peters claimed that Ryan and Luttger never got back to him about jobs, and Ryan and Luttger claimed that Peters never got back to them about job offers. The onus is on Phil Van, however, to demonstrate that an offer was made to Ryan and Luttger. The availability of work and any job offer (including the details of an offer, such as a start time/date) would be within the knowledge of Phil Van and not within the knowledge of Ryan and Luttger. In my opinion, Phil Van has not shown that Ryan and Luttger were clearly made aware that they had specific jobs in Abbotsford and were to start on a certain day and time. Phil Van has also not established that Ryan and Luttger refused jobs. There is no evidence that either ever stated they did not want jobs in Abbotsford and the Records of Employment indicate there was no work available, not that Ryan and Luttger refused jobs.

In the **People's Food Market** case the Court held that the principle of mitigation did not apply to the statutory severance pay requirements of the old *Act.* In my opinion, the principle of mitigation is not applicable to the comparable provision (Section 63) of the new *Act.*

The purpose of the *Act* is to ensure that employee's receive basic minimum standards of compensation and conditions of employment. The *Act* clearly prohibits any waiving of these requirements. Section 63 of the *Act* sets out the requirements of an employer to pay compensation for length of service. There is no requirement for employees to mitigate their damages after an employer terminates their employment. The *Act* makes no provision for mitigation to be considered in determining compensation for length of service.

For the above reasons, I conclude that Ryan and Luttger are each owed 2 weeks compensation for length of service as outlined in the Determination.

I decline to consider the issue of vacation pay, given the objection by Kitsul and the fact that no notice was given to the other parties of this issue prior to the hearing.

ORDER

Pursuant to Section 115 of the *Act*, I order that Determination No. CDET 001113 be confirmed.

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Norma Edelman
Registrar
Employment Standards Tribunal

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