Employment Standards TRIBUNAL

An appeal

- by -

Norma Ruth Short
("Short")

- 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

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE No.: 2004A/12

DATE OF DECISION: April 21, 2004

DECISION

SUBMISSIONS

L. Dorrington and C.M.A. Bungay	Legal Counsel for Norma Ruth Short
B. Gifford	for the Director of Employment Standards

INTRODUCTION

This is an appeal filed by Norma Ruth Short ("Short") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*). Ms. Short appeals a Determination that was issued by a delegate of the Director of Employment Standards (the "Director") on October 17th, 2003 (the "Determination").

By way of a decision issued on January 27th, 2004 (B.C.E.S.T. Decision No. D014/04), I extended the appeal period pursuant to section 109(1)(b) of the *Act* and ordered that the appeal be adjudicated on its merits. These reasons for decision now address the merits of the appeal.

This appeal is being adjudicated based on the parties' written submissions. I have determined that an oral hearing is not required in this case (see section 107 of the *Act* and *D. Hall & Associates v. Director of Employment Standards et al.,* 2001 BCSC 575). I have before me the section 112(5) record provided by the Director's delegate and the written submissions of legal counsel for Ms. Short. Despite being invited to do so, the respondent employer, Compass Group Canada operating as Eurest Dining Services ("Compass"), did not file any submission with the Tribunal. The Director's delegate's submission is very brief and only speaks to the correct name of the employer which, I am advised, is Compass Group Canada (Beaver) Ltd.

ISSUES ON APPEAL

Following an oral hearing conducted on June 23rd, 2003, the Director's delegate issued reasons for decision on October 10th, 2003 in which he concluded that Ms. Short voluntarily resigned her position and that since she was a "manager", as defined in section 1(1) of the *Employment Standards Regulation*, she was not entitled to any overtime pay. The delegate dismissed Ms. Short's complaint on the basis that the *Act* had "not been contravened" and that "no wages are outstanding".

Ms. Short filed an appeal with the Tribunal on November 26th, 2003. In her appeal form, Ms. Short seeks a variance of the Determination. Ms. Short alleges that the Director's delegate erred in law [section 112(1)(a)] and failed to observe the principles of natural justice in making the Determination [section 112(1)(b)].

More particularly, Ms. Short alleges that she was entitled to compensation for length of service because she was "constructively dismissed" (see section 66 of the *Act*) and that the delegate was "biased". Among other things, Ms. Short says that "all relevant facts were not dealt with". Ms. Short does not challenge the delegate's conclusion that she was a "manager" (March 11th, 2004 submission, para. 23); indeed, she asserts that she worked for many years "in a manager's position".

BACKGROUND FACTS AND DELEGATE'S FINDINGS

Compass operates cafeterias for a number of client firms including a "Rogers Sugar" plant in Vancouver. "[Ms. Short] had supervised the operation at B.C. Sugar [Rogers] for several years prior to transferring to the company's operation at Alcatel where she worked one day and part of another" (Reasons for Determination, p. 1).

Ms. Short's testimony at the hearing before the delegate is set out in the following excerpts from the Determination (at pp. 1-3):

> The complainant's duties at Rogers Sugar consisted of cash and sales management, including banking, supervising employees, hiring and firing of employees and cost control...
>
> She had hired two employees during her Rogers service but had not fired any...
>
> She was called to a meeting with her supervisors...who informed her, because of serious inventory short-fall [$3,000], that the client, Rogers, insisted on her removal from their cafeteria, as a condition of the company (Compass) retaining the contract. [The two supervisors] offered the complainant the choice of relocation within the company to another cafeteria or to be "severanced". The complainant chose the relocation option on condition that it be reasonably accessible by bus from her Burnaby residence and second, that her duties at the new location would not include any "menial tasks"...
>
> They told her she would remain at the same rate of pay but was not told whether it would be a managerial position or where the new position would be located.
>
> She was notified 2 weeks later that she was being transferred to the Alcatel cafeteria...
>
> On her first day at Alcatel, she testified she started work at 6:00 a.m. Wendy McIsaac [the Alcatel cafeteria manager] was already at work and told her to familiarize herself with the location. Having done so, by walking around the premises, she was instructed to begin washing dishes. She washed dishes all day except for a period when she chopped vegetables for the next day's soup and, at another time, cleaned up the outside tables.
>
> She stated she tried to ring in customer sales or to work the sandwich bar but Wendy McIsaac declined the offer...
>
> She tried several times to speak to Wendy McIsaac about her long term duties but McIsaac replied: "We'll talk later"...
>
> Before the complainant left for the day, she asked McIsaac if she would be doing the same thing next day. McIsaac, she testified, replied by saying she would talk to her the next day and gave her no assurance that she would not be doing the same menial duties the next day...
>
> When she left Rogers, she was supervising one regular employee and casuals on occasion...
>
> She understood the Rogers operation was operated as a "cost recovery unit" whereby the client pays all costs plus a fee for service.

Ms. Short reported for work the next day and submitted the following written resignation:

> April 8/2000
>
> Wendy:
>
> Due to the drastic change in my job from Rogers Sugar to Elcalel [sic], I do not see any way that I can continue working for compass foods.
>
> "Norma Short"

The employer's evidence, as set out in the delegate's Reasons (at p. 4), was as follows:

> [Wendy McIsaac] explained to Short that she would be acting as manager in her absence from Alcatel when she (McIsaac) was engaged at other company units in her role as supervisor...
>
> Short's transfer to Alcatel left her with the same wages, benefits and hours although the Alcatel site was larger, with more staff and supplied product to other sites.
>
> McIsaac states that she instructed Short to look around the operation when she arrived on her first day and then help Linda, the prep cook, and Chris.
>
> She told Short she didn't have time to train her that day but to "bear with me". Short went on dishes at lunchtime, she testified...
>
> On the 2nd day, "Norma walked in and handed me her written notice", she testified, with the comment "I hate to have to do this".
>
> Short worked for a couple of hours until her son picked her up...
>
> [McIsaac] stated she could not recall the conversation with Short on the previous afternoon as alleged by Short.
>
> McIsaac claims she told Short to "just let me get through today and we'll start training tomorrow".

The delegate, faced with conflicting evidence, made the following findings (at pp. 5-6):

> The issue of Short's resignation is not disputed which leaves only the question: Did the employer's actions bring about her termination, i.e., "Constructive Dismissal"?
>
> Short's testimony appears to establish her understanding and acceptance of 1) her removal from Rogers, where she had worked for eleven years, and 2) her acceptance of the employer's offer to place her in another company location, albeit with certain minimal conditions...
>
> Short's evidence that she had an informal understanding with the employer that her relocation would entail "no menial work" does not argue with McIsaac's evidence that Short's first day was to be spend orienting herself to the new location and helping out others (including some dishwashing).
>
> I conclude that McIsaac's testimony that she asked Short to exercise a minimal level of patience until the next day, when some training would take place, was credible and reasonable.
>
> That leaves only the competing testimony about the events of the morning on the second day.

> Short testified that on the second day she was again assigned menial work and spoke to McIsaac about it, telling her "if she was going to continue doing menial work she'd have to look for another job."
>
> The conversation, she testified, occurred mid-morning and she left at approximately 11 a.m.
>
> McIsaac testified that she was already at work on the second day when Short arrived in the morning and, without "taking off her coat" handed McIsaac a handwritten note with the words "This is not something I want to do."...
>
> Accepting Short's version of the events would require me to conclude that the employer had deliberately set up a scenario that they knew would bring about Short's resignation.
>
> I am persuaded, however, that the employer's evidence to accommodate her after her removal from Rogers, even if Short's service at the new location was awkwardly handled, refutes that conclusion.

I now turn to the two grounds of appeal.

ANALYSIS

Error of Law

Ms. Short says that she was "constructively dismissed" pursuant to section 66 of the *Act* and that the delegate erred in finding that she voluntarily resigned her position. Section 66 is reproduced below:

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

Section 66 essentially codifies the common law notion of "constructive dismissal". In *Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846, the Supreme Court of Canada defined this latter doctrine in the following terms (at paras. 33, 35 and 36):

> ...where an employer unilaterally makes a fundamental or substantial change to an employee's contract of employment--a change that violates the contract's terms--the employer is committing a fundamental breach of the contract that results in its termination and entitles the employee to consider himself or herself constructively dismissed...
>
> ...However, each constructive dismissal case must be decided on its own facts, since the specific features of each employment contract and each situation must be taken into account to determine whether the essential terms of the contract have been substantially changed.
>
> In a number of decisions in both Quebec and the common law provinces, it has been held that a demotion, which generally means less prestige and status, is a substantial change to the essential terms of an employment contract that warrants a finding that the employee has been constructively dismissed. In some decisions, it has been held that a unilateral change to the method of calculating an employee's remuneration justifies the same finding. Other decisions have found that a significant reduction in an employee's income by an employer amounts to constructive dismissal [citations omitted].

The question of whether or not an employee has been "constructively dismissed" within the meaning of section 66 of the *Act* is a question of mixed law and fact, a species of error of law (*Housen v. Nikolaisen*, [2002] 2 S.C.R. 235). As noted by the Supreme Court of Canada in *Farber, supra,* the decision-maker must:

- first identify the terms and conditions (both express and implied) of the parties' employment contract;

- second, determine whether the employer breached one or more terms of that contract by way of a unilateral change; and, if so,

- third, determine if that breach was "substantial" (s. 66) or, in terms of the common law, "fundamental" or "repudiatory".

As can be seen, the above analysis requires the decision-maker to both find facts (the terms of the contract) and draw legal conclusions (Was there a breach?; if so, Was it a repudiatory breach?). If the decision-maker at first instance (such as the Director's delegate) applied the correct legal test, the standard of review by an appellate body (such as the Tribunal) is to determine if the initial decision is tainted by a "palpable and overriding error": see *Housen v. Nikolaisen, supra.*

In my opinion, the delegate correctly instructed himself about the governing legal principles with respect to section 66 of the *Act.* The delegate held that the transfer to the new location was not intended, nor did it constitute, a unilateral and substantial alteration by Compass of Ms. Short's conditions of employment. Ms. Short agreed to a transfer to another Compass cafeteria operation. She may well have felt that she had no choice since, if she refused, she was apparently going to be terminated with severance pay (her entitlement under the *Act* would have been 8 weeks' wages). Nevertheless, it must be remembered that employers have the right under the *Act* to terminate an employee, even if there is no just cause to do so, provided proper written notice is given or, absent notice, the employee is paid the proper amount of compensation for length of service. There is nothing in the record before me to indicate that the employer was acting unlawfully in offering Ms. Short the choice of dismissal (with "severance") or relocation.

Ms. Short did not apparently wish to be terminated with compensation. Thus, she accepted her employer's offer to work at a new location. In essence, the parties agreed to a novation of the existing employment contract. The new contract embodied somewhat different duties, as would be expected given that the new location was a larger operation, but it nonetheless provided the same pay and benefits and the expectation that Ms. Short would continue to exercise certain managerial responsibilities.

Ms. Short says that she expected to continue to exercise managerial responsibilities at the new location but, in fact, her new position involved only, as she characterized it, "menial tasks". The delegate found that the employer had not embarked on a course of action that left Ms. Short no option but to quit. Rather, on her first day at the new location, Ms. Short was asked to be "patient" and that her formal training would soon begin soon, if not on that very first day. In other words, the employer had no intention of, and indeed did not, fundamentally change Ms. Short duties by turning her into a "menial servant".

I note that Ms. Short's resignation letter was drafted on her very first day at the new location (April 8th, 2002); presumably, after work. Thus, when Ms. Short reported for work the next day (April 9th), she had already, it would appear, made up her mind to quit. In this regard, in my view, she acted precipitously

and not in response to a fundamental breach of her new employment contract by the employer. Had the situation persisted and Ms. Short carried on only as a "dishwasher" without any supervisory authority whatsoever, perhaps section 66 might have been triggered. However, I am fully satisfied that the delegate did not err in concluding that section 66 was not triggered given the facts of this case.

Failure to Observe the Principles of Natural Justice

Counsel for Ms. Short says that the delegate was biased:

> The Delegate of the Director feels that the employer would no way [sic] set up a scenario to bring about the resignation of Ms. Short. I would suggest that the facts should bear out this response not a feeling from the Delegate. I would suggest there is a bias from the Delegate of the Director.

I see no evidence whatsoever of bias on the part of the delegate. In my view, the delegate simply concluded, based on an entirely reasonable inference from the facts as he determined them, that Ms. Short was not, in effect, purposely "humiliated" (as is suggested by Ms. Short's counsel) so that she would feel obliged to resign.

ORDER

This appeal is dismissed. Pursuant to section 115(1)(a) of the *Act,* I order that the Determination be confirmed as issued.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal