EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act

-by-

Stordoor Investments Ltd.
Operating as Overhead Door Co. of Vancouver

("Overhead Door")

-of a Determination issued by-

The Director of Employment Standards

(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 96/526

DATE OF HEARING: December 2nd, 1996

DATE OF DECISION: December 10th, 1996

DECISION

APPEARANCES

Mac Gordon for Stordoor Investments Ltd.

Ernest Helliker on his own behalf

Diane MacLean for the Director of Employment Standards

OVERVIEW

This is an appeal brought by Stordoor Investments Ltd. operating as Overhead Door Co. of Vancouver ("Overhead Door") pursuant to section 112 of the Employment Standards Act (the "Act") from Determination No. CDET 003724 issued by the Director of Employment Standards (the "Director") on August 16th, 1996.

The Director determined that Overhead Door owed its former employee, Ernest Helliker ("Helliker"), the sum of $3,285.85 representing four weeks' wages as compensation for length of service pursuant to section 63(2) of the Act. The Director found that Helliker was "constructively" dismissed as defined by section 66 of the Act. Overhead Door maintains that there was no constructive dismissal and that, in effect, Helliker voluntarily resigned his employment.

An appeal hearing was held in Burnaby, B.C. on December 2nd, 1996. Mr. Mac Gordon ("Gordon") appeared as the authorized representative for Overhead Door and was its sole witness. Helliker testified as the sole witness called on his own behalf. The Director did not present any evidence.

FACTS

The parties are in agreement on many of the key facts. Helliker was hired in May 1991 to be the Fraser Valley sales representative for the company's products. Helliker worked out of his home in Abbotsford and was styled as a "sales manager" although, in truth, he only managed himself--he constituted a one-person office.

Helliker was paid a monthly salary that ranged from $2,850 when he was hired to $3,236 when his employment ended in September 1995.

Overhead Door also provided Helliker with a pickup truck to assist him in carrying out his employment duties. The main local office of the company is located in Burnaby. Helliker was required to attend at the Burnaby office once each week to pick up materials that would be required by an installer (installers were contracted as needed). The pickup truck was supposed to be used for business purposes but Helliker had full-time use of the vehicle and treated it, at least in some sense, as a personal vehicle. Overhead Door did not report to Revenue Canada that the truck was a taxable benefit to Helliker, nor did Helliker report his personal use of the truck as a taxable benefit on his own tax return.

The sales volume that the Overhead Door initially hoped that Helliker would achieve failed to materialize and in late August 1995 the corporate head office in Edmonton advised Gordon that the Fraser Valley "branch office" was going to be closed down. This decision was communicated to Helliker by Gordon at a luncheon meeting on September 7th, 1995. During this luncheon, Helliker was offered an "inside" sales position working out of the Burnaby office. In order to create this position for Helliker, Gordon had sought and obtained permission to terminate the current inside sales representative (who was viewed as an unsatisfactory employee) and to maintain Helliker's salary at the same level (although Helliker's salary was about $10,000 per annum higher than this inside sales representative).

Although Helliker's salary was to remain unchanged, Helliker was concerned about the length of the daily commute from Abbotsford to Burnaby (about ninety minutes each way) and about the loss of the use of the company truck. The employer's position was that since Helliker would no longer require the truck to carry out his duties (*i.e.,* there would be no "outside" sales calls as he would be working from a sales desk), it would no longer be necessary to provide him with a corporate vehicle.

These two concerns--the travel time and loss of the use of the truck--lead Helliker to ask for some time to think about the employer's proposal. There were intermittent discussions between Helliker and Gordon over the ensuing days and by September 12th Helliker was still not prepared to commit to the proffered inside sales position in Burnaby and, accordingly, Gordon took that refusal to be tantamount to a resignation. Helliker's final pay was deposited to his bank account on September 15th and a Record of Employment was issued on September 20th

indicating that Helliker had “quit” (Code E on the Form). The employer does not assert that it had just cause to terminate; rather it says that Helliker simply refused to accept a reasonable lateral transfer from Abbotsford to Burnaby.

ISSUES TO BE DECIDED

Two related issues need to be addressed:

> • First, was Helliker constructively dismissed? (section 66)
>
> • Second, if so, is the employer nonetheless relieved of its obligation to pay compensation for length of service because Helliker refused a reasonable alternative employment offer? [section 65(1)(f)]

ANALYSIS

Was Helliker terminated?

It is clear that the Overhead Door did not purport to terminate Helliker. The Director proceeded on the basis that Helliker was “constructively” dismissed, relying on section 66 of the Act which provides as follows:

> 66. If a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated.

Section 66 has two elements, the first being that the employer alters a “condition of employment”, the second being that such alteration is “substantial”. The Director found that the there were several differences between the new “inside” sales position and Helliker’s former “outside” sales position including a change of work venue and the loss of the company vehicle. It cannot be denied that the “inside” sales position differed in some material aspects from the former “outside” sales position, however, I am not satisfied that these aspects were “conditions of employment” nor am I satisfied that these aspects were “substantially” altered. In my view, the term “condition” in section 66 must be given its ordinary legal meaning, namely, a fundamental contractual term.

There is no evidence before me to suggest that Helliker's employment contract with Overhead Door specified that, for so long as he remained in Overhead Door's employ, he would be an outside sales representative working out of his Abbotsford home. Our Court of Appeal has repeatedly held that, absent an express contractual provision, it is an implied term of an employment contract that the employer be given a relatively free hand to transfer the employee from one position to another, or from one geographic region to another [see *e.g., Longman v. Federal Business Development Bank* (1982), 131 D.L.R. (3d) 533; *Reber v. Lloyd's Bank International Canada* (1985),18 D.L.R. (4th) 122; *Lesiuk v. British Columbia Forest Products Ltd.* (1986) 33 D.L.R. 4th 1; and *Cayen v. Woodwards Stores Ltd.* (1993) 100 D.L.R. (4th) 294].

Nor is there any evidence before me that Overhead Door was contractually obliged to provide Helliker a company vehicle *for his own personal use.* The truck was provided to Helliker so that he could make sales calls on current and potential customers and to attend at the Burnaby office to pick up necessary materials for the installers. While Overhead Door undoubtedly did not formally object to Helliker's occasional personal use of the vehicle, I am not satisfied that Overhead Door's *acquiescence* can be relied on to transform the situation into one of *contractual entitlement.*

With respect to the vehicle, I would parenthetically note that Helliker's own conduct is inconsistent with the position that both he and the Director now assert. First, if Helliker had a contractual entitlement to the use (including personal use) of a corporate vehicle, why would he have inquired about purchasing the truck from Overhead Door shortly after being advised of his impending transfer to Burnaby? Second, if Overhead Door was obliged to provide a vehicle for both business and personal use why did neither party treat the personal use portion as a taxable benefit?

In my view, the Director has fallen into error by treating the *effects* of the transfer as evidence of breach of contract. However, it does not follow that because an employee may suffer some pecuniary disadvantage as a result of a lateral transfer, the employer has committed a breach of contract. The issue of appropriate monetary relief should be addressed only after it has first been established that the transfer itself was a breach of contract.

Even if it could be said that the transfer to the Burnaby office and the loss of the use of the truck were alterations in his conditions of employment (and I have already held that they were not), I do not believe that these changes were

sufficiently "substantial" (especially in light of the caselaw referred to above) to constitute a dismissal. I do not believe that in the circumstances of this case, a transfer from one Lower Mainland locale to another was a "substantial" alteration--indeed, in the *Reber* case a transfer (quite arguably, a demotion) from Vancouver to New York was held not be a constructive dismissal.

As for the truck, the primary, if not exclusive, purpose of the vehicle was to facilitate outside sales; in the new position, Helliker would not have been required to make in-person sales calls and, therefore, he would not have needed a vehicle to fulfill his work duties.

Reasonable Alternative Employment

As I have indicated above, I do not see that either the transfer to the Burnaby office, or the withdrawal of the use of corporate vehicle, constituted a breach of contract and, therefore, a "constructive" dismissal under section 66 of the Act. However, if I am wrong in this conclusion, I am nonetheless satisfied that Overhead Door was not obliged to pay Helliker termination pay under section 63 of the Act. An employer is not required to pay termination pay to an employee if one or more of the enumerated exceptions set out in section 65 of the Act applies to the particular employment contract. Of particular relevance to this case is section 65(1)(f) which provides as follows:

> 65. (1) Sections 63 and 64 do not apply to an employee...
>
> (f) who has been offered and has refused reasonable alternative employment by the employer.

In order to bring itself within this exception the employer need not offer an identical position to the employee, however, the offer must be a "reasonable alternative". In my view, the inside sales position at Burnaby was a "reasonable alternative employment" offer. Helliker was offered another sales position at the same salary. He was being transferred to the nearest local office of the employer and would not be required to leave the lower mainland region. This offer was made in good faith by the employer--evidenced, particularly, by the fact that the employer terminated the former inside sales representative in order to make the position available to Helliker--but Helliker, despite being given what I would consider to be a reasonable time to consider the employer's offer, refused to accept the offer.

ORDER

Pursuant to section 115 of the *Act,* I order that Determination No. CDET 003724 be cancelled.

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Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal