Employment Standards TRIBUNAL

An appeal

- by -

Georgina Young
("Young")

- 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: C. L. Roberts

FILE No.: 2000/653

DATE OF HEARING: January 16, 2001

DATE OF DECISION: January 24, 2001

DECISION

APPEARANCES:

Georgina Young:	On her own behalf
For Capilano Care Centre:	David Brennan
For the Director of Employment Standards:	No one appeared

OVERVIEW

This is an appeal by Georgina Young ("Young"), pursuant to Section 112 of the Employment Standards Act ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued August 29, 2000. The Director dismissed Young's complaint that Preferred Care Corporation operating as Capilano Care Centre ("Capilano") contravened Section 66 of the Act in constructively dismissing her, and without paying compensation for length of service.

ISSUE TO BE DECIDED

There are two issues on appeal. The first is whether the Director's delegate made factual errors. The second issue is whether the delegate erred in law when he concluded that, in order to find that an employer had terminated an employee by substantially altering the employee's conditions of employment, the changes had to be made, not just contemplated.

FACTS

The facts, as determined by the delegate, and not disputed by the parties, are as follows.

Capilano employed Young as a Director, Resident and Family Services from September 1, 1999 to February 10, 2000. She worked four days per week at Capilano Care Centre in North Vancouver.

When Young was offered the position on July 28, 1999, she was told the salary would be $25.00 per hour. After three month's employment, Young was also to receive a benefit package, including RRSP/Pension Plan, medical, life insurance, accidental death and dismemberment, extended health, dental long term disability and sick leave. The value of these benefits was estimated by Capilano to be from $238 to $368 per month.

Shortly after hiring Young, Capilano was faced with budgetary difficulties and decided to reduce its operating costs. It eliminated some management positions, and reduced the working hours of other employees.

Late in the afternoon on January 26, 2000, Capilano told Young that, effective February 10th, it would be eliminating her benefits. In partial compensation for the elimination of those benefits, Young would receive an extra $1 per hour in wages. Capilano also advised Young that her hours were being reduced by one half, to 2 days per week, but told her that she could work additional hours at the East Vancouver location. The delegate, while setting out Capilano's position that Young was told that the benefits might be reinstated, made no findings of fact on this point. Young denied that she was ever advised of this.

Young discussed the adverse effect Capilano's decision would have on her with Ms. Rushton of Capilano on two occasions before she left. There was no negotiation or change in Capilano's decision. On February 10, Young delivered her resignation letter to Capilano, effective that day. It stated, in part, that she considered the "adverse change as a constructive termination of our agreement."

The delegate found that Young was given one month notice of those changes. However, as Young argued, she was told about the changes, which were to take effect on February 10, at the end of the day on January 26. That is just two week's notice.

Young sought alternative employment upon being told of the changes to her position, and began working in her new job February 14.

Although the delegate is not clear on this point, it appears that he determined that a condition of Young's employment was substantially altered pursuant to Section 66 of the Act. Nevertheless, he also determined that Young had quit her position before the changes came into effect, and concluded that Young was not entitled to compensation for termination on that basis. He stated

> Section 66 requires that a condition of employment be substantially altered. It is my understanding this means that before Section 66 can come into effect the conditions must be altered, not just contemplated. I appreciate that Ms. Young was notified that the changes were to be made however, part of the test for constructive dismissal deals with the alterations that have been made. In this case, no changes had been made.
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> I find that no conditions of employment had been substantially altered at the time Ms. Young quit her position with the company. Section 66 does not apply and subsequently when Ms. Young quit she cannot be protected under that section of the Act.

ARGUMENT

Young argues that the delegate erred in finding that she was told that the benefits or hours could be reinstated at a later date, if possible. She argues that she was not. Although, as noted above, the delegate made no finding of fact on this point, I find that nothing turns on this discrepancy, since, even if this information was communicated to Young, there was no indication of the date these benefits would be reinstated, if ever.

Young argues that she could not accept the offer of 2 days work at Capilano's other location. She argues that it would have been impossible for her, as a sole charge Social Worker to double her client base, and provide services in two different cities operating under 2 separate Health Boards. For the reasons set out below, I find nothing turns on this point, and have found it unnecessary to address it.

Ms. Young further contended that the changes to her employment contract had gone into effect when she left. She argues that her hours of work were reduced, and that her benefit package had been cancelled as of February 10. She also argued that the cancellation of the benefits amounted to a substantial alteration to her employment, and that a $1 per hour wage increase was not sufficient compensation for the benefits she had lost.

Capilano argues that if Young was constructively dismissed on January 26, she worked out her notice period in any event, and is not entitled to severance pay.

ANALYSIS

The burden of establishing that the Determination is incorrect rests with an Appellant. Having reviewed the submissions of the parties, I find that Young has discharged that burden. However, I also conclude that she is not entitled to compensation for length of service.

Section 66 provides as follows:

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

"Conditions of employment" is defined in Section 1 as "all matters and circumstances that in any way affect the employment relationship of employers and employees".

The test to ascertain whether a substantial change has occurred is an objective one (see Task Force Building Services Inc. v. British Columbia, (Director of Employment Standards) [1998] BC EST #D047/98). In determining whether a condition of employment has been substantially altered, the director will have regard to the nature of the employment relationship, and may consider factors such as a change of working location, hours of work, a

reduction of wages or a change in responsibilities. I would add to this list the alteration or elimination of a benefits package.

I find, as the delegate appeared to do, that Capilano unilaterally and fundamentally altered Young's contract of employment. It eliminated a substantial benefits package that could not be replaced by a $1 per hour wage increase. I find that the benefits package was a fundamental term of Young's employment contract, the elimination of which entitles her to treat the agreement at an end. Whether or not Capilano promised to reinstate those benefits if it could does not negate that breach, since it was a conditional promise upon an event over which Capilano suggested it had no control. Young accepted the termination after unsuccessful attempts to negotiate the alterations with Capilano.

However, the delegate went on to suggest that, because Young quit her employment before the changes took effect, she could not obtain the protection of Section 66. Once an employer acts in a way that evinces an intention not to be bound by the employment contract, the agreement is breached. Capilano unilaterally and unequivocally communicated its intention not to honour its agreement on January 26, constructively terminating Young's employment as of that date. I find that the changes had been made, not just "contemplated" as found by the delegate, as of January 26. Therefore, that is the date she was advised of her termination, which took effect February 10.

Section 63 sets out an employer's liability for compensation for length of service. After 3 consecutive months of service, an employer becomes liable to pay an employee an amount equal to one weeks' wages as compensation for length of service. Young worked for two weeks after Capilano gave her notice of the alteration of her employment contract, and was paid for those two weeks. I find that Capilano has discharged its liability to Young.

ORDER

The Determination regarding the violation of Section 66 of the Act is cancelled. However, no wages are owed to Young as Capilano has discharged its liability by providing notice to Young.

C.L. ROBERTS

C. L. Roberts
Adjudicator
Employment Standards Tribunal