Employment Standards TRIBUNAL

An appeal

- by -

Deborah Simpson
("Simpson")

- 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: Ian Lawson

FILE No.: 2005A/199

DATE OF DECISION: April 3, 2006

DECISION

SUBMISSIONS

Deborah Simpson	on her own behalf
Leo Sorensen	for Sorensen's Loans 'til Payday Inc.
J. Ross Gould	for the Director of Employment Standards

OVERVIEW

1. This matter returns to me as a result of my decision dated June 24, 2005 (BCEST #D087/05), in which I referred the complaint made by Deborah Simpson ("Simpson") back to the Director for further investigation. The results of the investigation are set out in a letter to the Tribunal dated November 17, 2005, from the Director's delegate J. Ross Gould. Simpson's employer, Sorensen's Loans 'til Payday Inc. ("Sorensen's"), responded with a written submission dated December 7, 2005, and Simpson made a submission dated January 16, 2006. I now complete the matter by deciding Simpson's original appeal, which was filed on April 1, 2005. I am deciding the appeal without an oral hearing, on the basis of all submissions received to date, and on the record before the Tribunal.

FACTS

2. Simpson had filed a complaint with the Director that she was owed regular and overtime wages, and compensation for length of service. Sorensen's had employed her as an Accounts Manager and Accounts Clerk in its Williams Lake office. Sorensen's is a business providing short-term loans, income tax services, transfers of funds through Western Union, and the sale of telephone cards.

3. Simpson's complaint was initially dismissed by Director's delegate Alan Phillips in Determination ER#102-860, issued on February 24, 2005. In addressing Simpson's appeal to the Tribunal from that Determination, I found a breach of the principles of natural justice had occurred. Sorensen's had not disclosed information to Simpson that it had been directed to disclose prior to the complaint hearing, and I found it was unfair for the delegate to resolve that problem by offering Simpson an adjournment at the hearing. I further found Simpson's cross-examination of Sorensen's witnesses had been interfered with by the delegate, who had failed to exercise adequate control over the hearing.

4. As a result of my decision, an investigation was conducted by delegate Gould, who spoke directly with Simpson and also with Leo Sorensen, Trudy Folk and Christine Bennett for the employer. The delegate reported to me that as a result of his investigation, Simpson's complaint respecting regular and overtime wages should be dismissed (as was decided in the original Determination). The delegate also reported that Simpson's complaint that she had been constructively dismissed by Sorensen's should also be dismissed, for the same reasons that were set out in the Determination. The delegate found, however, that Simpson had not quit her employment, as had been argued by Sorensen's. The delegate's report on this point is as follows:

The employer's position is that Ms. Simpson quit. They aren't certain if she quit on October 29, 2004, when she didn't return to work but they do argue she quit in February, 2005, by declining their return-to-work plan at the Adjudication Hearing, when they said she could return to work at 30 hours a week.

They also said they did not directly terminate Ms. Simpson and they didn't give her a written notice of termination during the period she was on medical leave because to do so would have been a violation of Section 67 of the Act, which states:

> (1) A notice given to an employee under this Part has no effect if (a) the notice period coincides with a period during which the employee is on annual vacation, leave, temporary layoff, strike or lockout or is unavailable for work due to a strike or lockout or medical reasons.

Ms. Simpson clearly denied she quit and said at no time did she ever intend to quit. She admitted she did not return to work on October 29, because her doctor advised her not to unless her issues with the employer were resolved and when Ms. Bennett did not respond to her email in October, 2004, she continued on her medical leave following her doctor's advice pending Ms. Bennett's response which never came.

When disputes arise as to whether an employee quit or was fired the onus for proving an employer is relieved of the need to give written notice or compensation for termination is on the employer who asserts it.

In the B.C. Tribunal case, Zoltan Kiss (B.C. EST #D091/96) the Tribunal sets out a test used to determine whether an employee quit or was fired, for the purpose of the Employment Standards Act. The test states:

> The right to quit is personal to the employee and there must be clear and unequivocal facts to support a conclusion that this right has been voluntarily exercised by the employee involved. There is both a subjective and objective element to a quit; subjectively, the employee must form an intent to quit employment; objectively, the employee must carry out an act inconsistent with his or her employment.

There is no evidence that Ms. Simpson ever formulated an intent to quit her employment because she told me she desperately needed to keep her job. Further, I found no evidence indicating she took any steps to resign from her job. She certainly didn't communicate in any manner to anyone that she intended to resign and aside from being on extended medical leave, I find Ms. Simpson did nothing inconsistent with continued employment. ….

To summarize, the onus was on Sorensen's to seek out Ms. Simpson to discuss the terms and conditions of employment under which she would return. Sorensen's did nothing to establish contact with Ms. Simpson any time after she commenced her medical leave in August, 2004 and at no point in time did they ever meet their responsibility to provide written notice or compensation for termination and therefore I find Ms. Simpson's employment was terminated by Sorensen's and as a result they have contravened Section 63 of the Employment Standards Act.

5. The delegate reports that as a result of this finding, Sorensen's should be liable to pay the sum of $1,320.00 plus interest to Simpson.

ARGUMENT

6. In its submission, Sorensen's addresses the compensation for length of service issue as follows:

> There were enough written warnings for Ms. Simpson to be dismissed with cause. On July 19, 2004 when Miss Trudy Folk, Ms. Simpson's supervisor, confirm verbally and in writing the consequences of her actions, she was informed that she had been temporarily demoted to a part-time office employee and this meant that her hours were reduced to 24 hours per week at the same rate of pay. "Ms. Simpson's duties included some of the manager's duties and some clerical office functions, her argument and complaint was that she was not a manager and had no day to day decision making authority". Is she a manager or is she not? If she is not a manager then why did she have duties as a manager?
>
> How a termination incurred [*sic*] was the fact that Ms. Simpson worked a 5 week period without a problem and from this I also accept that she agreed with these changes. When she had taken her medical leave, she was not dismissed or fired. Our proof is that she worked the 5 week period without being rude to clients, and we offered to put her hours back up to 30 hours, she would have had that opportunity had the complaints not continued. It was found that she was not constructively dismissed.
>
> Ms. Simpson did quit in February 2005 by declining to return to work at the 30 hours per week. She did not give any notice, she was still on medical leave and that would have been in violation of Section 67 of the Act.
>
> The statement where she denied she had quit and did not intend to quit but would not come back for the 30 hours, which was an increase from the 24 hours per week that she had been working, she did not dispute at that time. "When dispute arises as to whether the employee quit or was fired, the onus for proving this, an employer [*sic*] need to give written notice is on the employer who asserts it".
>
> Sorensen's Loans 'til Payday Inc. at no time fired Ms. Simpson, when she was offered to come back it was not the 30 hours that stopped her, it was her request that we shred her personnel file and we would not comply with this.

7. In her submission, Simpson asserts she did not state she wanted her whole personnel file shredded, but "only the parts I could show were not justified complaints."

ISSUE

8. Was there any failure to observe the principles of natural justice in the making of the Determination under appeal? If not, has any error of law or unfairness been made in the further investigation conducted by the Director?

ANALYSIS

9. The referral back process poses an interesting problem for both the Tribunal and parties appearing before it. The practice that has arisen in the past ten years is for the Director to make a report to the Tribunal member who ordered the matter referred back to the Director. This practice has evolved, in part, to avoid the inefficiencies involved in having another Determination made on the referral-back issue, which then

potentially creates another appeal process with the associated delay and expense to all parties. The problem created by this practice, however, is neatly illustrated in this case: the result of the Director's further investigation is something quite different from the original Determination which Sorensen's was defending. Sorensen's only option, if it is not content with the results of the referral-back investigation (and if I confirm those results in this decision), is to request a reconsideration of my decision under section 116 of the *Act*. The test for reconsideration is very high, and is significantly different from the test which must otherwise be met by an employer who alleges an error or unfairness was made in a Determination.

10. The problem raised in this situation can be overcome, however, by ensuring the employer has had a fair opportunity to present contrary evidence or otherwise challenge the results of the referral-back. If it were otherwise, Sorensen's may feel ambushed by the new result, and then have a higher test to meet in order to challenge it. In this case, I see the delegate conducted a thorough investigation, and spoke directly with three people who had evidence to give on Sorensen's behalf. The delegate had the benefit of the first delegate's findings in the Determination, and the additional benefit of ensuring Simpson's issues were fully investigated following my finding that the Determination had been reached in a procedurally unfair manner. Sorensen's has now had an additional opportunity to raise with me any problems it sees in how the referral-back report was made, and has filed a submission in response to that report. Although this process is not perfect, I am satisfied it is a process which best complies with the fairness and efficiency principles on which the *Act* is based, and I am satisfied Sorensen's has not been disadvantaged in any way by the different result that has arisen in the referral-back report.

11. I am also satisfied that Sorensen's has not raised any issue or argument that might call into question the correctness of the delegate's report to me. Having had a chance to take a thorough second look at Simpson's complaint, the delegate found correctly, in my view, that Simpson had never quit her employment. More accurately, the delegate found that Sorensen's could not prove satisfactorily that Simpson had quit. The delegate reported to me his conclusion that Sorensen's had terminated Simpson by failing to communicate with her regarding the terms of her return to work following medical leave. I repeat his summary of his findings as follows:

> ... the onus was on Sorensen's to seek out Ms. Simpson to discuss the terms and conditions of employment under which she would return. Sorensen's did nothing to establish contact with Ms. Simpson any time after she commenced her medical leave in August 2004 and at no point in time did they ever meet their responsibility to provide written notice or compensation for termination and therefore I find Ms. Simpson's employment was terminated by Sorensen's and as a result they have contravened Section 63 of the Employment Standards Act.

12. I find, in particular, Sorensen's disregard of Simpson's e-mail shortly before her scheduled return to work in October, 2004 to be significant. The absence of any reply by Sorensen's to a key issue in the dispute between them, communicated to Simpson that Sorensen's was not interested in continuing her employment. Simpson's brief contact with other employees at her workplace that month also led her reasonably to believe the employer was not interested in making any arrangements for her return to work. These facts support the delegate's conclusion in that regard.

13. If it could be said, however, that the delegate is incorrect in this finding of termination by the employer's inaction or disinterest, I am of the view Sorensen's conduct supports Simpson's complaint of constructive dismissal. While application of that doctrine to these facts is admittedly novel, Sorensen's conduct did send a message to Simpson, which she reasonably interpreted as saying that she was not welcome to return to work. Sorensen's clearly knew her medical leave was related to the stress of the discipline they

had imposed on her, and Sorensen's also clearly knew Simpson disagreed with the complaints that had been made against her and wished to respond to them. Sorensen's knew or ought to have known that ignoring Simpson's reasonable request, and generally doing nothing to arrange for her return to work in October, 2004, would have caused her to experience heightened stress and anxiety such that she might quit her employment. As I am not convinced this conduct can be interpreted as formal notice of termination, I consider it to be a fundamental breach of the parties' contract of employment.

14. If I am wrong in treating Sorensen's inaction or disinterest as a constructive dismissal, it is my view that Sorensen's reduction in Simpson's hours of work in July, 2004 was also a constructive dismissal. An employer has many options to discipline an employee and correct poor performance, apart from reducing the employee's hours by 40%. The delegate records Sorensen's letter to Simpson as containing the following:

> "The Company is very disappointed in the amount of complaints that have continuously been lodged at head office…. Your position as of July 19, 2004 will be part-time office personnel."

15. Correcting poor performance requires that an employer identify the employee's shortcomings and create a realistic plan for the correction thereof. It is clear that Simpson did not know the nature of the complaints made against her, that she wished to know them, and Sorensen's did not apparently do anything to correct her performance other than reduce her hours of work. In the absence of any such effort to communicate the wrongdoing and create an environment in which it could be corrected, I find Sorensen's 40% reduction in Simpson's hours of work to be a fundamental breach of her employment contract.

16. More important, however, is my conclusion that both delegates were wrong to find Simpson had acquiesced to this breach by her failure to act in the ensuing five weeks. As the Tribunal has stated in *Re Tollasepp*, BCEST #D490/02:

> The Act contains no grievance or other procedure which permits an employee to effectively resolve a workplace "grievance" relating to a change of a condition introduced on a unilateral basis by an employer. Resignation is the only method which leaves the employee with a potential remedy of damages for compensation for length of service.

17. Just as there is no grievance procedure in the *Act*, there is no deadline after which an employee is deemed to acquiesce to a fundamental change in the terms and conditions of her employment. The Tribunal has held that an employee who continued to work for three months after a fundamental change had acquiesced in it (*Re Gordon*, BCEST #D399/02), but each case will depend on its facts. In this case, Simpson's desire to respond in some way to the complaints is palpably clear, just as those complaints are connected to the stress she experienced which caused her to take medical leave. The employer's consistent failure to disclose the nature of the complaints would have exacerbated Simpson's stress and rendered her less able to make an informed decision respecting her employer's fundamental breach of her employment contract. I find a period of five weeks to be on the short end of the range of reasonable periods after which employees might be deemed to have acquiesced to a significant change in their working conditions. In this case, Simpson's five-week period ended with her doctor's direction to take a leave from work, and not to return to work until the "issues" had been resolved. It is therefore my view that five weeks was not so lengthy a period of time that the delegates could properly conclude Simpson had acquiesced to the 40% reduction in her hours of work.

18. On any of the above analyses, I conclude delegate Gould correctly decided compensation for length of service is owed to Simpson. I therefore allow Simpson's appeal from the original Determination, and will order that she is to be paid compensation for length of service in the amount of $1,320.00 plus interest, as set out in the delegate's referral-back report.

ORDER

19. Pursuant to section 115(1) of the *Act*, I confirm the results of the referral back to the Director of Determination ER#102-860, and order Sorensen's Loans 'til Payday Inc. to pay Deborah Simpson compensation for length of service in the amount of $1,320.00 plus interest pursuant to s. 88 of the *Act*.

Ian Lawson
Member
Employment Standards Tribunal