

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-

Raymond Vincent Hayes

(“Hayes”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 98/653

DATE OF DECISION: December 8th, 1998

DECISION

OVERVIEW

This is an appeal brought by Raymond Vincent Hayes (Hayes") pursuant to section 112 of the *Employment Standards Act* (the "Act") from a Determination issued by a delegate of the Director of Employment Standards (the "Director") on September 24th, 1998 (the "Determination").

The Director's delegate dismissed Hayes' complaint that he was "constructively dismissed" (and therefore entitled to 3 weeks' wages as compensation for length of service) by his former employer, Flag Chevrolet Geo Oldsmobile Ltd. ("Flag" or the "employer").

FACTS

Flag is an automobile dealership. Hayes was formerly employed as a "business manager" with Flag and was paid by way of a commission based on sales. He was employed from September 10th, 1994 to November 27th, 1997.

On November 25th, 1997 Hayes received a letter giving him notice of termination effective December 31st, 1997. Thus, Hayes was given slightly more notice than that to which he was entitled under section 63 of the *Act*. The termination letter continues: "During this time all cheques taken in final settlement will be certified".

Hayes says that the employer's policy of requiring customers to deliver a certified cheque in order to finalize a vehicle purchase was a new policy, not uniformly administered, and that the policy caused him a great deal of stress. Accordingly, and apparently on his doctor's advice, he resigned his employment two days later. Hayes commenced new employment with another automotive dealership on December 2nd, 1997.

In his typed statement appended to his appeal form, Hayes essentially asserted that the employer's policy of demanding certified cheques was wrongheaded and would result in lost sales, although he admitted to completing at least one sale by way of a certified cheque. His statement continued:

"...it was clear that the salespeople were not going to agree with this new policy of certifying cheques while I was still employed there because it would also affect their wages. In the automobile industry, which is highly competitive, sending a customer away even just to certify a cheque gives them the opportunity not to come back to us which costs the whole dealership money.

The day I left to go to the doctor the salesmanager [sic] was telling me to accept the cheques without certification when the termination letter stated I was not to accept uncertified cheques."

The delegate dismissed Hayes' complaint stating, at p. 2 of the Determination:

“You stated that the change made it impossible for you to do your job, however, you also stated that you did close a sale by requiring the customer to provide a certified cheque. There is no evidence that the change reduced, or would have reduced, your wage or changed your duties or responsibilities, or in fact, made it impossible for you to do your job.”

ANALYSIS

Under section 63(3) of the *Act*, an employer's statutory obligation to pay an employee compensation for length of service is deemed to be discharged provided the requisite amount of written notice of termination is given to that employee. In this case, Hayes received somewhat more written notice than that to which he was entitled. However, section 67(2) states that an employer must not alter an employee's wages or other conditions of employment during the notice period unless the employee gives his or her written consent. A “substantial alteration” of an employee's conditions of employment may be characterized as a termination of employment under section 66 of the *Act*. This is the gravamen of Hayes' complaint--his terms and conditions of employment were substantially altered during his notice period and thus he was, in effect, “constructively dismissed”.

It must be understood, however, that the employer had the absolute right to direct that all sales were to be finalized by way of a certified cheque:

“...an employer has a right to determine how his business shall be conducted. He may lay down any procedures he thinks advisable so long as they are neither contrary to law nor dishonest nor dangerous to the health of the employees and are within the ambit of the job for which any particular employee was hired. It is not for the employee nor for the court to consider the wisdom of the procedures. The employer is the boss and it is an essential implied term of every employment contract that, subject to the limitations I have expressed, the employee must obey the orders given to him.” [per Southin, J.A., *Stein v. British Columbia Housing Management Commission* (1992) 65 B.C.L.R. (2d) 181 at p. 185 (B.C.C.A)].

While Hayes apparently questions the wisdom of the employer's policy, the business efficacy of that policy is not a matter that may be reviewed by this Tribunal. The only matter that is open to review is whether or not that change--if indeed it represented a change in employer policy (the employer maintains that there was *no* change in policy)--amounted to a substantial alteration in Hayes' terms and conditions of employment. Further, Hayes' own statement appended to his appeal form (see above) suggests that the employer *was* prepared to accept uncertified cheques to close a sale and thus the “policy” may not have even been enforced during the balance of his notice period.

Clearly, if there was evidence before the delegate that the “changed” policy would have had a marked negative impact on Hayes’ overall compensation, then section 66 might well apply. But there was no such evidence before the delegate and there is no such evidence before me. This appeal must be dismissed.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal