Employment Standards TRIBUNAL

An appeal

- by -

Fraser Irvine
(the “Employee”)

- 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: Ib S. Petersen

FILE No.: 2001/50

DATE OF DECISION: January 18, 2001

DECISION

APPEARANCES:

Mr. Michael Korbin	on behalf of Mr. Fraser Irvine ("Irvine", the "Employee or "Appellant")
Ms. Shelley-Mae Mitchell	on behalf of Covenant House Vancouver ("Covenant House" or the "Employer"

OVERVIEW

This is an appeal by the Employee pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director of Employment Standards (the "Director") issued on January 18, 2000. Irvine was employed with Covenant House, a non-profit community service society, from September 2, 1997 to September 7, 1999. The delegate concluded that Irvine was neither owed overtime wages, based on his conclusion that Section 34(1)(r) of the *Employment Standards Regulation* (the "*Regulation*") applied to Irvine's employment, nor compensation for length of service because he had resigned and not been constructively terminated. In a decision dated October 12, 2000, I referred the matter of overtime back to the Director for further investigation (*Fraser Irvine*, BCEST #D427/00).

As noted, the delegate found that the Employer had given notice to Irvine of certain changes to the terms and conditions of his employment and did not accept that Irvine had been constructively dismissed and, in the result, was not entitled to compensation for length of service. While I concluded that the delegate failed to give adequate reasons with respect to the overtime claim, in my earlier decision, I did not consider the same to be the case with respect to the issue of "constructive dismissal:"

> "...With respect to the second issue, constructive dismissal, I am of the view that the delegate did not fail to give adequate reasons for his conclusion. In the result, the Tribunal will contact the parties to ascertain if a hearing is required and, if not, allows the parties an opportunity to make submissions, should they so desire."

The material facts are largely not in dispute and the parties made written submissions upon which this decision is based.

ISSUES

The issue in this decision is whether Irvine is entitled to compensation for length of service.

ANALYSIS

The appellant has the burden to prove that the Determination is wrong.

I understand the material facts to be as follows. Irvine commenced employment on September 2, 1997. After a brief training period, Irvine worked as an Overnight Team Leader between September 22, 1997 and July 12, 1999. In late May, the Employer gave verbal notice of changes. On June 30, 1999, the Employer gave written notice that effective July 12, 1999, his position would be as an Overnight Shift Supervisor and that, effective September 1, 1999, his hours of work would be reduced from 80 hours to 60 (a subsequent memorandum from the Employer changed this to 63 hours). He was also advised that his rate of pay would not be reduced until September 1, 1999. Accordingly, on or about September 1, 1999, his pay rate was reduced from $18.26 per hour to $17.00 and his hours were reduced. It is common ground between the parties that Irvine was given three months notice of the changes to his employment. On September 7, 1999 he advised the Employer that, in his view, he had been constructively dismissed. September 7 was the last day of work.

Irvine does not take issue with the adequacy of the notice given by the Employer. However, he says that because he continued to work after the date of the notice, September 1, the notice is of no effect. Irvine relies on Section 67 of the Act which provides (in part):

> 67. (1) A notice given to an employee under this Part has no effect if
>
> ...
>
> (b) the employment continues after the notice period ends.
>
> Section 66 of the *Act* provides:
>
> 66. If a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated.

I accept that the changes imposed by the Employer constituted "substantial" alterations of Irvine's terms and condition of employment. In the circumstances of this case, I do not accept that the mere change of title from Team Leader to Shift Supervisor, constitutes a substantial alteration. Irvine continued to receive his hours and he continued to receive his hourly rate up until September 1 and, accordingly, he suffered no loss or earnings until that time. From September 1, 1999, his pay rate was reduced and, more importantly, the number of hours were reduced by almost 25%. In other words, in the circumstances, his income would be reduced by 25% or more.

Nevertheless, in my view, Irvine's argument is wholly without merit. I agree with the Employer that "constructive dismissal"--to the extent that concept is applicable within the context of the *Act*--occurs "when an employer makes a unilateral and fundamental change to

a term or condition of employment without providing reasonable notice to the employee" (see *Farber v. Royal Trust Company* (1997), 145 D.L.R. (4th) 1 (S.C.C.). In the instant case, Irvine was given notice in late May and on June 30, 1999 that his terms and conditions of employment would change effectively September 1, 1999 and they did change as per the notice. He received three months notice of the changes. It does not make sense that Irvine's decision to continue to work after September 1 would vitiate the notice.

This provision must be read in the context of the *Act*. It is agreed that the changes took effect on or about September 1, 1999. However, notice was given some three months prior. In my view, there is nothing in the *Act* that bar employers from making *otherwise lawful* changes to the terms and conditions of an employees, provided, if the changes constitute substantial alterations, that notice is given in accordance with the *Act*. In other words, I do not read Section 66 as precluding an employer from making substantial altercations to conditions of employment provided notice is given. The *Act* provides for minimum standards of employment. The notice required under the *Act* is often shorter than that provided for under the common law (see Section 63). In this case, the Employer provided three months notice of the changes to Irvine's employment. If the Employer had simply terminated Irvine's employment, under the *Act* he would have been entitled to two weeks' notice or pay in lieu (Section 63). Following Irvine's interpretation, would, in effect, make it impossible to give notice of changes to employment and an employer would, therefore, be required to terminate the employment in order to avoid a complaint that employment has been constructively terminated. That result cannot, in my view, have been intended by the legislature.

In short, I do not agree with Irvine's interpretation of the *Act*. The appeal on this point is dismissed.

ORDER

Pursuant to Section 115 of the Act, I order that Determination in this matter, dated January 18, 2000 be confirmed with respect to the issue of constructive dismissal.

IB S. PETERSEN

Ib S. Petersen
Adjudicator
Employment Standards Tribunal