Employment Standards TRIBUNAL

An appeal

- by -

Kulwinder Gill
(the "Appellant")

- 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: W. Grant Sheard

FILE No.: 2002/605

DATE OF DECISION: February 18, 2003

DECISION

OVERVIEW

This is an appeal based on written submissions by the Employee, Kulwinder Gill (the "Appellant") pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), of a Determination issued by the Director of Employment Standards (the "Director") on October 29, 2002 wherein the Delegate ruled that the Appellant had not been constructively dismissed, that there was just cause for her dismissal and that no compensation for length of service was owed. The Delegate determined that the *Act* had not been contravened.

ISSUE

Was the Director's Delegate correct in finding that the Appellant was not constructively dismissed and that no compensation for length of service was owed?

ARGUMENT

The Appellant's Position

In an appeal form dated November 12, 2002 filed December 6, 2002 the Appellant appeals on the basis that there is a different explanation of the facts and that there are other facts that weren't considered during the investigation. The Appellant wants to change or vary the Determination saying that she totally disagrees with it and that she has been treated unfairly. In a one page letter (undated) the Appellant questions why, after such a long time, the Employer has made reference to an incident which occurred back on October 9, 1996 and notes that, prior to the incident (when she was terminated April 12, 2002) she was not given a warning letter, but was simply fired. In a further undated seven page letter addressed to "To: Whom it may concern" the Appellant refers to incidents at her work primarily between January 31, 2002 and the date she was terminated, April 12, 2002.

In this written material the Appellant says that on January 31, 2002 her legs began to hurt while she was working at her regular sewing duties and she told the lead hand that she could not sew anymore. On April 4, 2002 she asked the supervisor if she could cut end panels instead. She goes on to say that she told the Employer that she would only do this for one day afterwhich she would return to her "standard duty". She says that she repeatedly told the Employer this until April 12, 2002 but was never allowed to return to her regular duty as a seamstress. On April 12, 2002 she was told that she could no longer work on the sewing machines and that she would either have to continue doing folding or to tie knots or else she would have to go home. She says that she was crying and that one of the representatives of the Employer then returned a short time later with a formal letter of dismissal. The Appellant also provides a list of other employees whom she asserts had problems with the Employer company. The Appellant concludes by saying that she believes the main reason she was fired was because she had filed a WCB claim against the Employer.

The Respondent's Position

In a written submission dated December 30, 2002 and filed with the Tribunal the same date, Mr. Robert Reeves, Interwrap safety manager, says on behalf of the Respondent Employer that the Appellant was

terminated "after a succession of events that showed her unwillingness to work with the company or to follow the orders of her immediate supervisor. She was warned on numerous occasions in front of witnesses that insubordination could lead to termination. The Respondent says that it was left with no choice but to terminate the Appellant for just cause." The Respondent submits that the Determination should be upheld.

The Director's Position

The Delegate advised this Tribunal that he did not have a submission to make in this matter.

THE FACTS

The Respondent Employer, Interwrap Inc., produces wrapping material for lumber. The Appellant worked for the Respondent from November 27, 1992 to April 12, 2002 as a seamstress/folder. She was paid $11.75 per hour when she was dismissed.

The Appellant was suspended from her employment on October 9, 1996 for insubordination. On about January 31, 2002 the Appellant complained to the Employer of pain in her leg caused by the pedal of the sewing machine she was operating. The Employer reassigned her from sewing to light duties (folding cloth) until the foot pedal on her sewing machine could be retrofitted. Her base rate from sewing was maintained. However, by moving from sewing to folding, her income was reduced from the loss of piece rate totaling $26.80 for each two week period she was then assigned to folding.

On April 4, 2002 the complainant refused to do folding work and insisted on returning to sewing. However, the Employer informed her that her sewing machine had not yet been retrofitted and required her to continue folding. She refused and was sent home for the day to consider her decision. She was told that continued refusal to obey her supervisor could result in dismissal. On April 12, 2002 the Appellant again asked the Employer to return her to her sewing duties. The Employer refused, as her sewing machine had not yet been retrofitted to accommodate her complaints about leg pain. She stated at this time that her shoulder and hand hurt so she would not do folding. The Employer told her that continued refusal to obey instructions to stay on folding would result in dismissal. The Appellant continued to refuse to stay on folding and was dismissed by the Employer without compensation for length of service. She was paid her wages and holiday pay earned up to that point in time.

