Employment Standards TRIBUNAL

An appeal

- by -

Rupert Title Search Ltd.
("RTS")

- 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:** David B. Stevenson

**FILE No.:** 2002/581

**DATE OF DECISION:** February 26, 2003

# DECISION

## OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by Rupert Title Search Ltd. ("RTS") of a Determination that was issued on November 8, 2002 by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded that RTS had contravened Part 8, Section 63 of the *Act* in respect of the employment of Coreen M. Davies ("Davies") and ordered RTS to cease contravening and to comply with the *Act* and *Regulations* and to pay an amount of $4,346.78.

RTS says the Determination is not supported on the facts or the law. RTS has indicated the Determination is wrong in the following respects:

1. The Delegate (Director) made an error in determining the notice of termination given to Davies had no effect because she was on 'medical leave' during the notice period;

2. The Delegate (Director) erred in failing to find RTS had discharged its liability under Section 63(3) of the *Act*; and

3. The Delegate (Director) erred in determining Davies had not 'quit' her employment.

RTS asks that the Determination be cancelled, alternatively, RTS asks that the effect of the Determination be suspended, under Section 113 of the *Act*, and the matter be referred to an oral hearing on the issues raised in the appeal.

I will first address the request that the matter be referred to an oral hearing and the effect of the Determination be suspended until such hearing has been conducted and a final decision has been made by the Tribunal.

Generally, the Tribunal will not hold an oral hearing on an appeal unless the case involves a serious question of credibility on one or more key issues or it is clear on the face of the record that an oral hearing is the only way of ensuring each party can state its case fairly (see *D. Hall & Associates Ltd. v. British Columbia (Director of Employment Standards)* [2001] B.C.J. No. 1142 (B.C.S.C.). This appeal does not contain any facts or reasons which lead me to conclude that an oral hearing would be the only adequate way of providing RTS a fair opportunity to state their case. No new evidence has been provided. While the appeal challenges some of the conclusions that flow from findings of fact, none of the arguments made in the appeal challenge the findings of fact made in the Determination.

The Tribunal has decided that an oral hearing is not required in this matter and that the appeal can be properly addressed through written submissions.

In response to the request for a suspension of the effect of the Determination, I note initially that in the Director's reply, it is pointed out that, except in circumstances which do not appear to be present in this case, it is not the normal practice to initiate proceedings on a Determination which is under appeal. Notwithstanding the apparent assurance that unless circumstances changed no enforcement proceedings

would be commenced by the Director, the Director opposes the request. I will therefore address that request.

Section 113 of the *Act* reads:

> *113. (1) A person who appeals a determination may request the tribunal to suspend the effect of the determination.*
>
> *(2) The tribunal may suspend the determination for the period and subject to the conditions it thinks appropriate, but only if the person who requests the suspension deposits with the director either*
>
> *(a) the full amount, if any, required to be paid under the determination, or*
>
> *(b) a smaller amount that the tribunal considers adequate in the circumstances of the appeal.*

In *Tricom Services Inc.*, *supra*, the Tribunal stated that:

> . . . it is important to note that the legislature has provided, as a first proposition, that a suspension should only be ordered if the "total amount" of the determination is posted; a "smaller amount" should only be ordered if such lesser amount would be "adequate in the circumstances of the appeal".

There is no indication in the appeal that RTS has deposited with the director any amount required to be paid under the Determination. In the absence of some indication that has been done, or approval by the Tribunal of some lesser amount being deposited, the Tribunal will not exercise its discretion under Section 113.

## ISSUE

The issue in this appeal are whether RTS has shown an error in the Determination sufficient to justify the Tribunal cancelling the Determination.

## FACTS

RTS provides registry services in Prince Rupert. Davies was employed by RTS as an office assistant from April 13, 1992 until June 28, 2002. Her rate of pay was $16.00 an hour.

On April 15, 2002, Davies went on a medical leave after providing RTS with a note from her doctor. The doctor's note stated that Davies was unable to work and that her condition would be re-assessed on April 22, 2002. A later note, dated April 22, 2002, estimated Davies would be able to return to work on June 1, 2002. On April 30, 2002, RTS gave Davies eight weeks' written notice of termination. Davies returned to work on June 10, 2002.

On, or about, June 26, 2002, Davies spoke with Rhoda Witherly ("Witherly"), RTS' Manager and Davies' supervisor, about her entitlement to 'termination pay'. As a result of the discussion and some inquiries made by Witherly, RTS 'withdrew' the April 30, 2002 notice, acknowledging that under Section 67 of the *Act* it had no effect, and issued another written notice of termination to Davies on June 27, 2002 indicating her last day of employment would be August 22, 2002. Until June 27, 2002, Davies

understood, and accepted, that her last day of employment with RTS would be June 28, 2002 and acknowledged she had made plans to leave Prince Rupert on June 28 to visit with her sister in Francois Lake on that understanding.

Davies worked June 28, 2002. She did not report for work on July 2, 2002. RTS took the position that Davies had terminated her employment by failing to report for work. At the end of the work day on July 2, 2002, Davies delivered a doctor's note to RTS, which stated:

> Coreen is unable to work due to medical reasons. Estimated return to employable status is Aug 30/02.

A Record of Employment ("ROE") was issued by RTS for Davies on July 12, 2002. On the ROE, RTS entered Code 'E' (quit) as the reason for issuing it. In the area designated for 'comments', RTS stated:

> Employee did not show up for work July 2, 2002 & then dropped off medical note at the end of the day.
>
> Have had no further communication with employee.

## ARGUMENT AND ANALYSIS

The first area of concern raised by RTS in this appeal turn on whether the Director correctly interpreted and applied subsection 67(1) of the *Act*. That provision states:

> *67 (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, or*
>
> *(b) the employment continues after the notice period ends.*

At the outset of its argument, RTS points out a lack of clarity in the terminology used in the Determination, citing a continuing reference in the Determination to Davies being on 'medical leave' and 'leave' over the relevant period of time, including a conclusion that Davies was on 'medical leave' during the period June 28, 2002 to August 30, 2002. In its submission on this point, RTS says:

> We can only presume that the [Director] was actually referring to "unavailability for work . . . for medical reasons" when he used the terms "sick leave" and "medical leave".
>
> . . .
>
> 11. It is submitted that the language of the statute would have provided more clarity if used in the Determination instead of using the word "leave".

I agree. There is no indication in the file that the absence which commenced June 28, 2002 was a period during which Davies was on 'leave'. It would have been more accurate to describe that absence as a period during which Davies was unavailable for work due to medical reasons. In fact, that is very close to what the June 28, 2002 doctor's note says. Having said that, I do not suggest that the description of the absence used by the Director affects in any way the Determination or the conclusion reached on the effect of the June 27, 2002 notice. There can be no confusion that regardless of the terminology used, the

Director was referring to the absence that commenced as of June 28, 2002. As well, under subsection 67(1), the effect on the notice is the same whether Davies was on 'leave' or 'unavailable for work due to medical reasons' following June 28, 2002 and, in the circumstances, the loose description of that absence is nothing more than a technical irregularity.

The central argument in this area of concern incorporates the proposition that since Davies was at work on the day the second notice of termination was delivered to her, it could not be made 'ineffective' by a period of "unavailability due to . . . medical reasons" that did not commence until after that notice was given.

RTS says the Director erred in finding that Davies was "unavailable due to medical reasons" at the time she was given the second notice. I agree that if the Director did make such a factual finding, it would be an error on the face of the record. That assertion, however, is not supported by reference to the actual finding made in the Determination, which is contained in the following paragraphs:

> I agree with Witherly in her assertion that the first notice of termination that Davies received had no effect. Davies' leave coincided with her notice period and Section 67 of the *Act* states that where the notice period coincides with a leave the notice of termination will have no effect.
>
> As to the second notice of termination given to Davies by Witherly, I find on the balance of probabilities that it would have no effect for the same reason: that Davies was on a medical leave during the notice period between June 28, 2002 and August 30, 2002 as the doctor's note was dated June 28, 2002.

The above excerpt quite clearly relates the effect of the notice of termination to the whole of the notice period; it is not limited or confined to whether Davies was at work or "unavailable due to medical reasons" on the day she given the notice of termination.

The implication of the proposition being advanced by RTS is that the status of the individual on the day a notice of termination is issued will govern any question of the effect of that notice for the purposes of Part 8 of the *Act*. In other words, if the employee is at work to receive the notice, that notice will not be affected by any absence occurring during the notice period, but if the employee is on annual vacation, leave, *etc.*, or unavailable due to medical reasons when the termination notice is delivered to the employee, Section 67 will operate to make it ineffective.

In reply to this point of the appeal, the Director says the words of subsection 67(1) cannot be read in the manner suggested; that the language of the provision is clear and uses the notice period as the reference against which the employee's period of unavailability is applied, not the day on which the notice is given; that when Davies' period of unavailability (June 28 to August 30, 2002) is placed against the notice period (June 27 to August 22, 2002), the two coincide; that an interpretation consistent with the suggestion of RTS would be contrary to the statutory objective of that provision; and that if the legislature had intended the result suggested by RTS, paragraph 67(1)(a) would have read:

> *(a) the day on which the notice is given coincides with a period during which the employee is . . .*

I agree with the argument of the Director on this point. The Tribunal has consistently recognized that Section 63(1) of the Act establishes a statutory liability on an employer to pay an employee length of service compensation upon completion of three consecutive months of employment. It is not only a statutory liability on an employer, but in a sense it is also an 'earned' benefit to the employee that

accumulates as the length of service of the employee increases. The employer may discharge its statutory liability by giving the appropriate written notice, a combination of notice and money or by the payment of an amount of money equivalent to the appropriate notice. The statutory objective of Section 63 is to provide an employee with working notice, or its equivalent, in order to allow the employee a reasonable opportunity to seek out alternative employment and to arrange their affairs to deal with the imminent loss of employment. Working notice, or its equivalent is both time and money. That objective is not met if the affected employee is disabled, unable or unavailable to utilize the opportunity intended by the legislation to be provided.

Section 67 is appropriately headed 'Rules about Notice". It intended to adjust to the notice requirements to cover those eventualities, identified in that section, which operate to frustrate the statutory objective of Section 63. The words used in subsection 67(1), read in their grammatical and ordinary sense, do not support the suggestion made by RTS. If the legislature intended that the notice of termination would have no effect only if it was issued on a day the affected employee was on annual vacation, leave, *etc.*, or unavailable due to medical reasons, there would be no need to make any reference at all to the 'notice period'.

This argument is dismissed. In light of the above, I do not need to address the question of whether RTS discharged is statutory obligation under Section 63 by providing Davies with 8 weeks' working notice. By application of Section 67(1), the notice has no effect on the liability of RTS under Part 8 of the *Act*.

Before leaving this area of concern, some comments about the doctor's note are in order. In this appeal, RTS has not questioned the validity of the doctor's note provided by Davies on July 2, 2002 or challenged the Director's factual conclusion that after June 28, 2002, Davies was *"unavailable for work due to . . . medical reasons"*. Generally speaking, it should not be presumed that the provision of a doctor's note, or equivalent, is determinative of whether an employee was *"unavailable for work due to . . . medical reasons"*. It is, at best, *prima facie* evidence. If such a note were challenged, the evidence presented would have to confirm the validity of the note and be sufficient to allow a conclusion, on a balance of probabilities, that there were, in fact, medical reasons for the employee being unavailable to work.

