

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 -

Collin Campbell
("Campbell")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Hans Suhr

FILE NO.: 1999/560

DATE OF HEARING: **NOVEMBER 24, 1999**

DATE OF DECISION: **December 6, 1999**

DECISION

APPEARANCES

Collin Campbell	on his own behalf
Keith Christensen	summonsed to appear by Collin Campbell
Ed Penner	on behalf of Ed Penner Trucking Ltd.
Mona Penner	on behalf of Ed Penner Trucking Ltd.
Peter Croot	on behalf of Ed Penner Trucking Ltd.

OVERVIEW

This is an appeal by Collin Campbell (“Campbell”) under Section 112 of the *Employment Standards Act* (the “Act”), against a Determination dated August 31, 1999 issued by a delegate of the Director of Employment Standards (the “Director”). Campbell alleges that the delegate of the Director erred in the Determination by concluding that he was not entitled to compensation for length of service from his former employer Ed Penner Trucking Ltd. (“EPT”).

ISSUE

The issue to be decided in this appeal is whether Campbell is entitled to compensation for length of service.

FACTS

The following facts are not in dispute:

- Campbell commenced employment with EPT as a truck driver on June 29, 1986;
- Campbell was paid at the rate of 29% of the truck;
- Campbell’s last day of work for EPT was November 6, 1998;
- EPT issued a Record of Employment (“ROE”) on November 26, 1998 indicating that the reason for issuing was “A” - shortage of work;
- the ROE indicated that the expected date of recall was unknown;
- Campbell met with Ed Penner (“Penner”) on November 29, 1998 at which time Penner offered work to Campbell;
- Campbell declined the work being offered.

Campbell, Christensen, Penner and Peter Croot (“Croot”) gave evidence. I will only reproduce the relevant evidence.

Campbell testified that:

- on November 6, 1998 he was advised by the mechanic Ed Hanson (“Hanson”) that there was no more work and further that Penner was selling all of the trucks and the shop;
- the next evening he was called by another trucking company offering him a job for a week but before he accepted he advised the other employer he (Campbell) would have to speak to Penner;
- he spoke to Penner who advised that if he was offered another job to go ahead and take it and if it finished in a week, Campbell could haul equipment to the auction in Prince George;
- the job he accepted lasted two weeks;
- he was offered and accepted a job for a company in Houston which promised work for the winter;
- he worked for the Houston company until the job was shut down due to warm weather and then returned to Terrace on November 21;
- on November 26th he picked up his ROE from EPT;
- he discussed the shortage of work with another driver, Keith Christensen (“Christensen”) and they decided to speak to Penner about severance pay after they contacted the *Employment Standards Branch* (the “Branch”);
- he and Christensen arranged to meet Penner on November 27th to discuss what was happening;
- Penner was asked if they (Campbell and Christensen) were definitely finished with the Company to which Penner responded that there was not going to be anymore work now or in the future;
- he then asked Penner about severance pay and Penner told them that after the employees had been paid for the last 2 weeks work there would be no money left over for severance pay;
- Penner further stated that there was a good possibility that he would go bankrupt and that he would like to see the employees get something before the creditors;
- Penner then said he would call them (Campbell and Christensen) back before 4 p.m. that day (Nov. 27th);
- Penner called him at around noon and asked to see Campbell and Christensen at his office by 1:30 p.m.;
- at that meeting, Penner advised that there was no money for severance pay, either now or later;
- he and Christensen went to the *Branch* and filed complaints seeking severance pay;
- on November 28th he received a call from Penner asking that Campbell and Christensen come to a meeting at the office at 9:30 a.m. the next morning;
- at the November 29th meeting, Penner advised that he had just gotten a job for 2 trucks starting Monday November 30th and wanted to know if Campbell and Christensen were interested;

- present at that meeting were Campbell, Christensen, Penner and Croot;
- Penner did not state how long the job was to last;
- he believes he asked Penner if he could give his current employer 1 weeks notice but Penner refused;
- he told Penner he had no choice but to decline the job;
- Christensen accepted the job.

Christensen testified that:

- he was summonsed to appear at this hearing by Campbell;
- he was at the meeting of November 29th along with Campbell, Penner and Croot;
- he recalls Penner advising them that he had just gotten work for 2 trucks and offered this work to he and Campbell;
- he recalls that Campbell said “No, I’m committed in Houston”;
- he accepted the offer as he needed the work and was told by Penner where to report for work the next day;
- he does not recall Campbell asking to be allowed to give 1 weeks notice where he was working at the time;
- he was shocked at how fast Campbell refused the work;
- he reported to work the next day and the contractor asked him where the other truck was;
- he has continued to work for EPT since that time with only the regular seasonal layoffs;

Penner testified that:

- he is a principal of EPT;
- the business of trucking logs is affected by seasonal issues and is sensitive to the overall economy;
- any time there is a shortage of work, ROE’s have been issued so employees can collect E.I. benefits;
- they do not put down an expected date of recall on the ROE’s as they don’t want to cause a problem for the employees if the layoff is longer;
- at the time Campbell and Christensen were laid off, he had no idea of what was going to happen to his business;
- on the day of the lay off, there was no work and no foreseeable work;
- at the time of the lay off, EPT had 8 trucks and drivers working;
- Campbell and Christensen were the two most senior drivers employed by EPT;
- on November 29th he had just gotten work for 2 drivers and offered that work to Campbell and Christensen;
- he recalls Campbell stating that he was not available as he was going to stay in Houston;
- he does not recall Campbell asking to be able to give 1 weeks notice to his current employer;

- Christensen accepted the work and started the next morning;
- he was not able to supply another driver and truck so the contractor got another truck elsewhere;
- Christensen is still working for EPT;
- at the current time, EPT has 2 full time trucks and drivers and occasionally some part time drivers.

Croot testified that:

- he was at the meeting on November 29th along with Campbell, Christensen and Penner;
- he recalls Penner stating that he had work for a couple of trucks and offered that work to Campbell and Christensen;
- he recalls Campbell saying that he was not interested as he had work in Houston;
- he does not recall Campbell saying he wanted to give 1 weeks notice to his employer in Houston.

ANALYSIS

The burden of establishing that the delegate of the Director erred in the Determination rests with the appellant, in this case, Campbell.

The obligation of an employer to pay compensation for length of service is set forth in Section 63 of the *Act* which provides:

Section 63, Liability resulting from length of service

(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 additional 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 just cause.*

(4) The amount the employer is liable to pay becomes payable on termination of the employment and is calculated by

- (a) totalling all the employee's weekly wages, at the regular wage, during the last 8 weeks in which the employee worked normal or average hours of work,*
- (b) dividing the total by 8, and*
- (c) multiplying the result by the number of weeks' wages the employer is liable to pay.*

(5) For the purpose of determining the termination date, the employment of an employee who is laid off for more than a temporary layoff is deemed to have been terminated at the beginning of the layoff.

There is no dispute with respect to the basic facts of this matter. Campbell was laid off due to a shortage of work. The evidence was that EPT was forced to restructure its business and was not sure if there would be any work at all. EPT was able to subsequently obtain some work for 2 trucks and offered that work to Campbell and another laid off employee.

Campbell believes he asked for permission to give his Houston employer 1 weeks notice prior to returning to work for EPT. Campbell was also concerned with the uncertainty of the offered position. Campbell felt he could not return to work for EPT under those circumstances.

The issues critical to the final determination of this matter took place during the meeting of November 29, 1998. The evidence of the other participants at that meeting was in conflict with Campbell's recollection of the events. The other participants were consistent in their recollections that Campbell did not ask for permission to give 1 weeks notice, rather, Campbell immediately declined the work being offered and chose to remain employed in Houston.

The question that arises therefore is whether Campbell's refusal to accept work offered by EPT constitutes self-termination of employment and, pursuant to the provisions of Section 63 (3) (c) effectively discharges the obligation of EPT to pay compensation for length of service to Campbell.

The evidence was that Campbell was laid off on November 6, 1998. The *Act* defines layoff as follows:

"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;

Furthermore, should the layoff of an employee exceed the period defined as a *temporary layoff*, the *Act* provides that the employee is deemed to have been terminated. The definition of termination of employment is:

"termination of employment" includes a layoff other than a temporary layoff;

The evidence was that the period of temporary layoff being experienced by Campbell ended on November 29, 1998 when EPT offered Campbell work.

Campbell argues that the work he was being offered was of uncertain duration and did not include driving the same truck that he had been driving for EPT. Campbell further argues that the offer of work by EPT was not a "genuine" offer of employment, merely a ploy by EPT to escape their obligation to pay compensation for length of service.

In my view, the arguments put forward by Campbell are not supported by the evidence provided. The uncontradicted evidence of both Christensen and Penner was that Christensen has continued to work for EPT since November 29, 1998 with only the normal seasonal interruptions.

If Campbell had accepted the recall to work from EPT *and* his concerns about the job offer came to pass, Campbell would not have jeopardized his entitlement to compensation for length of service under the *Act*.

I conclude therefore, that the refusal of Campbell to accept the work being offered by EPT constitutes a self-termination of employment (quit).

In any event, even if Campbell's refusal to accept the work is not self-termination or a quit, he would still not be entitled to compensation pursuant to the provisions of Section 65 (1) (f) which provides:

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.

For all of the above reasons, based on the evidence provided and on the balance of probabilities, I conclude that Campbell is not entitled to compensation for length of service.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated August 31, 1999 be confirmed in all respects.

Hans Suhr
Adjudicator
Employment Standards Tribunal