Employment Standards TRIBUNAL

An appeal

- by -

Woodpecker Hardwood Floors (1987) Ltd.
("WHF")

- 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: Lorne D. Collingwood

FILE No.: 2000/655

DATE OF HEARING: January 17, 2001

DATE OF DECISION: February 13, 2001

DECISION

OVERVIEW

The appeal is pursuant to section 112 of the *Employment Standards Act* (the "*Act*") and by Woodpecker Hardwood Floors (1987) Ltd. (which will be referred to as "WHF" and "Woodpecker" and also "the employer"). WHF appeals a Determination by a delegate of the Director of Employment Standards ("the Director") which was issued on August 29, 2000. The Determination orders WHF to pay Kenneth Wallace $2,457.65 in compensation for length of service, vacation pay and interest included. The Determination also orders WHF to pay Mark Neal $2,036.53 in compensation for length of service and overtime wages, vacation pay and interest included.

WHF, on appeal, claims that Kenneth Wallace was given verbal, and also written, notice of termination, that the intent of the law has been fulfilled and that, as such, the employee is not entitled to the amount awarded in and by the Determination.

WHF, also appeals, the order to pay Neal. According to the employer, the employee was not required to work overtime, he was free to chose his hours of work and he occasionally chose to work overtime as that suited him personally. WHF, in regard to Neal, also argues that it did not terminate the employee. According to Woodpecker, it is simply that the employee never made any attempt to return to work after the Workers' Compensation Board ceased paying him benefits.

In hearing the appeal, I chose to proceed as though each of its two parts were separate and distinct from the other. And I have separated the two matters in this decision. I first deal with the matter of the order to pay Wallace and, following that, rule on the order to pay Neal.

APPEARANCES:

Terry Noble	or WHF
Bonnie Noble	Witness for the employer
Kenneth Wallace	On his own behalf (attending by conference call)
Mark Neal	On his own behalf

ISSUES TO BE DECIDED

The order to pay Kenneth Wallace compensation for length of service is at issue. Underlying that issue is the matter of whether the employer's liability to pay compensation for length of service has or has not been discharged.

The employer attacks Wallace's credibility. Noble claims that Wallace falsely denies that he received written notice of termination because he knows that it is important to his claim for length of service compensation. And I am told that the employee has proved less than trustworthy in the past in that he asked the employer to sign a form which contained a number of false statements, that form being a "*Declaration of Conditions of Employment*", a Revenue Canada form which is necessary for claiming employment related expenses.

The order to pay Mark Neal overtime wages is at issue.

The order to pay Neal compensation for length of service is at issue. Underlying that issue is the matter of whether it was the employer or the employee that acted to terminate the employment.

What I must ultimately decide is whether the appellant has or has not shown that the Determination ought to be varied or cancelled for reason of an error or errors in fact or law.

FACTS (IN RESPECT TO THE WALLACE EMPLOYMENT)

WHF was incorporated in 1987 and it is in the business of supplying and installing hardwood flooring.

Kenneth Wallace worked for WHF as an installer and, later, as a crew scheduler. The employment ran from July 2, 1996 to February 25, 2000.

On February 4, 2000, a Friday, Terry Noble, President and the owner of WHF, told Wallace that business was so bad that he needed to downsize the company and that there would be no work for him after February 25, 2000. Noble explained that it was all due to the depressed marked for hardwood flooring. Written notice of termination was typed up that very day by Bonnie Noble, Terry Noble's wife.

The delegate has decided that there is nothing to indicate that Wallace received written notice of termination. The delegate interviewed Lola Cox, the part-time employee who was in charge of bookkeeping, and was told that Cox had no knowledge of any written notice of termination.

According to the Nobles, written notice of termination was put on Wallace's desk on Saturday, the 5th of February, and that, as such, the employee would have received it Monday when he reported for work. A copy of the letter is produced. It is dated February 4, 2000 and it states, "This will confirm our verbal conversation of today's date, that effective February 25/00 your employment with Woodpecker will be terminated due to a shortage of work".

The employee claims that it was not until he received the Determination that he saw what is said by the employer to be his written notice of termination. (A copy of the letter was attached to the delegate's decision.) And, according to Wallace, it was not until the employer issued an ROE, and paid him all of his vacation pay, that it was made clear to him that he was being terminated by WHF. He tells me that, prior to that, on the basis of what Noble had said on the 4th, it was his belief that he might return to Woodpecker once business improved.

The employer on appeal notes that "although one cannot prove that Wallace received written notice, one can prove that he knew that he had three weeks in which to seek other employment". I accept that. I find that there is in fact no evidence which shows that Wallace was given written notice of termination. And I find that it is clear that the employee knew on the 4th that he had to find some sort of other work, temporary layoff or not. He did start looking for other work before the end of the employment. And I find that Wallace asked for a letter of recommendation from his employer on or about the 7th and that he was given a letter of recommendation, one dated February 11, 2000, if not on the 11th, at least, several days prior to leaving Woodpecker on the 25th.

In regard to what are said to be misleading statements by Wallace on the above noted Revenue Canada form, I find that the form was not in fact filled out by Wallace but by his accountant. And on examining the form, I find that it does not specify what are to be considered employment expenses and that it, in effect, asks questions which are open to broad interpretation. Yes the employer provided Wallace with use of a vehicle but as the form is written it covers the use of a wide range of personal belongings used for carrying out the employment.

I am shown the letter of recommendation which was prepared by the employer. In that letter, Noble describes Wallace as "co-operative, punctual and reliable in what is sometimes a very stressful position" and he states "We highly recommend Ken for any position for which he is qualified". Noble underlines that sentiment in testifying before me. He tells me that he really liked Wallace and that he really felt bad about letting Wallace go.

ANALYSIS

The burden of proof is on the appellant.

Section 63 of the *Act* imposes a liability on employers to pay length of service compensation once a person's employment reaches 3 consecutive months. Subsection 63 (3) of the *Act* provides, however, that the liability to pay compensation for length of service can be discharged.

***63** (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) 2 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.* *(my emphasis)*

Not just any sort of notice will do. It is not sufficient that the employer give verbal notice of termination. The law clearly requires written notice.

The employer attacks Wallace's credibility and it argues that it should be believed over the employee on the matter of whether the employee received written notice of termination. I have found, however, that what are said to be misleading statements by Wallace are not those of Wallace but are attributable to his accountant. I find, moreover, that the meaning of statements and questions on the form to which the employer refers is so vague that there is simply no basis for saying that the form which was presented to the employer is clearly misleading. I find that there is in fact no evidence to show that Wallace is not a credible witness and that the employer has in fact led evidence which supports a conclusion which is to the contrary. I am told that the employer really liked Wallace and I am shown a letter of recommendation, written with full knowledge of the form that is said to be misleading and untrustworthy, which highly recommends Wallace to other employers. That indicates to me, as it is likely, that the employer itself does not really and truly believe that the employee is given to making false statements and that he cannot be trusted.

The matter of whether or not the employer must pay compensation for length of service is not about credibility but whether there is or is not evidence to support a conclusion that the employee was served with written notice of termination. The *Act* states that "the liability is deemed to be discharged if the employee … is given written notice of termination …". The word "given" is not defined in the *Act* but when read in the context of the requirement to provide written notice of termination, I find that it demands there must at least be clear, unequivocal evidence to support a conclusion that written notice of termination was actually given to the employee, if not written proof of service. It is not by accident that the *Act* requires written notice and not just proof of verbal notice, and I must conclude that the point of requiring written notice is to avoid the ambiguity and to side-step the very sort of question that naturally arises where only verbal notice is required.

As noted above, there is in this case no evidence which shows that Wallace was given written notice of termination. Even WHF appears to have concluded, at least at one point, that it is unable to prove that Wallace received written notice of termination.

The order to pay Wallace compensation for length of service is confirmed.

FACTS (IN RESPECT TO THE NEAL EMPLOYMENT)

Mark Neal was employed a delivery driver by WHF from March 1, 1999 to November 7, 1999.

Neal worked beyond 8 hours a day on occasion but he was not paid overtime. According to the employer, the employee wanted flexible work hours so that he could pursue an interest in photography, and he was therefore allowed to work whatever hours he wanted.

On the November 7, 1999, Neal injured his back while unloading materials from his truck at a site in Maple Ridge. According to the employer, Neal did not injure his back but faked the injury in order to receive compensation. I find that the employer does not provide proof of that and that

the employee received compensation from the Workers' Compensation Board. I am, for reason of the latter, satisfied that Neal did in fact sustain a back injury.

On being injured, Neal contacted Rob Armstrong, his immediate supervisor, and told him that he had been injured and that he had been advised by a doctor that the injury would take 2 to 4 weeks to heal. A few days later, Noble telephoned Neal and asked him what was going on and when he would be returning. Neal said he did not know exactly when that would be as it would depend on when he could resume heavy lifting.

On the 19th of November, the employer issued an ROE and it paid Neal all of what he was owed in the way of back wages and vacation pay. The reason for the ROE was given as "D". That letter is code for "illness or injury".

Neal found the ROE, and the fact that the employer had paid him all of what he was owed in the way of wages, somewhat troubling. At about the same time, in speaking to other WHF employees, he learned that Woodpecker was looking for another driver, at least that was Neal's perception of matters. And, with that, he began to think that he was about to be, if he had not been already, terminated and that led him to contact Armstrong once again. He asked Armstrong if there were "light duties" that he could perform for the employer until his back healed. Neal was told that the employer did not have any light work for him to do and that he was needed as a truck driver. Neal said that he was not up to doing such work yet.

By mid-December, Neal was feeling quite a bit better and he telephoned Armstrong and raised the matter of his resuming work. According to the employee, he was told that WHF had hired a driver and he was led to believe at that point that he was not wanted back. The Determination is consistent with that and a belief that Neal was terminated by WHF.

There is no evidence to show that Woodpecker contacted Neal and asked him to return to work or, at least, when he was going to return, prior the filing of the Complaint.

ANALYSIS

The *Act* requires that employers pay extra for work which is beyond 8 hours in a day or 40 hours in a week.

> ***40*** *(1) An employer must pay an employee who works over 8 hours a day and is not on a flexible work schedule adopted under section 37 or 38*
>
> *(a) 1 ½ times the employee's regular wage for the time over 8 hours, and*
>
> *(b) double the employee's regular wage for any time over 11 hours.*
>
> *(2) An employer must pay an employee who works over 40 hours a week and is not on a flexible work schedule adopted under section 37 or 38*

> *(a) 1 ½ times the employee's regular wage for the time over 40 hours, and*
>
> *(b) double the employee's regular wage for any time over 48 hours.*

Section 37 of the *Act* allows employers to adopt flexible work schedules but an employer may only adopt those schedules which are prescribed by the *Employment Standards Regulation* (the "*Regulation*") and the modified work weeks must be approved by at least 65% of all employees who will be affected by the schedule.

The modified work weeks which are allowed by the *Act* and the *Regulation* are set out in Appendix 1 of the *Regulation*. Neal did not work a modified work week which is prescribed by the *Act*.

The employee denies that he agreed to work overtime for straight-time wages but, had he done so, the agreement would have no force or effect as it would provide the employee with less than what the *Act* demands. An employee like Neal cannot agree to accept less than the minimum standards of the *Act*. An agreement which provides for less is struck down by section 4 of the *Act*.

> ***4*** *The requirements of this Act or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61 and 69.*

Sections 43, 49, 61 and 69 have no application in this case as they refer to union employees.

The employee is plain and simply entitled to overtime wages. The Determination is confirmed, there being no dispute over the amount of overtime pay awarded.

Length of Service Compensation (Neal)

The delegate found that there was no evidence to support a finding that the employee quit and she has in effect found that it is the employer that terminated the employment. I agree with that conclusion.

Section 63 of the *Act* is again relevant. It outlines the circumstances in which the liability to pay compensation for length of service can be discharged. As matters are presented to me, it is not argued that the employer gave Neal written notice, nor is it argued that he retired or that he was terminated for just cause. It is argued that he just did not return to work, which is in essence to argue that he quit. If he quit, the liability to pay length of service compensation is discharged. If he did not quit, it follows that termination was at the hand of the employer. There is no middle ground. It is one or the other.

It is an employee's right to resign his or her employment and that right is something which only the employee may exercise. An employer may not deem that an employee has quit.

The Tribunal has through its decisions said that there must be clear, unequivocal facts to show that the employee voluntarily exercised his or her right to quit. And it has recognized that there

is both a subjective and an objective element to quitting. Subjectively, the employee must form the intention to quit. Objectively, he or she must act in a way, or demonstrate conduct, which is inconsistent with continuing the employment. [See for example, *Burnaby Select Taxi Ltd. and Zoltan Kiss*, (1996), BC EST #D091/96.]

I recognize that in this case, Terry Noble believes that Neal did not make an attempt to return to work once his Workers' Compensation Board benefits ran out. There is not in the case, however, plain, clear evidence that the employee voluntarily exercised his right to resign, indeed, I am led to believe that the employee contacted his employer (his immediate supervisor) and was led to believe that Woodpecker did not have a job for him any longer. The employer has not produced evidence which is clearly contrary to the latter. There is no evidence to show that Neal formed the intention to quit. He did not at any point voice an intention to quit. And there is no evidence of an act or conduct which is clearly inconsistent with continuing the employment.

In summary, it is not shown that Neal agreed to work overtime at straight-time wage rates but, even it he did, such an agreement has no force or effect: The employer must pay overtime. The reason that the employee did not return to work once his back injury had healed appears to be because his immediate supervisor led him to believe that he was no longer wanted at Woodpecker, however, I find that in this case, there is not plain, clear evidence to support a conclusion that the employee quit and, as such, I find myself in agreement with the conclusion of the delegate which is that termination was by the employer. It follows that Neal is entitled to compensation for length of service.

ORDER

I order, pursuant to section 115 of the *Act*, that both parts of the Determination dated August 29, 2000, be confirmed.

The order that Woodpecker Hardwood Floors (1987) Ltd. pay Kenneth Wallace $2,457.65 is confirmed and to that amount is added whatever further interest has accrued pursuant to section 88 of the *Act*.

The order that Woodpecker Hardwood Floors (1987) Ltd. pay Mark Neal $2,036.53 is confirmed and to that amount is added whatever further interest has accrued pursuant to section 88 of the *Act*.

Lorne D. Collingwood
Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal