

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, c.113

-by-

Flameco Holdings (1996) Ltd.
(" Flameco ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

AJUDICATOR:	Carol Roberts
FILE NO.:	98/443
DATE OF HEARING:	September 14, 1998
DATE OF DECISION:	September 21, 1998

DECISION

APPEARANCES

Don Gress Doug McConnell Rolf DeGiest	For Flameco (1996) Ltd.
Ken McLean	On his own behalf

OVERVIEW

This is an appeal by Flameco Holdings (1996) Ltd. ("Flameco"), pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued June 18, 1998. The Director found that Flameco contravened Sections 18(1) and 63(2) of the *Act* in failing to pay Ken McLean ("McLean") compensation for length of service, and Ordered that Flameco pay \$1353.50 to the Director on behalf of McLean.

Flameco claims that McLean quit the company, and is not entitled to compensation.

ISSUE TO BE DECIDED

Whether the Director correctly determined that McLean was constructively dismissed, and was entitled to compensation for length of service.

FACTS

McLean worked for Flameco for over 12 consecutive months, but less than 3 years. He resigned his position on March 31, 1998. McLean was paid a base salary of \$2,250 per month, a 5% commission on sales of homes that are occupied and 2.5% on unoccupied (new) homes, and a monthly car allowance.

In early part of 1998, Mr. Gress ("Gress") who was previously a silent partner in the company, became more active in the organization and management of its affairs. There was some discussion that new sales staff would be hired.

At the end of March, Gress presented a new pay structure to McLean. It indicated that as of April 1, 1998, the base salary was to be reduced to \$1,500 per month with a variable commission. There was no monthly car allowance. Additional sales staff were also to be hired, in accordance with the overall restructuring plan.

The Director's delegate determined that the new compensation package, which reduced the base monthly salary \$750.00 per month, eliminated the car allowance, and revised commission structure "...constituted a significant alteration to a fundamental condition of employment, sufficiently significant as to amount to both a repudiation of the existing employment contract and an offer of

continued employment under the revised terms. McLean chose not to accept the offer of continued employment."

Argument

Flameco argues that the restructuring of the company was necessary to ensure its economic viability. Flameco's evidence, which was not disputed, was that the new, inexperienced sales staff were earning much more than McLean was, due to an increased volume of sales. Flameco contended that the new structure would have more profitable to McLean.

Flameco denies constructively dismissing McLean.

ANALYSIS

The burden of establishing that a Determination is incorrect rests with an Appellant. On the evidence presented, I am unable to find that burden has been met.

I do not find anything new in Flameco's appeal documentation or argument that was not presented to the Director. The Tribunal has held that an appeal is not an opportunity to rehear the evidence or to retry the case (*Kaiser Stables Ltd.* B.C.E.S.T. D058/97, and *Tri West Tractor* B.C.E.S.T.D058/97). It is not open to me to review evidence presented to the Director's delegate unless it can be shown that he erred.

I am not able to find that the Director erred in his consideration of the facts, as alleged by Flameco. McLean's total sales for the months of January through March of 1998, the number of salespersons, or the company's financial situation are not issues relevant to the issue of whether there is a substantial alteration of a condition of employment.

Section 66 of the *Act* provides that

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

One of the factors which may be considered in determining whether there is a substantial alteration to the condition of employment is a reduction in the wage rate. The question of the employer's intent is not central to this issue.

Flaemeco reduced the base salary \$750.00 per month, took away McLean's \$300.00 per month vehicle allowance - a reduction to the base compensation of over \$1000.00 per month. Furthermore, commissions were to be paid only after sales reached \$15,000, rather than the existing \$12,000.

The Director concluded that the effect of these unilateral changes was a substantial change to the condition of employment. I am unable to find that this conclusion is incorrect.

The appeal is dismissed.

ORDER

I order, pursuant to Section 115 of the *Act*, that the Determination, dated June 18, 1998, be confirmed together with any interest that may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

Carol Roberts
Adjudicator
Employment Standards Tribunal