Employment Standards TRIBUNAL

An appeal

- by -

Isle Three Holdings Ltd. carrying on business as Thrifty Foods
("Thrifty Foods")

- 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 (as amended)

TRIBUNAL MEMBER: David B. Stevenson

FILE No.: 2008A/51

DATE OF DECISION: August 26, 2008

DECISION

SUBMISSIONS

Daniel J. Mildenberger	on behalf of Isle Three Holdings Ltd
Emilio DeRose	on his own behalf
Terry Hughes	on behalf of the Director

OVERVIEW

1. This decision completes an appeal filed by Isle Three Holdings Ltd. carrying on business as Thrifty Foods ("Thrifty Foods") under Section 112 of the *Employment Standards Act* (the "*Act*") of a Determination that was issued by a delegate of the Director of Employment Standards (the "Director") on November 23, 2007. The Determination found that Thrifty Foods had contravened Part 4, Section 40 and Part 8, Section 63 of the *Act* in respect of the employment of Emilio DeRose ("DeRose"). The Director ordered Thrifty Foods to cease contravening those sections of the *Act*, to comply with the *Act* and the *Employment Standards Regulation* (the "*Regulation*") and to pay wages to DeRose in the amount of $10,289.06, an amount which included annual vacation pay on the amounts found owing and interest.

2. The Director also imposed administrative penalties on Thrifty Foods under Section 29(1) of the *Regulation* in the amount of $1000.00.

3. The Tribunal has issued a decision on the appeal, referring aspects of the Determination back to the Director. The Director has filed a supplement to the Determination with the Tribunal. As a result of the resignation of the Tribunal Member who decided the appeal, he is unable to consider the supplement and the appeal file has been assigned to me.

OVERVIEW

4. It is appropriate to provide a brief overview of the process to this point, including summaries of the outcome of various parts of the process.

THE COMPLAINT AND THE DETERMINATION

5. DeRose complained that Thrifty Foods had contravened the *Act* by failing to pay compensation for length of service and overtime wages. His claim for compensation for length of service was based on an assertion that conditions of his employment were substantially altered such that the Director should consider his employment terminated under Section 66 of the *Act*. His claim for overtime wages was based on his assertion that he had worked beyond 8 hours in a day and 40 hours in a week.

6. The Director found overtime wages were owed. The Director also found that DeRose's conditions of employment had been substantially altered and under Section 66 of the *Act* his employment was terminated. The Director considered two other points raised by Thrifty Foods: whether Section 65(1) (f) applied and whether Section 66 no longer applied because DeRose had waited too long before resigning.

THE APPEAL

7. Thrifty Foods appealed that part Determination which found DeRose was entitled to length of service compensation, arguing the Director had failed to consider whether DeRose had, in the words of Section 65(1) (f), "been offered and refused reasonable alternate employment by the employer". There was no appeal on the overtime wages. There was a "further issue" raised in the appeal about whether DeRose had accepted the reassignment and, as a consequence, was disentitled to length of service compensation under the *Act*.

THE APPEAL DECISION

8. In BC EST #D031/08 (the "original decision"), the Tribunal Member found that the Director was entitled to decide that DeRose's employment was terminated under Section 66 of the *Act*. There were, however, two elements of the Determination about which the Tribunal Member expressed some concern.

9. In paragraph 11 of the original decision, the Tribunal Member stated:

> Notwithstanding section 63, however, where an employee has been terminated, and remains in or is offered reasonable alternate employment, the requirement to pay compensation for length of service in relived against by section 65(1)(f) if "… the employee has been offered and has refused reasonable alternate employment".

10. The Tribunal Member was not satisfied the analysis by the Director on the question of whether DeRose had been offered and had refused reasonable alternate employment met the required standard and referred the question back for "appropriate analysis".

11. The Tribunal Member referred to the argument by Thrifty Foods that DeRose had effectively accepted the demotion, by remaining in the changed position for three months, and indicated it was not apparent the Director had considered that factor. He referred back to the Director the question of whether "there was acceptance through the effluxion of time".

THE REFERRAL BACK DECISION

12. The Director has issued a supplement to the Determination, dated May 22, 2008 (the "referral back decision"). The Director identifies the two matters which were being reconsidered as follows:

> The first is the applicability of Section 65(1) (f), and secondly whether Mr. DeRose waited too long to resign, as it relates to a claim under Section 66.

13. On the first question, the Director found:

> . . . the Produce Supervisor position was not a reasonable alternate position to the Merchandiser position. As a result Section 65(1) (f) does not apply in these circumstances.

14. On the second question, the Director stated:

> I find waiting in excess of eight weeks to resign was too long. I find this amount of time was not reasonable in all of the circumstances. As a result, I find compensation for length of service is not owed.

THE POSITIONS OF THE PARTIES

15. In a letter dated May 23, 2008, the Tribunal provided a copy of the referral back decision to the other parties and requested their response to it.

16. The response by counsel for Thrifty Foods expresses agreement with the disposition reached by the Director and had nothing to add to it.

17. DeRose, as one might expect, disagrees with the result. He says he never considered that he had accepted the position. He says he did not work in the position from June 28 until August 13, 2006 and claims to have been under the care of a physician and unable to work during this period. He submitted his resignation immediately on being given permission to return to work.

18. Thrifty Foods has filed a reply to DeRose's submission, submitting the Tribunal should not accept the new evidence and argument provided by him and, alternatively, that the new argument should not be persuasive given the findings made by the Director in the referral back decision.

THE TRIBUNAL'S QUESTION

19. Following a review of the Determination, the original decision and the referral back decision, a question was raised concerning the decision of the Director to deny DeRose compensation for length of service on the basis that he had waited too long to resign from his employment. In a letter dated July 14, 2008, the Tribunal wrote the parties asking for submissions on how the period of time DeRose worked in the Produce Supervisor position before his resignation could disentitle him to length of service compensation under Section 63 for the termination?

20. Each of the parties filed a response.

21. DeRose did not address the question, but provided submissions on the reply filed by counsel for Thrifty Foods on his referral back decision submission.

22. Counsel for Thrifty Foods filed a submission which stated he was not able to respond to the request since it was "based on an incorrect premise" in the Tribunal's letter that, "the Director found, and Mr. Savage confirmed, that Mr. DeRose's employment was terminated under Section 66 of the Act in May 2006 . . .". Counsel submits that the Director found, after reconsidering the matter in the referral back, "that Mr. DeRose's employment was not terminated pursuant to Section 66" and that such a conclusion is the prerogative of the Director to decide.

23. The Director's submission refers to that part of the Determination which states:

> An employee is entitled to a reasonable time to try out a new position and to make an informed decision as to whether or not to accept a new position (Levitt, The Law of Dismissal in Canada). What is reasonable will depend on the circumstances.

24. The Director says the Branch takes the view that an employee must quit within a reasonable period of time after the substantial alteration of employment for the Director to deem a termination under Section 66 of the *Act*.

25. While it appears both the Director and Thrifty Foods are of the view that the length of time which DeRose stayed in the altered position relates to the decision of the Director under Section 66, neither have provided any submission on why that is an appropriate consideration.

ISSUE

26. The issue raised by the referral back decision is whether the effluxion of time is a relevant factor in deciding under Section 66 of the *Act* whether an employee has been terminated.

ANALYSIS

27. Section 66 of the *Act* states:

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

28. An accurate summary of the elements of this statutory provision is found in *Bogie and Bacall Hair Design Inc.*, BC EST #D062/08, at para 41:

> Section 66 of the *Act* provides that if a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated. There must be a finding that there is a change in the conditions of employment, that the change is substantial and that the change constitutes termination.

29. Conditions of employment is defined in Section 1 of the *Act* to mean all matters and circumstances that in any way affect the employment relationship. The alteration must be substantial, or "sufficiently material that it could be described as being a fundamental change in the employment relationship": see *Helliker*, BC EST #D338/97, (Reconsideration of BC EST#D357/96). The focus of the examination in Section 66 is the employment relationship in place at the time of the alteration: *Helliker*, *supra*.

30. The Tribunal has indicated that the test of what constitutes a substantial change is an objective one that includes a consideration of the following factors:

> a) the nature of the employment relationship;
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> b) the conditions of employment;
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> c) the alterations that have been made;
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> d) the legitimate expectations of the parties; and

> e) whether there are any implied or express agreements or understandings.
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> (see for example, *Helliker*, BC EST #D338/97; *A.J. Leisure Group Inc.*, BC EST #D036/98; *Task Force Building Services Inc.*, BC EST # D047/98; and *Big River Brewing Company Ltd.*, BC EST #D324/02)

31. The language of section 66 gives the Director discretion to decide the employment of the employee has been terminated. The exercise of that discretion is reviewable by the Tribunal: *Jaeger*, BC EST#D244/99, *Jody L. Goudreau*, BC EST #D066/98; and *Takarabe and others*, BC EST #D160/98. As expressed in the last decision, the Director must exercise discretion for *bona fide* reasons, must not be arbitrary and must not base the decision on irrelevant factors.

32. In some decisions, the Tribunal has stated that Section 66 incorporates the common law notion of "constructive dismissal" into the *Act*: see, for example *Stordoor Investments Ltd.*, BC EST # D357/96 and *Norma Ruth Short*, BC EST #D061/04. In other decisions, the Tribunal has expressed the view that Section 66 is different from the concept of "constructive dismissal" at common law: see for example, *Herbert van Kampen*, BC EST #RD707/01 (Reconsideration of BC EST #D492/01); *Andy Tollesepp*, BC EST #D490/02 and *B & C List (1982) Ltd.*, BC EST #RD641/01 (Reconsideration of BC EST #D387/01). The last mentioned decision will be considered in more detail later in this decision.

33. In my view, the more correct perspective is that Section 66 is not legislated "constructive dismissal", although reference to elements of the common law of "constructive dismissal" will undoubtedly be helpful, and in many cases relevant, to a Section 66 analysis. While Section 66 is similar to the common law notion of constructive dismissal, there is a key difference, which is reflected in the description of "constructive dismissal" provided by the Supreme Court of Canada in *Farber v. Royal Trust Company*, [1997] 1 S.C.R. 846:

> A constructive dismissal occurs when an employer makes a unilateral and fundamental change to a term or condition of an employment contract without providing reasonable notice of that change to the employee. Such action amounts to a repudiation of the contract of employment by the employer whether or not he intended to continue the employment relationship. Therefore, the employee can treat the contract as wrongfully terminated and resign which, in turn, gives rise to an obligation on the employer's part to provide damages in lieu of notice.

34. The foundation of "constructive dismissal" lies in the administration of the contract of employment at common law. In constructive dismissal, the actions of employer, if they amount to "fundamental breach" of contract, result in a termination of the employment relationship by operation of law. At common law, an employee's claim that there has been a "constructive dismissal" can be denied by application of the principle of estoppel and an employee's claim for damages for the "constructive dismissal" is subject to the duty to mitigate.

35. The point of this brief overview is to indicate that "constructive dismissal" is a common law concept that is administered according to common law principles.

36. The foundation of Section 66 is the administration of a statutory provision found in the *Act*, which, as the Tribunal has repeatedly confirmed, is remedial legislation "that exists, in large part, for the benefit and protection of employees who otherwise have no control over decisions of their employer about the terms and conditions under which they will be employed": *Barry McPhee*, BC EST #D183/97. In reviewing the language of Section 66 of the *Act*, it is apparent that "termination" does not necessarily follow from a

finding of "substantial alteration" of a condition of employment. It is for the Director to determine if the employment has been terminated. If the Director determines that the employment has been terminated, the employee is entitled to compensation for length service pursuant to the *Act*. However, the Director must be guided in that exercise of discretion by the purposes and objects of the *Act*, and in particular to the statutory purposes and objects of the provisions relating to the termination of employment.

37. As the Supreme Court of Canada held in *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, at para. 25, "the objects of the termination and severance pay provisions are also broadly premised upon the need to protect employees". While that case was considering a matter which arose under the Ontario employment standards legislation, the statement made by the Court applies equally to the *Act*. In *Barry McPhee, supra*, the Tribunal echoed the view of the Court in following comment:

> The *Act* exists, in large part, for the benefit and protection of employees who otherwise have no control over decisions of their employer about the terms and conditions under which they will be employed. A key purpose is to ensure the application of minimum standards of compensation and conditions of employment, including hours of work, overtime pay, leaves of absence, annual and statutory holidays and holiday pay and length of service compensation for termination without notice, for those employees.

38. The above comment is reflected in a large number of decisions of the Tribunal.

39. In *B & C List (1982) Ltd., supra*, a reconsideration panel considered the relationship between Section 66 and the requirement to pay length of service compensation in Section 63 in circumstances where the employer had "substantially altered" conditions of employment for the employee, the employee had agreed to work under the new conditions and did so for approximately a week and a half before leaving to take a full-time position elsewhere.

40. The matter came before a reconsideration panel of the Tribunal on the grounds that the Tribunal Member of the original decision had failed to consider the principle of estoppel and had misapplied the concept of mitigation. The reconsideration panel concluded that the principle of estoppel had no application and that mitigation was not a factor that needed to be considered.

41. In respect of the question of whether a substantial alteration had occurred, the reconsideration panel noted that the Director had reviewed the totality of the circumstances and found that the conditions of employment of the employee were "substantially altered". That finding has also been made in this case. The reconsideration panel noted that the Director then determined that because the conditions of employment had been substantially altered that the employer had terminated the employment. In this case, the Director found that Thrifty Foods had terminated DeRose's employment. There is some question about whether the referral back decision altered the conclusion that DeRose's employment was terminated or whether, as suggested in the Determination, the effluxion of time negated the effect of Section 66. For the reasons which follow, this question does not need to be resolved as I do not accept that the "effluxion of time" cannot be a relevant factor in deciding under Section 66 whether an employee has been terminated and, it follows, nor can it be applied to negate the statutory effect of a termination.

42. In *B & C List (1982) Ltd., supra*, the reconsideration panel provided an overview of the legislative scheme relating to length of service compensation under Section 63:

> Section 63 is part of the legislative scheme to "ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment". Generally speaking,

> section 63 contains provisions relating to an employer's liability to pay an employee length of service compensation upon termination of employment. Length of service compensation is, from the employee's perspective, a statutory benefit earned with continuous employment. It is a minimum statutory benefit. From the employer's perspective, it is a statutory liability that accrues to each employee with more than 3 consecutive months of employment. While length of service compensation is often referred to as "termination" or "severance" pay, it is related to termination only to the extent the termination of employment, actual or deemed, triggers the benefits or liability, depending on the perspective. Subsection 63(3) identifies three circumstances where the statutory liability of the employer to pay length of service compensation is deemed to be discharged: first, if the employee is given written notice of termination equivalent to the employer's statutory liability to the employee; second, if the employee is given a combination of notice and compensation equivalent to the employer's statutory liability to the employee; and third, if the employee terminates the employment, retires from employment or is dismissed for just cause.

43. The reconsideration panel then stated:

> In this case termination occurred when the conditions of employment were substantially altered. While there were discussions about notice and alternative employment there was no actual notice prior to the events that have been determined by the Director to constitute termination. It was also never suggested that she had terminated her own employment at that time or that she had retired or was dismissed for just cause. The liability of the employer to pay compensation for length of service was not discharged by the operation of any of the three circumstances identified in Section 63(3).

44. It is worth noting that an employer may make a substantial alteration to conditions of employment by providing written notice of appropriate length. Such notice will discharge an employer from its statutory liability for length of service compensation: see *Director of Employment Standards (Re Keenan Leigh Moses)*, BC EST #D219/98 (Reconsideration of BC EST #D480/97):

> If an employer wishes to make such a change [a substantial alteration to conditions of employment], then the employer is obliged to give the employee written notice as provided by section 63 of the *Act*. If the employer does not give the employee the requisite written notice, then the employer is liable to pay the employee compensation for length of service.
>
> An employee is entitled to clear, written notice.

45. On the issue of whether the employee was "estopped" from claiming her employment was terminated under Section 66 because of her agreement to accept the new terms of employment and her continuing in that employment for a week and a half before resigning, the reconsideration panel said:

> While the adjudicator does not refer specifically to "estoppel" such a principle has no application, as the right to compensation for length of service is statutory and was already vested prior to any such agreement. Estoppel is a public policy doctrine designed to advance the interests of justice. It is not intended to allow an employer to enter into an agreement with an inferior to avoid a statutory obligation. As the Supreme Court of Canada has put it:
>
> > "Besides the unequal situation which makes an estoppel inapplicable, there is another consideration: the public interest and morality require that the perpetrator of a wrongful act should not profit thereby."
> >
> > *Bank of Montreal v. Ng*, [1989] 2 S.C.R. 429

> More specifically the Privy Council has held that estoppel cannot operate so as to impede a statutory obligation: *Marine Electric Co. v. General Dairies Ltd.* [1937] 1 D.L.R. 609 (P.C.). This principle was applied by the Supreme Court of Canada in *Hill v. Nova Scotia (Attorney General)* [1997] 1 S.C.R. 69. As stated above it is our opinion that the compensation for length of service is a vested statutory right and **no agreement entered into, or any actions, by the employer and the employee can operate as an estoppel to impede the application of the *Act.*** (emphasis added)

46. The reference by the Director to a statement of principal found in Levitt: *the Law of Dismissal in Canada*, 2nd Edition, which appears to have been incorporated into the Director's Interpretation Guidelines Manual, purports to be a statement of the common law, which in its complete form, states:

> Accordingly, although an employee must resign in order to sue for constructive dismissal, a reasonable time will be allowed in order to try out the new position and make an informed decision as to whether it will be accepted or not. After that period elapses, the employee is deemed to have accepted the position and is estopped from then claiming a constructive dismissal.

47. Even at common law, the principle stated in Levitt has not been adopted by the Courts as a conclusive statement of the law applicable to the circumstances of an employee who retains employment following a constructive dismissal. The Courts have said whether that principle applies is open to both interpretation and argument. The Courts have noted that while it is arguable that such a circumstance is consistent with an alleged "acceptance" by the employee of the new position which could arguably create an estoppel, it is also arguable that the same circumstance is simply consistent with efforts at mitigation of damages.

48. Notwithstanding, as indicated above, the Tribunal has concluded that estoppel cannot operate to impede the application of the *Act*. As well, the reconsideration panel in *B & C List (1982) Ltd.*, *supra*, any many other decisions of the Tribunal, have confirmed that the concept of mitigation has no application to the vested statutory right to compensation for length of service.

49. The *Act* allows an employee a period of six months from the date of termination of employment to complain. The *Act* does not require an employee to terminate their employment in order to file a complaint alleging the employer has substantial altered to a condition of employment. To import such a requirement would offend the stated purposes in Section 2 of the *Act* of ensuring that "*employees in British Columbia receive at least basic standards of compensation and conditions of employment"* and contributing in *"assisting employees to meet work and family responsibilities"*.

50. Thrifty Foods says the result, which allows an employee to earn twelve weeks of income working at a new position and eight weeks length of service compensation, is absurd and inconsistent with the objectives of the *Act*. I disagree. As indicated above, length of service compensation is a minimum statutory benefit earned with continuous employment. There is nothing inconsistent with the object and purposes of the *Act* of adopting a position that would allow an employee to receive an earned statutory benefit while earning wages for work performed. There is no unfairness to the employer because the benefit paid in this circumstance to DeRose is a statutory obligation for Thrifty Foods. The *Act* should not be applied to allow an employer to avoid a statutory obligation clearly expressed in the *Act*.

51. I provided all of the parties with the opportunity to make submissions on how the period of time DeRose worked in the Produce Supervisor position before his resignation could disentitle him to length of service compensation under Section 63 for the termination. None have provided a response that addresses that question in the context of the purposes and objects of the *Act*.

52. The appeal is dismissed.

ORDER

53. Pursuant to Section 115 of the Act, I order the Determination dated November 23, 2007 confirmed in the amount of $11,289.06, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal