

An appeal

- by -

Henderika (Rita) Koops
("Koops")

- 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: Cindy J. Lombard

FILE No.: 2002/598

DATE OF HEARING: March 4, 2003

DATE OF DECISION: March 25, 2003

DECISION

APPEARANCES:

Henderika (Rita) Koops, on her own behalf and one witness, Bill McGuire

Jay Gaboury on behalf of Comet Transport Ltd. together with two witnesses, Denis Weston and Jean Mumford

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) by Henderika (Rita) Koops (hereinafter referred to as “Koops”) of a Determination which was issued on November 8, 2002, by a Delegate of the Director of Employment Standards (the “Director”).

The Determination found that the Respondent Employer, Comet Transport Ltd.’s (hereinafter referred to as “Comet”) action in changing Koops’ hours of work did not substantially alter her condition of employment such as to constitute termination of Koops within the meaning of section 66 of the *Act*. Consequently Koops had quit and was not due compensation in lieu of notice pursuant to the *Act*.

ISSUE TO BE DECIDED

The issue to be decided here is whether Comet’s action in changing Koops’ daily hours of work constituted termination of Koops’ employment within the meaning of section 66 of the *Act* thereby making Comet liable to Koops for compensation in lieu of notice pursuant to section 63 of the *Act*?

FACTS

Koops was employed by Comet from October, 1993 until February 25, 2002 as an office administrator doing administrative, bookkeeping, telephone duties for Comet and customers such as TCT, Porter Trucking and Vitran. Comet is a freight distribution company.

Koops’ Evidence:

Koops says that when Jay Gaboury (hereinafter referred to as “Gaboury”), owner of Comet, changed her daily work hours from 6:00 a.m. to 2:00 p.m. to 10:00 a.m. to 6:30 p.m. effective February 26, 2003 that it was a substantial change to the terms and condition of her employment leaving her no alternative but to resign as she is a single parent to two children, a fact known to Comet.

Koops says that when she began her employment in 1993 her hours of work were from 8:30 a.m. to 3:00 p.m. except on Fridays when she would work until 5:00 p.m.

These work hours continued until September, 2001 when Gaboury bought out his two partners, one of whom was Dennis Weston (hereinafter referred to as “Weston”) who stayed on as general manager. Prior to that time the two other partners had worked the early shift, that is, beginning at 6:00 a.m. Once Gaboury took over, as often happens with a change in ownership, changes occurred. Gaboury had his

daughter, Holly, take over take over most of the bookkeeping work, some of which was previously done by Koops. Also since the two previous partners were not there or not willing to do the early morning shift, Koops was asked or volunteered to work it.

Thus, in approximately September, 2001 she began working from 6:00 a.m. until 3:00 p.m. Koops worked this shift for approximately six months until February 25, 2002 when Gaboury called her into his office. According to Koops, Gaboury said the following:

1. the company had lost the Porter work that she had been doing, that is, some computer work (Koops was already aware of this);
2. Jean Mumford (hereinafter referred to as “Mumford”) who worked for Vitran and who Comet did work for in the form of answering the telephone and some computer work and which was currently being performed by Koops, had complained that she could not work with Koops any more and as well the Vitran head office had indicated to him that they had had complaints about Koops’ telephone manners

and therefore he had made the following decision to be effective the next day:

1. Koops would commence to work from 10:00 a.m. to 6:30 p.m. Monday to Friday and she would be taking a half an hour for lunch (she had not been previously taking a lunch break) and that Holly would be taking over the morning shift;
2. if she had to work overtime she would not be paid overtime but rather would be expected to come in later the next day;
3. that her wage would change to salary from hourly but did not indicate the amount of the salary.

Koops says that she was shocked by the news that Mumford could not work with her as they had had daily contact in their work for years and about the change in her shift given that Gaboury knew that she had two children, ages 10 and 15, to look after at home as a single parent. The shift change she says meant that from her knowledge of that shift that she may not get home until somewhere between 7:00 and 8:30 p.m. She was furthermore shocked that the change was presented as a finality without discussion with her. Koops says that she knew from her years with the company that her hours would often be later than 6:30 p.m. because the night shift duties involved staying until all in and outbound freight was taken care of.

Koops says that she had another brief discussion with Gaboury later in the day wherein she stated to him that with her kids she could not work those hours and that his response was to shrug his shoulders.

Koops says that she was devastated. She went home and immediately went to see her doctor who put her on stress leave. Her doctor, Dr. Dean Griswold, wrote a note, dated February 25, 2002 which stated as follows:

“Ms. Koops is under my care and is to be off work for the next 3 weeks.”

Koops passed that note on to Comet. She never had another discussion with Gaboury. She did not contact him and he did not contact her.

On March 4, 2002 after looking for alternate employment Koops began another job on March 6, 2003 at a wage \$2.00 per hours less than the \$12.25 per hour that she had been making at Comet.

Bill McGuire gave evidence on behalf of Koops. Mr. McGuire is Koops' boyfriend of several years. He too was employed by Comet for five years but was let go one month following Koops' departure. Mr. McGuire simply made the observation that during the months prior to Koops' departure Holly was being trained by Koops to do much of the accounting work that she had done so that in his mind it would be just a matter of time before Comet no longer had a need for Koops.

Comet's Evidence

Gaboury:

Since September, 2001, Gaboury had been the sole owner of Comet since buying out his two partners, one of whom is Weston. Mr. Gaboury says that the decision to change Koop's hours was a necessary business decision due to changes that had and were coming. Those changes included the following:

1. TCT, who Comet had done work for and had been part of Koops' job description, had gone bankrupt and therefore they had lost that business;
2. his family, that is, Holly, was now doing the bookkeeping work that she had done;
3. Mumford, who is employed by Vitran, did not want to work with Koops any more. Gaboury advised Koops that Mumford had told him that as soon as he had taken over Comet in September, 2001.

Gaboury admits that he had never before, that is, between September 2001 and February 25, 2002, raised this complaint with Koops. In any event Gaboury says that he was concerned that Comet would lose the Vitran work given the complaints with respect to Koops.

Gaboury says that he told Koops in their meeting that she was not losing her job but that he was "scrambling to find work" for her on the morning shift and given the reasons outlined about was going to have to change her hours.

Gaboury says that Koops responded that "she was okay with that". According to Gaboury, they never had another conversation and the next thing he knew Koops had delivered a note from her doctor and later heard that she had obtained other employment. He did not at any time make efforts to talk to Koops.

In mid-March a woman by the name of Shirley Thompkins was approached to work and did commence to work in mid-April for four hours per day commencing at 6:00 a.m. Holly continued to work the late shift that he had wanted Koops to work so that Holly could work the day shift as Mumford preferred to work with her.

Gaboury says that the business decision behind telling Koops that he wanted her to work the late shift was that he wanted to keep the Vitran work and get the afternoon work done with the employees that Comet had.

Weston:

Weston gave evidence on behalf of Comet. As previously stated he was a partner in the Comet business until September, 2001, and has remained with the business as its general manager. Weston says that Comet was going through changes which required reorganization, including:

1. TCT went bankrupt and therefore no longer had their work to do as previously stated;
2. Porter Trucking: there was some uncertainty as to whether they would continue to do their administrative work because in the past Comet had done it without being paid and no longer wanted to do it unless paid for the work. Heated discussions had taken place in February 2002. In fact, Comet did continue to do that work after February 2002.
3. Some of the work that he and the third partner had previously taken on as owners, Gaboury now had to hire and pay someone to do;
4. Vitran was also pressing Comet to give it a rate reduction on freight.

Weston says that he knew that a change with respect to Koops was going to be made he simply did not know when or the specifics prior to the February 25, 2002, meeting between Koops and Gaboury.

Weston says that as general manager he was aware that once in a while Mumford complained about Koops but that it was never a serious issue; rather, simply something that happens from time to time in the work place where people work together for a long period of time. Furthermore, he stated that the relationship between Koops and Mumford at no time threatened the relationship and work that Comet received from Vitran. This evidence conflicts with that of Gaboury. Where the evidence of the two men conflicts, we prefer that of Weston who the Tribunal found to be forthright in his evidence.

Gaboury stated that Koops had received accommodation in her work hours to reflect her family life to the detriment of himself and the other partner who was bought out in that they had to work late when it should have been Koops. Once Weston was simply an employee, he was not prepared to work late any longer.

Mumford:

Mumford also gave evidence on behalf of Comet. Mumford has been with Vitran for fourteen years in charge of inside sales. For the past four years Vitran and Comet have been located in the same building. Mumford had frequent contact with Koops, who did the computer work for Vitran relating to the Vitran freight which Comet delivered and unloaded for Vitran, as she had to check Koops' work. Koops also answered a telephone line for Vitran.

Mumford says that she did tell Gaboury that she preferred to work with Holly but did not say that she would not work with Koops. Furthermore, she says that she had no problem with the quality of work that Koops did and that she got the work done that needed to be done.

Again, where the evidence of Mumford conflicts with that of Gaboury, we prefer the evidence of Mumford who we found to be credible.

OVERVIEW AND FINDINGS OF FACT

Section 66 of the *Act* states as follows:

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

The question as to whether there has been a substantial alteration of the conditions of an employee’s employment must be considered in light of the right of an employer to determine how to conduct its business. The Tribunal has no right to review the business efficacy of a decision made by an employer.

However, the Tribunal is given jurisdiction by Section 66 of the *Act* to determine whether on the facts of a particular case there has been what can be described as a “substantial change” in the terms of an employee’s conditions of employment such as to amount what would be at common law “constructive dismissal.” If the change can be described as “substantial” then the employer is bound by Section 63 to provide the compensation dictated by that section where reasonable notice was not given by the employer of the dismissal.

The *Act* does not provide a definition of what constitutes a “substantial alteration”; rather, the common law principles relating to constructive dismissal are to be considered in making that determination. The objective test is set out for example, in the decision of the Employment Standards Tribunal decision in *Re: A. J. Leisure Group Inc.* [1998] B.C.E.S.T.D. No. 58:

1. analyze the nature of the employment relationship;
2. look at the conditions of employment;
3. what alterations have been made;
4. what are the legitimate expectations of the parties;
5. are there any express or implied agreements or understandings.

Turning to the facts of this case we find that there was a “substantial alteration” of the conditions of Koops’ employment. We have reached this conclusion based on an analysis using the objective test set out above as applied to the facts of this case.

Koops was employed by Comet for nearly nine years. During the whole of that period, the company was aware that she was the single parent of two children. Koops’ hours of work had never during those years gone past the dinner hour. When she first began working at Comet, she worked until 3:00 p.m. and later her shift ended at 5:00 p.m. As stated by Weston while he remained a part owner of Comet, he and another partner had worked late in order that Koops did not have to. Beginning approximately six months before her departure when Gaboury bought out Weston and the third partner, she voluntarily assumed an earlier shift as she was still able to manage her family obligations.

After nine years with Comet, it was an implied agreement between the company and Koops that she would work hours which enabled her to still manage her home life as a single mother, that is, she was able to be at home by dinner time or earlier as her shift times changed over the years.

Gaboury was not forthright in the reasons given for requiring Koops to commence work, on one day’s notice, a shift which at the earliest did not end until 6:30 p.m. There was no threat that Comet might lose Vitran’s business due to a bad relationship between Koops and Comet as asserted by Gaboury and directly contradicted by his witnesses, Weston and Mumford. Nor did he have to move his daughter,

Holly, into the day slot to work with Mumford because she refused to work any longer with Koops because Mumford denied the veracity of the statement by Gaboury.

In fact, Holly, is still working the late shift and Comet hired someone else to do the work that Koops was doing albeit with less hours.

Gaboury had furthermore made a decision that once he bought out his partners he would have his daughter, Holly, do some of the work that had previously been done by Koops.

Gaboury made no effort, once Koops told him that she was distressed because a shift that went that late and would get her home at the earliest at 7:00 p.m. simply could not work with her children and was distressed to the extent that her doctor advised that she take a three week stress leave, to contact her and try to come to some resolution that worked.

Based on the evidence before us, we see no reason why it was necessary to alter Koops' hours in a way that clearly was on the facts a "substantial alteration" of the conditions of her employment.

The appeal is therefore allowed.

According to Section 63(2)(b) of the *Act*, Comet is liable to pay to Koops eight weeks' wages and interest pursuant to Section 88 of the *Act*.

ORDER

Pursuant to Section 115 of the *Act*, the Determination dated November 8, 2002, is cancelled and the matter is referred back to the director to calculate the amount of wages and interest owing to the appellant, Koops.

Cindy J. Lombard
Adjudicator
Employment Standards Tribunal