

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 -

Springfield Autobody Ltd.

(“Springfield”)

- of a Determination issued by -

The Director Of Employment Standards
(the “Director”)

ADJUDICATOR: Lorna Pawluk

FILE NO.: 97/771

DATE OF DECISION: December 15, 1997

DECISION

OVERVIEW

This is an appeal by Springfield pursuant to Section 112 of the *Employment Standards Act* (the “Act”), against a Determination dated October 3, 1997 by the Director of Employment Standards (“the Director”).

ISSUE TO BE DECIDED

The issue is whether Springfield is required to pay Michael Otway compensation for length of service under section 63 of the *Act*.

FACTS

Otway was employed by Springfield as an auto prepper from July 8, 1996 to February 4, 1997 at a rate of \$11.00 per hour. He was laid off from work on February 7, 1997 due to lack of work and was not recalled within 13 weeks. Garry Grigg, the owner of Springfield, acknowledges that Otway was laid off due to shortage of work but insists that he will not pay severance. In the Determination under appeal here, the Employment Standards Officer, as a delegate for the Director found that since Otway was not recalled within 13 weeks, he was entitled to one week's pay as compensation for length of service. The employer did not raise the issue of just cause during the investigation.

Grigg appeals on behalf of Springfield, arguing that Otway was terminated because of a shortage of work:

I'll be damned if I'll tell an employee he's fired when in fact there is a shortage of work. Why should a person have to explain to a future employer why their employment was terminated, which they would have had to do if I put "fired" on the Record of Employment". Due to circumstances there was a shortage of work at the time and I only wanted this employee to be able to find suitable employment elsewhere as soon as possible as he had a family. We still do not have any more employees in that part of the body shop than we did when Michael [Otway] was laid off.

Grigg also asserts that Otway's employment could have been terminated for cause due to "his poor attitude and sub-standard work performance". He also asks this tribunal "to draw their standards on more realistic situations and even perhaps sometimes make an exception".

In reply, Otway says that he always worked to the best of his ability and that while he was at Springfield, the quality of his work was never questioned by Mr. Grigg or co-workers. He also enclosed a copy of a letter of reference dated February 7, 1997 in which Mr. Grigg described Otway as "a conscientious worker" who "performed his duties well".

ANALYSIS

Where an employee is dismissed, section 63 of the *Act* requires an employer to pay the employee compensation for length of service unless the employee is given written notice of termination; given a combination of notice and payment; or dismissed for just cause. After three consecutive months, the employer must pay an amount equal to one week's wages; after twelve months, the equivalent of one week and after that an additional sum week for each year of employment. Section 1 of defines "termination of employment" to include "a layoff other than a temporary layoff". It also defines "temporary layoff":

"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/

Grigg concedes that he laid off Otway due to a lack of work and that no one replaced him in that area of the shop. It is also uncontested that after 13 consecutive weeks, Otway was not recalled. Under the section 1 of the *Act*, this means that Otway's employment was terminated and that he is eligible for length of service compensation under section 63. (*See Slumber Lodge Motel Corp. BC EST #D171/97*)

Grigg now argues that he had just cause to terminate Otway and that this should be a defence to the required payment under section 63. While termination for just cause discharges the obligation to pay compensation for length of notice (section 63(3)(c)), this defence is not available to Springfield for two reasons. First, it was not raised during the investigation by the Director's delegate and there is no explanation as to why it was not. Thus, it cannot be raised here. Second, the evidence shows that in February of 1997, immediately after the layoff, Grigg described Otway as a conscientious employee who performs his duties satisfactorily. It is difficult for him to now successfully maintain that Otway was a substandard employee who was terminated for cause.

ORDER

Pursuant to section 115 of the Act, I hereby confirm the Determination CDET dated October 3, 1997.

**Lorna Pawluk
Adjudicator
Employment Standards Tribunal**