ANALYSIS

The onus is on the Appellant to establish on a balance of probabilities an error in the finding of the Delegate

Section 66 of the *Act* provides as follows:

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

In Employment Standards in British Columbia Annotated Legislation and Commentary, Allison G.C., the Continuing Legal Education Society of British Columbia, Vancouver 2002 it is said at page 8-50 as follows:

> *"Not all changes in conditions of employment will constitute constructive dismissal. Under the statute, the change must be "substantial". The change must be sufficiently material that it could be described as being a fundamental change in the employment relationship. The test of what constitutes a substantial change is objective, and includes (1) An analysis of the nature of the employment relationship; (2) The conditions of employment; (3) The alterations that have been made; (4) The legitimate expectations of the parties; and (5) Whether there are any express or implied agreements or understandings."*
>
> *Re A. J. Leisure Group Inc.*, [1998] BCESTD #58 (QL), (22 January 1998), BCEST #D036/98 (Pedersen, Adj.)

I find that the Appellant has failed to demonstrate on a balance of probabilities that the Delegate erred in finding that the amount of reduced wages due to loss of piece rate totalling $26.80 every two weeks did not constitute a substantial change to the terms and conditions of employment. I agree with the Delegate in that this did not amount to a fundamental change in the employment relationship.

With respect to the issue of just cause and insubordination, in the Employment Standards in British Columbia Annotated Legislation and Commentary at page 8-34 it is said as follows:

> *"A single act of insubordination may justify termination, especially when the behaviour amounts to a fundamental refusal to carry out usual work duties or a concerted and deliberate refusal to carry out important duties that the employee was hired and paid to do."*
>
> *Re Fluid-Tech Hydraulics Ltd.*, [1996] BCESTD #262 (QL), (23 September 1996), BCEST #D260/96 (Thornacroft, Adj.)

I also find that the Employee has failed to demonstrate on a balance of probabilities that the Delegate erred in finding that the Employer had adequately warned the Appellant in the past regarding insubordination and that the Appellant's actions were insubordinate and justified dismissal without compensation for length of service. The Appellant could not return to her sewing duties as the machine had not yet been retrofitted for her safety. The Appellant clearly refused the Employer's direction to continue working at reassigned duties. It is apparent that the Delegate received evidence from several employees of the Respondent that the Appellant was warned that refusal to follow direction regarding her reassigned duties would result in termination. The Appellant has not offered any new evidence or shown evidence which was before the Delegate to demonstrate that the Delegate's finding of fact in this regard was erroneous. The Appellant has not demonstrated on a balance of probabilities that she we not warned that this continued insubordination would result in dismissal.

Section 63 of the *Act* provides for liability resulting from length of service. Section 63 provides as follows:

> ***Section 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 1 additional week's wages for each additional year of employment, to a maximum of 8 week's 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) two 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 notice 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.*

In the case of *Silverline Security Locksmith Ltd.*, BCEST #D207/96, this Tribunal delineated a four part test for determining whether just cause exists or not. In that case it was said as follows:

> Paragraph 15. The concept of "just cause" requires the Employer to inform an Employee clearly and unequivocally that his or her performance is unacceptable and that failure to meet the Employer's standards will result in their dismissal. The principal reason for requiring a clear and unequivocal warning is to avoid any misunderstanding, thereby giving an Employee a false sense of security that their work performance is acceptable to the Employer.

On the material filed by the Appellant in this appeal I find that she has failed to demonstrate on a balance of probabilities that the Delegate erred in ruling that the Respondent had just cause to dismiss her without compensation for length of service pursuant to Section 63(3)(c) of the *Act* and that she was clearly and unequivocally warned that her continued insubordination would result in dismissal.

ORDER

Pursuant to section 115 of the Act, I order that the Determination of this matter, dated October 29, 2002, be confirmed.

W. Grant Sheard
Adjudicator
Employment Standards Tribunal