

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 -

Brian M. Tweed

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Richard S. Longpre

FILE No: 1999/545

DATE OF HEARING: November 15, 1999

DATE OF DECISION: December 14, 1999

DECISION

APPEARANCES:

| | |
|-----------------|--|
| Donald S. Boyle | Counsel for Brian Tweed |
| Brian Tweed | On behalf of himself |
| Maryanne Prohl | Counsel for New Home Warranty of B.C. |
| Bob Kuhn | On behalf of New Home Warranty of B.C. |
| Rita Wood | On behalf of New Home Warranty of B.C. |
| Jim Thompson | On behalf of New Home Warranty of B.C. |

OVERVIEW

Brian Tweed seeks to appeal under section 112 of the *Employment Standards Act*, a Determination by the delegate of the Director of the Employment Standards. In the Determination, dated August 12, 1999, (ER 095 309), the delegate concluded that Tweed initiated his termination with New Home Warranty of B.C. (the “Employer”). Accordingly, Tweed was not entitled to termination pay pursuant to section 63 of the *Act*.

In his appeal application, Tweed argued that the evidence established that Tweed was laid off from his employment with the Employer. In the hearing, Tweed further argued that the delegate failed to consider the subjective and objective elements of the evidence. That is, on April 15, 1999, Tweed could have resigned his employment with the Employer. He chose not to do so. Tweed left it to the Employer to decide whether to lay him off. The Employer considered his request and severed Tweed’s employment. Accordingly, Tweed was entitled to severance pay under section 63(3) of the *Act*.

In reply, the Employer pointed to the well established onus on the appellant in establishing their case. The Employer argued Tweed had not met that onus. The Employer argued that in the two weeks prior to April 15, Tweed was employed in a very difficult position. It was well known that for valid reasons, he wanted to terminate his employment with the Employer. He was actively seeking other employment. On April 15, Tweed spoke with Bob Kuhn, the Employer’s legal counsel and Jim Thompson, the Chair of the Board of Directors and the acting president, Tweed made it clear that he no longer wanted to work for the Employer. Thompson accepted his resignation and directed accounting to prepare the necessary papers. The Employer noted that Tweed's duties at the time of his termination continued and were performed by the acting president.

ISSUE TO BE DECIDED

Did Tweed terminate his employment or was he laid off by the Employer and therefore, was qualified for compensation for length of service under section 63 of the *Act*?

FACTS

The conversation between Tweed and Thompson on April 15 is central to this case. It is useful, however, to summarize the events that led up to that conversation.

Tweed commenced employment in January 1989 as Manager of Marketing and Communication with the Employer. The Employer provided home owners with insurance on the structure of their homes. The Employer held almost 80% of the market in British Columbia.

In early March 1999, legislative changes in the industry required the Employer to seek partnership with a larger insurance company. This resulted in the Employer reaching an agreement to merge with London Guarantee Insurance Company. On Thursday, March 25, the Employer issued a press release that stated in part:

...our Company has joined forces with London Guarantee Insurance Company, to provide all of the warranty insurance and builder pre-licensing approvals, pursuant to the requirements of the Homeowner Protection Act and Regulations.

On the same day, the Employer became aware that it would not be able to meet its future liabilities with its current cash reserves. As a result, the agreement with London Guarantee had to be cancelled. In the afternoon of March 25, the president of the Employer resigned effective immediately. Kuhn and Thompson were called to the office immediately. They met with senior management and informed them of the situation.

Tweed was out of town on March 25; Kuhn and Thompson met with him on March 26 and informed him of the situation. Tweed testified that at the end of this meeting Kuhn asked him if he wanted to be laid off. Tweed said no. Both Kuhn and Thompson categorically denied that such a statement was made. I question whether Tweed's recollection is correct. Tweed never disputed the Employer's evidence that it sought to maintain the employment of its employees. On Friday, March 26, the Employer continued discussions with London Guarantee. The Employer also sought assistance from the provincial government. I doubt that on March 26, Kuhn asked Tweed if he wanted to have his employment with the Employer terminated.

On Monday, March 29, Thompson and Kuhn called an all-employee meeting. They explained that the president of the Employer had quit the previous week. They also explained that because of the Employer's insolvency, the agreement with London Guarantee could not be completed. They told the employees that the Employer would file its intention to file for bankruptcy in court. Kuhn and Thompson testified that they made it clear to the employees that no one was being laid off. The Employer also informed the employees that it had begun discussions with an existing competitor of the Employer, National Home Warranty ("National")

That evening, Tweed was put in charge of dealing with the public and the media. The loss of new home insurance to a large sector of homeowners became an instant concern to both the public and the media. Kuhn and Thompson agreed that Tweed's assignment to deal with the public and the media was full-time and difficult.

By April 11, two issues arose. First, Tweed had done a commendable job of dealing with the media and the public, but he found it very difficult. Second, the Employer was involved in serious discussions with National. Critical to those discussions was National's agreement to offer employment to at least some of the Employer's employees. There was no doubt that Tweed would not consider working for National.

Tweed testified that while public and media attention was less intense the second week, it continued. By the middle of the week, it was clear that National would be successful in purchasing the Employer's assets. Tweed met with Kuhn on April 15. Tweed explained to Kuhn that he did not feel that he would fit in with National. Tweed understood that the Employer would continue to employ "technical" employees and would not need his marketing skills. Tweed recalls saying to Kuhn "do the honorable thing". Tweed explained that he was leaving it up to the Employer to lay him off work. Kuhn, as the Employer's counsel, was not in a position to address the issue. He suggested that Tweed call Thompson.

Tweed said that when he contacted him, Thompson said that he had talked to Kuhn and was expecting Tweed's call. Thompson asked Tweed when he wanted the lay off to occur. Tweed replied "sooner than later". Thompson said that he would contact the office and ask them to prepare his Record of Employment.

Thompson recalled the telephone conversation much differently. He recalled Tweed asking to be laid off. He told Thompson that he would not work for National and that he wanted to get on with his life. In his current situation, Tweed felt "out of the loop". Thompson said that he understood the decision was based on three points: Tweed's marketing work was over. Tweed's work with the media and the public was winding down. Finally, Thompson understood that Tweed wanted to get on with his life.

ANALYSIS

After reviewing the evidence, the delegate reached the following conclusion:

..... the employer did not take action to terminate Mr. Tweed's employment. I found that the employer's version of the circumstances leading to Mr. Tweed's termination is more believable. There was no time schedule of his departure as planned by the employer. Although the employer announced that the company was going under, no employees were terminated at that point. As a matter of fact, the employer is preparing the employees to deal with the future issue of a possibility of unemployment.

Mr. Tweed argued that the request for termination was an involuntary action induced by the employer. However, the liability to pay termination pay under the Employment Standards Act did not arise until the employee [was] being terminated. On the other hand, Mr. Tweed's action of initiating his termination with the employer had discharged the employer of the liability to pay termination pay pursuant to section 63(3)c of the Act.

I agree with delegate's conclusion. Counsel referred to *Burnaby Select Taxi Ltd.* (B.C.E.S.T. D091/96), which reads:

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 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; objectively, the employee must carry out some act inconsistent with his or her further employment... the uttering of the words "I quit" may be part of an emotional outburst...and as such it is not to be taken as really manifesting an intent by the employee to sever his employment relationship".

The subjective and objective elements were well established in the evidence. Central to my decision is the evidence that neither Kuhn nor Thompson went to Tweed. There was no suggestion that either considered raising the matter with Thompson. Neither wanted him to quit. Neither wanted to lay him off. The work Tweed was performing remained, albeit to a lesser extent. As Thompson testified, the Employer's relations with the public and the media continued after Tweed left.

The evidence established that Tweed wanted to end his employment with the Employer. He did not want to continue to deal with the media. He was not interested in working with National. Understandably, he wanted to get on with his work career. His intent to terminate his employment was clear. Indeed, he started with London Guarantee a week after leaving the Employer.

Tweed's only argument is that he left the timing of his termination up to Thompson. Stated differently, Tweed would have stayed on longer if asked to do so. Tweed was certainly reasonable. I do not see that Tweed's reasonableness, however, resulted in his termination by Thompson. Thompson understood from both Kuhn and Tweed that Tweed wanted to leave his employment. Thompson agreeing that Tweed could leave immediately cannot be seen as the termination of Tweed's employment.

Finally, Tweed's discussions with Thompson were not a momentary outburst. There was no suggestion that he regretted leaving his employment. Tweed was pleased that Thompson agreed that his departure would be effective April 15, 1999.

ORDER

Pursuant to Section 115 of the *Employment Standards Act*, the delegate's Determination, dated August 12, 1999, (ER 095 309), is confirmed.

Richard S. Longpre
Adjudicator
Employment Standards Tribunal