Employment Standards TRIBUNAL

An appeal

- by -

Columbia Dodge (1967) Ltd.
("Columbia Dodge")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 2001/735

DATE OF DECISION: December 18, 2001

DECISION

OVERVIEW

This is an appeal filed by Columbia Dodge (1967) Ltd. ("Columbia Dodge") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*). Columbia Dodge appeals a Determination that was issued by a delegate of the Director of Employment Standards (the "Director") on October 1st, 2001 (the "Determination"). The Director's delegate determined that Columbia Dodge owed its former employee, Brett Jameus ("Jameus"), the sum of $1,369.20 on account of compensation for length of service (1 week plus 1 day's wages), concomitant vacation pay and section 88 interest.

By way of a letter dated December 4th, 2001 the parties were advised by the Tribunal's Vice-Chair that this appeal would be adjudicated based on the parties' written submissions and that an oral hearing would not be held (see section 107 of the *Act* and *D. Hall & Associates v. Director of Employment Standards et al.,* 2001 BCSC 575). I have before me submissions filed by the appellant (original appeal and reply submissions), Mr. Jameus and the Director's delegate.

ISSUES ON APPEAL

Columbia Dodge says that the delegate erred in determining that it owed Jameus any compensation for length of service. Columbia Dodge's position is set out in a submission prepared by its legal counsel dated October 18th, 2001 which is appended to its notice of appeal. In essence, counsel says that the delegate erred in interpreting sections 66 and 67(2)(a) of the *Act* and did not properly address the effect of 65(1)(f) of the *Act.*

BACKGROUND FACTS

Columbia Dodge is an automobile dealership that was located in New Westminster for several years. On or about November 30th, 2000, Columbia Dodge closed down its New Westminster location and relocated its entire business operations to Richmond. Mr. Jameus was employed by Columbia Dodge from July 1995 to November 30th, 2000 as a mechanic. Given his tenure, and pursuant to section 63 of the *Act*, upon termination Jameus was entitled to 5 weeks' wages as compensation for length of service or, alternatively, 5 weeks' written notice of termination in lieu of compensation.

On or about November 3rd, 2000 Jameus received the following letter from Columbia Dodge:

> Dear Brett Jameus
>
> Unfortunately, we are not going to be able to offer you continued employment after our New Westminster location is shut down and our operation is transferred to Richmond.

> We therefore must give you notice that your employment will be terminated effective January 31, 2001. We will continue to employ you here at the New Westminster location, which will keep operating until approximately mid-January 2001. We will pay your salary and benefits to January 31, 2001 unless you get another job in the meantime.
>
> We have already had inquiries from other dealerships seeking to hire some of our employees who will not be moving and we therefore offer to assist you in looking for a new position between now and January 31. We would also ask that if you do find other employment in the meantime, that as a courtesy, you give us a week's notice before you leave.
>
> Thank you very much for your service with Columbia Dodge and best wishes for your future career in the business.

Accordingly, Jameus received nearly 3 months' written notice of termination, an amount well beyond his statutory entitlement to 5 weeks' written notice. Although Columbia Dodge indicated that it would continue operating its New Westminster location until mid-January, 2001, the New Westminster location was actually closed down on November 30th, 2000 at which point Jameus' employment ended. Thus, Jameus received one day less than 4 weeks' "working" notice. Accordingly, as noted above, the delegate awarded Jameus an additional 1 week plus 1 days' pay as compensation for length of service under section 63(3)(b) of the *Act* which states that an employer's obligation may be satisfied by way of a combination of pay and written notice.

Columbia Dodge says that Jameus was offered, and he declined, the opportunity to continue working for the balance of the original notice period (*i.e.*, to January 31st, 2001) at the Richmond location. According to the information set out in the Determination (at page 2), Jameus does not recall being offered the opportunity to continue working in the Richmond location until January 31st but, in any event, he says that he would have declined such an offer because of the longer commute involved and because the work would only continue until January 31st. It might also be noted that Jameus obtained new employment in Surrey in early December 2000.

ANALYSIS

The Director's delegate referred to section 66, but primarily relied on 67(2)(a), of the *Act* in finding in favour of Jameus. These two provisions are set out below:

> **Director may determine employment has been terminated**
> 66. If a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated.
>
> **Rules about notice**
> 67. (2) Once notice is given to an employee under this Part, the employee's wage rate, or any other condition of employment, must not be altered without the written consent of (a) the employee...

The delegate held that even if Columbia Dodge offered Jameus the opportunity to work in Richmond until January 31st, 2001 (and the delegate made no firm finding in that regard), that offer represented a change in a condition of employment that was proscribed by section 67(2)(a) of the *Act.*

Counsel for Columbia Dodge says that section 67(2)(a) must be read in light of section 66 which requires a *substantial* alteration of a condition of employment. Thus, counsel says that the delegate erred "in finding that the move of the business was a termination of the employment contract under the Act" (October 18th, 2001 submission, para. 12).

I agree with counsel for Columbia Dodge when he asserts (October 18th submission, para. 11) that section 66 (which essentially codifies the common law notion of "constructive dismissal")--see *e.g.*, *Stordoor Investments Ltd.*, B.C.E.S.T. Decision No. D357/96--requires a change in the conditions of employment that amounts to a *repudiation* of the employment contract. However, as I read the Determination, the delegate did *not* find that Jameus' employment was terminated under section 66. Indeed, I am of the view that if, on or about November 30th, 2000, Columbia Dodge directed Jameus to report for the balance of his working notice period to the Richmond location, that direction would not have triggered section 66. As I observed in *Stordoor, supra.:*

> Our Court of Appeal has repeatedly held that, absent an express contractual provision, it is an implied term of an employment contract that the employer be given a relatively free hand to transfer the employee from one position to another, or from one geographic region to another [see *e.g., Longman v. Federal Business Development Bank* (1982), 131 D.L.R. (3d) 533; *Reber v. Lloyd's Bank International Canada* (1985),18 D.L.R. (4th) 122; *Lesiuk v. British Columbia Forest Products Ltd.* (1986) 33 D.L.R. 4th 1; and *Cayen v. Woodwards Stores Ltd.* (1993) 100 D.L.R. (4th) 294].

In this case, Jameus was given written notice of termination on or about November 3rd, 2000 which, in turn, triggered section 67(2)(a) such that Columbia Dodge could not alter Jameus' "wage rate or any other condition of employment" without his written consent. Although Jameus was given notice of termination on November 3rd, 2000, in the ordinary course of events his employment would not have actually terminated until January 31st, 2001. During this so-called "working notice" period, Jameus continued to be bound by the terms and conditions of his employment contract (including any express or implied term regarding the employer's right to make a work location reassignment). If, during the working notice period, Columbia Dodge *substantially* altered Jameus' terms and conditions of employment, that unilateral action could amount to a "constructive dismissal" under section 66 of the *Act.*

In my view, sections 66 and 67(2)(a) stand as independent statutory provisions. Section 66 is not triggered unless the employer repudiates the employee's employment contract. Section 67(2)(a), on the other hand, simply states that if an employer wishes to avail itself of the statutory right to give written notice in lieu of paying compensation for length of service, the employee's wage rate and other conditions of employment are, in essence, subject to a statutory "freeze" for the duration of the notice period.

As previously noted, an employer can avoid its statutory obligation to pay compensation for length of service if it gives the employee the proper amount of written notice (or an equivalent combination of pay and notice). During the notice period, wages and other terms and conditions of employment must not be altered. However, if an employer has the express or implied right under the employment contract to reassign work location, then any such reassignment--even if effected during the notice period--would not offend section 67(2)(a) since the employer would not be *altering* a term of the contract but merely exercising an *existing right* under that contract.

Section 67 establishes certain rules when written notice is given in lieu of paying compensation for length of service. However, an employer need not pay any compensation, nor give any written notice in lieu of compensation, if one of the circumstances set out in section 65 of the *Act* applies.

Counsel for Columbia Dodge submits that the delegate erred by failing to consider section 65(1)(f) of the *Act* which states that "sections 63 and 64 do not apply to an employee...who has been offered and has refused reasonable alternative employment by the employer". Counsel says that Jameus refused an offer of reasonable alternative employment when he refused to relocate, for the balance of the working notice period, to "the same job, 20 minutes down the road, at the same business" (October 18th submission, para. 14). Thus, two questions arise. First, did Columbia Dodge make Jameus an offer of reasonable alternative employment? Second, if so, was that reasonable offer refused?

With respect to the first question, the delegate did not decide whether an offer to continue working in Richmond was, in fact, made to Jameus. The delegate declared that latter question to be "moot" in light of his interpretation of section 67(2)(a) of the *Act.* However, the delegate did not address whether the employer had the existing right under the employment contract to reassign work location--the delegate appears to have assumed (and perhaps, in view of existing caselaw--see above--incorrectly) that the employer had no such contractual right. Even if the employer did not have such a contractual right, the employer's obligation to pay compensation for length of service might well have been obviated by reason of section 65(1)(f) of the *Act.*

In his submission to the Tribunal dated November 13th, 2001, Jameus stated: "The fact is I was not asked to continue to work [and] I did not refuse to work at Richmond." This statement is more forceful than his original position, recorded in the Determination at page 2, that he "could not recall" such an offer being made.

There is nothing in the material before me in the form of a statement from the Columbia Dodge official who purportedly made the relocation offer to Jameus. Further, there is nothing in the material before me which would corroborate counsel's assertion that Jameus voluntarily "resigned" on November 30th, 2000 rather than accept the geographic transfer to Richmond.

If such an offer was made (and that is a factual question that I am unable to answer based on the material before me), it might well have constituted an offer of reasonable alternative employment. The Tribunal has previously held that an offer of comparable work at another location can satisfy section 65(1)(f)--see *Stordoor, supra.*; *Harding Fork Lift Services Ltd.*,

B.C.E.S.T. Decision No. D073/97. If a reasonable alternative employment offer was made and refused, Columbia Dodge would not be obliged to pay any compensation for length of service.

Similarly, if such a relocation offer did not amount to a repudiation of Jameus' employment contract (and I am inclined to the view that such an offer is *not* a repudiation), and if Jameus chose resignation over relocation, the employer would not be obliged to pay any compensation by reason of section 63(3)(c) of the *Act.*

In light of the fact that the delegate did not make a finding of fact on the key questions of whether an offer was made and refused, or whether the employer had a contractual right to reassign work location--and coupled with my inability to make these findings of fact based on the material before me--I think the most appropriate disposition of this matter is a referral back to the Director for further investigation.

ORDER

Pursuant to section 115(1)(b) of the *Act,* I order that this matter be referred back to the Director so that the following questions can be investigated:

a) Did Columbia Dodge have the express or implied right under the employment contract to reassign Jameus' work location from New Westminster to Richmond?;

b) Did Columbia Dodge offer Jameus the opportunity to complete his working notice period at its Richmond dealership?;

c) If such an offer was made, did it constitute an offer of reasonable alternative employment?; and

d) Did Jameus voluntarily resign his employment on or about November 30th, 2000?

Once the Director has completed her investigation of the above questions, the Determination may be varied or cancelled pursuant to section 86 of the *Act.*

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal