Employment Standards TRIBUNAL

An appeal

- by -

Stewart, Aulinger & Company

- 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: John M. Orr

FILE No.: 2003A/284

DATE OF DECISION: January 19, 2004

DECISION

SUBMISSIONS

Mark R. Braeder	Counsel on behalf of Stewart, Aulinger & Company
Renata Sheppard	On her own behalf
J.R. Dunne	Delegate on behalf of the Director

OVERVIEW

This is an appeal by Stewart, Aulinger & Company ("the law firm") pursuant to Section 112 of the Employment Standards Act (the "*Act*") from a Determination dated October 28, 2003 by the Director of Employment Standards (the "Director").

In the exercise of its authority under section 107 of the *Act* the Tribunal has concluded that an oral hearing is not required in this matter and that the appeal can be properly addressed through written submissions.

The Director determined that the law firm owed wages to a former employee, Renata Sheppard, as compensation for length of service including associated vacation pay and interest. The compensation was calculated on the premise that Ms. Sheppard had a period of uninterrupted employment from March 1997 until October 31, 2002 when she was laid off. This entitled her to 5 weeks compensation.

The law firm submitted that the calculation of compensation was incorrect because the employment was interrupted on April 28, 2002 and compensation should only be calculated on the time employed thereafter resulting in only one week's compensation. The law firm claims that on April 28, 2002 Ms. Sheppard was dismissed for cause. However, the law firm immediately offered her a new position in a different department of the firm and her employment continued in this new position until October 31, 2002. Ms. Sheppard was then laid-off for lack of work. She was not recalled and therefore she was deemed to have been terminated as of October 31, 2002.

The Director's delegate investigated the matter and in the course of that investigation held some form of *viva voce* hearing. Following that process the delegate determined that employment is not interrupted where an employer dismisses an employee for cause and then immediately re-hires that employee.

The law firm has appealed on the basis that the Director made an error in law in finding that the employment was not interrupted by the dismissal for cause.

ISSUE

The issue in this case is whether employment is uninterrupted where an employee is dismissed for cause and then immediately re-hired in another position with the employer.

ARGUMENT

The law firm submits that the evidence before the delegate was unequivocal that Ms. Sheppard was dismissed for cause on April 28, 2002. It is submitted that the effect of this dismissal was to interrupt Ms. Sheppard's employment and that therefore she had no more than 6 months of "consecutive" employment when she was laid-off at the end of October.

It is submitted that because Ms. Sheppard was dismissed for cause in April there would have been no compensation payable at that time. Accordingly, her entitlement to compensation should only be calculated from the commencement of her employment in her new position.

The Director's delegate submits that the appeal only relates to findings of fact and not errors in law and should be therefore be dismissed as not coming within the grounds of appeal allowed in the *Act.* The delegate does not make any submission on the law firm's submission that the dismissal for cause interrupted the consecutive months of employment.

Ms. Sheppard submits that she was not dismissed for cause but simply transferred to another position within the firm. Even then her actual employment was "consecutive" throughout the time she worked for the law firm.

ANALYSIS

Section 63 of the Act provides that an employer is liable to pay an employee compensation for length of service under certain circumstances. After 3 "consecutive" months of employment the employer is liable to pay one week's wages. After 12 "consecutive" months of employment the amount increases to 2 week's wages. After "3 consecutive years of employment" the amount again increases up to a maximum of 8 weeks.

Section 63 also provides that the employer's liability to pay compensation for length of service is discharged if an employee is dismissed for cause.

It is unfortunate in this case that the Director's delegate did not address the issue of "just cause". On the materials submitted to me it would appear that "just cause", in accordance with the principles set out in the Tribunal's jurisprudence, could not have been established by the law firm in any case. The whole issue of "consecutive" months of employment would not have arisen if there was not a valid termination of employment on April 28, 2002 as claimed by the law firm. However, as the delegate did not determine this issue, I must either refer this matter back to the Director or determine this appeal on the assumption that there was a dismissal for cause.

Assuming then that Ms. Sheppard was dismissed on April 28th for just cause and was then immediately re-hired in a different position was her employment "consecutive"? If the delegate erred in this regard it is clearly an error in law that would be grounds to grant the law firm's appeal.

The fundamental point here is what was intended when the legislation provided for increasing levels based on "consecutive" months or years of employment. The *Interpretation Act* of British Columbia provides that:

> **Enactment remedial**
> **8.** Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

It is also well established in the jurisprudence that the basic purpose of the *Act* is the protection of employees through minimum standards of employment and that an interpretation which extends that protection is to be preferred over one which does not (*Machtinger v. HOJ Industries Ltd*., [1992] 1 S.C.R. 986).

Bearing these principles in mind, I conclude that even if the employee was dismissed and re-hired by the same employer on the same day her employment with her employer continued uninterrupted and that each day, week or year of her employment with the employer was "consecutive". In my opinion this interpretation is consistent with the intent of the legislation to increase the level of compensation based on length of service.

In conclusion I find that Ms. Sheppard's employment was consecutive from March 1997 through October, 2002 and that the Director's delegate correctly calculated her entitlement to compensation for length of service.

ORDER

I order, under section 115 of the *Act,* that the Determination herein dated October 28, 2003 is confirmed.

John M. Orr
Adjudicator
Employment Standards Tribunal