BC EST #D338/97
Reconsideration of BC EST #D357/96

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an application for reconsideration
pursuant to Section 116 of the
Employment Standards Act S.B.C. 1995, C. 38

- by -

Ernest J. Helliker
("Helliker")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: David Stevenson

FILE NO.: 97/438 (96/526)
DATE OF DECISION: July 28, 1997

DECISION

OVERVIEW

This is an application by Ernest J. Helliker ("Helliker") pursuant to Section 116 of the *Employment Standards Act* (the "*Act*") of a decision of an adjudicator of the Employment Standards Tribunal (the "Tribunal"), BC EST #357/96, dated December 10, 1996. The decision canceled a Determination of a delegate of the Director of Employment Standards (the "Director") which had concluded, applying Section 66 of the *Act*, that the employment of Helliker had been terminated, applying subsection 65(1)(f) of the *Act*, that no reasonable alternative employment had been offered and, applying Section 63 of the *Act*, Helliker was entitled to length of service compensation in an amount of $3285.85.

FACTS

On or about September 12, 1995 Helliker's employment with Stordoor Investments Ltd. operating as Overhead Door Co. of Vancouver ("Overhead Door") was terminated. Helliker was, at the time, the Sales Manager for Overhead Door in their Fraser Valley office. He had held that title since December of 1992. Helliker filed a complaint with the Director claiming length of service compensation and, following an investigation, the Director concluded Helliker had been terminated by reason of a substantial alteration of a condition of employment and was entitled to length of service compensation as the offer of employment in an inside sales position was not reasonable alternative employment. Overhead Door appealed.

The adjudicator disagreed with the opinion of the Director that there had been a substantial alteration of a condition of employment and found, in any event, the employer's offer to Helliker of an inside sales position in their Burnaby office was reasonable alternative employment and by refusing the job, Helliker had disentitled himself to the benefit established by Section 63 of the Act.

Helliker argues the adjudicator has "missed the point" and that the differences between his job in Abbotsford and the job offered in Burnaby were misunderstood by the adjudicator. Helliker outlines a number of areas where he feels the adjudicator failed to appreciate the existence or relevance of certain facts going to whether the alterations were "substantial". First, he says the adjudicator was wrong in saying he only supervised himself. He says that part of his job was to supervise and direct two installers who worked from a warehouse used by Overhead Door in Abbotsford. He also says the adjudicator erred when he inferred his presence in Burnaby was only required for the purpose of picking up materials.

There were other areas of disagreement raised by Helliker to the conclusions but they are not helpful to my analysis and conclusions.

The Director treated the termination as a deemed termination under Section 66 of the Act because it viewed the "offer" of an inside sales position in the Burnaby office as a substantial alteration of a condition of employment. The Director specifically identified several aspects of the offer that represented a substantial alteration of Helliker's job as Sales Manager in the Abbotsford office:

1. A change in job content from a job that involved a combination of outside sales (which included direct contact with the prospective customer) and telephone sales to a job involving only inside sales. This difference related to the elimination of direct contact with prospective customers.

2. A move from a home office environment with no set hours of work to a structured office environment where the hours of work would be fixed at 8:00 am to 5:00 pm Monday to Friday.

3. A requirement to commute to Burnaby on a daily basis.

4. A loss of the use of a company vehicle.

For the same reasons, the Director also concluded the inside sales position offered to Helliker was not "reasonable alternative employment" and would not disentitle Helliker from the length of service benefit contained in Section 63. This conclusion was stated to be the result of a substantial change in Helliker's working conditions and a drastic decrease in his net income (due to his increased transportation costs) caused by a combination of the commute and the loss of the use of a company vehicle.

A submission was submitted for the Director and the delegate supporting the application. It contends, as a matter of law, the adjudicator misinterpreted Section 66 and argues, as a matter of mixed fact and law, there was a substantial alteration to a condition of employment, the Director was correct in deeming Helliker's employment to have been terminated and the offer of an inside sales position in Burnaby was not reasonable alternative employment.

ANALYSIS

This application turns, first, on what the Act contemplates, from both a factual and legal perspective, as constituting a substantial alteration to a condition of employment for the purposes of Section 66 and, second, whether the offer of an inside sales position in Burnaby,

even if it represented a substantial alteration of a condition of employment, was reasonable alternate employment.

Helliker argues that issue primarily on a factual basis while the Director argues it primarily as a point of law under the Act. The result is the same. Both say the differences between the Sales Manager's job, which was eliminated, and the inside sales job in Burnaby was a substantial alteration to a condition of employment and Helliker should have been entitled to length of service compensation.

I will first deal with the issue of whether the adjudicator erred in his interpretation of Section 66. Section 66 states:

> 66. If a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated.

The adjudicator identified and defined two elements in Section 66. The first element was a finding of an alteration to a "condition of employment". "Condition" was interpreted as being a fundamental contractual term. To put it in other words, he found Section 66 required evidence of a change to a fundamental contractual term of employment. The second element was a requirement to find the alteration was "substantial".

In my opinion, the adjudicator has erred in identifying and defining the elements of Section 66 of the *Act*. The term "conditions of employment" is defined in Section 1 of the *Act*:

> "conditions of employment" means all matters and circumstances that in any way affect the employment relationship of employers and employees;

If the above definition is applicable to Section 66 of the *Act*, it is apparent the term "condition" could not be interpreted to be a "fundamental" contractual term. In the context of the definition given to "conditions of employment" in Section 1, it is "all" matters and circumstances that would constitute "conditions", not only those that are "fundamental".

On an application of principles of statutory interpretation, I conclude the definition does apply to the term "condition of employment" in Section 66. The principle that applies is codified in the *Interpretation Act*, R.S.B.C. 1979, c. 206 at Section 12:

> 12. Definitions or interpretation provisions in an enactment, unless the contrary intention appears in the enactment, are applicable to the whole

> enactment including the section containing a definition or interpretation provision.

I can find nothing in the *Act* indicating the above definition is not intended to apply to the term "condition of employment" in Section 66. In the absence of some contrary intention appearing in the *Act* the definition is applicable and the requisite elements of Section 66 become:

> (I) an alteration of a matter and circumstance that in any way affects the employment relationship; and
> (ii) a conclusion the alteration is substantial.

There are a number of observations to make concerning those requisites. First, the requirement that the alteration be "substantial" will apply to both the "matter and circumstance" and to its "affect" on the employment relationship. The "matter and circumstance" which are affected by the alteration must be of significance or importance to the employment relationship: an insignificant alteration of even a very significant "matter and circumstance" will not satisfy the requisites of the section. The alteration must also substantially affect the employment relationship. In other words, it must be sufficiently material that it could be described as being a fundamental change in the employment relationship.

Second, "matter and circumstance" are individual concepts and are intended to address the reality that an employment relationship can be affected not only by a unilateral alteration in the terms of employment but also by a change in the job situation, exemplified by conduct inconsistent with an intention to continue the employment relationship, such as threats of dismissal or demotion, harassment or badgering an employee to quit.

Third, "matter and circumstance" can include aspects of the employment relationship that are express, implied or statutory. Where the parties to the employment relationship have expressly stated certain matters are part of the employment relationship that would be important to a consideration of whether a deemed termination has occurred.

Fourth, the question of whether a condition of employment has been substantially altered is essentially a question of fact. The test is an objective, not subjective, one. The issue is not whether the particular employee feels their employment has been substantially altered, but whether on a reasoned objective analysis a substantial alteration has occurred. Such an analysis would include, but is not necessarily limited to, the nature of the employment relationship, the conditions of employment, including their significance to the particular employment relationship, the alterations which have been made, the legitimate expectations of the parties (which may arise as a matter of custom or common practice in the employment relationship under consideration) and whether there are any express or implied agreements or understandings.

I agree with the Director that Section 66 was not intended to replicate the common law of constructive dismissal. That is not to say principles created and refined in the context of the common law analysis of constructive dismissal should be disregarded. There is little reason to reject these principles as a starting point from which a determination under Section 66 can be made. The question addressed in a common law constructive dismissal is much the same as that asked in a Section 66 analysis: has the been a sufficiently serious unilateral alteration of the employment relationship that the employee/Director is justified in treating the relationship as ended.

In my opinion, the adjudicator's insertion of a requirement to show a breach of a fundamental contractual term placed too high a test on what could result in a deemed termination under the *Act*. On the other hand, some of the aspects of the delegate's decision rely upon matters that in most employment relationships will be insignificant. The delegate relied upon the potential introduction of a commute from Abbotsford to Burnaby as supporting the conclusion Helliker should be deemed terminated. In the submission of the Director supporting Helliker's application, the Director says:

> The Director is of the view that one of the key elements of a contract of employment is the agreement or understanding as to where the work is to be performed. Where the work is to be performed is on the same level as what work is to be performed and what wages are to be paid.

That proposition, as a general presumption about the consequences of a change of location of employment, is unworkable and unrealistic. As I indicate later in this decision, circumstances may exist which, when examined objectively, make geographic proximity a factor in considering a question of deemed termination or reasonable alternate employment. This would be the same as for any alteration which is demonstrated on the facts to be a significant or important aspect of the employment relationship. However, those circumstances would not include what affect the change might have on an employee's "lifestyle", as suggested by the Director. There is nothing in the circumstances of this employment relationship that would suggest a change of location of work, *simpliciter*, would represent a "substantial alteration" to Helliker's employment.

Even dismissing the notion the change in location of employment contemplated by the offer of an inside sales position is not any aspect of "substantial change in this case, there were some "material" differences between Helliker's Sales Manager position and the proposed inside sales position. The adjudicator reached that conclusion and I agree with him. There were material changes to matters that affected the employment relationship in a significant way. The original agreement between Helliker and Overhead Door quite clearly contemplated Helliker would be an outside sales representative. That condition was one which was important to both parties.

Further, it is difficult to rationalize how the elimination of one's job can be viewed as anything other than a "substantial alteration of a condition of employment".

I reinstate the determination of the Director that Helliker was deemed terminated.

That conclusion does not end the matter, however. The adjudicator also found Helliker had disentitled himself to length of service compensation because he had refused reasonable alternate employment. The relevant portion of the *Act* reads:

> 65. (1) Sections 63 and 64 do not apply to an employee . . .
>
> (f) who has been offered and has refused reasonable alternative employment by the employer.

The adjudicator found the offer of an inside sales position in Burnaby to be reasonable alternative employment. I can see no reason for disturbing that conclusion. The analysis under the above statutory provision is not the same as under Section 66. Whereas the focus of the examination in Section 66 is the employment relationship in place at the time of the alteration, the focus in subsection 65(1)(f) is the alternate employment offered. I agree with the adjudicator that the test of reasonableness is an objective test, that is, what a reasonably officious bystander would consider as reasonable, not what the employee believes is reasonable. This test will include an assessment of the following factors:

1. The nature of the job offered compared to the one currently performed;

2. Any express or implied understandings or agreements;

3. If there are comparable wages, benefits, working conditions and security of employment;

4. Geographic proximity or costs of dislocation; and

5. Any objective personal circumstances that might operate against accepting the offer.

As I outlined above, the Director concluded the offer was not reasonable alternative employment. The reasons for that conclusion were a substantial change in working conditions and a drastic decrease in Helliker's net income due to increased transportation costs.

The Director concluded there was little difference in the nature of the inside sales position compared to the Sales Manager position. Both jobs were sales representative positions. Both

involved telephone sales to a greater or lesser degree. The difference was the inside sales position would not require Helliker to make outside sales calls. Helliker would continue to report to the same supervision as before. On the evidence there appears to be no loss of status, and none was specifically argued. Helliker inferred in his application because he no longer supervised the assignments of two labourers there was a loss of some element of authority. However, it is clear from the employment agreement between he and Overhead Door that the supervision of labour was a matter that could be requested or not requested by management regardless of the position he had. It was not an authority which vested in him by virtue of being Sales Manager, but because his superiors asked him to do the supervision. They could have asked the same of him if he assumed the inside sales position. The fact that Helliker was supervising the work assignments of two labourers while at the Abbotsford office is consistent with the agreement he had. The fact he was no longer requested to supervise them after the Abbotsford office was shut down is also consistent with the agreement. I do not accept the change in his supervisory authority to be a factor in determining the reasonableness of the alternative employment. The difference in the nature of the position held and the position offered is insubstantial and would not justify a conclusion the inside sales position was not reasonable alternate employment.

The wages, benefits and security of employment would remain the same.

The Director did identify a number of areas which were perceived to be changes in the working conditions, including a change in the office environment and a change in hours, from a flexible day to a fixed day. The Director also found the requirement to commute contributed to her conclusion the offer was not reasonable alternative employment.

On the evidence, I do not find any of these differences, either individually or cumulatively, made the employment offered not a reasonable alternative to the Sales Manager position.

In respect of the change from a home office environment to a more structured office environment, the evidence would seem to suggest such a change would be a positive adjustment. Apparently, Helliker found the home office environment to be an unsatisfactory arrangement. In a letter dated September 12, 1995, Helliker writes about the home office environment:

> I have used my home ie. my kitchen as an office, my own personal computer and fax machine for company business and have never been compensated for it. I have received phone calls at all hours of the night, disrupting my family. I kept telling my wife that it will get better one day when they set up a full office in Abbotsford which would be outside of our home.

It is ingenuous to suggest on the one hand the home office was an unsatisfactory work environment, while suggesting a move to a structured office environment was an adverse element of the inside sales position offer.

Also, standardizing the work week and hours of work are not sufficient to make the inside sales position offer unreasonable. No personal circumstances are evident on the face of the record that would make the inside sales position offer an unreasonable alternative on this basis.

I do not accept the argument of the Director that a requirement to commute from Abbotsford to Burnaby has any affect on the reasonableness of the job offer. I do not believe Helliker felt it was unreasonable either, as he inquired about purchasing the company vehicle for the purpose of making the commute. In his application, he says " I was never concerned about the length of the commute from Abbotsford to Burnaby". As I indicated above, the geographic proximity of the place of work is encompassed in the term "reasonable alternative employment". The question is objective and involves assessing whether the circumstances of getting to and from the place of work would impose such a burden or hardship on Helliker that the offer cannot be considered reasonable. No such burden or hardship would be imposed in this case. As Helliker put it in his application: "A drive to Burnaby once a day and back would be a picnic."

Turning to the final aspect of this issue, the delegate felt Helliker's net employment income had been drastically decreased as a consequence of the loss of the company vehicle. In addressing this aspect of the case, I cannot ignore the agreement of the parties.
The company vehicle was provided almost as an afterthought in the employment relationship. Originally, Helliker was to have received a car allowance and mileage when traveling for business reasons. The vehicle was provided as a substitute for that condition of employment. The significance of the vehicle is directly related to the question of substantial alteration of a condition of employment, but it has no particular importance as an independent condition of employment. It is implicit in the employment relationship that if the understanding and agreement upon which the vehicle was provided has changed, that condition would change. It is not reasonable to infer an agreement or understanding that Helliker would continue to have a company vehicle if his employment did not require it. The loss of the vehicle (in effect, the loss of a car allowance and mileage when traveling for business reasons) has been factored into the conclusion of there was a substantial alteration of a condition of employment. But I reiterate, the focus of this part of the analysis is not on the job that has been altered, but on the one that had been offered. As the position offered did not require Helliker to travel for business reasons, there is no reason to include the use of a company vehicle in the offer. The question then becomes whether a position which did not require Helliker to travel for business reasons is reasonable alternate employment. That question has already been answered.

The fact Helliker will incur some cost associated with the commute does not make the alternate employment unreasonable unless, like the factor of geographic proximity, the cost imposes a burden or hardship associated with the change in the place of work. I do not find that would have occurred in the circumstances of this case. It is apparent Helliker balked at the new position mainly for personal reasons that on the evidence are not objectively related to whether the inside sales position was reasonable alternate employment.

The original decision is confirmed on the alternate conclusion that Helliker is disentitled to length of service compensation as he was offered and refused reasonable alternate employment. I do not accept he did not have a reasonable opportunity to consider the offer.

ORDER

The application to vary the decision of the adjudicator is denied.

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David Stevenson
Adjudicator
Employment Standards Tribunal