

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 -

Lower Mainland Steel Ltd.
("LMS Ltd.")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 97/657

DATE OF HEARING: October 16, 1997

DATE OF DECISION: October 23, 1997

1997. On March 18, 1997 Prevost retrieved his personal belongings from the work site.

According to the statutory declaration from James Shannon, the yard foreman Prevost told him that he was “not waiting around to be called back by this company” and indicated the he had started a new job.

According to Prevost he did come and pick up his personal belonging from the work site and had informed the yard foreman that he had found alternate employment for the layoff period. Prevost alleges that he did not quit his job and had anticipated being called back to work when work was available.

Findings

I find that:

- Prevost did not indicate that he would not come back to work if recalled to full-time employment.
- There was no letter of resignation.
- The employer did not call Prevost back to work and the temporary layoff period has been exceeded.

Those reasons and findings led the Director’s delegate to conclude that Mr. Prevost was entitled to compensation for length of service under Section 63 of the *Act*.

LMS Ltd. submitted three statutory declarations in support of its appeal. Mike Shuttleworth, foreman with LMS Ltd., declared, in part:

On March 18, 1997 Mr. Prevost came back to the yard to retrieve his personal belongings. I was working that day and I saw him come into the yard. I asked him how he was doing and he told me he was working at Steel Tech. I spoke with him while he was emptying his locker in the change room. Mr. Prevost specifically told me:

- a) he wasn’t waiting for call-back because he had to keep on working; and
- b) he had spoken with Dave Wright of Steel Tech who had given him a job which was starting right away.

Mr. Shuttleworth did not attend the hearing to give evidence.

The statutory declaration by James Shannon, yard manager with LMS Ltd., included the following statement:

Mr. Prevost was temporarily laid-off on March 17, 1997.

On March 18, 1997 Mr. Prevost returned to the company's yard at 9076 River Road, Delta to retrieve his personal belongings. I was working that day and I spoke with Mr. Prevost in the office when he arrived. Mr. Prevost told me that he was "not waiting around to be called back by this company."

I asked Mr. Prevost what he would be doing, and he told me that he was starting a new job with Steel Tech, and repeated that he was not going to wait to be rehired instead. Mr. Prevost then went out into the yard and told our foreman Mike Shuttleworth that he had a new job at Steel Tech.

Mr. Shannon attended the hearing and gave evidence under oath.

Mr. Shannon's oral testimony confirmed his statutory declaration. In particular, Mr. Shannon testified that Mr. Prevost told him on March 18th that he "... was not waiting around for Lower Mainland to bring him back." This left Mr. Shannon with "...the impression that he wanted to work for Steel Tech..." rather than LMS Ltd. This impression was formed in part also because Mr. Shannon knew that Mr. Prevost was not happy about the fact that his hours of work had been reduced due to a downturn in business at LMS Ltd.

Mr. Prevost testified that he was employed to work in the "shop" by Steel Tech. shortly after being laid-off on March 17, 1997. However, in that position he was paid a lower wage and received fewer benefits than he had received while employed at LMS Ltd. According to Mr. Prevost, the position with Steel Tech. was not permanent as he was replacing a foreman who was reassigned temporarily from the "shop" to the "field".

Under cross-examination, Mr. Prevost testified that on March 17th, Mike Shuttleworth told him (and four other employees) in the locker room that "...everyone was laid-off and would not be called back seniority-wise (sic)." Also under cross-examination, Mr. Prevost denied having told either James Shannon or Mike Shuttleworth that he was "...not waiting around to be called back by this company."

ANALYSIS

Section 63 of the *Act* creates a liability for employers to pay "compensation for length of service." That liability is deemed to be discharged if the employee is given notice, a combination of notice and money, or (under Section 63(3) of the *Act*) if the employee "...terminates the employment, retires from employment, or is dismissed for just cause."

LMS Ltd. has the burden of establishing, on the balance of probabilities, that the Determination made by the Director's delegate was wrong.

The central issue in this appeal is whether or not Mr. Prevost terminated his employment with LMS Ltd. on March 18, 1997. That is, did he "quit" or not. If he did "quit", then LMS Ltd. is discharged from its liability to pay compensation for length of service. In *Burnaby Select Taxi Ltd.* (BCEST # D091/96), the Tribunal adopted the following test for determining whether an employee has "quit."

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 voluntarily 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 employment; objectively, the employee must carry out an act inconsistent with his or her further employment.

That test was also adopted in *Wilson Place Management Ltd.* (BCEST #047/96) and I adopt it again in this appeal.

When I consider all of the evidence I cannot find "clear and unequivocal" facts to support a conclusion that Mr. Prevost resigned (i.e. "quit") his employment. Mr. Prevost denied having told Mr. Shannon or Mr. Shuttleworth that he was "...not waiting around to be called back by this company." However, I find, on the balance of probabilities, that he did make a statement to that effect. But such a statement by itself is not a "clear and unequivocal" indication of Mr. Prevost's intention to resign. The statement is equally capable of indicating that he was going to seek other employment while awaiting a recall to work following his temporary lay-off. By securing a temporary position at Steel Tech (with a lower wage and fewer benefits) Mr. Prevost did nothing which was inconsistent with his continued employment with LMS Ltd.

On balance, I find that Mr. Prevost's actions were those of a prudent person who had received notice of temporary lay-off. He looked for and secured alternative temporary employment with another employer rather than "waiting around to be called back" to work at LMS Ltd. I conclude that Mr. Prevost did not terminate his own employment and LMS Ltd. is not relieved of its liability to pay compensation for length of service.

I should also note that "temporary lay-off" and "termination of employment" are defined in Section 1(1) of the *Act* in the following terms:

“temporary layoff” means:

- (a) in the case of an employee who has a right of recall, a layoff that exceeds the specified period within which the employee is entitled to be recalled to employment, and
- (b) in any other case, a layoff of up to 13 weeks in any period of 20 consecutive weeks;

“termination of employment” includes a layoff other than a temporary layoff.

It is clear from the evidence that Mr. Prevost was laid-off for more than 13 weeks in a period of 20 consecutive weeks because LMS Ltd. never recalled him to work. Thus, his lay-off was not temporary for purposes of the *Act* and his employment was terminated. As noted at the beginning of this analysis, an employer has a liability under Section 63 of the *Act* to pay compensation for length of service unless that liability is discharged. LMS Ltd. has not discharged its liability. I agree with the conclusions made in the Determination by the Director’s delegate.

ORDER

I order, under Section 115 of the *Act*, that the Determination be confirmed.

Geoffrey Crampton
Chair
Employment Standards Tribunal

GC/sf