

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 -

Dawn Cody
("Cody" or "employee")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Paul E. Love

FILE NO.: 98/733

DATE OF HEARING: January 28, 1999

DATE OF DECISION: February 15, 1999

DECISION

APPEARANCES

Bob Buchanan

Dawn Cody

OVERVIEW

This is an appeal by Dawn Cody (“Cody” or “employee”) of a Determination dated October 30, 1998. This appeal was heard concurrently with an appeal by the employer concerning a breach of minimum hours of work (Section 34 of the *Act*), which is the subject of a Decision issued concurrently as BC EST #D034/99. In this appeal the employee resigned her position because the employer failed to grant a request for family responsibility leave. Ms. Cody seeks compensation due to the termination of her employment by way of a fundamental change to her conditions of employment.

ISSUES TO BE DECIDED

Is the failure by the employer to grant a family leave a fundamental alteration of the conditions of employment such that the employee can be said to be constructively dismissed and entitled to compensation pursuant to the *Act*?

What remedy, if any should flow from a breach of Section 52 of the *Act*, (Family Responsibility Leave)?

FACTS

The employer operates a dry cleaning business at a number of locations in the Nanaimo area. The employer gave evidence that the proper name was P.F.T. Dry-cleaning Inc. Mr. Bob Buchanan is an officer but not a shareholder of that company. The company and its predecessor has been operating a dry cleaning business in the Nanaimo areas for 33 years, and since Mr. Buchanan’s involvement had never been involved in an employment standards complaint.

At all times material to this appeal. Ms. Cody was employed on a part time basis with the employer while she was attending Malaspina College in Nanaimo. She was employed primarily at the Woodgrove location. Margaret Gill was the only other employee and the manager of the location. On or about May 17, 1998 Ms. Cody was contacted by her father and advised that her younger sister, aged 2, was required to attend for dental surgery at Children’s Hospital in Vancouver. The younger sister and Ms. Cody’s father ordinarily

resided on a ranch in the Quesnel area. The procedure involved the administration of a general anesthetic, and the child apparently had a heart murmur. Ms. Cody was concerned that she be able to see her sister, before the anesthetic was administered on a Sunday afternoon.

She commenced her request for leave to the employer by notifying Ms. Gill of her request in May 17, 1998, approximately 6 days before the leave was required. Ms. Gill was apparently not prepared to work that date for Ms. Cody. On Wednesday May 20, 1998, Ms. Cody was advised by her manager Margaret Gill, that she could not have that day off. Ms. Cody indicated that she must have the day off and asked Ms. Gill to canvass the matter with the owner of the business, Mr. Buchanan.

On Friday May 22, 1998, Ms. Cody was advised that she could not take the day off. She tendered her resignation, which was effective at the close of business Saturday. The resignation came to Mr. Buchanan's attention Friday evening after Ms. Cody had left the work place for the day. It is unclear from the evidence whether Ms. Gill ever raised the issue with Mr. Buchanan. It appears that she did not, as it was Mr. Buchanan's evidence that he did not hear of the request until he received the notice of resignation on Friday evening. He attempted to make some arrangements or accommodation with Ms. Cody so that she could a portion of the day off on Sunday. Ms. Cody was not satisfied with the attempts of the employer to accommodate her, and let her resignation stand.

There was a conflict in the evidence on one material point. Did the employer concede the Sunday off to Ms. Cody, before the conclusion of the Saturday shift. Mr. Buchanan for the employer testified that he made two attempts to resolve the problem by offering to Ms. Cody an earlier leaving time. He indicated that the request was granted by Robert Cox, at Mr. Buchanan's direction, with a request to Ms. Cody to attend the next week to discuss the matter.

At this hearing a letter was filed, apparently signed by Mr. Cox but apparently prepared by Mr. Buchanan. It does not amount to a statement of Mr. Cox's evidence in his own words concerning the matter. Mr. Buchanan has no personal knowledge whether Mr. Cox carried out his instructions. Ms. Cody, who gave evidence, indicated that she resigned her position, and the employer may have made arrangements to have someone come in consequence of her resignation but at no time was it communicated to her that she could have the day off. I prefer Ms. Cody's evidence on this point, as she is the only person who has produced for examination and cross-examination who was able to comment on the transaction between herself and Mr. Cox. It is my view that there is no clear communication to Ms. Cody that she could have the day off before the end of the Saturday shift.

ANALYSIS

In my view there is a clear violation of Section 52 by the employer. The section reads as follows:

Family Responsibility Leave

An employee is entitled to up to 5 days of unpaid leave during each employment year to meet responsibilities related to

(a)...

(b) the care or health of any other member of the employee's immediate family...

The section creates a duty on the employer to arrange the scheduling such that the employee can take the family leave required. It is without dispute that this is a leave request which fell under Section 52(b) of the *Act*. The employer has no discretion to refuse leave. In my view in the circumstances of the case, one would have thought more consideration would have been given to Ms. Cody, who had worked for the employer on a part time basis for 7 years and apparently had faithfully and diligently discharged her duties. In my view, while there might have been some scheduling difficulties engendered by the family leave request, as the staff at the Woodgrove workplace consisted of only Margaret Gill and Ms. Cody. The employer operates a number of locations in the Nanaimo area. The employer, however, has duty to comply with the *Act*, and the employer was given plenty of notice with regard to the request.

Employee's Argument

Ms. Cody argues that there was a substantial alteration of her terms of employment because the employer ignored her request and then failed to grant her request. She had to quit to get the leave requested. She says that she did not receive the same considerations as full time employees. She indicates that the Director's delegate found that there was a breach of the *Act*, that there ought to have been a remedy given to her, and that such a remedy should have a deterrent effect.

Employer's Argument

The employer says that it did not violate the *Act*. The employer argues that it made some attempt to accommodate the employees request for leave, and that the employee did not have to quit to get the leave as in the end he arranged it. The employer supports the decision made by the Director's delegate in respect of this issue.

In the written submission of the Director's delegate the Director addressed the matter as follows:

The provision of the Family Responsibility Leave is a minimum requirement of the *Act*. The Employer had no option but to grant the leave

when it was requested. His failure to do so is a contravention of the *Act*. However, is it sufficient a contravention, to allow the Employee to claim that her conditions of Employment have been substantially altered and thus she was forced to terminate her employment? I do not believe it was. The failure to pay the minimum four hourly daily guarantee or overtime or statutory holiday pay may be contraventions of the minimum provisions of the *Act*, but they are not substantial alterations of ones terms and conditions of employment. The failure to grant Family Responsibility Leave is not the type of alteration that is envisioned by Section 66 of the *Act* thus no compensation is warranted for Ms. Cody's termination of her own employment.

There is no definition in the *Act* as to when a condition of employment is "substantially altered". One can think of examples of substantial alteration which might include the failure of the employer to pay an employee, the failure of an employer to permit an employee to work at all, the reduction in the pay of an employee, a substantial change in the type of work, or scheduling of the performance of work. The above list is illustrative rather than exhaustive. A breach of the *Act* may or may not suffice, in an analysis of "substantial alteration". An employee's conditions of employment may be substantially altered without breach of the *Act* occurring. In my view, it is important to analyze and consider the facts, the nature of the employment relationship or contract, the terms and conditions of the relationship, and determine whether the conduct complained of amounts to a change of a substantial ought.

I do not see that there has been a fundamental change to the relationship. The employer has the responsibility to determine the hours that the employee worked and the employee's work schedule. The employer did give some consideration to the request for the leave, and should have approved the request. The duty on the employer as set out in Section 54 of the *Act* is to grant the request, and not to terminate employment, change a condition of employment without the employee's written consent, and place the employee upon return from the leave in a comparable position. I agree with the delegate that this is not the type of case where one can say that there was a fundamental change in the employment relationship such that there has been a constructive termination, within the meaning of Section 66 of the *Act*.

There was, however, a finding by the delegate of a breach of the *Act*, and I agree that the *Act* was breached by the employer. Once the Director's delegate has determined that there was a breach of the *Act* the Director may under Section 79(3) of the *Act* require the employer to comply with the *Act*, require the person to remedy or cease doing the activity, or impose a penalty. In this case the Director's delegate was dealing with two separate issues, a minimum hours complaint under Section 34 of the *Act*, and a family leave complaint under Section 52 of the *Act*. The delegate did not however, go on to grant any remedy for the breach of the *Act*, or discharge his duty under Section 79(3) of the *Act*.

It is my view that the Determination is incomplete as the delegate has not considered what, if anything, should result from the breach of the *Act*. It is clear that the delegate determined that no compensation should be awarded to Ms. Cody. I agree that on the facts of this case, compensation is not appropriate, but this is not the end of the matter. I am unable to determine from my review of the Determination whether the Director's delegate considered the breach of the *Act*, in the circumstances of this case, such a minor matter that it did not require the Director to make, at a minimum, a declamatory statement that the *Act* was breached and that it ought not to be breached again. It is clear that both parties viewed that family leave issue as an important one. It was characterized by the employee as a fundamental breach and by the employer as a matter which would have required further serious discussion with the employee had she not acted upon her resignation. It is not up to me as an Adjudicator to exercise the discretion in this case, but I am left with the view that the decision-making task of the delegate remains incomplete.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated September 26, 1998 be referred back to the Director for a determination of what if any action should be taken, pursuant to Section 79 of the *Act*, as a result of the employer's breach of the Section 52 of the *Act*.

Paul E. Love
Adjudicator
Employment Standards Tribunal

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