Employment Standards TRIBUNAL

An appeal

- by -

Attila Balazs
("Balazs")

- 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: April D. Katz

FILE No.: 2002/129

DATE OF DECISION: July 15, 2002

DECISION

SUBMISSIONS:

Attila Balazs	on his own behalf
Mark Metzner	on behalf of Performance Motor Group Inc.
Jim McPherson	on behalf of the Director of Employment Standards

OVERVIEW

Attila Balazs ("Balazs") appealed a Determination which found that he was not entitled to compensation for length of service when his employment ended after 4 years of working for Performance Motor Group Inc. ("AMG"). AMG laid Balazs off due to shortage of work and Balazs found employment the same day. AMG tried to recall Balazs to work 18 days later but Balazs did not report to work on the day agreed. Another letter was sent and Balazs did to return to work. AMG concluded that Balazs had voluntarily left his employment. Balazs claims he was laid off permanently.

This appeal proceeded by written submissions.

ISSUE

Did the Director err in finding that Balazs permanently end his employment and that he is therefore not entitled to compensation for length of service?

ARGUMENT

In his appeal Balazs argued that AMG permanently ended his employment on June 4, 2001 and not June 1, 2001 as found in the Determination. He argues that the wage calculation in the Determination missed three days of work that were not included in the calculation. He argued that if there was a shortage of work he should not have been laid off as there were three co-workers with less experience who continued to work after he was told to leave.

He argued that on June 4, 2001 when AMG called him in they wanted him to accept an ROE back dated 30 days or they told him they would fabricate cause to end his employment. When Balazs refused either alternative, AMG made up the story that he was temporarily laid off. He argued that he would not have found new employment immediately if he believed it was a short term lay off. When Balazs received the letter dated June 19, 2001 offering him work on June 21, 2001, Balazs was sick. He phoned AMG and arranged to start on June 25, 2001. Balazs believed a co-worker's advice not to give up his full time work with another employer because if he returned AMG would find a reason to end his employment as quickly as possible.

Balazs stated he had a witness whom the officer failed to interview. This witness could verify everything he argued.

AMG argued the employment continued when Balazs was laid off due to a shortage of work and only ended when Balazs did not report for work as agreed on June 25, 2001. AMG argued no compensation was due because Balazs ended his employment by his conduct.

The Director's Delegate argued that the evidence supported the conclusion that the lay off was within the definition of "temporary layoff" in the *Employment Standards Act* as being up to 13 weeks layoff within 20 weeks of consecutive employment. Balazs was contacted to come back to work within 3 weeks of his layoff and did not return. The Determination states that Balazs received the three letters from AMG about returning to work which Balazs does not dispute. These letters, the Director argued demonstrate that Balazs left his employment voluntarily and is therefore not entitled to compensation for length of service.

FACTS

Balazs was employed as an auto body repair technician earning $26 per hour from March 24, 1997 until June 4, 2001 when he was told he was laid off. The Record Of Employment dated June 6, 2001 said Balazs was laid off due to a shortage of work. After Balazs' employment was terminated less experienced employees continued to work. Balazs found work the day he was laid off and did not use his ROE until September when he was laid off from his second job.

On June 19, 2001 AMG wrote to Balazs and told him there was work for him. AMG spoke to Balazs on June 20, 2001 and they agreed he would start work on June 25, 2001. Balazs did not report to work and AMG wrote on June 26, 2001 stating his failure to report indicated he had voluntarily left his employment. The letter indicated Balazs should contact AMG if he disagreed with their conclusion. Balazs did not contact AMG. On July 9, 2001 AMG wrote to Balazs confirming that Balazs did not report for work or provide any explanation for not returning that would change their conclusion that he had voluntarily left his employment.

The Determination reviewed the employment record times. Balazs raised specific concerns in his appeal about his hours on June 4, 2001, April 7, 2000 and October 5, 1999. The record of calculation includes, 4 hours for June 4, 2001, 4 hours for April 7, 2000 and 8 hours for October 5, 1999. The Determination concluded that Balazs was owed some outstanding wages that AMG has paid and is in trust for Balazs. Balazs was not prepared to sign a release to receive these funds.

ANALYSIS

The onus of proving the Director has erred is on the appellant in an appeal to the Tribunal.

The Appeal raised issues around the nature of Balazs' termination of employment and whether he was paid appropriately while he was working. From the appeal there is no evidence that Balazs' hours of work were not fairly calculated by the Director's Delegate. The specific dates of concern were included in the calculation and there is no additional evidence to support any change in this regard.

With respect to the ending of Balazs' employment, Balazs indicates that AMG wanted him to go but did not want to pay him any length of service compensation. To avoid paying the compensation AMG wanted him to accept a back dated notice. Balazs was unable to provide evidence of a back dated Record Of Employment.

The Record Of Employment Balazs provided indicated shortage of work and unknown recall dated. When AMG called Balazs back he had the option of returning. He had secured alternative employment and he believed AMG would find another way to end his employment. Returning was a risk, but not returning meant he chose not to show up for work. It was a hard choice but a choice Balazs knew he was making.

Balazs had filed his complaint with Director. He could have consulted the Employment Standards Office about the consequences of not returning to AMG. Section 63 (3) of the *Employment Standards Act* ("*Act*") sets out an employer's liability for compensation for length of service. The section reads as follows.

> **Liability resulting from length of service**
> **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 one additional week's wages for each additional year of employment, to a maximum of 8 weeks' 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) 2 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.

Balazs failed to go to work as agreed on June 25, 2001. By failing to return to the workplace after receiving a "temporary layoff" Record of Employment, Balazs **terminated** his employment with AMG. Under the *Act* AMG is not liable for any compensation for length of service.

It may well be that AMG wanted to end Balazs' employment for a long period. AMG may not have wanted to pay compensation. If Balazs had returned to work and been laid off permanently, AMG would have been liable for compensation. The option of returning to work on June 25, 2001 was within Balazs' control. He made a choice. The choice he made deprived him of the ability to claim compensation for length of service as found in the Determination.

CONCLUSION

Based on the evidence provided there is no evidence to support the appeal. The Determination is therefore confirmed.

ORDER

Pursuant to section 115 of the Act, I order that the Determination in this matter, dated February 21, 2002 is confirmed.

April D. Katz
Adjudicator
Employment Standards Tribunal