

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1995, C. 38

- by -

Cheri Lowden
("Lowden")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 96/556

DATE OF HEARING: January 6, 1997

DATE OF DECISION: January 13, 1997

DECISION

APPEARANCES

Cheri Lowden on her own behalf

Dr. W. P. McRoberts on his own behalf

Donna Cummings on behalf of the Director of Employment Standards

OVERVIEW

This is an appeal by Cheri Lowden (“Lowden”), under Section 112 of the *Employment Standards Act* (the “Act”), against Determination No. CDET 003845 which was issued by a delegate of the Director of Employment Standards on August 30, 1996. The reason for Lowden’s appeal is that she alleges constructive dismissal occurred due to sexual harassment at her workplace. Lowden seeks as a remedy \$1,419.090 in the form of “severance pay.” The Director’s delegate concluded that there was not sufficient evidence to support Lowden’s claim of constructive dismissal.

FACTS

Lowden was employed as an office/administrative assistant by Dr. W Patrick McRoberts (“McRoberts”) (operating as Mosquito Creek Optometry Centre) from November, 1993 to December, 1995.

The Determination found that McRoberts contravened several Sections of the *Act*: Section 17(1) - Paydays; Section 18(2) - Payment of Wages after termination of employment; Section 27(1) - Wage Statements and Section 58(3) - Vacation pay. However, the Director’s delegate found that there was “... not enough evidence to support a claim for constructive dismissal.”

There is no dispute concerning the fact that Lowden resigned her employment in a letter dated December 13, 1995 although her last day of work was December 6, 1995.

Lowden’s appeal to the Tribunal relies primarily on two documents to support her allegation of constructive dismissal:

- a Board of Referees Decision (dated August 6, 1996) concerning her entitlement to Unemployment Insurance benefits; and
- “Observations of the Commission” to the Board of Referees, dated July 5, 1996.

The Board of Referees Decision dated August 6, 1996 made the following finding:

*Findings: The Board weighed all the miscellaneous incidents and situations presented by the appellant and the claimant. The **sexual harassment may or may not have happened**, the Board could not arrive at a finding on this issue because the evidence was so contradictory. However, it found that there was increasing antagonistic relationship between the claimant and her employer Section 28(4)(j). (emphasis added)*

This finding was made by the Board of Referees despite the following statements in the “Observations of the Commission” dated July 5, 1996:

*It is apparent from the many letters from the employer, that there are very strong feelings between the parties in this situation. **The Commission has attempted to have the claimant clarify her statements and to rebut the employer’s statements, but has received no response. (Exhibit 18) The Commission urges both parties to attend the hearing in order that the Board of Referees can be accorded an opportunity to ascertain the facts of the case first hand.** The Commission notes that section 40(1.1) of the Act requires that in situations where evidence on each side of an issue is equally balanced, the benefit of doubt shall be given to the complainant. Notwithstanding that, the Commission finds that the evidence of the claimant is more compelling than that of the employer in this case, as the claimants account is direct and is focused on the issue. On the other hand, the employer’s accounts of the events surrounding the dismissal tend to be emotional , and to dwell on events and emotions not relevant to the issue.*

The Commission submits that on the basis of the evidence submitted thus far, the claimant has shown that on that she was faced with a situation of sexual harassment, and that she has proven just cause for leaving her employment. (emphasis added)

ANALYSIS

Section 63(1) of the Act establishes a liability for employers to pay compensation to employees under certain circumstances. Section 63(2) sets out how the employers liability increases based on the length of consecutive months of employment. Section 63(3) sets out how an employer’s liability is discharged if the employee:

- a) is given written notice of termination ;
- b) is given a combination of notice and money; or
- c) terminates employment, retires, or is dismissed for just cause.

There is no dispute in this appeal that Lowden resigned her employment. However, she alleges that her resignation should be found to be a constructive dismissal because of sexual harassment by a co-worker in her workplace.

An employee's entitlement to compensation under Section 63 of the *Act* is quite different from any entitlement to benefits under the *Unemployment Insurance Act* or any entitlement to compensation or payments under the *Human Rights Act*. I explained this point to Ms. Lowden at the commencement of the hearing and she stated that she understood it.

Part 13 of the *Act* sets out the right to appeal a determination (Section 113) and the Tribunal's powers to hear and decide appeals (Sections 114; 115; 116). Under this statutory scheme, the Determination establishes the parameters of the case and places the legal and evidentiary onuses on the appellant (Lowden in this case). Part 13 creates a right of appeal. This does not mean that the Tribunal is required to hold a hearing *de novo* to decide every appeal. Adjudicators must bring an appeal mind-set to the proceedings. This means that the person making the appeal must, at least, show why the Determination is wrong.

In this appeal, Lowden relies on the findings made in a Decision made by a Board of Referees (which was appointed under the *Unemployment Insurance Act*) as the basis for supporting her allegation that she is entitled to "severance pay" because she was constructively dismissed. However, the very Decision on which Lowden relies does not support her allegation. The Board of Referees made a finding that "... sexual harassment may or may not have happened."

When I review the extensive documentary evidence and the submissions made to this Tribunal by Lowden, I am unable to conclude that the findings set out in the Determination are unreasonable. For that reason, I decline to vary or cancel the Determination.

ORDER

I order, under Section 115 of the *Act*, that Determination No. CDET 003845 be confirmed.

Geoffrey Crampton
Chair
Employment Standards Tribunal

GC:sr