Employment Standards TRIBUNAL

An appeal

- by -

Zonia Kernested
("Kernested")

- 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

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE No.: 2004A/46

DATE OF DECISION: June 23, 2004

DECISION

SUBMISSIONS

Zonia Kernested	on her own behalf
Kimberly Buchanan	for 572984 B.C. Ltd.

INTRODUCTION

This appeal was filed by Zonia Kernested ("Kernested") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*). Ms. Kernested appeals a Determination that was issued by a delegate of the Director of Employment Standards (the "Director") on October 9th, 2003 (the "Determination") following a teleconference hearing conducted on August 29th, 2003.

Ms. Kernested's appeal was not filed with the Tribunal within the statutory appeal period. In my reasons for decision issued on March 23rd, 2004 (B.C.E.S.T. Decision No. D051/04), I ordered that the appeal period be extended to January 23rd, 2004 (the date the appeal was actually filed). I now propose to address the merits of the appeal.

Ms. Kernested appeals the Determination on the ground that the Director's delegate failed to observe the principles of natural justice in making the Determination [section 112(1)(b)]. However, a review of her appeal documents suggests to me that the real basis for her appeal is an alleged error of law [section 112(1)(a)], namely, that the delegate erred in concluding that Ms. Kernested quit her employment.

By way of a letter dated May 20th, 2004 the parties were advised by the Tribunal's Vice-Chair that this appeal would be adjudicated based on their written submissions and that an oral hearing would not be held (see section 107 of the *Act* and *D. Hall & Associates v. Director of Employment Standards et al.,* 2001 BCSC 575). I note that none of the parties requested that an oral appeal hearing be held in this matter.

In a letter dated March 24th, 2004, the Tribunal's Vice-Chair advised the parties that the appeal period had been extended and requested both the section 112(5) record from the Director (to be delivered by April 16th, 2004) and the parties' written submissions regarding the merits of the appeal (also to be delivered by April 16th, 2004).

I now have before me the following documents:

- section 112(5) record;
- submission dated April 15th from the respondent employer, 572984 B.C. Ltd. operating as "Nutrition House" under the signature of Kim Buchanan, President (the "Employer"); and
- the original appeal documents filed by Ms. Kernested (she did not file any further submission in response to the Vice-Chair's March 24th letter).

THE PROCEEDINGS BEFORE THE DIRECTOR'S DELEGATE

According to the information set out in the delegate's reasons, Ms. Kernested was employed as a retail clerk from September 24th, 2002 to March 9th, 2003; her wage rate was $10 per hour. Accordingly, upon termination, Ms. Kernested was presumptively entitled to one week's wages (or one week's written notice of termination in lieu of written notice) on account of compensation for length of service [see section 63(1) of the *Act*].

Following a hearing conducted by teleconference on August 29th, 2003, the Director's delegate issued reasons for decision on October 9th, 2003 in which she concluded that Ms. Kernested voluntarily resigned her position with her former Employer and, accordingly, was not entitled to any compensation for length of service [see section 63(3)(c) of the *Act*]. As I understand the situation, there was also was a claim regarding statutory holiday pay for December 25th, 2002, however, this latter issue has now been resolved. Ms. Kernested and the Employer's principal, Ms. Kimberly Buchanan, provided evidence during the teleconference hearing.

Ms. Kernested's position

Ms. Kernested testified that she was originally hired as a full-time employee working "very close to 40 hours a week". In January 2003, Ms. Kernested learned that the Employer was looking to hire other staff and when she questioned the Employer was advised that when additional staff were hired, her own hours would be reduced. Accordingly, since she required 40 hours of paid employment each week, she then sought out additional part-time work which she secured in early March 2003. On March 9th, 2003 she wrote a note to the Employer's principal, Kim Buchanan. In her note, Ms. Kernested stated that she had found a second part-time job as a cosmetician and that her new employer had given her a "rather rigid schedule". Accordingly, Ms. Kernested advised that "I have to restrict myself here for the rest of March" and that she was confident Ms. Buchanan "will be able to reschedule the shifts". Finally, Ms. Kernested stated that she would only be available for work on 7 days for the balance of March.

Ms. Kernested said that Ms. Buchanan called her two days later to discuss her March 9th note and that Ms. Buchanan told Ms. Kernested that if she was not willing to work her scheduled shifts Ms. Buchanan would not be able to provide any other shifts for her. Ms. Kernested's position was that this latter action on the part of the Employer constituted a termination.

The Employer's Position

Ms. Buchanan testified that she originally interviewed Ms. Kernested since the latter had some managerial experience but that Ms. Kernested was not interested in a managerial position. Accordingly, Ms. Kernested was hired as a sales clerk with the expectation that she would work between 30 and 40 hours each week. Ms. Buchanan continued to seek out a manager for the store and advised Ms. Kernested that when a manager was hired, Ms. Kernested could expect to work about one less shift each week but that her working hours would still be in the range of 30 to 40 each week. Ms. Kernested was seemingly thankful for the advance notice and also advised that she would be looking for additional part-time employment.

Upon reading Ms. Kernested's March 9th note (on March 10th), Ms. Buchanan realized that Ms. Kernested would not be available to work 8 of her next 10 scheduled shifts. Ms. Buchanan spoke with Ms. Kernested and expressed concern about replacing her shifts on such short notice and asked her to try

and reschedule her working hours with the new employer; Ms. Kernested was unwilling to do so. Ms. Buchanan took the position that since Ms. Kernested was unwilling to work her scheduled shifts, she was, in effect, quitting her employment.

The Delegate's Findings

The delegate noted that based on the Employer's payroll records, Ms. Kernested averaged about 37.5 hours each week from September 2002 through January 2003 and never worked less than 30.75 hours in any week. During February 2003, her hours ranged from 28.5 to 32.5 over 4 days each week. Ms. Kernested's schedule for February 24th to March 23rd, 2003 indicated that she was scheduled to work either 4 or 5 days each week for an average of about 29 weekly hours. The delegate noted that this latter schedule was entirely consistent with the terms of Ms. Kernested's original engagement whereby should could expect to work between 30 and 40 hours each week and with Ms. Buchanan's evidence that Ms. Kernested was told her working hours would be reduced by about one shift each week once the new manager was hired.

The delegate stated in her reasons that "the employer is not under any obligation to accommodate the employee's availability" and that once shifts are scheduled the employer need not accommodate an employee's reduced availability: "The employee is then in the position of having to decide if she will work the scheduled shifts, or quit".

I should say, parenthetically, that I do not wholly endorse the delegate's reasoning on this latter point. First, where there are issues arising under the *Human Rights Code*, clearly the employer has a duty to accommodate (say, for example, the employee cannot work scheduled shifts due to family responsibilities or religious ceremonies). Second, where a shift schedule is imposed for an improper purpose (say, to force the employee an employee to quit) and contrary to the parties' employment agreement, the schedule could amount to a constructive dismissal (see section 66). This case does not raise any issue under the *Human Rights Code* nor does it fall into the "constructive dismissal" category since it was *Ms. Kernested who refused to work shifts that were previously scheduled in accordance with the parties' employment contract.*

The delegate concluded:

> [Ms. Kernested's] hours for [the Employer] were scheduled to at least March 23, 2003. On March 9, 2003 she told [the Employer] she could no longer work the scheduled hours, and she gave [the Employer] dates when she was available to work during the rest of the month. She made herself unavailable to work most of her current schedule with [the Employer], and left her employer with very limited time to replace her. She then made it clear in her note that the hours for the second job would come first, i.e., [the Employer] could employ her when she wasn't scheduled at the second job...
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> [Ms. Kernested] had two part-time jobs with conflicting hours. She had to make a choice and she chose the hours provided by the second job rather than work the previously scheduled shifts from [the Employer], her original employer. By refusing to work the scheduled shifts, she withdrew her services from [the Employer], and in effect, quit.

ANALYSIS

I am not satisfied that the Director's delegate failed to observe the principles of natural justice in making the Determination. Both parties were given a full and fair opportunity to present their respective positions before an unbiased decision-maker.

The delegate found that Ms. Kernested voluntarily quit her employment; this latter finding raises issues of both fact and law. While I am not fully satisfied, as I noted above, that the delegate entirely accurately characterized an employer's obligations with respect to shift schedules, neither can I say that, for purposes of this appeal, the delegate relied an incorrect legal analysis. Ms. Kernested's actions might be fairly characterized as an abandonment of her employment. Certainly, given the contractual agreement between the parties with respect to working hours (30 to 40 each week), it cannot be said that Ms. Kernested was constructively dismissed within section 66 of the *Act.*

Ms. Kernested makes the point that other employees may have been able to "cover" the shifts that she was refusing to work. That may be so; I cannot conclude that to be so based on the record before me. However, even accepting that position, the fact remains that Ms. Kernested simply refused to work (on only two days' notice) a significant number of shifts that had been scheduled for at least two weeks. Further, Ms. Kernested indicated that she was no longer prepared to work for the Employer in accordance with their contractual agreement. Had the Employer unilaterally reduced Ms. Kernested's contractually-agreed hours by 80% (8 of 10 shifts), I do not doubt that Ms. Kernested could rightly have stated she was constructively dismissed. Here, however, the shoe was on the other foot--it was Ms. Kernested who was refusing to work 80% of her previously scheduled shifts. I cannot conclude that the delegate erred in characterizing that refusal to work as a quit.

The appeal is dismissed.

ORDER

Pursuant to section 115(1)(a) of the *Act*, the Determination is confirmed as issued.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal