Employment Standards TRIBUNAL

An application for Reconsideration

- by -

Urban Sawing & Grooving Company Ltd.
("Urban Sawing")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft, Panel Chair
Norma Edelman
Alison Narod

FILE No.: 2005A/153

DATE OF DECISION: December 7, 2005

DECISION

SUBMISSIONS

A. Paul Devine	for Urban Sawing & Grooving Company Ltd.
Lynne L. Egan	for the Director of Employment Standards

INTRODUCTION

1. This is an application filed by Urban Sawing & Grooving Company Ltd. ("Urban Sawing") pursuant to section 116 of the *Employment Standards Act* (the "*Act*") for reconsideration of a Tribunal Member's decision issued on July 27th, 2005 (B.C.E.S.T. Decision No. D112/05). The Tribunal Member confirmed a Determination that was issued by a delegate of the Director of Employment Standards (the "delegate") on April 1st, 2005 pursuant to which Urban Sawing was ordered to pay its former employee, Jerry A. Sentes ("Sentes"), the sum of $11,113.30 and, in addition, a further $2,000 reflecting four separate $500 administrative penalties (the "Determination").

2. This application is being adjudicated based on the parties' written submissions. We have before us the original reconsideration application filed on August 25th, 2005 by legal counsel for Urban Sawing, a one-sentence submission filed by the Director's delegate dated September 2nd, 2005, and a one-sentence reply submission filed by Urban Sawing's legal counsel dated September 30th, 2005. We also have before us the Tribunal Member's reasons for decision, the section 112(5) "record" and the parties' submissions that were filed in the course of the Tribunal appeal proceedings.

3. This application is timely and, in our view, raises serious questions justifying reconsideration by the Tribunal, namely, the interpretation and application of sections 63(3)(c), 65(1)(e), 66, 79(2)(c) and 83 of the *Act*. These latter provisions address, respectively, voluntary resignation; the statutory "exemption" in favour of certain employers in the "construction" industry regarding their obligation to pay compensation for length of service (section 63) and/or group termination pay (section 64); the "deemed termination" provision that may be triggered where a condition of employment has been "substantially altered"; the "make whole" remedy that is available in certain circumstances; and the "wrongful retaliation" provision of the *Act*. Accordingly, and in accordance with the test for reconsideration first enunciated in *Re Milan Holdings Ltd. et al.* (B.C.E.S.T. Decision No. D313/98), we shall proceed to examine the application on its merits. We shall first, however, set out the adjudicative history of this matter.

PRIOR PROCEEDINGS

The Initial Complaint and Proceedings before the Director's Delegate

4. On August 12th, 2004, and while still employed by Urban Sawing (as a "cutter/lead hand" at an annual salary of $52,200), Mr. Sentes completed a "Self-Help Kit" (a necessary step in Employment Standards Branch's dispute adjudication process); he claimed over $19,000 in unpaid overtime pay and that Urban Sawing was "taking advances off my check without written permission". Mr. Sentes forwarded his completed "Self-Help Kit" (by registered mail) to Urban Sawing on August 13th, 2004. On August 16th,

2004 Mr. Sentes filed a formal complaint against Urban Sawing in which he sought over $18,000 in unpaid overtime pay (spanning the period from September 2003 to August 2004) and recovery of an unauthorized wage deduction ("I recently took five days off and they took $678.00 off my check without permission…"). Almost immediately thereafter, Mr. Sentes' employment with Urban Sawing ended—his position was that he was terminated; Urban Sawing's position was that he voluntarily resigned.

5. In due course, the Employment Standards Branch scheduled a mediation session that resulted in the wage deduction dispute being resolved. A "Complaint Hearing" was scheduled for February 15th, 2005; the hearing notice was forwarded to the parties by registered mail on January 7th, 2005. At the outset of the February 15th hearing, Mr. Sentes advanced two further claims: compensation for length of service (section 63) and a claim for compensation based on "wrongful retaliation" (section 83). Mr. Sentes suggested that each of these two latter claims was raised at the mediation session, however, Urban Sawing's representatives maintained that these latter issues had not been raised or discussed at the mediation session. The delegate asked Urban Sawing's representatives (Marie Velecky and Steven Velecky—the company's only officers and directors) if they wished to adjourn the hearing and reconvene at a later date, however, "both stated an adjournment was not necessary and that they would deal with this issue at this hearing" (delegate's "Reasons for the Determination", page 2).

