

**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 -

Okanagan Truss (1989) Ltd.  
("OK Truss")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** David Stevenson

**FILE No.:** 96/499

**DATE OF HEARING:** November 29, 1996

**DATE OF DECISION:** December 6, 1996

## DECISION

### APPEARANCES

for the Appellant:	Mark Swanky
for the Complainants/Respondents:	Kirby Grant, Esq. (for Robert Daoust) Kurt Bullach and Darra Bullach (for
For the Director:	no one appearing

### OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "Act") by Okanagan Truss (1989) Ltd. ("OK Truss") from a Determination of a delegate of the Director of the Employment Standards Branch (the "director"), Number CDET 003582, dated August 2, 1996. The Determination found OK Truss in contravention of Section 63(2) of the *Act* in respect of the termination of two employees, Kurt Bullach and Robert Daoust, and ordered OK Truss to pay the amount of \$5483.25 to the two employees in respect of the contravention. OK Truss says it should not be required to pay length of service compensation to either employee in the circumstances of the respective terminations of employment. In effect, OK Truss says it should be discharged from its statutory liability to pay length of service compensation because both employees terminated the employment, Kurt Bullach ("Bullach") by asking to be laid off and Robert Daoust ("Daoust") by not responding to a recall from layoff.

### ISSUE TO BE DECIDED

The issue in this case is whether OK Truss has established either employee terminated their employment.

### FACTS

OK Truss was, for many years, in the business of manufacturing residential and commercial roof and floor trusses for the construction industry in the Okanagan Valley and surrounding areas. Mark Swanky ("Swanky") assumed control of the company in 1989. There were eleven full time employees. Through his hard work, perseverance and commitment to a quality product he increased the fortunes of the business. The employee compliment grew to thirty-eight at its peak. In retrospect, Swanky admits he grew too soon and too fast. Then, as the number of competitors in the valley increased and the amount of new construction declined, the company felt the strain of a large wage cost and reduced income.

In July, 1995 some employees were laid off, including Daoust. Daoust had been employed by OK Truss since May, 1990. At the time of the layoff he was employed as a sawyer and was earning \$13.65 an hour. Only four other employees had a higher hourly rate. This was the fourth time Daoust had been laid off while employed at OK Truss, but it was the first time a layoff had occurred during what would be considered a peak construction period. Approximately six to eight weeks after the layoff, Warren Molnar ("Molnar"), then shop foreman for OK Truss, called the home of Daoust. He did not talk to Daoust, but did talk to his father. According to the evidence before me, Molnar asked if Daoust was at home. When his father replied in the negative he was asked when Daoust would be home. He replied he would be home around dinnertime and Molnar replied he would call back then. Mr. Daoust gave that message to his son. Molnar did not call back that night. When no call came for two days, Daoust called the office of OK Truss. He was not able to speak with Molnar, but left a message he had called. He heard nothing further from Molnar or anyone else at OK Truss. Daoust says he was not working in Vernon or anywhere else when Molnar called and he found no other employment until August, 1996.

In late September or early October, with the financial condition of the business continuing to decline, Swanky asked his employees to take a ten percent wage cut. The employees agreed but many, as might be expected, were not happy. The pressures of the business were becoming a personal burden for Swanky and he decided to sell. Through the latter part of 1995, several prospective buyers visited and viewed the business. This activity did not go unnoticed by the employees and the rumours began to circulate concerning the future of the business and of certain employees. In early January Swanky met with the employees and told them he was trying to sell the business and Revelstoke Building Supplies was interested in buying it. He also told the employees whether or not the business was sold he was moving up north and he would be gone by mid-March.

On January 22, 1996, Bullach was given two weeks notice of layoff. He says this notice was unexpected as he was one of the most senior employees of OK Truss, having been there since April, 1986. The notice of layoff stated:

We regret to inform you that as of February 5, 1996, you will be laid off from Okanagan Truss (1989) Ltd.

Due to a work slowdown within the industry, we find it necessary to reduce our staff. You have given us every indication that this layoff will comply with your wishes.

He attempted to raise the content of the letter with Swanky the afternoon he received it, but Swanky was unresponsive, saying it was not the appropriate time or place to discuss it, but would meet him the following morning. Bullach says he took issue with the statement the layoff would comply with his wishes. He says he never asked Swanky to lay him off and he was never given an option to be laid off or to continue working until the business was sold or closed.

The evidence does suggest Bullach spoke openly to other employees expressing his general unhappiness with the state of affairs and suggesting it would be better for both he and the company if he was laid off. In a very real sense he challenged the employer to lay him off, as the last sentence of the layoff notice indicates. But I accept there is no evidence that he asked Swanky or Molnar to be laid off and was not given an option to accept layoff as of February 5, 1996 or to continue working until Swanky moved north.

## **ANALYSIS**

Section 63 of the *Act* places a statutory liability upon an employer to pay length of service compensation to each employee upon completion of three consecutive months of employment. In a sense length of service compensation is a statutory benefit conferred upon an employee. The amount of compensation increases as the employee's length of service increases to a maximum of 8 weeks' wages. An employer may effect a discharge from this statutory obligation by providing written notice to the employee equivalent to the length of service entitlement of the employee or by providing a combination of notice and compensation equivalent to the entitlement of the employee. An employee may cause an employer to be discharged from the statutory obligation by doing one of three things: first, self terminating employment; second, retiring from employment; and third, giving just cause for dismissal.

In respect of Daoust, the employer gave no written notice prior to his layoff. No compensation has been paid. The employer has done nothing to discharge its statutory liability. Daoust did not retire and the employer has not alleged just cause for dismissal. The only basis for asserting the employer has been discharged of its statutory liability to pay Daoust length of service compensation is if Daoust terminated his employment.

Similarly, the employer has not given sufficient written notice to Bullach to discharge its statutory obligation to pay length of service compensation to him. Nor has it paid any compensation to him. Bullach has not retired and just cause is not present. Again, the only basis for asserting the employer has discharged its statutory liability to pay length of service compensation to Bullach is if he terminated his employment.

While the *Act* uses the word “terminate” in paragraph 63(3)(c) to describe the action of employee which would discharge the statutory obligation of an employer in Section 63, the term is intended to capture any manner by which an employee chooses to end the employment relationship. Labour relations concepts such as abandonment, resignation and voluntary termination or severance of employment are all notions caught by the term. To the lay person, however, it is simply known as a “quit”. The question I have to answer is whether, in all of the circumstances present in this case, I can find either or both Daoust and Bullach quit OK Truss. The position the Tribunal takes on the issue of a quit is now well established. It is consistent with the approach taken by Labour Boards, arbitrators and the Ontario Employment Standards Tribunal. It was stated as follows in the Tribunal’s decision *Burnaby Select Taxi Ltd. -and- Zoltan Kiss*, BC EST #91/96:

The right to quit is personal to the employee and there must be clear and unequivocal facts to support a conclusion that this right has been exercised by the employee involved. There is both a subjective and an objective element to a quit: subjectively, the employee must form an intent to quit; objectively, the employee must carry out some act inconsistent with his or her further employment. The rationale for this approach has been stated as follows:

. . . the uttering of the words “I quit” may be part of an emotional outburst, something stated in anger, because of job frustration or other reasons, and as such it is not to be taken as really manifesting an intent by the employee to sever his employment relationship.

**Re University of Guelph**, (1973) 2 L.A.C. (2d) 348

Daoust did absolutely nothing to indicate to the employer he had quit OK Truss. Molnar, the person apparently charged with the responsibility of determining his availability for work did not even talk with him. Instead he relied on unsubstantiated hearsay communications to unilaterally conclude - quite incorrectly it appears - Daoust was working elsewhere and had no desire to return to, and in fact had quit, OK Truss. They have not met the burden of establishing they have been discharged of their statutory obligation by any conduct of Daoust and their appeal in respect of the Determination for Daoust is dismissed.

While I find Bullach did express what could be interpreted as “an intention” to terminate his employment, I can find no objective manifestation of that statement in his conduct. The comments by Bullach were part of the frustration and anger he felt about the situation evolving at OK Truss. Swanky made this observation in a letter written 12 days before the layoff of Bullach:

Kurt is still acting like an asshole, ever since the payout he hasn’t been the same.

That comment also fairly summarizes the evidence. Bullach was angered by the payout and by what he felt was a failure on the part of Swanky to live up to his contribution to the cost saving when he failed to promptly return a leased vehicle. He expressed his anger to anyone who would listen. He was a further disruption in an already unsettling situation. Swanky decided to remove his influence. He did not have cause to terminate. He laid Bullach off believing his obligation to him was to provide two weeks written notice. He was wrong. Bullach was entitled to 8 weeks written notice or compensation for length of service in lieu of notice. The appeal in respect of the Determination for Bullach is also dismissed.

## **ORDER**

I order, pursuant to Section 115 of the *Act*, Determination, Number CDET 003582, dated August 2, 1996, be confirmed.

.....  
**David Stevenson**  
**Adjudicator**  
**Employment Standards Tribunal**