

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, c.113

-by-

Lynette B. Small
("Small")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR:	C. L. Roberts
FILE NO:	98/808
DATE OF DECISION:	February 5, 1999

DECISION

This is a decision based on written submissions by Lynette B. Small, Linda Nelson on behalf of 32262 B.C. Ltd., and Glen Smale on behalf of the Director of Employment Standards.

OVERVIEW

This is an appeal by Lynette Small ("Small"), pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued November 30, 1998. The Director dismissed Small's claim for compensation. The Director's delegate determined that Small was dismissed within the three month probationary period, and concluded that there was insufficient evidence to support Small's claim for misrepresentation.

ISSUE TO BE DECIDED

Whether the Director erred in dismissing Small's complaint. Specifically, Small contended that the Director's delegate did not fairly investigate the complaint.

FACTS

Small was hired as a typist for 32262 B.C. Ltd. on May 26, 1998. She was dismissed on June 18, 1998. She subsequently filed a complaint with the Employment Standards Branch for compensation. She alleged that 32262 B.C. Ltd misrepresented the job that was available, the type of work to be done, and the terms of employment.

Following an investigation, the Director's delegate concluded that Small was dismissed within the three month probationary period. He stated that "no remedy for such a (sic) action rests within the *Act* for it is only after three months of continuous service that compensation for loss of service can be considered."

Further, the Director's delegate found 32262 B.C. Ltd's evidence on the issue of misrepresentation more compelling than Small's. As he determined there was insufficient evidence to support Small's allegation that the job was misrepresented, he dismissed the complaint.

ARGUMENT

Small claims that her complaint was inadequately investigated. She alleges that the Director's delegate was biased against her. She suggested that Ms. Nelson checked her references before she was hired, and complimented her on her job performance. She contends that this evidence was given insufficient weight or ignored by the Director's delegate in arriving at his determination that she was dismissed for cause.

Small also claims that the procedures followed by the delegate were inadequate, and, as I understand her argument, that the delay in the investigation prejudiced her.

Small claims that Ms. Nelson was untruthful in her responses to the Director's delegate regarding their relationship. She contends that she was not spoken to about numerous errors in the performance of her work, which is the reason Ms. Nelson stated she was dismissed. Small stated that although she had made mistakes, any crucial ones were corrected before anything serious resulted.

Small also contended that the job she was hired for was misrepresented, and that she discovered that she was only filling in for another employee who was on maternity leave. She alleged that the company's misrepresentation "created a difficult work scenario whereby it was difficult to garner the support of fellow staff members and ultimately led to the termination of my position."

Small claimed that she had been hired only to replace an employee who had taken maternity leave. She alleged that co-workers of the woman who was on maternity leave felt Small was displacing her, and became disgruntled. She contended that one of the other employees made her job difficult to do by withholding a manual which was vital to her job performance.

Ms. Nelson contended that Small was terminated for "unnecessary and costly mistakes." She stated that while Small represented herself in her resume as an accurate and detail oriented individual, she was not. Nelson further contended that "Small was given ample time to adjust and familiarize herself within the department, but even after numerous verbal discussions regarding mistakes and to slow down, as speed was not important but accuracy was essential, the mistakes continued." She denied that Small was fired because the woman who had left on maternity leave was returning.

The employee whom Small alleged had withheld a manual stated in her letter to the Tribunal that the manual was merely a binder of precedents which she prepared herself and relied upon. She stated that she advised Small that she was welcome to use it at any time.

The employee who went on maternity leave also provided a letter which indicated that she had originally been hired to be Nelson's assistant, but because there was a lot of typing to do, she was primarily performing that function before she left on maternity leave. She stated that on her return from maternity leave, she was to return to the position she was originally hired for. She indicated that Small was not, as far as she was aware, hired to do her job.

Smale stated that Small's complaint was received in the Employment Standards office on July 31, 1998, and assigned to him on September 4. He communicated with the employer and the complainant in September and October, and rendered his Determination in November.

Smale stated that he had no previous working knowledge of or experiences with Small or Nelson, and that he did not favor one party over the other.

ANALYSIS

The burden of establishing that a Determination is incorrect rests with an Appellant. On the evidence presented, I am unable to find that burden has been met.

Section 63(1) of the *Act* provides

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.

Small contends that this section is not constitutional. I have not addressed this issue as the Tribunal does not have jurisdiction to determine the constitutionality of the *Act*, in whole or in part. In any event, to challenge the constitutionality of a part of any *Act*, certain procedures with respect to notice to the Attorney General must be followed. Those were not in this case.

The investigation took approximately four months to complete from the time it was filed with the Branch. I am unable to conclude that there was a delay in the investigation.

Although Small claims that the Director's delegate was biased against her, she provided no evidence to support this allegation. There is no evidence that he had previous dealings with either party, or failed to give Small an opportunity to make her case. The Director's delegate spoke to her, and reviewed the documentation she provided to him. He also spoke to the employer. He reviewed that information in the Determination, and came to a conclusion based on it. There is no evidence of bias.

Small contends that she was dismissed, in essence, because another employee was returning from maternity leave. However, the company's evidence suggests that she was dismissed for cause. Following the investigation, the Director's delegate preferred the evidence of the employer. I am unable, on the evidence presented, to find that the Determination is in error.

The evidence is that Small was terminated on June 18. The employee who was off on maternity leave did not return until approximately the end of October. If the employer hired Small only to fill that position for the six month period the employee was on maternity leave, it would not seem reasonable that they would terminate her employment four months before that time. I am unable to conclude, on the evidence, that the Determination that the job was not misrepresented, was in error.

The evidence indicated that Small was hired to type. It was essential to the company's business that the typing was accurate. The evidence is that it was not, and the company dismissed Small within a three month period. Consequently, she is not entitled to compensation for length of service, pursuant to Section 63.

ORDER

I order, pursuant to Section 115 of the *Act*, that the Determination dated November 30, 1998 be confirmed.

Carol Roberts
Adjudicator
Employment Standards Tribunal