6. On April 1st, 2005 the delegate issued the Determination and accompanying "Reasons for the Determination". The delegate's key findings are set out below:

- Mr. Sentes unpaid wage claim was limited by section 80 of the *Act* to his last six months of employment (i.e., from February 16th to August 16th, 2004);
- Urban Sawing did not keep proper payroll records;
- Mr. Sentes' annual salary was $52,200;
- Mr. Sentes received an additional 8% of regular pay each pay period on account of vacation pay, however, this latter adjustment did *not* include any payment on account of statutory holiday pay;
- Mr. Sentes did not work more than 8 hours each day and, accordingly, had been paid for all hours worked. His claim for additional regular wages and/or overtime pay was dismissed;
- In early August 2004 Mr. Sentes provided 10 weeks' notice of his intention to resign his employment effective October 31st, 2004. The proposed working notice period was accepted by Urban Sawing;
- However, events occurred on August 16th and 17th, 2004 that the delegate concluded amounted to a "substantial alteration" of Mr. Sentes' conditions of employment. Accordingly, the delegate determined, pursuant to section 66 of the *Act*, that Urban Sawing was deemed to have terminated Mr. Sentes as of August 17th, 2004. Thus, Mr. Sentes was entitled to 4 weeks' wages as compensation for length of service under section 63 of the *Act.*
- Finally, the delegate concluded that Mr. Sentes' "deemed termination" amounted to a "retaliatory discharge" under section 83 of the *Act* that was triggered by Urban Sawing's receipt of Mr. Sentes' "Self-Help Kit" on August 16th, 2004. The delegate awarded Mr. Sentes an additional 6 weeks' wages under section 79(2)(c) of the *Act:*

> Had it not been for Urban's interference with Mr. Sentes' plan for an orderly resignation, he probably would have worked and earned wages during this 10-week resignation notice period. I have awarded Mr. Sentes his entitlement to four weeks' wages as compensation for length of service pursuant to Section 63. In order to remedy the contravention of Section 83, I order Urban to pay an additional six weeks' wages pursuant to Section 79(2)(c). This award puts

> Mr. Sentes in the same economic position as he would have been in if Urban permitted him to work out his notice period.

Urban Sawing's Appeal

7. Urban Sawing appealed the Determination on the grounds that the delegate erred in law [section 112(1)(a)] and failed to observe the principles of natural justice in making the Determination [section 112(1)(b)]. Urban Sawing alleged that the delegate erred in law by awarding Mr. Sentes compensation for length of service (payable under section 63) contrary to section 65(1)(e) of the *Act:*

> **Exceptions**
>
> 65. (1) Sections 63 and 64 [group termination pay] do not apply to an employee…
>
> (e) employed at one or more construction sites by an employer whose principal business is construction, …

8. "Construction" is defined in section 1 of the *Act* as follows:

> "**construction**" means the construction, renovation, repair or demolition of property or the alteration or improvement of land…

9. Urban Sawing also alleged that the delegate erred in law in determining that Mr. Sentes had been "constructively dismissed" pursuant to section 66 of the *Act.*

10. Urban Sawing argued that the delegate proceeded without jurisdiction and contrary to the principles of natural justice in agreeing to hear evidence and adjudicate Mr. Sentes' claims for compensation for length of service and for "wrongful retaliation" and that, in any event, a finding of wrongful retaliation could not be supported by the evidence that was before the delegate.

The Tribunal Member's Decision

11. The appeal was adjudicated based on the parties' written submissions and on July 27th, 2005 a Tribunal Member issued written reasons for decision dismissing the appeal and confirming the Determination (B.C.E.S.T. Decision No. D112/05). The Tribunal Member noted, at page 4 of his reasons, that although the appeal raised alleged errors of law and breaches of natural justice "there is a substantial aspect of Urban seeking to introduce 'new evidence' into this appeal". The Tribunal Member admitted the "new evidence" for the following reasons (at page 5 of his reasons):

> …The Tribunal has taken a relatively strict view of attempts to submit additional evidence with an appeal. As well, the argument invoking Section 65 of the *Act* was not raised during the complaint process. As stated earlier, the Tribunal has taken a relatively strict approach to new evidence and new arguments.
>
> Nevertheless, the Tribunal has some discretion in allowing new evidence and hearing new arguments in an appeal. I have decided to exercise that discretion and accept the new evidence and argument relating to Section 65. I do so for two main reasons. First, the evidence goes to an issue that was only included in the complaint process at the complaint hearing and [even] though Urban was prepared to deal with it without an adjournment of the complaint hearing, Mr. and Mrs. Velecky [Urban Sawing's principals and its representatives at the complaint hearing] may not

> have appreciated the potential for the application of Section 65 to Sentes. This reason reflects that principles of fairness and reasonableness are included in the purposes and objectives of the *Act.* Secondly, the statutory purposes of efficiency and finality are better achieved by considering the issue at this stage.

12. The "new evidence" submitted by Urban Sawing consisted of an affidavit sworn by its president, Mr. Steven Velecky. Mr. Velecky's affidavit primarily addressed two matters, namely, the nature of Urban Sawing's business and the circumstances preceding Mr. Sentes' termination of employment (which Mr. Velecky maintained was a voluntary resignation and not a dismissal). It should be noted, however, that the affidavit evidence was only admitted in relation to the former, and not the latter, issue.

13. We agree that the affidavit evidence could not have been properly admitted with respect to the circumstances surrounding Mr. Sentes' termination of employment since all of the so-called "new" evidence was "available" and could have been—indeed, so far as we can determine, virtually all of it was—presented to the delegate at the Complaint Hearing.

14. The Tribunal Member held (at page 7 of his Reasons): "I am not persuaded on the available evidence that the principle [sic] business of Urban is construction". The Tribunal Member noted that Mr. Sentes' work consisted of attending up to a dozen sites each day in order to cut asphalt or concrete "to provide access through roadways and curbs on public property or rights of way for the service crews of the City of Vancouver and Terasen Gas". The Tribunal Member concluded (at page 8):

> It is difficult to see how the asphalt and concrete cutting being done by Urban for the City of Vancouver and Terasen Gas fits into the definition of "construction" in the *Act.* No attempt has been made by Urban to analyze the work against the definition, but on its face the work cannot be considered to be included in the generally held notions of what is *"the construction, renovation, repair or demolition of property"* or *"the alteration or improvement of land"*. What must also be considered is that the exception in Section 65(1)(e) applies where the employer's *"principal business is construction"*, not simply where the employer is in a business related to construction. [*italics* in original text]
>
> Urban has not shown Sentes is an employee described in Section 65(1)(e) and this part of the appeal is dismissed.

15. The Tribunal Member also dismissed (at page 9) Urban Sawing's assertion that the delegate erred in determining that Mr. Sentes' employment was terminated under section 66:

> The question asked when considering Section 66 is whether there has the [sic] been a sufficiently serious unilateral alteration of the employment relationship that the employee and/or Director is justified in treating the relationship as ended. Accordingly, Urban's argument that the alterations were not to conditions which were fundamental to the employment contract is misplaced.
>
> Nothing in Urban's argument persuades me the Director made any error of law in finding, on a reasoned objective analysis, that a substantial alteration of a condition of Sentes' employment occurred that justified treating the relationship as ended.
>
> This ground of appeal fails.

16. The Tribunal Member also dismissed Urban Sawing's assertion that the hearing before the delegate amounted to a denial of "natural justice" (at pages 9-10):

> The claim for length of service compensation was raised at the complaint hearing. Urban indicated they were unaware of this claim and were offered an opportunity by the Director to have the complaint hearing adjourned and rescheduled to a later date. Urban did not consider an adjournment was necessary and chose to deal with that part of the claim in the complaint hearing. Urban argues the Director failed to provide them with a reasonable opportunity to respond to the claim. This argument is based on there being no "particulars" of or written claim for length of service compensation when the complaint hearing commenced…
>
> In this case, there was a complaint in writing that was filed within the time required under the *Act.* Urban was put on notice of the claim for length of service compensation and was given an opportunity to respond to it. While the amount of notice of the claim was short, it was apparently sufficient notice, as Mr. and Mrs. Velecky passed on an opportunity for an adjournment of the complaint hearing in order to consider their position and indicated to the Director they would address it at the complaint hearing. This part of the appeal is really about Urban seeking to have Mr. and Mrs. Velecky relieved of that decision and provided with another opportunity to address the length of service compensation claim. There is no reason that should be allowed.
>
> This part of the appeal is dismissed**.**

17. Finally, the Tribunal Member upheld (at page 10) the delegate's finding under section 83 of the *Act:*

> Urban argues that the Director's finding of a contravention of Section 83 of the *Act* cannot stand because there was no "constructive dismissal"…
>
> There is no reference in [section 83] to "constructive dismissal" and my comments on that aspect of the appeal have been made above. The finding of a contravention of Section 83 was based on the evidence that Mr. Velecky had threatened Sentes, had taken his cel phone, had told him on August 17 not to come to work and had taken away the company [truck] leaving him no way of getting to work, all because he had delivered a Self Help Kit claiming unlawful deductions by Urban had been made from his wages and that overtime wages were owed.
>
> The short answer to this part of the appeal is that Urban has not shown there was [an] error made by the Director in finding a contravention of Section 83 on the evidence.

THE APPLICATION FOR RECONSIDERATION

18. Urban Sawing's application for reconsideration is predicated on three separate grounds, namely, that the Tribunal Member erred in law:

1. "in concluding that the principal business of [Urban Sawing] was not "construction";
2. "in its interpretation of Section 66 of the *Act*"; and
3. "by failing to provide a reasoned analysis on the points in issue".

19. In response to the application, the Director's delegate filed a one-page submission in which she simply asserted her position "that this application…is an attempt to re-argue the employer's case and should be dismissed". The respondent employee, Mr. Sentes, did not file any submission regarding this application. Given the significant legal issues raised by the applicant—particularly in regard to the first of the above three issues—we would have preferred to have received, at least from the Director [recall that the section

65(1)(e) "construction" exemption was never considered by the delegate in her Reasons], a detailed submission regarding this latter point. However, we are nonetheless obliged to proceed on the basis of the limited material that is before us.

FINDINGS AND ANALYSIS

Was Urban Sawing's Principal Business "Construction"?

20. As noted above, the Tribunal Member accepted "new evidence" from Urban Sawing in the form of an affidavit from its President, Mr. Steven Velecky (who attended the hearing before the delegate along with his spouse and fellow director, Mrs. Marie Velecky). Mr. Velecky's affidavit contained the following information regarding Urban Sawing's business activities and the work of Mr. Sentes:

> 2. …There are two components to the business. One component is involved in concrete coring and testing, primarily on new construction projects.
>
> 3. The other aspect of the business involves service connections, primarily for new construction or renovations. In this aspect of the business, the Company makes it possible to connect building services as part of new construction or renovations.
>
> 4. The service work requires cutting of concrete or tarmac roadways, trenching to the services where the connection is required, and providing all necessary shoring and trenching equipment. Once the work is complete, the trenches are filled and the roadway is re-built. Our work is mainly cutting the roadway for access by the service crews.
>
> 5. [Sentes] was employed in the service connection side of the Appellant's business…
>
> 6. The Appellant has ongoing contracts with the City of Vancouver and Terasen Gas among other clients. There is work from these clients available almost every day.

21. The foregoing evidence represents the sum total of the evidence submitted by Urban Sawing with respect to its business activities; the balance of Mr. Velecky's affidavit dealt with the events of mid-August 2004 that resulted in the parties' employment relationship ending.

22. Section 65(1)(e) of the *Act* provides that compensation for length of service is not payable "to an employee employed at one or more construction sites by an employer whose principal business is construction". "Construction", defined in section 1 of the *Act*, "means the construction, renovation, repair or demolition of property or the alteration or improvement of land".

23. The term "construction sites" is not defined in the *Act*, however, in *Honeywell Ltd. v. British Columbia (Director of Employment Standards)*, [1997] B.C.J. No. 2290, Pitfield, J. of the B.C. Supreme Court made some comments (at paras. 28-34) regarding "construction" and "construction site" (the singular term that formerly appeared in section 10 of the *Employment Standards Act Regulation*, B.C. Reg. 37/81; that latter regulation has since been replaced by B.C. Reg. 396/95). In particular, Pitfield, J. observed (at paras. 28 and 29):

> The application of the exemption provided by the Regulation must be determined by reference to its terms and not by reference to practices in other areas of labour relations in the context of other statutes.

> …the Regulation specifies that two conditions must be satisfied if the exemption from Part 5 is to apply: the employee must be employed to work at a "construction site" and the principal business of the employer must be "construction". Neither condition requires that the employee be a construction worker per se.

24. The definition of "construction" now found in section 1 of the *Act* is quite different from that formerly contained in section 10 of the *Regulation.* The Tribunal Member was obliged to determine if Urban Sawing's principal business was "construction" based solely on the present statutory definition. Both the Tribunal Member and this panel have been referred to decisions that interpret the former definition, or different definitions that appear in other statutes (such as the *Labour Relations Code*); such decisions must be considered with some caution.

25. In our view, "concrete coring and testing" might be characterized as being ancillary to the "construction", "renovation" or "repair" of property. Further, the "cutting of concrete or tarmac roadways" might possibly fall within the ambit of "alteration or improvement of land". However, we also note that section 65(1)(e) of the *Act* removes what would otherwise be a statutory employment benefit, namely, compensation for length of service. It is, of course, a well-established principle that employment standards legislation, being "benefits-conferring" legislation, must be given a large and liberal interpretation—see e.g., *Re Rizzo and Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27. That being the case, statutory provisions that take away employment benefits should be construed narrowly (see e.g., *E. Nixon Ltd.*, B.C.E.S.T. Decision No. D573/97).

