

An appeal

- by -

Robert Gordon
("Gordon" or "Employee")

- 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: Paul E. Love

FILE No.: 2002/382

DATE OF DECISION: September 9, 2002

DECISION

OVERVIEW

This is an appeal by an employee, Robert Gordon (“Employee”), from a Determination dated June 26, 2002 (the “Determination”) issued by a Delegate of the Director of Employment Standards (“Delegate”) pursuant to the *Employment Standards Act*, R.S.B.C. 1996, c. 113 (the “Act”). Western Star Trucks Inc. Division of Freightliner Corp (“Western Star” or “Employer”), the Employer, as part of a restructuring plan, gave notice to all non-union employees of a 5 % rollback in wages. The notice was given in writing on September 27, 2001, to commence on January 6, 2002. Mr. Gordon was then given notice on December 3, 2001 that his employment would terminate on September 30, 2002, because of a plant closure. Mr. Gordon argues that the Employer, breached the Act by rolling back his wages by 5 %. Mr. Gordon claims wages based on the pre-roll back rate. Mr. Gordon continued to work for the Employer until he gave two weeks notice, on April 5, 2002, of his intent to resign on April 19, 2002. Mr. Gordon resigned his employment and has taken up other employment. Mr. Gordon argues that he was constructively dismissed and claims an entitlement to severance. I confirmed the Determination as the Employee did not demonstrate that the Employer breached the Act by altering wages, after giving notice of termination. I further found that Mr. Gordon resigned his position, and in any event, the Employer discharged its obligations under section 63 of the Act, by providing more than adequate written notice of termination.

ISSUE

1. Did the Employer breach section 67 of the Act by altering wages after giving the Employee notice of termination?
2. Did the Employer constructively dismiss Mr. Gordon?
3. Is Mr. Gordon entitled to compensation for length of service?

FACTS

I decided this case after considering the submission of the Employee, Employer and the Delegate. The facts in this matter are not significantly in dispute.

Mr. Robert Gordon, was employed with Western Star Trucks Inc. Division of Freightliner Corp. On September 27, 2001, the Employer gave written notice of a 5 % wage roll back for all non-union employees. The roll back was to take effect on January 6, 2001. This notice was given as part of a comprehensive “Turnaround Program” for the business, which was experiencing a collapse of the Class 8 truck market in North America. On November 15, 2001 Mr. Gordon signed an amendment to his employment contract. The amendment provided that the Employer could terminate the agreement by giving written notice in accordance with the termination policy attached as Schedule “C”. For Mr. Gordon, this meant he could be terminated by giving him 16 weeks notice or paying 16 weeks salary. On December 3, 2001 all non-union employees, including Mr. Gordon received notices of termination, which became effective on September 27, 2002. The Employer intended to close its Kelowna plant operation at the end of September 2002.

Mr. Gordon lodged a complaint in writing with his Employer on January 25, 2002 objecting to the wage roll back as a violation of section 67(2) of the *Act*.

Mr. Gordon found replacement employment and quit his job with the Employer on April 5, 2002, given two weeks notice. His final date was April 19, 2002. The text of his letter of resignation reads as follows:

Please accept this letter as my written resignation from Western Star Trucks Inc. Thus giving the company two weeks notice as required by my employment contract, with my last day of employment with Western Star Trucks Inc., being the end of my shift April 19, 2002.

Mr. Gordon seeks severance pay, and compensation for the 5 % roll back, vacation pay and interest.

The Delegate investigated this matter and determined that Mr. Gordon was paid in excess of the minimum wage set out in the *Act*, and that:

The *Employment Standards Act* does not intervene in management right to establish a rate of remuneration as long as it is not less than the minimum wage. There is nothing prohibiting an employer from altering the rate of pay prior to notice being given.

The Delegate concluded that there was no violation of section 67 of the *Act* as alleged by Mr. Gordon, as the salary roll back notice preceded the date on which he received the notice of termination.

Employee's Argument

Mr. Gordon filed an appeal claiming that his written consent was not given to a roll back of his wages by 5 %, and that he was constructively dismissed. He seeks payment of \$839.00 per week from January 6, 2002 to April 19, 2002, and also seeks to have the Employer pay severance as stated in the contract.

Employer's Argument

The Employer submits that it made changes in the wage structure in the hope of cutting costs to remain in business. The Employer's position is that it has complied with the *Act*, by giving Mr. Gordon advance notice of change in compensation, and adequate advance working notice of termination. The Employer further argues that Mr. Gordon resigned his position, and that he is not entitled to compensation for length of service. The Employer further argues that the notice given was in excess of the minimum standards set out in the *Act*.

Delegate's Argument

The Delegate says that this is a case of resignation, not constructive dismissal, as the Employee did not tender his resignation following the announcement of the wage roll back, but continued to work and resigned some seven months later. Further, the Delegate says that the Employer complied with the *Act*, but providing "written working notice" in excess of its obligations under the *Act*. The Delegate says that the Employer complied with section 67 of the *Act* by giving notice of the salary roll back prior to giving Mr. Gordon his notice of termination.

ANALYSIS

In an appeal under the *Act*, the burden rests with the appellant, in this case, the Employee to show that there is an error in the Determination, such that the Determination should be canceled or varied. I would like to deal with the issues in the order set out above.

Section 67 Issue

Mr. Gordon argues that the Employer is in breach of the *Act*, by reducing his wages after having given him notice of termination. Section 67(2) reads as follows:

Once notice is given to an employee under this Part, the employee's wage rate, or any other condition of employment must not be altered without the written consent of

- (a) the employee
- (b) a trade union representing the employee.

Mr. Gordon was given notice on September 27, 2001 that his wages would be reduced as of January 6, 2002. He received his termination notice on December 3, 2001. Section 66 of the *Act* is intended to prevent the Employer from making changes in working conditions after the Employer has given an Employee notice of termination. This section is not intended to restrict the manner in which an employer carries on business in the usual course, and management of a business is generally the prerogative of the Employer. In this case it is apparent, however, that Mr. Gordon was given notice of changes in his remuneration, prior to notice of termination. In the context of a change in the wage rate, consent is only needed, where the Employer gives notice of a change in the wage rate, and changes the wage rate, after having given the employee notice of termination. The change of wage rate was one that was contemplated by the Employer prior to the date of termination. The Employee was notified of the change prior to his termination of employment. For the above reasons, I reject Mr. Gordon's argument that the Employer has breached section 67(2) of the *Act*.

Constructive Dismissal or Resignation?

The Delegate did not make any finding in the Determination that disposes of Mr. Gordon claim that he was constructively dismissed, and the Determination contains no analysis of section 66 of the *Act*. In my view this was an error, however, in my view the only conclusion to be drawn from the facts of this case is that Mr. Gordon resigned his position.

I note that the Employer did reduce this employee's wages by 5 %, as it reduced the wages of all other non-union wage earners. Mr. Gordon was given notice of this event on September 27, 2001. In my view, by continuing to perform the employment contract for a period of six and a half months, after notice, it cannot be said that Mr. Gordon was "constructively dismissed" by the Employer. Section 66 of the *Act*, provides that if an Employer substantially alters a condition of employment, the Director may consider the employment relationship to be terminated. This Tribunal has held that an Employer who give reasonable notice of a change does not constructively dismiss an employee: *Irvine*, BC EST # D005/01. However, by working for a period of three months after the rate change was effected, Mr. Gordon affirmed and accepted the changes to the employment contract.

Constructive dismissal is a matter to be inferred from the facts of the case. The evidence in this case, clearly indicates that Mr. Gordon resigned his job. I cannot ignore the fact that Mr. Gordon knew that the Employer intended to close permanently the Kelowna operation, and that he would be without any employment after the end of September of 2002. The Employer gave notice to minimize the disruptive effect of its plant closure. Mr. Gordon did find alternative employment, and appears to have exercised his right to resign, when he had secured alternative employment. For the above reasons I am not satisfied that the Delegate erred in determining

Entitlement to Severance

In my view, this is a clear case of an Employee who resigned from his employment, after having been given notice by the Employer on December 3, 2001 that it was ceasing operations by the end of September of 2002. When the Employer gave notice of the termination of employment it also indicated:

Please note that you are not eligible for the severance package if you voluntarily resign.

Section 63 (1), of the *Act* deals with the Employer's liability for compensation for length of service. Section 63 of the *Act* reads as follows:

- 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 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 cause.

By voluntarily resigning his position, Mr. Gordon gave up any right to compensation for length of service under the *Act*, pursuant to section 63(3)(b) as he terminated the employment relationship.

In any event, on December 3, 2001 the Employer provided written “working notice” of the termination to Mr. Gordon. The last day of employment was September 30, 2002. This is in excess of nine months notice. An Employee in Mr. Gordon’s position, with his years of service, in the absence of a resignation would be entitled to eight weeks compensation for length of service, pursuant to section 63(1) of the *Act*. An employer can discharge its liability under section 63(3) by giving a combination of notice or money equivalent to the amount the employer is liable to pay.

I note that the Employer, complied with the *Act*, by giving a far more generous working notice, than Mr. Robert’s entitlement under the *Act*. The working notice given by the Employer discharged its liability under section 63 of the *Act*, for compensation for length of service.

ORDER

Pursuant to s. 115 of the *Act* I order that the Determination dated June 26, 2002 is confirmed.

Paul E. Love
Adjudicator
Employment Standards Tribunal