Employment Standards TRIBUNAL

An appeal

- by -

Carol Lindsay
("Lindsay")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2014A/91

DATE OF DECISION: December 4, 2014

DECISION

SUBMISSIONS

David Hughes	on behalf of Carol Lindsay
Melony Forster	on behalf of the Director of Employment Standards

INTRODUCTION

1. Carol Lindsay ("Lindsay") appeals, pursuant to subsections 112(1)(a) and (c) of the *Employment Standards Act* (the "*Act*"), a Determination that was issued by a delegate of the Director of Employment Standards (the "delegate") on June 13, 2014, following his investigation into Ms. Lindsay's misrepresentation/unpaid wage complaint filed under section 74 of the *Act*. By way of the Determination, the delegate determined that Ms. Lindsay's former employer, Big Brothers Big Sisters of Kamloops & Region ("BB/BS"), did not contravene the *Act* as alleged by Ms. Lindsay and, accordingly, her complaint was dismissed.

2. Ms. Lindsay says that the delegate erred in law in issuing the Determination (subsection 112(1)(a)) and, in addition, she now has new evidence that was not available when the Determination was being made (subsection 112(1)(c)).

3. I am adjudicating this appeal based on the parties' written submissions. I have submissions filed on behalf of Ms. Lindsay and from the delegate. Although invited to do so, BB/BS did not file any submission relating to Ms. Lindsay's appeal. In addition, I have also reviewed the delegate's "Reasons for the Determination" that were issued concurrently with the Determination (the "delegate's reasons") and the subsection 112(5) record that was before the delegate when he issued the Determination.

BACKGROUND FACTS

4. BB/BS is a society that provides child and youth mentoring services. According to the delegate's reasons, Ms. Lindsay worked as a part-time telemarketer and relief clerical supervisor for the organization from July 23, 2009, to February 8, 2014, and, as of the date of her dismissal, she earned $12.35 per hour. Ms. Lindsay's evidence is that she responded to an advertisement for a managerial position within the organization ("Renew Crew Operations Manager") and was interviewed in late October 2013 for the position. She says that she was offered, and accepted, a "co-management" position with a division known as the "Renew Crew". I understand that this division collects clothing and household item donations and, in turn, sells the items to Value Village. Ms. Lindsay says that she turned down a job offer with another organization as an educational instructor in order to accept the new position with BB/BS.

5. Ms. Lindsay says that she learned in early November 2013 that the job she accepted turned out to be quite different from what she had been offered – it was a clerical, not a management, position. While still employed with BB/BS she completed the Employment Standards Branch's "Self-Help Kit" and on November 12, 2013, delivered it to BB/BS. She asserted that BB/BS contravened section 8 of the *Act* by misrepresenting the position she had been offered and accepted.

6. Ms. Lindsay says that the very next day she was called into BB/BS's executive director's office. The executive director, the BB/BS board chairman, and the Renew Crew project manager were all present. The executive director stated that she was disappointed with Ms. Lindsay and denied having ever offered her a "co-

manager" position. Ms. Lindsay filed a formal complaint on November 29, 2013, in which she claimed $50,000. In her complaint, she alleged that she accepted a "co-manager" position of the Renew Crew but was shortly thereafter told that the position would only be classified as a "Team Leader which is a clerical position". She continued to work as a telemarketer until January 8, 2014, at which point she was suspended without pay. By letter dated January 8, 2014, and under the signature of the executive director, Ms. Lindsay was advised:

> This letter is to confirm that you have been instructed to provide our office with a criminal record check as a term of your continued employment and that you are to have no further discussions with Big Brothers Big Sisters of Canada with regards to your employment with our agency. On December 18, 2013, we provided you with a letter requesting a criminal record check be completed by December 23, 2013.
>
> Effective immediately you are suspended from employment without pay until such time as you provide us with a criminal record check. If we have not been provided with a criminal record check by February 8, 2014 your employment will be terminated.
>
> A copy of this letter has been placed in your employment file.

7. Ms. Lindsay says that her employment was terminated effective February 8, 2014, (although there is no formal termination letter contained in the record before me). On January 22, 2014, BB/BS issued to Ms. Lindsay a Record of Employment ("ROE"). The ROE indicates that it was issued based on code "K" ("other") rather than code "M" ("dismissal"). Further, one might consider that her suspension without pay, on January 8, 2014, constituted a deemed dismissal under section 66 of the *Act*. Thus, although I do not believe anything necessarily turns on the point, there are three separate possible termination dates – January 8, January 22, or February 8, 2014. Ms. Lindsay's last three working days were January 6 to 8, 2014, and she claimed she was not paid for those final three days of work.

8. BB/BS's evidence differed in many critical aspects from Ms. Lindsay's evidence. The executive director (who left the organization effective January 15, 2014, and was replaced by another individual the next day) posted an advertisement for a "Renew Crew Operations Manager" with applications to be submitted by October 18, 2013, to the executive director. The preferred candidate was expected to have a "business degree" (a qualification that Ms. Lindsay did not meet) and "a minimum of 3-5 years recent, related experience". Four candidates were interviewed – two internal and two external. At the October 22, 2014, evening board meeting, BB/BS decided to defer the hiring of a Renew Crew Operations Manager and that for an interim 90-day period, the duties associated with this position would be assumed by the executive director.

9. BB/BS says that "at no time was an offer of employment made to Ms. Lindsay or any other candidate" and that any such offer would have required board approval. BB/BS says that "the board meeting minutes provided show that no such motion was made". Parenthetically, I note that while the record contains a memorandum from BB/BS to the delegate stating that the relevant board meeting minutes are enclosed, the record before me (submitted by the delegate) does not contain any such minutes.

10. In any event, BB/BS says that all members of the Renew Crew were informed at a November 5, 2013, meeting that the board had decided not to hire an operations manager but that Ms. Lindsay and the other internal applicant would function "as supervisors, preferably on opposite shifts in order that coverage is available for all operating hours" (delegate's reasons, page 6).

11. "On January 8, 2014 … Ms. Lindsay was suspended without pay effective January 11, 2014, for failure to comply with a new policy requiring that all employees complete a criminal record check at hiring and on a yearly basis during their tenure with the agency" (delegate's reasons, page 6). Ultimately, Ms. Lindsay, and she

alone among the Renew Crew members, failed to submit the required criminal records check authorization and thus she was terminated. BB/BS "provided a copy of a wage statement dated January 24, 2014, indicating that Ms. Lindsay was paid for her final three days of work" (delegate's reasons, page 7).

12. The delegate addressed several separate issues in his reasons. First, he concluded that Ms. Lindsay was in fact paid for her last three working days (and Ms. Lindsay does not contest that finding in this appeal). Second, and with respect to Ms. Lindsay's section 8 complaint, the delegate determined that the board's decision to defer the hiring of an operations manager did not contravene section 8. Further, with respect to her assertion about the nature of the new position's duties and pay, the delegate held (at pages 8-9):

> Ms. Lindsay's evidence was that she was offered a co-management position …
>
> Ms. Lindsay stated during the investigation that she had not enquired about the duties or rate of pay before agreeing to what she referred to as the co-management position, although she expressed her expectations that the rate of pay would be 50% of what the previous Operations Manager had been paid. Ms. Lindsay stated that when she was advised that the new position would result in a pay increase of only $1.00 per hour, she felt she had been misled when she accepted the new position.
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> Ms. Lindsay did not provide any evidence with respect to the potential earnings in regard to the part-time job she had declined …
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> … Ms. Lindsay stated that she had not made any enquiries with respect to the duties or wage rate prior to accepting the new position. It is obvious that the salary change did not meet Ms. Lindsay's expectations, but, as no salary level was discussed prior to her acceptance of the position, that would not meet the test of misrepresentation necessary for the section 8 of the Act complaint.
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> Based on the evidence, I find that [BB/BS] has not contravened section 8 of the Act. Accordingly, there is no need to consider remedy [*sic*].

13. Finally, with respect to whether or not BB/BS had just cause for dismissal (in which case it is relieved from having to pay any compensation for length of service), the delegate held that there was just cause for dismissal. Specifically, he determined (at pages 9-10):

> [BB/BS's] evidence was that there was a review of [its] operations and policies by the National Office with respect to compliance with the accreditation standards As a result of the accreditation review, a decision was made to have all Renew Crew staff provide a Criminal Record Check in order to be compliant with the National Standards of Big Brothers and Big Sisters of Canada. All Renew Crew staff members, including Ms. Lindsay, were provided with written notice dated November 26, 2013, advising that they were required to complete the application for a Criminal Record Check at the local Police station. …
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> … Ms. Lindsay did not comply with the direction in the November 26, 2013, notice to obtain a Criminal Record Check despite the letters of December 23, 2013, and January 8, 2014.
>
> … [BB/BS], as the employer, has the right to institute policies and procedures that they believe are reasonable and relevant to the workplace for the protection of both [BB/BS] and its clients. Given the nature of the programs being provided by [BB/BS] and the nature of its client groups, I find it is reasonable to institute a policy requiring Criminal Record Checks for all employees.
>
> There is no doubt that Ms. Lindsay was aware of the multiple instructions to her from [BB/BS] to obtain a Criminal Record Check in order to continue her employment. She was well aware of the consequences of her failure to do so, the suspension on January 8, 2014, and finally her termination if she did not comply by February 8, 2014.
>
> Ms. Lindsay was terminated when she did not comply with the requirement to provide the Criminal Record Check by February 8, 2014.

> Based on the evidence, I find that that [BB/BS] has established just cause for the termination of the employment of Ms. Lindsay. Accordingly, there is no compensation for length of service due to Ms. Lindsay.

REASONS FOR APPEAL

14. As noted above, Ms. Lindsay appeals the Determination on the grounds that the delegate erred in law and on the basis that she has "new evidence" that was not available when the Determination was being made. More particularly, Ms. Lindsay alleges the following:

- "The job that I turned down, [the delegate] did not ask me about that salary of $50,000."
- The job that was offered to her, and that she accepted on a "co-manager" basis, was the advertised position for an "operations manager".
- That she "should not be penalize for insubordination" [*sic*] since it was her agent, David Hughes, who contacted the National Office rather than herself and, with respect to that communication, Mr. Hughes was advised "only people who dealt with children needed a criminal record check".
- Finally, she submitted an ROE as new evidence claiming that it showed she "quit" her job when, in fact, "I was suspended than Dismissed" [*sic*].

15. These assertions arguably raise two separate grounds of appeal. First, Ms. Lindsay challenges findings of fact made by the delegate relating to whether she was insubordinate and whether there was a section 8 misrepresentation. Second, she offers new evidence in the form of the ROE and, arguably, information relating to the salary for the position she turned down and regarding Mr. Hughes' communication with the National Office. Although Ms. Lindsay did not indicate in her Appeal Form that she was relying on the "breach of natural justice" ground (subsection 112(1)(b)), her assertion that the delegate never asked her about the salary for the "educational instructor" position she turned down could be conceived as a natural justice argument.

16. By letter dated October 9, 2014, I advised the parties that I had reviewed the appeal under subsection 114(1)(f) of the *Act* to determine if it should be wholly, or partially, dismissed as having no reasonable prospect of succeeding. By way of my October 9 letter I indicated that, in my view, the appeal had to be summarily dismissed with respect to the "new evidence" ground of appeal and the challenge to the delegate's determination that there was no section 8 contravention. I also advised the parties that I was not prepared to summarily dismiss Ms. Lindsay's argument that there was no "just cause" for her dismissal and, accordingly, the parties were directed to file further submissions on this issue. As noted at the outset of these reasons, although the Director filed a brief submission (from a delegate other than the delegate who issued the Determination) simply reiterating the delegate's findings as set out in the Determination, for whatever reason, BB/BS chose not to file a submission on the just cause issue.

FINDINGS AND ANALYSIS

17. I shall briefly set out my reasons for summarily dismissing the appeal with respect to the "new evidence" ground of appeal and with respect to the section 8 issue. I will then more fully address the "just cause" issue.

Summary Dismissal (subsection 114(1)(f)) – New Evidence/Section 8

18. The principal document submitted as "new evidence" is the ROE. Quite simply, Ms. Lindsay has misread the form – it clearly states that the "reason for issue" was code "K" ("other") rather than code "E" ("quit"). The document is plainly not relevant. Further, and in any event, this document was issued on January 22, 2014, and, accordingly, could have been provided to the delegate prior to his issuing the Determination on June 13, 2014 – in other words, it obviously cannot be said that the document "was not available at the time the determination was being made" (subsection 112(1)(c)).

19. For much the same reason, evidence now submitted on appeal relating to the foregone salary for the "educational instructor" position could have been presented to the delegate as could evidence from Mr. Hughes relating to his conversations with the National Office. Further, I do not believe that the delegate had any affirmative duty to inquire of Ms. Lindsay about these matters. It was up to Ms. Lindsay to present to the delegate all of the evidence she thought relevant – certainly, the delegate invited her to do so. In a fashion, the evidence relating to the foregone salary *was* before the delegate since, I presume, Ms. Lindsay claimed $50,000 in her complaint form as it represented one year's salary from the foregone position. If the delegate had found that there was a section 8 contravention, I assume that he would have sought further information about this latter matter in order to fashion an appropriate remedy but, of course, he did not find that BB/BS contravened section 8 of the *Act*.

20. As for the delegate's finding that BB/BS did not contravene section 8, it must be first be noted that while a finding of fact can constitute an error law, in order for the factual finding to be so characterized, the factfinder must not have had a sufficient evidentiary basis for making the finding. According to the Supreme Court of Canada, a factual finding only amounts to an error of law if the finding is tainted by "palpable and overriding error" or is "clearly wrong" (*Housen v. Nikolaisen*, [2002] 2 S.C.R. 235).

21. In the instant case, the delegate notes that BB/BS decided not to hire a single person for the advertised "operations manager" position and, of course, it was under no duty to hire Ms. Lindsay, or anyone else for that matter, into the position (see *Roback v. U.B.C.*, 2007 BCSC 334). The delegate determined that this action did not amount to a contravention of section 8 and the delegate, in my view, was absolutely correct in that regard. Ms. Lindsay says that that she, and another employee, were offered the position on a "co-manager" or shared basis; she further says that she accepted that offer. There was no job offer letter and, to a very large degree, this matter turned on the relative credibility of the parties since they both had mutually exclusive versions of what transpired. I note that Ms. Lindsay did not present evidence from the other employee who was also offered the co-supervisor position – one could draw an adverse inference from her failure to provide this evidence. Ms. Lindsay carried the evidentiary burden of proving that a section 8 misrepresentation occurred and I agree with the delegate that she simply failed to provide sufficient evidence to show that BB/BS contravened section 8.

22. The delegate accepted BB/BS's version of events noting that Ms. Lindsay could not have been misled, at least at it related to pay, since she (and by her own admission) never inquired about the pay level for the job (rather, she assumed she would be paid 50% of the pay of the operations manager position). The delegate accepted BB/BS's version that Ms. Lindsay was offered a "co-supervisor" position at about a $1 per hour increase relative to her then current position. I am unable to conclude that the delegate's findings were wholly unsupported by a proper evidentiary foundation and thus I cannot find that he erred in law in finding that there was no section 8 contravention.

Just Cause for Dismissal

23. Compensation for length of service is presumptively payable to a dismissed employee unless there is "just cause" for the dismissal (subsection 63(3)(c)). With respect to the "just cause" issue, BB/BS argued that it did not have to pay Ms. Lindsay any compensation for length of service due to her "wilful misconduct" (delegate's reasons, page 9). BB/BS argued that as a result of directions received from the National Office, Ms. Lindsay (and all other "Renew Crew" staff) was required to complete an application for a criminal records check. Since Ms. Lindsay failed to comply with this direction she was suspended and then, when she still had not complied, dismissed. The delegate determined, first, that BB/BS had "the right to institute policies and procedures that they believe are reasonable and relevant to the workplace for the protection of both [BB/BS] and its clients" (delegate's reasons, page 10) and that the criminal records check fell within this mandate. Second, the delegate determined that since Ms. Lindsay failed to "comply with the requirement to provide the Criminal Record Check by February 8, 2014…[BB/BS] has established just cause for the termination of the employment of Ms. Lindsay" (delegate's reasons, page 10).

24. In my view, there are several matters that the delegate simply failed to consider and, accordingly, I find that his decision with respect to whether BB/BS had just cause for dismissing Ms. Lindsay cannot stand and this issue must be referred back to the Director.

25. BB/BS in a memorandum to the delegate indicated that during an accreditation review conducted in September 2013 "it was identified that we were not in compliance with a national standard as none of our Renew Crew employees had completed criminal record checks on file." The record includes an undated "Memo" to "Renew Crew Staff" from the executive director that states, in part: "Per National Standards for [BB/BS], *all* employees are required to have a Criminal Record Check completed at hiring and an update form completed yearly at the time of their review" (my *italics*). The memo included instructions about how to obtain the criminal record check and contained the following notice: "The record check must be to the police station by Monday, December 2, 2013. Please note that non-compliance will result in suspension until proof that completion of is provided" [*sic*]. Since Ms. Lindsay did not comply by the December 2 deadline, the executive director sent her a letter, dated December 18, 2013, stating: "I regret to inform you that failure to comply by December 23, 2013 will result in suspension from your duties until we are in receipt of a completed Criminal Record Check". On January 8, 2014, the executive director sent a further letter to Ms. Lindsay the relevant portions of which read: "On December 18, 2013 we provided you with a letter requesting a criminal record check be completed by December 23, 2013. Effective immediately you are suspended from employment without pay until such time as you provide us with a criminal record check. If we have not been provided with a criminal record check by February 8, 2014 your employment will be terminated." It does not appear that BB/BS ever issued a formal termination letter – there is no such document in the record – however, her employment was subsequently terminated. The delegate found that Ms. Lindsay was terminated on February 8, 2014; however, BB/BS issued an ROE (which must be issued on termination of employment) on January 22, 2014. Further, as previously noted, her suspension without pay as of January 8, 2014, could be characterized as a deemed dismissal under section 66 of the *Act*.

26. As recorded in the delegate's reasons (page 4), Ms. Lindsay raised a concern about whether she was actually required to provide a criminal records check. As noted above, all members of the "Renew Crew" staff were informed by memorandum that "all employees" were required to complete a criminal records check. However, the "National Standards" document that BB/BS submitted to the delegate clearly states that the criminal records check requirement did *not* apply to all employees: "The National Standards apply ONLY to the delivery of mentoring programs (see the Measuring Reach document for the definition of a mentoring program) offered to children and youth under the age of 16. Programs that do not fall within these parameters are not subject to the Standards." (CAPITALIZATION in original document). Although

BB/BS's executive director indicated to the delegate in her January 22, 2014, memorandum to him that all "Renew Crew" members were required to provide criminal records checks, there was absolutely no further documentation from the National Office to BB/BS that corroborated this assertion. Further, the executive director's assertion appears to stand in marked contradiction to the text of the National Standards. This was the very point that Ms. Lindsay was attempting to make to the delegate but it was summarily dismissed as irrelevant: "Whether the Criminal Record Checks were a requirement pursuant to the National Standards or not, is in my view, irrelevant" (delegate's reasons, page 10).

27. BB/BS operates a number of programs including a variety of mentoring programs – with which, so far as I can determine, Ms. Lindsay (as a telemarketer) had absolutely no connection – and the Renew Crew. It is not clear from the record before me whether Ms. Lindsay's job duties as a telemarketer related to the Renew Crew; she seemingly did not accept the position offered to her to "co-supervise" the Renew Crew and thus, on termination, was employed as a telemarketer (as indicated in the ROE that was issued on January 22, 2014). The Renew Crew is described on the BB/BS website as follows:

> In 1996, innovative members of our Board of Directors met with Savers, Inc. and together launched one the first non-profit social ventures in Kamloops. This partnership helps to stimulate demand for gently used clothing and household goods. In turn, Savers recycling program supports Big Brothers Big Sisters of Kamloops & Region's mentoring programs, the environment, and national and international people in need.
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> Through a combination of home pick-ups, on-site clothing bins for drop-offs, and targeted community clothing drives, the Donation Center creates a sustained source of revenue for the vital social service activities of the Big Brothers Big Sisters of Kamloops & Region.
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> Donated clothing and household items collected by our Renew Crew is sold by weight to Value Village, turning your donations into critical funding that supports our programs, or on occasion, may be used for agency purposes.

28. Ms. Lindsay maintained that her duties were unconnected with BB/BS's "mentoring programs" and indicated to the executive director that the National Office had informed her that the criminal records check requirement did not apply to her. Rather than attempting to clarify the situation, the executive director issued a written reprimand to Ms. Lindsay asserting that she had been insubordinate and, for extra measure, also suspended her. As noted above, the delegate did not attempt to sort out whether, in fact, Ms. Lindsay was required by organizational policy to submit to a criminal records check; he considered the matter irrelevant. For my part, I do not find this matter to be irrelevant. On what lawful basis can an employee be disciplined (and later dismissed) for failing to comply with a non-existent organizational policy?

29. Even if Ms. Lindsay *was* required by organizational policy to submit to a criminal record check (and I am far from satisfied that the policy applied to her), the delegate wholly ignored the privacy implications of that policy. In British Columbia, certain employers are governed by the *Criminal Records Review Act* and Part 3 of that statute requires certain employees to submit a criminal records check authorization but it does not appear that this statutory scheme applies to Ms. Lindsay – certainly, BB/BS never asserted that to be the case. Further, an employer's right to require an employee to submit to a criminal records check is constrained by the *Personal Information Protection Act* (see *Use of Police Information Checks in British Columbia*, April 15, 2014, 2014 BCIPC No. 14 esp. para. 6.4).

30. The delegate appears to have completely ignored the fundamental privacy issues raised by the employer's unilateral demand for a criminal records check and did not turn his mind to whether the employer could lawfully demand a criminal records check in this case. In my view, if the employer had no right to require Ms.

Lindsay to submit to a criminal records check, it follows that she could not be disciplined or terminated as a result of her asserting her lawful right to refuse.

31. In addition to the privacy issues raised by this case, there are some fundamental principles of contract law that also appear to have been wholly ignored by the delegate. I start with the entirely uncontroversial notion that the employment relationship is, fundamentally, a contractual relationship. It is an axiom of contract law that neither party to the agreement can unilaterally impose new terms and conditions on the other party. There is nothing in the record before me to indicate that Ms. Lindsay was required by the terms of her existing employment contract to submit to a criminal records check (as noted above, the employer did not rely on a *statutory* authority to impose this requirement). Thus, the employer's demand, contained in the memo issued to all "Renew Crew" members sometime in late November 2013, constituted a new employment condition unilaterally imposed by BB/BS.

32. In *Wronko v. Western Inventory Service Ltd.*, 2008 ONCA 327, the Ontario Court of Appeal identified three options open to an employee when faced with an attempt by their employer to unilaterally amend a fundamental contract term (paras. 34-36):

> First, the employee may accept the change in the terms of employment, either expressly or implicitly through apparent acquiescence, in which case the employment will continue under the altered terms.
>
> Second, the employee may reject the change and sue for damages if the employer persists in treating the relationship as subject to the varied term. This course of action would now be termed a "constructive dismissal", as discussed in *Farber*, although this term was not in use when *Hill* was decided.
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> Third, the employee may make it clear to the employer that he or she is rejecting the new term. The employer may respond to this rejection by terminating the employee with proper notice and offering re-employment on the new terms. If the employer does not take this course and permits the employee to continue to fulfill his or her job requirements, then the employee is entitled to insist on adherence to the terms of the original contract. In other words, if the employer permits the employee to discharge his obligations under the original employment contract, then – unless proper notice of termination is given – the employer is regarded as acquiescing to the employee's position. As Mackay J.A. so aptly put it [at para. 45]: "I cannot agree that an employer has any unilateral right to change a contract or that by attempting to make such a change he can force an employee to either accept it or quit."

33. These principles were adopted by our own Court of Appeal in *Allen v. Ainsworth Lumber Co. Ltd.*, 2013 BCCA 271.

34. Clearly, Ms. Lindsay did not accept the unilateral change (although it must also be noted she never affirmatively rejected the change). Ms. Lindsay did not affirmatively reject the proposed change to her contract terms and conditions and sue for damages for constructive dismissal (and, insofar as her complaint was concerned – filed while she was still employed – she did not mention the employer's demand for a criminal records check although she did refer to this matter in her January 15, 2014, letter to the delegate). Ms. Lindsay never filed a complaint, so far as I can determine, alleging that her suspension without pay, issued on January 8, 2014, constituted a "constructive dismissal" contrary to section 66 of the *Act*. The delegate never turned his mind to this potential issue since, in his view, the employer apparently had the right to issue a suspension without pay based on her refusal to submit to the demand for a criminal records check.

35. In light of the third option set out in *Wronko*, *supra*, if BB/BS was of the view that Ms. Lindsay was refusing to accept the changes to her employment contract relating to the criminal records check (and, clearly, that was its view since it terminated her based on her failure to provide an authorization for a criminal records check) then it was open to BB/BS to "terminat[e] [Ms. Lindsay] *with proper notice* and offering re-employment on the

new terms" (quoting *Wronko*; my *italics*). This, of course, is the very thing that BB/BS did *not* do – it summarily terminated her employment with no notice (or compensation in lieu or notice) whatsoever on the assumption that it had just cause for dismissal.

36. Accordingly, it follows that if BB/BS did not otherwise have the legal right to impose the criminal record requirement (say, because it had a statutory right to do so), the only way in which it could have addressed Ms. Lindsay's failure to comply with its demand that she provide a criminal records search authorization was to terminate her *with proper notice* and offer her re-employment on its proposed new terms and conditions.

37. In my view, given the problems identified above with respect to the delegate's finding that BB/BS had just cause for dismissal, I am unable to confirm the Determination as it relates to this issue. On the other hand, and in light of the dearth of relevant information before me (principally due to the fact that the delegate did not turn his mind to several relevant considerations), I am equally unable to find that BB/BS did not have just cause and thus vary the Determination by making an award for compensation for length of service in Ms. Lindsay's favour. The only way to sensibly proceed is to refer the "just cause" issue back to the Director so that it can be reheard afresh – either by way of an entirely new investigation or by way of an oral hearing. I will leave it to the Director's discretion as to this procedural matter. The Determination is confirmed as it relates to the delegate's other findings (i.e., section 8 and Ms. Lindsay's claim for three days' pay).

ORDER

38. Pursuant to subsection 115(1)(a) of the *Act*, the Determination is *confirmed* as it relates to the delegate's findings that BB/BS did not contravene section 8 of the *Act* and that Ms. Lindsay was, in fact, paid for her work on January 6, 7 and 8, 2014.

39. Pursuant to subsection 115(1)(a) of the *Act*, the Determination is *cancelled* as it relates to the delegate's finding that BB/BS had just cause for dismissing Ms. Lindsay. Pursuant to subsection 115(1)(b) of the *Act*, the issue of whether or not there was just cause for dismissal is *referred back to the Director* for reinvestigation or rehearing.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal