Employment Standards TRIBUNAL

An appeal

- by -

Isle Three Holdings Ltd. carrying on business as Thrifty Foods
("Thrifty Foods")

- 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 (as amended)

TRIBUNAL MEMBER: John Savage

FILE No.: 2007A/162

DATE OF DECISION: March 14, 2008

DECISION

SUBMISSIONS

Emilio DeRose	on his own behalf
Daniel J. Mildenberger	solicitor on behalf of Isle Three Holdings Ltd. carrying business as Thrifty Foods
Terry Hughes	Delegate of the Director of Employment Standards

INTRODUCTION

1. Isle Three Holdings Ltd. ("Thrifty Foods") appeals a determination of the Director dated November 23, 2007 (the "Determination") that it owes its former employee Emelio DeRose ("DeRose") termination pay pursuant to section 63 of the *Employment Standards Act* (the "Act").

2. DeRose was employed by Thrifty Foods as an Independent Produce Merchandiser from November 1, 2004. He commenced employment with Thrifty Foods in 1993 as a Deli Clerk and received various promotions thereafter. After issues arose between DeRose and Thrifty Foods in May 2006 he was reassigned to the position of Produce Supervisor at the Colwood store.

3. DeRose considered the position of Produce Supervisor a demotion. Although he received the same pay as he had as Independent Produce Merchandiser, he considered it a lesser position, and his rate of pay was "red-circled".

4. DeRose objected to the reassignment by correspondence of May 18, 2006 and sought to negotiate a different position without avail. Thrifty Foods replied by correspondence of May 23, 2006. On July 24, 2006 DeRose sought a formal response to his earlier request and was again advised that there would be no reconsideration by correspondence of July 26, 2006. He remained in the position of Produce Supervisor from May until his resignation which was effective August 27, 2006.

5. Thrifty Foods argues that DeRose was offered and refused reasonable alternate employment. Subsection 65(1)(f) of the Act provides that sections 63 and 64 do not apply to an employee that "has been offered and has refused reasonable alternate employment". The issue in the appeal is whether subsection 65(1)(f) applies in the circumstances of this case. A further issue is whether the employee accepted the reassignment.

ISSUE

6. Did the Delegate err in law in determining that subsection 65(1)(f) did not apply? Did the Delegate err in law in determining that the employee did not accept the reassignment?

LEGISLATION

7. Section 63 of the Act provides compensation for length of service:

63. (1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.

(2) The employer's liability for compensation for length of service increases as follows:

(a) after 12 consecutive months of employment, to an amount equal to 2 weeks' wages;

(b) after 3 consecutive years of employment, to an amount equal to 3 weeks' wages plus one additional week's wages for each additional year of employment, to a maximum of 8 weeks' wages.

(3) The liability is deemed to be discharged if the employee

(a) is given written notice of termination as follows:

(i) one week's notice after 3 consecutive months of employment;

(ii) 2 weeks' notice after 12 consecutive months of employment;

(iii) 3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice;

(b) is given a combination of written notice under subsection (3)(a) and money equivalent to the amount the employer is liable to pay, or

(c) terminates the employment, retires from employment, or is dismissed for just cause.

(4) The amount the employer is liable to pay becomes payable on termination of the employment and is calculated by

(a) totalling all the employee's weekly wages, at the regular wage, during the last 8 weeks in which the employee worked normal or average hours of work,

(b) dividing the total by 8, and

(c) multiplying the result by the number of weeks' wages the employer is liable to pay.

(5) For the purpose of determining the termination date under this section, the employment of an employee who is laid off for more than a temporary layoff is deemed to have been terminated at the beginning of the layoff.

1995, c. 38, s. 63; 2002, c. 42, s. 30.

8. Section 65 creates certain exceptions to liability to pay compensation for length of service:

65. (1) Sections 63 and 64 do not apply to an employee

(a) employed under an arrangement by which

(i) the employer may request the employee to come to work at any time for a temporary period, and

(ii) the employee has the option of accepting or rejecting one or more of the temporary periods,

(b) employed for a definite term,

(c) employed for specific work to be completed in a period of up to 12 months,

(d) employed under an employment contract that is impossible to perform due to an unforeseeable event or circumstance other than receivership, action under section 427 of the *Bank Act* (Canada) or a proceeding under an insolvency Act,

(e) employed at one or more construction sites by an employer whose principal business is construction, or

(f) who has been offered and has refused reasonable alternative employment by the employer.

(2) If an employee who is employed for a definite term or specific work continues to be employed for at least 3 months after completing the definite term or specific work, the employment is

(a) deemed not to be for a definite term or specific work, and

(b) deemed to have started at the beginning of the definite term or specific work.

(3) Section 63 does not apply to

(a) a teacher employed by a board of school trustees,

(a.1) a teacher who is employed with or who has a service contract with a francophone education authority as defined in the *School Act*, or

(b) an employee covered by a collective agreement who

(i) is employed in a seasonal industry in which the practice is to lay off employees every year and to call them back to work,

(ii) was notified on being hired by the employer that the employee might be laid off and called back to work, and

(iii) is laid off or terminated as a result of the normal seasonal reduction, suspension or closure of an operation.

(4) Section 64 does not apply to an employee who

(a) is offered and refuses alternative work or employment made available to the employee through a seniority system,

(b) is laid off or terminated as a result of the normal seasonal reduction, suspension or closure of an operation, or

(c) is laid off and does not return to work within a reasonable time after being requested to do so by the employer.

1995, c. 38, s. 65; 1997, c. 52, s. 33; 2002, c. 42, s. 32.

9. Section 66 provides as follows:

66. If a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated. 1995, c. 38, s. 66.

DISCUSSION AND ANALYSIS

10. In this case the director determined that because a condition of employment was substantially altered, DeRose's employment was terminated pursuant to section 66. In my opinion, the Delegate was entitled to make that finding which is similar to a finding at common law that the employee has been constructively dismissed.

11. Notwithstanding section 63, however, where an employee has been terminated, and remains in or is offered alternate employment, the requirement to pay compensation for length of service is relieved against by section 65(1)(f) if "…the employee has been offered and has refused reasonable alternate employment".

12. Thus, in my view, section 65(1)(f) may apply notwithstanding that there has been a termination arising through the substantial alteration of a term of employment.

13. The Tribunal has held that the onus of showing that the offer is reasonable is on the party making it, namely, the employer, *Southside Delivery Services Ltd.*, BCEST #D246/97.

14. The Tribunal has considered that the test of what is reasonable must be an objective one. In *Helliker*, BCEST #D338/97, reconsideration of BCEST #D357/96, the adjudicator stated:

> ".... I agree with the adjudicator that the test of reasonableness is an objective test, that is, what a reasonably officious bystander would consider reasonable, not what the employee believes 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 a 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."

15. With respect to geographic proximity of the new employment the Tribunal following court decisions has afforded an employer considerable latitude in reassigning employees: *Ernest J. Helliker* BC EST #D338/97, *Daniel Robert Williamson* BC EST#D043/01, *Harding Fork Lift Services Ltd.*, BC EST #D073/97, *Longman v. Federal Business Development Bank* (1982), 131 D.L.R. (3d) 533; *Reber v. Lloyd's Bank International Canada* (1985),18 D.L.R. (4th) 122; *Lesiuk v. British Columbia Forest Products Ltd.* (1986) 33 D.L.R. 4th 1; and *Cayen v. Woodwards Stores Ltd.*(1993) 100 D.L.R. (4th) 294].

16. Bearing in mind that the test of reasonableness is an objective test, the question of whether the employment offered is "reasonable alternate employment", is similar to the question of whether, in mitigation of damages, it is reasonable for an employee to remain in the employment of an employer during reasonable notice following a constructive dismissal.

17. This issue was analyzed by the British Columbia Court of Appeal as follows:

> "The cases where there is an obligation to continue in the work force of the employer, under a new employment relationship, following a constructive dismissal, will roughly correspond with those

> cases where it is reasonable to expect the employment relationship to continue through a period of notice, rather than to end with pay in lieu of notice. There must be a situation of mutual understanding and respect, and a situation whether neither the employer nor the employee is likely to put the other's interests in jeopardy. But if there is such a situation, then a reasonable employee should offer to work out the notice period, either where notice is given or where there is a constructive dismissal and an offer of a new working relationship". *Farquhar v. Butler Brothers Supplies Ltd.*, [1988] 3 W.W.R. 347 at p.352, 23 B.C.L.R. (2s) 89 (B.C.C.A.).

18. As I read the evidence, while there was disagreement, there was mutual respect, and there was no suggestion that either party would put the other's interests in jeopardy.

19. Following the decision to substantially alter the terms and conditions of employment, DeRose remained with Thrifty Foods for 3 months while seeking to negotiate something more to his liking as permanent employment. He was not successful in that endeavour, but that process is indicative of mutual respect. Moreover, when he left Thrifty Foods he did so by providing notice.

20. With respect to the application of Section 65(1)(f) the Delegate said only this:

> "I find that the Produce Supervisor position was not a reasonable alternative position to the Merchandiser position. As noted previously, the Produce Supervisor position was a lower level position with lower pay and with significantly different hours and duties".

21. I agree with Thrifty Foods that this does not meet the standard required for analysis of a whether the position was reasonable alternate employment pursuant to section 65(1)(f). Perhaps that is because the point was not pressed in argument below, where the main emphasis appeared to be based on the overtime claim and the application of section 66, as indicated by the careful and detailed reasons of the Delegate on these points. In any event, appropriate analysis should reference the factors enunciated in *Helliker* and other relevant matters. Arguably, some of the changes, the lack of required travel, etc., were of benefit to DeRose.

22. I disagree, however, that this passage indicates the Delegate misapprehended the evidence regarding wages of the position of Produce Supervisor. Elsewhere the Delegate makes it clear that while the wages were the same, the position was "red-circled", so that the potential for increases in that position were limited. That said, however, the wages, benefits, and security of employment were not altered although the potential for increases while remaining in that position was impaired.

23. Thrifty Foods also takes issue with whether the employee effectively accepted the demotion because DeRose remained in the position until August 27, 2006. The point made here is that DeRose had worked for Thrifty Foods since 1993 and was or should have been familiar with the position to which he was reassigned.

24. In my view requesting reconsideration and seeking to negotiate something different does not serve to extend the time for consideration when the reassignment is unequivocal. Although DeRose wrote a lengthy letter dated May 18, 2006 setting out his concern, Thrifty Foods replied promptly May 23, 2006 confirming the reassignment to Colwood and declining to discuss severance.

25. In circumstances where the employee knows about the employment position to which he is reassigned it is logical that less time should be necessary to evaluate the option, not more. It is not apparent that the Delegate considered this factor.

SUMMARY

26. In the circumstances, the Determination on these two matters is set aside. At the root of both of these questions are matters that are the prerogative of the Delegate to determine. If the parties are unable to agree on the disposition of the matter, it should be remitted to the Delegate to reconsider, in accordance with these reasons, the application of section 65(1)(f) and whether there was acceptance through the effluxion of time.

ORDER

27. The Determination with respect to compensation for length of service, and the consequential administrative penalty, is set aside and the matter remitted to the Delegate to reconsider in accordance with these reasons. In all other respects the Determination is confirmed.

John Savage
Member
Employment Standards Tribunal