Employment Standards TRIBUNAL

An appeal

- by -

Mohammed Khan
("appellant" or "employee")

- 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: Paul E. Love

FILE No.: 2000/736

DATE OF DECISION: February 12, 2001

DECISION

OVERVIEW

This is an appeal, by the employee, Mohammed Khan ("employee"), of a Determination dated September 28, 2000. The employee claimed that the employer was obliged to pay his medical services plan payments, and disability plan premiums, during the course of the disability. The employee claims that the Delegate erred in finding that as a 27 year employee, he was not entitled to compensation for length of service. The employer intended to cease operations as a result of business reasons, and give its employees notice of the date that it intended to cease operations. While the employer did not give 60 days notice to the employee, the employee in this case was not entitled to compensation for length of service. As a result of a workplace injury the employee was disabled permanently, and unable to return to his pre-accident job. The Director, in effect, applied s. 66 of the *Employment Standards Act* (the "*Act*") and found that the contract was at an end because a condition of employment was substantially altered. Alternatively, the Delegate's conclusion was justified on the basis of s. 65(1)(d) as it was impossible to perform the employment contract as a result of an unforseeable event. The *Act* did not require the employer to pay the employee's disability plan premiums, and the employee had advised the employer that the employee would like to be covered under his wife's medical plan.

ISSUES TO BE DECIDED

Did the Delegate err in determining that Mr. Khan was not entitled to compensation for length of service, and payment of the disability premium waiver, and medical services plan premium?

Did the Delegate err in determining that the employer was not obliged to give notice of termination and was not required to pay compensation for length of service because the employment relationship of the parties was at an end?

FACTS

This matter proceeded by way of written submissions, without an oral hearing. Neither the employee nor the employer had counsel draft the submissions on this appeal. Mr. Khan filed a second submission dated January 9, 2001, beyond the deadline of December 11, 2000 imposed by the Tribunal for submissions, and no reason is advanced for the late submission. I, therefore have declined to consider his late submission in this decision.

Mr. Khan, is a 27 year employee of Lawson Oates Chrylser Ltd. He worked for the employer as an auto technician from February 22, 1971 to December 17, 1998. He suffered a knee injury in 1996. Between 1996 to 1998 he was on a workers' compensation claim, and

worked off and on for the company. He did not work for the company after December 17, 1998. Mr. Khan became disabled permanently as a result of a knee injury. The permanent nature of the disability arose in January of 1999.

There is no evidence before me that Mr. Khan ever resigned his position from Lawson Oates because of a long term disability. There is some evidence that Mr. Khan and the employer received a letter from WCB dated October 8, 1999 indicating that Mr. Khan was unable because of his permanent disability to return to his work, and that he would be given retraining by WCB for a lighter occupation. The October 8 letter indicates that the WCB adjudicator had discussed a return to work with the employer:

> I have discussed your situation with Ms. Ruby Wong, Lawson Oates Chrysler (877-2678). Ms. Wong confirmed that Lawson Oates would have a Mechanic position for you if you were able to perform 100% of your duties. A Gradual Return to Work could be accommodated, however this had been unsuccessful in the past. No other positions are available to you with Lawson Oates. Therefore, phases 1 and 2 of the Vocational Rehabilitation process are complete.

The letter of October 8, 1999 indicates that Mr. Khan was eligible to participate in phase three of the program, which is available when the "the employer is unable to accommodate the worker in any capacity, vocational exploration will progress to suitable occupational options in the same or a related industrial sector."

The employer in its submission says that after receipt of this letter, Mr. Khan came to the employer's work place and removed his tools and personal effects from the premises. There is no evidence that Lawson Oates ever agreed or expected Mr. Khan to return to work. The question of whether Mr. Khan should have been accommodated, is not a question that is before me, but it may be a question that Mr. Khan could raise in a human rights context. Mr. Khan says that this retraining was to be completed in May of 2000. Mr. Khan received WCB benefits while he was on WCB, and he was given vocational training by the WCB.

The Delegate found that due to a decline in sales the company was closed on June 30, 2000. The employer mailed to Mr. Khan a letter of termination dated May 1, 2000 advising that the company would be closing its business on June 30, 2000. The letter stated that "We are providing you with two months of working notice in order to assist you in your transition to a new career". Mr. Khan claims that he received notice on May 26, 2000, and that he received notice after the WCB notified the employer, that Mr. Khan was retrained and fit to return to work in an accommodated capacity.

The Delegate found that due to the circumstances in this case, the employment relationship was brought to an end by the inability of Mr. Khan to perform his job duties. The Delegate found that while the employer did give notice, it was not necessary that it give notice:

> Section 63 of the Act requires an employer to provide compensation for length of service. The liability to provide compensation for length of service is deemed to be discharged if an employee is given written notice. The notice provided under section 63 must be working notice.
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> In the normal course, since Lawson Oates is unable to give working notice, it would have to give payment in lieu of that notice. Again, in the normal course, if the employer is unable to give working notices does not excuse it from payment in lieu.
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> In summary, any employee who is on disability leave would be owed compensation for length of service by virtue of the closing down of a business. However, in this case there are extenuating circumstances that alter that conclusion. Here, Mr. Khan and Mr. Bans have been on disability. During Mr. Khan's association with WCB Mr Khan was advised, by letter dated October 8, 1999 that "no other positions are available to you with Lawson Oates"
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> .... A finding by WCB that the complainants would not be returning to work because of their medical conditions effectively terminates their employment with Lawson Oates. Despite the notice of the company closing down provided to the complaint on May 1, 2000, the employment relationship was already terminated and, therefore Lawson Oates does not owe compensation for length of service to the complainants.

Mr. Khan sought compensation for length of service, and payment of the disability insurance premium, and compensation for the loss of Medical Services Plan coverage. It is not necessary for me to set out the particulars of the claim, but the total amount of the claim exceeds $9,000.

The Delegate found that it had always been the policy of the employer that the employee should pay for its disability premiums under the group insurance plan. This was to ensure that the benefits received, would be received on a tax free basis. While the employees were employed, the employer deducted the disability premiums from the employee's wages pursuant to a written assignment and remitted the payments to the insurance company.

ANALYSIS

In an appeal of a Determination, the burden rests with the appellant, in this case the employee, to show that there is in an error in the Determination such that I ought to vary or cancel the Determination.

Insurance Premiums and Medical Services Plan ("MSP") premiums:

It is open to an employee, who has become disabled, to apply to the disability insurer for a waiver of the premium paid. I am not sure whether Mr. Khan made this application. He says the employer should pay the premium. There is no requirement in the *Act* that the employer pay the disability insurance premiums once an employee is on a disability leave. Mr. Khan advances a proposition which is unsound, and if agreed to by the employer may have had the effect of converting the non-taxable disability benefits, into taxable benefits.

After the disability arose, Mr. Khan advised the employer that his MSP coverage could be covered under his wife's policy and therefore the employer cancelled Mr. Khan's coverage and credited to him his portion of the premium.

Mr. Khan has not demonstrated any error with regard to the disability insurance and MSP premium portion of the determination.

Compensation for Length of Service:

Section 63 of the *Act*, provides that after three consecutive months of employment, an employee must be given notice or compensation for length of service, where the employer terminates the employee, without just cause. Mr. Khan had not quit his employment. I cannot find that a removal of tools and personal effects, amounts to a "quit". The employer did not take any steps to terminate Mr. Khan until its letter of May 1, 1999. The employer was required to give 60 days notice, given Mr. Khan's length of service, and the notice was defective because it did not give Mr. Khan 60 clear days notice.

The real issue in this case is whether an employer, who has been deprived of the employee's services on a permanent basis, is required to give that employee a notice under the *Act*. The Delegate was of the view that while the notice was defective, the employer was not required to give notice because the contract was at an end. It is my view that the Delegate was correct in the result in this case but for reasons different than those expressed by the Delegate. This is an employment relationship between the employer and the employee, and a finding by the WCB that Mr. Khan was disabled permanently does not affect the employment status of Mr. Khan. He remains an employee until he resigns, is terminated, or another event occurs which brings the employment contract to an end. The finding by the WCB, is however, some evidence that Mr. Khan is incapable of performing the employment contract. I accept that evidence as determinative of Mr. Khan's permanent disability, and inability to perform the "pre-injury job". I note this finding is also buttressed by evidence supplied by Mr. Khan which includes a note from his doctor. This is a case, where there is no doubt that Mr. Khan was unable, as a result of a workplace injury, to perform his pre-injury job.

At the time when the employer gave notice of termination, Mr. Khan was permanently disabled, and could not return to his "pre injury job" with the employer. The employer does not appear to have been prepared to accommodate a return to work, other than with a

graduated return to work in the pre injury job. Whether this degree of accommodation amounts to a violation of the *Human Rights Code*, is not a matter, which is before me as an adjudicator under the *Act*.

The Tribunal has said in *J. Miller Enterprises Ltd, BCEST #D119/98*: that an employer can issue an appropriate written notice to run over the course of the disability period to avoid the statutory obligation to pay compensation for length of service. This decision, however, did not consider the impact of s. 67 of the *Act*, which deals with the effect of medical reasons on the giving of notice.

In *Bjorklund BCEST #D437/99* the Adjudicator held that a complaint was not filed out of time where the employee was disabled. The adjudicator held that the notice was ineffective because of s. 67 of the *Act*. This case, however, did not deal, apparently, with the termination of a permanently disabled employee because of business closure.

At a time when an employer is contemplating shutting down the business, the employer can during the course of that planning issue notice to an affected employee to relieve the employer of the effect of paying compensation for length of service under s. 63 of the *Act*. The *Act*, however, seems to prohibit the given of notice to employees who are on a leave related to medical reasons. Section 67 of the *Act* reads as follows:

> 67(1) A notice given to an employee under this Part has no effect if
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> (a) the notice period coincides with a period during which the employee is on annual vacation, leave, strike or lockout or is unavailable for work due to a strike or lockout or medical reason

The *Act* speaks to notice periods which coincide with periods when the employee is "unavailable for work". The words "annual vacation, leave, strike, or lockout" all denote temporary circumstances. The words "medical reason" are not defined in the *Act*. In my view, considering the context of the words in the *Act*, "medical reason" must mean a medical reason of a temporary nature or at best a medical reason which is "indeterminate". The legislature could not have intended "a permanent medical disability which prevents an employee from resuming employment" to give rise to an entitlement to compensation for length of service. If the legislature intended, as a minimum standard that permanently disabled employees, unable to return to their pre injury job, would have an entitlement to a severance package from the employer, one would expect this minimum standard to be clearly expressed within the *Act*. It makes absolutely no sense that an employer ceasing operations has the power to give notice and terminate an employee working in the business, but has no power to give notice and terminate a permanently disabled employee. If the employer is required to pay compensation for length of service to the disabled employee in this situation, but an employer has a discretion whether or not to give notice or pay a "working employee", the disabled employee, in effect receives additional compensation for disability. The permanently disabled employee would receive a benefit simply because the employee was

disabled permanently. This would be an absurd interpretation of the *Act*. The *Act* was intended to give an employee a right to notice or compensation for length of service. The *Act* was intended to prevent employers from terminating employees because they were off work temporarily for medical reasons. The *Act* was not intended to give a permanently disabled employee, compensation and preferential treatment, in a "cease operations" situation because of the disability.

Mr. Khan was incapable of performing the contract of employment. This was not his fault, and is "no one's fault". There is no evidence before me that this is anything but a genuine permanent disability that will continue in the future. An employee who is employed must "work" for the employer. The exchange of labour or service for pay is a fundamental term or condition of any employment contract. Here the employer was deprived of Mr. Khan's services because of permanent disability. In my view, the Determination made by the Delegate, is in effect, a finding by the Director that a condition of employment was has been substantially altered, within the meaning of s. 66 of the *Act*. Section 66 of the *Act* reads as follows:

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

In this Determination, the Delegate stated that the contract was at an end due to the findings of the WCB. As a matter of law, WCB cannot terminate the contract between the parties. I take this phrase, however, to be a finding by the Delegate, that as a result of the evidence, that the Delegate considered that a condition of employment was altered substantially, and that Mr. Khan's employment was terminated.

I note that most of the Tribunal's decisions interpreting s. 66 have been appeals involving the concept of "constructive dismissal." The wording of the section is broad, however, and I see no reason why the section is limited to the concept of constructive dismissal of the employee by the employer. I note that in *Stohlstrom, BCEST #D 453/98*, the adjudicator took the view that s. 66 only applies when an employer substantially alters a condition of employment. *Stohlstrom* involved a temporarily disabled employee who claimed that she was constructively dismissed because of reduced shifts arising from her temporary inability to perform all her job functions. In my view, the general statement concerning s. 66 was unnecessary to dispose of the case before the adjudicator. I note that it will be a rare circumstance that an employer will be able to meet the burden of persuading the Director that there has been a "substantial alteration", because most conditions of employment are within the control and contemplation of the employer.

Further, as a second reason for upholding this Determination, I find that the "notice provisions" of the *Act* do not apply because of s. 65(1)(d) of the *Act*, which reads as follows:

> Sections 63 and 64 do not apply to an employee
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> (d) employed under an employment contract that is impossible to perform due to an unforeseeable event or circumstance other than receivership, action under section 427 of the Bank Act (Canada, or a proceeding under an insolvency Act)

In my view, the disability in this case does amount to a contract impossible to perform due to an unforeseeable event, and therefore the employer was not required to give notice of termination of employment. I note that not every case of absence due to illness and injury will result in a contract which is impossible to perform. Section 65(1)(d) must be read in the context of s. 67 of the *Act*, which provides that notices are of no effect if given to an employee who is unavailable for work due to a medical reason. There is a distinction between an absence which makes performance of an employment contract impossible to perform, and the situation where the employee is merely unavailable for work due to a medical reason. In this case, given that Mr. Khan was disabled permanently, and unable to return to his pre-injury job, it is not a case of him being unavailable for a medical reason, but a case where it is impossible for him to perform the pre-injury duties.

In conclusion, I have found that section 67 of the *Act* does not impair the ability of employers to give notice to employees who are permanently disabled and unable to perform the pre-injury job assigned by the employer. The notice given by the employer was clearly inadequate as it appears that the employer did not give a clear 60 days notice of the termination of employment. Nevertheless, in the peculiar circumstances of this case, I agree with the Delegate that the employment contract between the parties had ceased. The employer was not required to give notice of termination to Mr. Khan because of a permanent disability which the Director viewed as a "substantial alteration of a condition of employment" (s. 66). Further, section 63 of the *Act*, dealing with compensation for length of service, did not apply because performance of the contract was impossible (s. 65(1)(d)).

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination in this matter, dated September 28, 2000, be confirmed.

PAUL E. LOVE

Paul E. Love
Adjudicator
Employment Standards Tribunal