

**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 -

Walter Hopp  
("Hopp")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** David Stevenson

**FILE NO.:** 97/520

**DATE OF HEARING:** September 9, 1997

**DATE OF DECISION:** September 23, 1997

**DECISION**

**APPEARANCES**

for the Appellant:	In person
for Don Folk Chevrolet-Oldsmobile Inc.:	Mance Binkley Chris Teal

**OVERVIEW**

This is an application under Section 112 of the *Employment Standards Act* (the “Act”) by Walter Hopp (“Hopp”) from a Determination of a delegate of the Director of Employment Standards (the “Director”) dated June 20, 1997. In that Determination, the Director concluded Hopp had lost his statutory entitlement to length of service compensation because he had refused reasonable alternative employment offered by the employer. The Director also concluded Hopp had no outstanding vacation pay owing to him, as the vacation pay that was owed to him as of December, 1993, when he went on disability benefits, was used to satisfy his obligation to pay a share of the medical and related benefits he continued to receive during his period of absence.

**ISSUES TO BE DECIDED**

There are two issues to be addressed in this case: the first is whether Hopp was offered and refused reasonable alternative employment by his employer; and the second is whether Hopp has persuaded me the conclusion of the Director that he had no vacation pay owing to him was wrong.

**FACTS**

Hopp commenced his employment with Don Folk Chevrolet-Oldsmobile Inc. (“Don Folk”) in February, 1979 as the service shop foreman. In September of 1992 he was involved in a motor vehicle accident. He was off work for a period of time, unsuccessfully attempted to return to work on two occasions in 1993 and, on December 8, 1993, was placed on short term and then long term disability benefits where he remained until March, 1996 when his long term disability benefits were canceled by the insurer. Between March, 1996 and August, 1996 he

continued to experience medical problems related to the accident and was unable to attempt a return to his employment with Don Folk. At the end of August, 1996 he received medical clearance to return to work. He contacted Don Folk, wishing to meet with Manse Binkley ("Binkley"), the General Manager, and discuss his situation. Binkley was not able to meet with Hopp and requested Chris Teal ("Teal"), the Service Manager, to meet with Hopp instead. Hopp and Teal met on September 5, 1996. There were two matters of importance discussed during that meeting: first, Teal told Hopp the position of service shop foreman had been eliminated; and second, that it was possible Hopp could return as a flat rate technician.

It is apparent from the evidence that Hopp did not accept his former position had been eliminated. Also, he was lukewarm to the idea of returning to the tools as a technician, as he felt he was out of practice (not having performed hands on work for about 15 years), out of touch with many technological developments that had occurred while he was absent and was uncomfortable with the prospect that his return as a technician might cause another employee to be laid off.

Hopp continued to communicate with Don Folk over the following four to five weeks, talking a number of times with Binkley. The two met on September 26, 1996. At that meeting Binkley re-affirmed that Hopp's old position of service shop foreman no longer existed and would not be resurrected. Hopp confirmed to Binkley he was not interested in returning to the tools. Binkley offered Hopp a position as a service writer, noting that the salary for that position was higher than what he had received as foreman before his absence. Hopp stated he wasn't very interested in that position either, but requested a few days to consider the offer. On October 1, 1996, Hopp called Binkley and told him he was not interested in the service writer job. He wished only to have his foreman job back. He also gave some reasons for refusing the service writer job. He told Binkley he wanted a termination package. Binkley told him a job had been offered to him and there was no severance if he turned it down. Hopp threatened to picket Don Folk if his demand was not met. Binkley suggested Hopp speak with Don Folk personally and he agreed to do this.

That meeting took place later that morning. Mr. Folk confirmed some elements of the meeting in a letter dated October 3, 1996. A portion of the letter, which was a focus of Hopp's appeal, stated:

At the conclusion of the meeting, you stated that you would consider borrowing money to purchase tools and return to work as a technician and Mr. Binkley and I stated we would discuss this with Mr. Teal and get back to you.

After considering the pros and cons, I do not believe you will be happy or satisfied returning to work as either a technician or a service writer for all the reasons you listed. You stated to me that you had a number of job

opportunities to be a shop foreman in Kelowna and that is really the only position you were interested in and would be happy with.

Hopp says he accepted the position of technician at the meeting and this passage confirms that acceptance.

Following the letter a release was prepared for Hopp and on October 16, 1996 he was asked by Binkley to attend a meeting. The ostensible purpose of the meeting was to arrange for the signing of the documentation necessary to effect a release of Hopp's profit sharing entitlement. At the meeting Hopp was asked to sign a release of liability in favour of Don Folk for matters relating to his termination of employment. Hopp refused.

Hopp also says he distrusts the assertion of Don Folk that the vacation pay he was owed at the time he went on disability was used to satisfy his obligation to contribute to a portion of the costs of medical and related benefits. I received a copy of calculations made by an employee of Don Folk for the investigating officer showing the amount of contributions made on behalf of Hopp. The calculations showed the total cost to Hopp to maintain the benefits during the time he was absent was slightly more than the vacation pay owed to him at the time he went on disability. I received no evidence indicating Don Folk did not maintain Hopp's benefits while he was disabled, that Hopp's obligation to contribute his share of the cost was suspended during the period of disability or that Hopp's share of the cost of maintaining the benefits was not as represented by the calculations made for the Director during the investigation.

## **ANALYSIS**

Hopp raises two points on the issue of whether he was offered reasonable alternative employment by Don Folk. He says he was offered two positions: the service writer job and a technician position. He says he refused the service writer job. His point is that his refusal of that offer was not unreasonable in the circumstances. His second point is that the offer of a technician position, which he says was accepted by him during the meeting of October 1, 1996, was withdrawn by Don Folk in his letter of October 3, 1996. He argues that it was the withdrawal of this offer after he had accepted it that effectively ended his employment and in those circumstances he is entitled to length of service compensation.

I will deal with the second point. In reply to Hopp's assertion that he accepted the technician position during the meeting of October 1, 1996, Don Folk says that is not so. They say the letter speaks for itself and Hopp told them at the meeting only that he would consider getting his own tools and returning to work as a technician. He had already rejected the suggestion he might be able to return to work as a technician. There was nospecific offer to that effect and no renewal of that suggestion by th employer on October 1.

I prefer the version of events given by Don Folk. On balance, I conclude Hopp did not tell Mr. Folk he agreed to return to work as a technician or accepted that position. If he had agreed to return or told them he accepted that position, it is not reasonable that he would have remained silent in the face of the statements made by Mr. Folk in the letter. Even in his appeal document Hopp does not say he accepted the technician position. He says:

I offered to borrow money to purchase tools to return to work as a technician (see page 3 - termination letter). They chose to refuse my offer as a technician.

These inconsistent versions of what he says occurred at the meeting lend more credence to the version given by Don Folk - that Hopp offered only to consider borrowing money to purchase tools and return as a technician. It is true that after Hopp refused to consider the option of returning to work as a technician and communicated that to Binkley, that option was not held out again, but in the circumstances of this case I do not accept Hopp's assertion that because Don Folk did not continue to hold out the option of employment as a technician, they caused the termination of his employment.

However, in these circumstances, I would not consider the suggestion that Hopp return to work as a technician to be an offer of alternative employment for the purposes of Section 65 of the *Act*. It appears from the evidence that this employment was never really offered, only proposed as a possible option which, even if accepted by Hopp, was still conditional upon approval by at least Binkley and Teal. That kind of conditional proposal should not be treated as an offer under Section 65(1)(f). However, the offer of a service writer job was clearly an offer of alternative employment for the purposes of the *Act* and was an offer which Hopp acknowledges he refused.

The next question is whether that offer was reasonable alternative employment. Hopp says it was not. He says there were two reasons for refusing the offer of employment as a service writer. First, he had no keyboard or computer experience. Second, he says he has difficulty with spelling names properly. Don Folk says they offered to provide him with some training to improve his keyboard and computer skills.

The relevant portion of the *Act* reads:

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.

The test of reasonableness is an objective test, that is, what a reasonably officious bystander would consider as reasonable, not what the employee believes is reasonable. This test includes an assessment of a number of factors, including:

- the nature of the job offered compared to the one currently performed or, in this case, previously held;
- any express or implied understandings or agreements;
- if there are comparable wages, benefits, working conditions and security of employment;
- geographic proximity or costs of dislocation; and
- any objective personal circumstances that might operate against accepting the offer.

Applying the above factors to the circumstances of this case, I conclude the position of service writer offered to Hopp was reasonable alternative employment. By refusing that offer he has caused Section 63 to have no application to him. His appeal on the issue of length of service compensation is dismissed.

On the vacation pay issue, Hopp has failed to persuade me there was any error made by the Director and that aspect of the appeal is also dismissed.

**ORDER**

Pursuant to Section 115 of the *Act*, I order the Determination of the Director dated June 20, 1997 be confirmed.

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