The second area of concern raised by RTS flows from the finding that Davies did not terminate, or 'quit', her employment. RTS challenges that finding in two respects: first, RTS says the facts do not support a conclusion that Davies did not 'quit' her employment; and second, the Director wrongly imposed a burden on RTS to show Davies had quit.

I shall first address the argument relating to the placement of the burden. On that matter, the Determination says:

> . . . the onus is on the employer to show that the employee made a clear indication that she was going to quit and then actually took an action that demonstrated she had quit.

The above statement is consistent with the approach the Tribunal has said should be applied in deciding whether an employee has quit.

RTS says that approach is incorrect and, citing a BC Supreme Court decision, *Osachoff v. Interpak Packaging Systems Inc.*, 44 C.C.E.L. 156, says that where the evidence suggests the employee might have resigned, the burden remains on the employee to show otherwise. With respect, I do not accept that comments relating to the burden of proof in civil cases involving a claim for damages for wrongful

dismissal should govern the administration of length of service compensation under the *Act*. Length of service compensation should not be equated with common law damages for wrongful dismissal. The main objective of the common law is to adjudicate a breach of contract and to provide appropriate relief for that breach, depending on the Court's view of the circumstances and factors in each case. The usual application of the burden of proof in civil cases is that 'he who asserts, proves'.

The administration of Section 63 of the *Act* is different. As noted above, the objective of length of service compensation is to give an employee a brief period, at a time when that employee's loss of employment is imminent, which the employee can use to seek alternative employment and make adjustments to their personal and financial circumstances unaffected by the immediate financial consequences of unemployment. It is, in a sense, a statutory benefit earned through employment. The 'default' position on length of service compensation is that it is a statutory liability for the employer. It is not necessary for an employee to prove a wrongful dismissal in order to claim payment for length of service compensation under the *Act*. The employee needs only to establish the fact of employment for a term longer than the qualifying period and the fact of termination. The *Act*, in subsection 63(3), allows an employer to discharge the statutory liability for length of service compensation by providing notice, or a combination of notice and compensation, paying compensation or by showing the employee has quit, retire or engaged in conduct that provides just cause for termination. It only makes sense that the burden of showing that liability has been discharged should be on the employer, since the statutory liability to pay length of service compensation belongs to the employer and the question of whether the employer should be discharged from it is invariably raised by the employer.

The other argument, that the facts do not support a conclusion that Davies quit her employment, is little more than a request for the Tribunal to reach a different conclusion than the Director on the same facts that were considered by the Director. RTS relies on the allegation by RTS that Davies, when given the second notice of termination on June 27, 2002, told Witherly that she did not want to work during the next eight weeks as she "had other plans" and that having made that comment, did not report for work on July 2, 2002. The allegation and Davies' failure to report for work were both considered by the Director, who appears to have given greater weight to the fact that Davies attended her doctor's office on June 28, 2002 and was given note indicating she was unable to work due to medical reasons and delivered that note to RTS on July 2, 2002. I agree with the submission of the Director that Davies' conduct in getting a doctor's note indicating she was medically unable to work and delivering that note to RTS are both inconsistent with an intention to quit her employment on June 28, 2002.

RTS has not provided any factual basis for altering or rejecting the findings made and conclusions reached in the Determination. An appeal is not simply an opportunity to re-argue positions taken during the investigation. If RTS wishes this Tribunal to reach conclusions that are different from those made by the Director, they are required to show a valid reason for doing so. Doing no more than restating a position that was not accepted in the first place does not satisfy that requirement. On the face of the Determination, the decision made by the Director is analytically sound and appears to be both reasonable and rationally grounded in the available evidence.

It follows that I do not accept that RTS should be deemed to have discharged its liability to Davies under Section 63 of the *Act*.

**ORDER**

Pursuant to Section 115 of the *Act*, I order the Determination dated November 8, 2002 be confirmed in the amount of $4,346.78, together with any interest that has accrued pursuant to Section 88 of the *Act*.

**David B. Stevenson**
**Adjudicator**
**Employment Standards Tribunal**