26. We are not satisfied that Urban Sawing met its evidentiary burden of proving that its "principal business is construction". The *only* evidence before the Tribunal Member concerning Urban Sawing's business was that there were two components to the firm's operations: i) "concrete coring and testing"; and, ii) "cutting of concrete or tarmac roadways". The bulk of the latter work, we understand, is performed under contract to the City of Vancouver and Terasen Gas. There was no evidence before the Tribunal Member that either of these latter two entities is principally engaged in "construction". While Urban Sawing's business activities might be ancillary to construction work, we are not satisfied that the evidentiary record before the Tribunal Member clearly established that Urban Sawing was itself a construction firm. Urban Sawing did not submit any evidence regarding what proportion of its total business operations either component represented.

27. "Coring and testing" does not, *per se*, involve construction (e.g., building), renovation (e.g., modification of an existing building), repair (e.g., restoration of an existing building) or demolition (e.g., destruction of a building) of property nor could such work be fairly characterized, except in the most technical (and perhaps trivial) sense, as "altering or improving" land. "Cutting of concrete or tarmac roadways" involves the use of construction tools (e.g., saws), however, again we are not persuaded, based on the evidence that was before the Tribunal Member, that such activities, standing alone, constitute "construction" as that term is defined in the *Act.* Mr. Velecky, in his affidavit, stated that after the concrete or tarmac has been "cut", there is additional trenching and shoring work to be undertaken (subsequently, the shoring is removed, the trenches are filled and the roadway is returned to its original condition). This latter sort of work more obviously falls within the ambit of "construction", however, we do not have any evidence before us indicating that the trenching/shoring work is regularly undertaken by Urban Sawing; indeed, Mr. Velecky averred: "Our work is mainly cutting the roadway for access by the service crews".

28. In summary, the evidentiary burden rested with Urban Sawing to clearly bring itself within the statutory exemption; the Tribunal Member was not satisfied that Urban Sawing met its burden in that regard. It

should be noted that we are sitting as a reconsideration panel rather than a decision-maker at first instance. In such circumstances, we should not overturn the Tribunal Member's decision unless we are satisfied it is clearly wrong. We are unable to conclude, based on the dearth of evidence presented by Urban Sawing, that the Tribunal Member was clearly wrong in finding that Urban Sawing was not principally engaged in the business of construction. We wish to emphasize that we are not concluding that Urban Sawing is not engaged in "construction" as that term is defined in the *Act*. Rather, we are simply not persuaded that the Tribunal Member erred in finding, based on the evidence presented to him, that Urban Sawing affirmatively proved its principal business is construction.

29. It thus follows that we are not prepared to disturb the Tribunal Member's conclusion that Urban Sawing could not avail itself of the section 65(1)(e) exemption regarding the payment of compensation for length of service. Further, and in any event, even if Urban Sawing was not obliged to pay any compensation for length of service by reason of the section 65(1)(e) exemption, in our view, Urban Sawing would have nonetheless been liable to pay Mr. Sentes a total of 10 weeks' under section 79(2) of the *Act*.

30. Compensation for length of service is not payable if an employee voluntarily terminates his or her employment [see section 63(3)(c)]. Urban Sawing alleged that the Tribunal Member erred in rejecting its position that Mr. Sentes quit his employment. We now turn to this issue.

Did Urban Sawing terminate Mr. Sentes employment?

31. The delegate concluded that Mr. Sentes did, indeed, voluntarily quit when he gave 10 weeks' notice sometime in early August 2004 in order to "relocate with his family to the B.C. Interior". Mr. Sentes gave notice of his intention to resign as of October 31st, 2004 and Urban Sawing agreed to that "working notice" period. In other words, the parties, in effect, negotiated an "employment termination agreement". We note that this latter point was not disputed before the delegate; in fact: "Mrs. Velecky agrees that Mr. Sentes offered 10 weeks' resignation notice" and "she was happy for Mr. Sentes that he was going to move his family to another town and she wished him well" (delegate's Reasons, page 6). Thus, at that point, a binding bilateral contract—to terminate the parties' extant employment agreement—arose.

32. Mr. Sentes' position was that Urban Sawing breached that latter agreement by refusing to allow him to work out his notice period; that refusal, in turn, caused him economic loss (i.e., the loss of wages for the balance of his working notice period). More particularly, Mr. Sentes claimed that Urban Sawing refused to allow him to work out the notice period as "retaliation" for his having filed a complaint regarding, among other things, unpaid overtime pay and certain payroll deductions.

33. The record before us indicates that Mr. Sentes, then still employed by Urban Sawing, completed a "Self-Help Kit" (a necessary step in the Employment Standards Branch's complaint procedure) on August 12th, 2004. He forwarded this document to Urban Sawing, by registered mail, the next day, August 13th. "Mrs. Velecky acknowledged the Self-Help Kit was delivered to her home on August 16th, however, she recalls putting it aside and not opening it for several days" (delegate's Reasons, page 6). Mr. Sentes testified before the delegate that he received a telephone call from Mr. Velecky on August 16th during which Mr. Velecky stated: "I am sickened by what I received in the mail" and "You have no idea what you are doing" and "You're in big trouble". "Mr. Velecky did not dispute Mr. Sentes' evidence about the August 16th telephone conversation" (delegate's Reasons, page 6).

34. The further course of events, as recounted before the delegate, was as follows:

- Mr. Sentes had a very busy workday on August 16th and during the evening of the 16th both Mr. and Mrs. Velecky attended at his residence and retrieved a company cellular phone from Mr. Sentes;

- On August 17th, Mr. Velecky telephoned Mr. Sentes at around 7:00 A.M. and told Mr. Sentes "don't bother coming to work" (delegate's Reasons, page 7); in his affidavit sworn May 5th, 2005 and appended to Urban Sawing's Appeal Form, Mr. Velecky stated: "I do not recall telling [Mr. Sentes] not to bother coming to work on August 17th, but I do not deny that I might have made that statement".

- Mr. Sentes, as instructed, did not report for work on August 17th and later that day Mr. Velecky attended at Mr. Sentes' home and retrieved a company truck that had been provide to Mr. Sentes for both business and personal use, a trailer and a saw. Mr. Velecky agreed "he was upset and angry and did not say much to Mr. Sentes at that time" (delegate's Reasons, page 7).

- "When [Mr. Sentes] did not show up for work [on August 18th and 19th], Mr. Velecky assumed Mr. Sentes had quit" (delegate's Reasons, page 7).

35. The record before us indicates that Urban Sawing prepared a "Record of Employment" ("ROE") on August 17th, 2004; this document, prepared and signed by Mrs. Velecky, indicated that Mr. Sentes' last day of paid employment was August 16th, 2005 and that the ROE was issued because Mr. Sentes "quit"—code "E" on the form. We note that this latter evidence is inconsistent with Urban Sawing's present position that it still expected Mr. Sentes to report for work on August 18th and 19th.

36. We believe that a reasonable inference to be drawn from the foregoing evidence is that Mr. Sentes' employment ended on August 16th, 2004 and that he did not voluntarily quit but, rather, quite reasonably considered himself to have been terminated on August 17th, 2004. There is nothing in the evidentiary record indicating that Urban Sawing made any effort to contact Mr. Sentes on August 17th, or at any point thereafter, to determine if he truly intended to quit (as of August 17th) or to inform him that he had not been dismissed.

37. Urban Sawing's position has always been that it did not terminate Mr. Sentes; rather he quit. As noted earlier, compensation for length of service is a statutory benefit, however, an employer's obligation to pay compensation "is deemed to be discharged" in certain circumstances (for example, by giving proper written notice). In this case, the *only* argument advanced by Urban Sawing before the delegate was that it was not obliged to pay compensation since Mr. Sentes' voluntarily quit his employment in mid-August 2004 [section 63(3)(c)].

38. Accordingly, it was Urban Sawing's burden to raise a *prima facie* case that as of August 17th, 2004 Mr. Sentes had both the subjective intention to quit and that this subjective intention was supported by objective evidence (see *Maple Ridge Travel Agency Ltd.*, B.C.E.S.T. Decision No. D273/99 and the cases cited therein).

39. In *Wilson Place Management Ltd.*, B.C.E.S.T. Decision No. D047/96, the Tribunal observed:

> The act of resigning, or "quitting", employment is a right that is personal to the employee and there must be clear and unequivocal evidence supporting a conclusion that this right has been voluntarily exercised by the employee involved. There is both a subjective and objective element

> to the act of quitting: subjectively, an employee must form an intention to quit; objectively, that employee must carry out an act that is inconsistent with further employment.

40. See also: *Burnaby Select Taxi Ltd. and Zoltan Kiss*, B.C.E.S.T. Decision No. D091/96; *Canadian Chopstick Manufacturing Co. Ltd.*, B.C.E.S.T. Decision No. D448/00 (reconsideration panel confirming B.C.E.S.T. Decision No. D369/98).

41. Clearly, the employment relationship between the parties ended in mid-August 2004. Urban Sawing has never asserted that it terminated Mr. Sentes or had just cause to do so. However, Urban Sawing maintains that it was not obliged to pay Mr. Sentes compensation for length of service because:

> i) its principal business is construction and Mr. Sentes was employed at one or more construction sites [section 65(1)(e)], or, alternatively,
>
> ii) Mr. Sentes voluntarily resigned his employment in mid-August 2004 [section 63(3)(c)].

42. We have already concluded that Urban Sawing did not prove that it could avail itself of the section 65(1)(e) exemption.

43. In addition, we are satisfied that the evidentiary record supports the delegate's finding that Mr. Sentes did not quit his employment in mid-August 2004. Mr. Sentes did not indicate to Urban Sawing in mid-August 2004 that he was quitting. While it is true that Mr. Sentes did not report for work on August 17th, his evidence (not disputed) is that he was specifically told not to do so by Mr. Velecky. Later on that same day, Mr. Velecky attended at Mr. Sentes' residence and retrieved the company truck that had been provided for Mr. Sentes' use as well as a trailer and a saw. Mr. Velecky, by his own admission, was upset and angry when he retrieved these items from Mr. Sentes.

44. Urban Sawing may have an arguable case that Mr. Sentes' employment was not terminated within the parameters of section 66 of the *Act:*

> **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.

45. The delegate specifically determined that Mr. Sentes was terminated pursuant to section 66. However, in our view it was not necessary for the delegate (or for that matter, the Tribunal Member) to make that finding since the delegate also concluded that Mr. Sentes did not voluntarily quit in mid-August 2004. The delegate concluded that Mr. Sentes failed to report for work after August 17th because he considered himself to have been terminated. Mr. Sentes had every reason to believe that he had been dismissed given the statements and deeds of Urban Sawing on August 16th and the morning of the 17th. If Urban Sawing expected Mr. Sentes to report for work on August 18th and 19th—as it now asserts—why did it not make any effort to contact Mr. Sentes on the 18th or 19th and ask him to return to work? Why did it precipitately issue an ROE on August 17th in which it maintained that the parties' employment relationship had ended because Mr. Sentes "quit"?

46. The delegate (quite reasonably in our view) concluded that the evidence simply did not clearly and unequivocally establish that Mr. Sentes intended to quit his employment—and in fact did so—on or about August 17th, 2004 (the date Urban Sawing fixed in the ROE as the "quit" date). That being the case,

Urban Sawing was obliged to pay compensation for length of service since its obligation to pay compensation was not "discharged" by reason of a voluntary resignation.

47. It bears repeating that compensation for length of service is a statutory benefit. Although compensation for length of service has often been called "statutory severance pay", the former award stands on an entirely different legal footing as compared to the common law doctrine of severance pay in lieu of notice. The latter is a form of damages for breach of contract—the breach being the employer's failure to give proper notice and not the termination *per se*. Compensation for length of service, on the other hand, is an earned statutory benefit that accrues as and from the commencement of employment but only becomes payable upon termination.

48. In certain circumstances, the employer's obligation to pay compensation for length of service "is deemed to be discharged" [e.g., section 63(3)(c)]; in other circumstances, an employee never earns any compensation for length of service [e.g., section 65(1)]. Urban Sawing advanced two such circumstances, neither of which applies here. That being the case, and there being no other basis to deny payment, Urban Sawing was obliged to pay Mr. Sentes compensation for length of service "on termination of the employment" [section 63(4)]; all parties agree that the employment relationship terminated by no later than August 17th, 2004.

49. In our view, we need not address the further question of whether Urban Sawing's statements and actions constituted a dismissal within section 66 of the *Act.* As noted, an employer must pay compensation for length of service "on termination of the employment" unless the obligation is "discharged" by reason of circumstances set out in section 63(3)—none of which applies here—or compensation is not payable by reason of circumstances set out in section 65—none of which applies here. The parties agree that Mr. Sentes' employment ended as of August 17th, 2004. In our view, the delegate reasonably concluded, based on the evidence before her, that Mr. Sentes did not voluntarily resign his employment in mid-August 2004 and, accordingly, Urban Sawing's obligation to pay compensation was not discharged.

50. Therefore, although we take a somewhat different view of the matter, we are nevertheless not prepared to disturb the delegate's original Determination (subsequently confirmed on appeal by the Tribunal Member) that Mr. Sentes was entitled to 4 weeks' wages as compensation for length of service.

The Tribunal Member's alleged failure to provide a "reasoned analysis"

51. Counsel for Urban Sawing submits that the Tribunal Member "failed to consider the Company's evidence in two areas", namely, he "failed to consider and apply the Company evidence about its work in the construction industry" and also "the s. 83 conclusion that Steven Velecky threatened the Complainant is at odds with the evidence contained in his affidavit". Counsel for Urban Sawing also makes the point that Mr. Sentes "did not participate in the appeal, and so did not provide contradictory evidence". By way of summary, counsel states:

> We submit the Tribunal failed to give a reasoned analysis for its conclusions on whether the principal business of the Company is construction. It also failed to give a reasoned analysis of whether a condition of employment of the Complainant was substantially altered (and so supporting a penalty under section 83 of the *Act*).

52. In our view, the Tribunal Member did not fail to provide a "reasoned analysis" regarding the possible application of section 65(1)(e) of the *Act.* The Tribunal Member accepted and subsequently considered

the "new evidence" that was tendered by Urban Sawing regarding its business activities. The Tribunal Member then turned his mind to the specific statutory language and, quite rightly, noted that it was Urban Sawing's burden of proving its business activities fell within the narrow confines of section 65(1)(e). Finally, he was not persuaded—on the basis of the evidence before him—that Urban Sawing had satisfied its evidentiary burden. We are unable to conclude that the Tribunal Member erred in reaching that latter conclusion.

53. With respect to section 83, we first wish to note that Mr. Velecky's affidavit was received as new evidence solely in regard to section 65(1)(e); it was *not* received with respect to section 83: "I have decided to exercise that discretion [to receive new evidence/arguments on appeal] and accept the evidence and argument relating to Section 65" (Tribunal Member's Reasons, page 5). Further, the threshold question regarding section 83 is not whether Mr. Sentes' termination fell within the ambit of section 66 (i.e., Was there a substantial alteration of employment conditions?); rather, the question was whether Urban Sawing took some "retaliatory action" against Mr. Sentes because he chose to exercise his rights under the *Act.* Section 83 reads as follows:

> **Employee not to be mistreated because of complaint or investigation**
>
> **83** (1) An employer must not
>
> (a) refuse to employ or refuse to continue to employ a person,
>
> (b) threaten to dismiss or otherwise threaten a person,
>
> (c) discriminate against or threaten to discriminate against a person with respect to employment or a condition of employment, or
>
> (d) intimidate or coerce or impose a monetary or other penalty on a person,
>
> because a complaint or investigation may be or has been made under this Act or because an appeal or other action may be or has been taken or information may be or has been supplied under this Act.

54. The delegate concluded that the delivery of the "Self-Help Kit" to Urban Sawing on August 16th, 2004 satisfied that statutory requirement that "a complaint or investigation may be or has been made"; we see no error in that finding. The delegate then concluded that something occurred on or about August 16th, 2004 that changed a "congenial and mutually respectful" employment relationship into a rather disputatious situation.

55. On August 16th, Mr. Velecky apparently told Mr. Sentes that he was "in big trouble" and that he "had no idea what he was doing". Later that same day, Urban Sawing took from Mr. Sentes' possession a cellular telephone. The next day, Mr. and Mrs. Velecky attended at Mr. Sentes' residence and retrieved a company truck, a trailer and a saw. Earlier in the morning of August 17th, Mr. Velecky, who admitted he was angry, told Mr. Sentes not to report for work that day. On August 17th Urban Sawing also issued an ROE claiming—without proper justification—that Mr. Sentes had quit his employment (an allegation that might have adversely affected any claim he might have made for employment insurance benefits).

56. On August 18th and 19th, Urban Sawing made no effort whatsoever to ease Mr. Sentes' mind and invite him to return to work. The delegate concluded that these events could be fairly characterized as instances of discrimination, threats, intimidation and coercion all of which were traceable to a point in time when Urban Sawing first learned about Mr. Sentes' intention to assert his rights under the *Act.* We share the

Tribunal Member's view that the evidentiary record before the delegate was sufficient to allow her to reach this latter conclusion.

57. Counsel for Urban Sawing has not challenged the calculation of the section 79(2) remedy awarded by the delegate. In any event, given the uncontradicted evidence that Mr. Sentes would have worked out his 10-week notice period but for the events that occurred in mid-August, we find that the award of an additional 6 weeks' wages, designed to make him "whole" relative to his loss of wages for the balance of his 10-week working notice period, was an entirely proper award in all the circumstances. We wish to reiterate our earlier observation that even if Urban Sawing did not have to pay any compensation for length of service, it would still have been obligated to pay Mr. Sentes a total of 10 weeks' wages under section 79(2) of the *Act*.

58. It follows from the foregoing that this application for reconsideration is refused.

ORDER

59. Pursuant to section 116(1)(b) of the *Act*, the Tribunal Member's decision in this matter is confirmed. It follows that the Determination issued on April 1st, 2005 is similarly confirmed in the amount of $13,113.30 (including $2,000 on account of administrative penalties) together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft **Panel Chair** **Employment Standards Tribunal**	**Norma Edelman** **Vice-Chair** **Employment Standards Tribunal**	**Alison Narod** **Member** **Employment Standards Tribunal**