Employment Standards TRIBUNAL

An appeal

- by -

582195 BC Ltd., operating as Great Clips
("Great Clips")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2002/601

DATE OF DECISION: February 12, 2003

DECISION

OVERVIEW

This is an appeal filed by 582195 BC Ltd., operating as "Great Clips" ("Great Clips"), pursuant to section 112 of the *Employment Standards Act* (the *"Act"*). Great Clips appeals a Determination that was issued by a delegate of the Director of Employment Standards (the "Director") on November 13th, 2002 (the "Determination").

The Director's delegate determined, following an oral hearing, that Great Clips owed its former employee, Ms. Kelli Tait ("Tait"), the sum of $724.03 on account of 2 weeks' wages as compensation for length of service together with concomitant vacation pay and section 88 interest.

By way of a letter dated January 24th, 2003 the parties were advised by the Tribunal's Vice-Chair that this appeal would be adjudicated based on their written submissions and that an oral hearing would not be held (see section 107 of the *Act* and *D. Hall & Associates v. Director of Employment Standards et al.,* 2001 BCSC 575).

ISSUES ON APPEAL

Great Clips' appeal documents advance a number of alleged errors in fact and in law on the part of the Director's delegate. In essence, Great Clips' appeal can be reduced to a single assertion: it did not dismiss Ms. Tait but, rather, she quit [see section 63(3)(c) of the *Act*] and, accordingly, she is not entitled to any compensation for length of service.

FINDINGS AND ANALYSIS

The *only* material submitted by Great Clips in support of its appeal is a 1 1/2 page memorandum and two attachments. This appeal can be simply adjudicated based on the fact that Great Clips has simply failed to discharge its evidentiary burden of showing that the Determination should be cancelled.

Great Clips says that Ms. Tait "quit" after she was informed that she would henceforth no longer be allowed to have weekends off (a term of her employment to which the employer had previously agreed and a term that was critically important to Ms. Tait in view of her status as a single mother); otherwise, she could relinquish her position but her pay would be reduced reflecting her loss of managerial status.

Thus, even if Ms. Tait did submit 2 weeks' notice of resignation at that point (a point she concedes), her resignation is tainted by the fact that it was consequent on the employer having made a unilateral and fundamental change in the terms and conditions of her employment--in other words, the employer, by its unilateral action, effectively "constructively dismissed" Ms. Tait within the meaning of section 66 of the *Act:*

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

However, Ms. Tait--although she would have been entitled to do so--did not take the position that she was constructively dismissed. She reported for work the following Monday fully intending to work out her notice period. On the Monday, Great Clips presented her with a form of "nonsolicitation agreement" for signature. When she refused to sign the agreement--as was her lawful right--she was summarily terminated.

While the employer may have had the right to refuse to allow Ms. Tait to report for work during her notice period (what is sometimes referred to as "garden leave"), it nonetheless was obliged to pay her wages during the notice period. When it summarily terminated her employment, it was obliged to pay compensation for length of service since, at that point, Ms. Tait's employment ended not by her voluntary resignation but, rather, by the employer's summary dismissal.

As for the two documents appended to the appeal form submitted by Great Clips, I find neither document to have any probative value. The first, a record of employment prepared by Great Clips, shows that it was issued on the basis of an employee "quit". Since the document was prepared by Great Clips, it could hardly be taken as an admission *by Ms. Tait*, that she quit. Further, and in any event, I have already observed that her resignation did not amount to a voluntary "quit" since it was triggered by an unlawful constructive dismissal by the employer.

The second document is two pages of an earlier resignation (some 8 months earlier) that Ms. Tait submitted but subsequently withdrew as a result of the employer's entreaties. This document has no evidentiary value whatsoever with respect to the current dispute. I might add that I find it curious that the employer chose to submit only two pages (none of which shows the date of the letter) of a document that comprised some 14 pages--one might reasonably conclude that the appellant was attempting to mislead the Tribunal by withholding the full text of the letter.

The appeal is dismissed.

ORDER

Pursuant to sections 114(1)(c) and 115(1)(a) of the *Act*, I order that this appeal be dismissed and that the Determination be confirmed as issued in the amount of **$724.03** together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal