Employment Standards TRIBUNAL

An appeal

- by -

Kootenay Uniform and Linen Ltd.
(the "Employer")

- 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: Yuki Matsuno

FILE No.: 2007A/121

DATE OF DECISION: December 20, 2007

DECISION

SUBMISSIONS

Mark Fynn and Wendy Fynn	for the Employer
Ed Wall	for the Director of Employment Standards

OVERVIEW

1. Kootenay Uniform and Linen Ltd. appeals a Determination of the Director of Employment Standards (the "Director") issued August 30, 2007 (the "Determination"), pursuant to section 112 of the *Employment Standards Act* (the "*Act*").

2. In the Determination, a delegate of the Director (the "Delegate") found that the Employer had contravened section 63 of the *Act* when it did not give Susan Keen compensation for length of service upon termination of employment. The Delegate ordered the Employer to pay Ms. Keen $1779.54, inclusive of interest calculated under section 88 of the *Act*.

3. The Delegate also imposed a $500.00 administrative penalty on the Employer for contravening section 63 of the *Act*, as prescribed by section 29 of the *Employment Standards Regulation* (the "*Regulation*"). The total amount of the Determination is $2279.54.

4. The Employer appeals the Determination on the grounds that the Director, represented by the Delegate, erred in law and failed to observe the principles of natural justice in making the Determination. In its appeal submission, the Employer requests an oral hearing. I have reviewed the file and considered the Employer's request. Given that credibility is not an issue in this appeal and no viva voce evidence is otherwise required, I will decide this appeal on the basis of the parties' submissions and the Record. To that end, I have reviewed and carefully considered these documents.

ISSUE

5. Did the Delegate err in law or fail to observe the principles of natural justice in making the Determination?

BACKGROUND

6. Ms. Keen was employed as a seamstress with the Employer from June 4, 1995. On September 5, 2006, the Employer held a meeting with its employees, during which it informed them of the coming sale of the company and provided them with a notice which stated, "NOTICE OF TERMINATION From Kootenay Uniform & Linen Ltd. New Employer: Canadian Linen & Uniform Service Ltd. DUE TO PENDING SALE = EFFECTIVE OCT. 1, 2006" (the "Notice"). Ms. Keen signed the Notice, as did three other employees. Two other employees were present at the meeting but did not sign the Notice. Ms. Keen was later issued a record of employment dated September 29, 2006 (the "ROE"). Under "Expected Date of

Recall" the ROE indicates "Not Returning"; it is also noted on the ROE that "Business sold Oct 1, 2006. This Employee has accepted continued employment with new employer."

7. Ms. Keen worked for Canadian Linen until February 2, 2007 when her employment was terminated. She filled out a self-help kit and sent it to Canadian Linen. She did not fill out a self-help kit to send to the Employer, acting on the advice of an Employment Standards Officer. Ms. Keen subsequently filed two complaints with the Employment Standards Branch; one was dated February 26, 2007 and sought vacation pay and compensation for length of service from Canadian Linen (the "Canadian Linen complaint"), while the other was dated February 27, 2007 and sought compensation for length of service from the Employer (the "Kootenay Uniform complaint").

8. When the assets of the Employer were sold to Canadian Linen, Mark Fynn, one of the owners of the Employer, began employment with Canadian Linen as an Area Manager. In that capacity, he received the self-help kit and the Canadian Linen complaint. Further, Mr. Fynn, along with the owner of Canadian Linen, represented Canadian Linen in a mediation session regarding the Canadian Linen complaint, held on April 4, 2007. At the end of the mediation session, Ms. Keen withdrew the Canadian Linen complaint.

9. On June 13, 2007, the Delegate wrote to Mr. Fynn at the Employer's address, advising that Ms. Keen was pursuing her claim for severance pay from the Employer and raising the possibility that she could be entitled to a further four weeks compensation for length of service. The letter goes on to ask for information, including "Ms. Keen's daily hourly records for the period June 1 – September 1, 2006" and "Payroll records indicating total wages paid to Ms. Keen in the period June 1 – September 1, 2006".

10. The Delegate then sent the Employer a Demand for Employer Records, dated June 29, 2006 and sent by registered mail. By letter dated July 18, 2007, Mr. Fynn on behalf of the Employer wrote to the Delegate in reply to the Demand, reaffirming his view that Ms. Keen accepted employment with Canadian Linen knowing that if she wished to receive severance pay from the Employer, it was possible she would not be rehired by Canadian Linen.

11. On August 30, 2007, the Delegate issued the Determination, which the Employer now appeals. The Delegate found that the Employer terminated Ms. Keen's employment on October 1, 2006, which was prior to or at the time of the disposition to Canadian Linen. He found that Ms. Keen was entitled to eight weeks' wages or notice in lieu as compensation for length of service. Since Ms. Keen had received four weeks' written notice, the Delegate found she was entitled to a further four weeks' wages.

ARGUMENT AND ANALYSIS

12. As the party bringing the appeal, the Employer has the burden of showing that the Determination is wrong and should be varied or cancelled. The Employer appeals the Determination under Section 112(1)(a) and (b) of the *Act*, on the grounds that the Delegate made erred in law and failed to observe the principles of natural justice. The parties advanced numerous arguments; I have read and reviewed all the submissions and will refer only to those that are relevant to each ground of appeal.

Error of Law

13. The Tribunal has established jurisprudence on how to determine whether an error in law has been made. In *Britco Structures Ltd.*, BC EST #D260/03, the Tribunal noted that panels have used the following

definition of "error of law", set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia* (Assessor of Area #12 – Coquitlam), [1988] B.CJ. No. 2275 (B.C.C.A.):

1. a misinterpretation or misapplication of a section of the *Act*;
2. a misapplication of an applicable principle of general law;
3. acting without any evidence;
4. acting on a view of the facts which could not reasonably be entertained; and
5. adopting a method of assessment which is wrong in principle (in the employment standards context, exercising discretion in a fashion that is wrong in principle: *Jane Welch operating as Windy Willows Farm*, BC EST #D161/05).

14. The Employer's arguments that go to error or law are as follows:

- The Delegate erred in concluding that there was a complaint against the Employer in spite of the fact that the Employer did not receive a self-help kit;
- The Delegate erred in deciding that the Notice was effective notice of termination, that Ms. Keen was not an employee of the Employer on October 1, 2006 and therefore that section 97 did not apply; and
- The Delegate erred in concluding that section 65(1)(f) did not apply in these circumstances.

The Kootenay Uniform Complaint

15. Mr. Fynn says that because the Employer did not receive a self-help kit, the Kootenay Uniform complaint does not exist. He refers to Employment Standards Branch publications that say the Branch requires a self-help kit to be used before it will accept a complaint. The Delegate argues that Section 76 obligates the Director to accept and review a complaint made under section 74, such as Ms. Keen's February 27, 2007 complaint. He further argues that Branch policy allows for the self-help kit to be a required step in the dispute resolution process, but that in some cases employees are exempted from having to use a self-help kit. In this case, he says that Ms. Keen was excused from having to use a self-help kit for the Employer after having used one for Canadian Linen.

16. Section 74 provides:

> **74** (1) An employee, former employee or other person may complain to the director that a person has contravened
>
> (a) a requirement of Parts 2 to 8 of this Act, or
>
> (b) a requirement of the regulations specified under section 127 (2) (l).
>
> (2) A complaint must be in writing and must be delivered to an office of the Employment Standards Branch.
>
> (3) A complaint relating to an employee whose employment has terminated must be delivered under subsection (2) within 6 months after the last day of employment.
>
> . . . .

17. The Kootenay Uniform complaint satisfied the requirements of this provision. Once the Director receives a complaint made under section 74, section 76 applies:

> **76** (1) Subject to subsection (3), the director must accept and review a complaint made under section 74.
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> (2) The director may conduct an investigation to ensure compliance with this Act and the regulations, whether or not the director has received a complaint.
>
> (3) The director may refuse to accept, review, mediate, investigate or adjudicate a complaint or may stop or postpone reviewing, mediating, investigating or adjudicating a complaint if
>
> . . . .
>
> (d) the employee has not taken the requisite steps specified by the director in order to facilitate resolution or investigation of the complaint . . . .

18. Under section 76(1), the Director is obliged to accept and review a complaint made under section 74, subject to section 76(3). Under section 76(3)(d), the Director may refuse to accept or review or may stop and postpone accepting or reviewing a complaint "if the employee has not taken the requisite steps specified by the director in order to facilitate resolution or investigation of the complaint". In my view, the Branch policy of requiring self-help kits is the general way in which the Director's discretion under this section is exercised. The Delegate is correct in stating that the legislation gives the Director (or a delegate of the Director) discretion to accept and review a complaint without a self-help kit having been used. I find that there was no error of law when the Delegate accepted the Kootenay Uniform Complaint without requiring a self-help kit.

Notice of Termination / Section 97

19. Mr. Fynn argues that it was an error for the Delegate to find that Ms. Keen was not an employee of the Employer at the time of its disposition to Canadian Linen. He argues that the meeting in September 2006 and the Notice are "insufficient to constitute what the Tribunal has established as "clear and unequivocal" termination". On the other hand, the Delegate argues that the Notice "contained the hallmarks of a clear and unequivocal termination notice. It stated that it was a notice of termination; it provided the date of the notice and the effective date of the termination. There is no evidence that this notice of termination was rescinded at any time. . . . Clearly the finding of fact made that Ms. Keen was terminated by Kootenay could, and was, reasonably made based on evidence before the Delegate. The appellant has not met the burden of establishing that there was an error in law or finding of fact with regard to this point."

20. The Delegate found that the Notice was a clear and unequivocal notice of termination and that Ms. Keen's employment with the Employer was terminated on October 1, 2006, which was prior to or at the time of the disposition of the Employer's assets to Canadian Linen. Based on these findings, the Delegate found that Ms. Keen's employment with the Employer was not continuous and therefore section 97 did not apply. My view is that with respect to the Delegate's findings and conclusions, it could not be said that the Delegate acted without any evidence, or on a view of the facts that could not reasonably be entertained. The Delegate had before him not only the Notice but other evidence, such as the ROE and Ms. Keen's inquires about severance pay in September 2007. The Delegate did not err in law.

Alternative Employment

21. The Employer also argues that its obligation to pay compensation for length of service is erased by the fact that Ms. Keen accepted reasonable alternative employment, namely, employment as a seamstress with Canadian Linen. The Employer argues because Ms. Keen accepted this employment, section 65(1)(f) operates and section 63 no longer applies. This section reads as follows:

> **65** (1) Sections 63 and 64 do not apply to an employee
>
> . . . .
>
> (f) who has been offered and has refused reasonable alternative employment by the employer.

22. The Delegate argues that Ms. Keen's employment with Canadian Linen "does not constitute reasonable alternative employment as contemplated by Section 65 of the Act" and that an "employee does not lose her right to proper notice of termination simply because another employer may offer her work." The Delegate also points out that exceptions to the protections afforded by the Act, such as section 65, should be interpreted narrowly.

23. The Delegate's arguments on this point accord with Tribunal jurisprudence. The Tribunal has held that since section 65 establishes exceptions to the employer's usual obligation either to give written notice or pay compensation in lieu, the section must be narrowly construed: *538592 B.C. Ltd. operating as Sweet Pea Produce*, BC EST #D207/02. Section 65 applies only where the current employer has made a reasonable offer of employment which was not accepted by the employee: *Mitchell et al.*, BC EST #D314/97. In the present case, Ms. Keen accepted an offer of employment from another employer, Canadian Linen; her circumstances do not fit within the section 65(1)(f) exception. The Delegate did not err in law.

Failure to Observe the Principles of Natural Justice

24. In order to successfully appeal on this ground, a person must prove a procedural defect, amounting to unfairness, in how the Director carried out the investigation or made the Determination. Such procedural defects include failing to inform a person of the case against him or her and not allowing a person an opportunity to respond to a complaint. In this case, the Employer says that it was denied natural justice because it did not receive sufficient notice of the Kootenay Uniform complaint in the form of a self-help kit. Further, Mr. Fynn suggests the Delegate did not make it sufficiently clear to him that Ms. Keen was seeking compensation from the Employer for the termination of her employment in October 2006, and he suffered disadvantage as a result.

25. The Delegate argues that the Employer had an adequate opportunity to respond. He says that an Employment Standards Officer advised Mr. Fynn on March 1, 2007 that "the complaints were filed against both Kootenay and Canadian, and that either or both entities could be held liable. . . . Mr. Fynn was advised of the central issue in the dispute: whether there was continual employment through the transfer of the business." This is borne out by the Employment Standards Branch workflow sheet, which is part of the Record. In response, the Employer says, "While he has mo [sic] clear recognition of it, Mr. Fynn acknowledges that Mr. Wall may have mentioned in passing that [Ms. Keen] may have also been looking to the Company for compensation relating to her termination. Mr. Fynn, as a layperson,

understood any such reference to mean the actual dismissal of her employment in the first week of February."

26. Mr. Fynn then sent a letter dated March 10, 2007 to the Employment Standards Branch, on Kootenay Uniform and Linen letterhead (the "March 10 Letter"). It states:

> As requested, a copy of "NOTICE OF TERMINATION [. . .]" is enclosed. All employees were present at a group staff meeting, where news was shared that a deal was "pending" to sell our business with new owner taking over effective Oct. 1, 2006.
>
> As a result of this meeting Ms. Keen came into my office a few days later to specifically discuss her strong desire to receive "severance Pay". I advised Ms. Keen that we had paid for legal advise [*sic*] and was advised that the written notice was "sufficient" as anyone desiring continued employment with the new owner, Canadian Linen & Uniform Service Co., would not be entitled to "Severance Pay" due to this continuous and uninterrupted employment. Ms. Keen again brought up this issue with [Canadian Linen managers] . . . during the last week of September 2006 . . . . [A Canadian Linen manager] was extremely definite in his detailed discussion with Ms. Keen . . . that she would be entitled to "Severance Pay" if she did not wish to continue on with employment after the sale completed. Ms. Keen's ROE reflected that she had agreed to accept employment with Canadian Linen & Uniform Service Co.
>
> The above sums up our positioning in regards to Ms. Keen's position with Kootenay Uniform & Linen Ltd. upon our sale to Canadian Linen & Uniform Service Co.

27. On April 4, according to the Delegate, a copy of the Kootenay Uniform Complaint was faxed to Mr. Fynn's fax number at Canadian Linen. A fax transmission stamp is part of the Record. Mr. Fynn acknowledges receiving this document in his submissions.

28. On June 13, the Delegate sent a letter to Mr. Fynn advising that Ms. Keen still wished to purse her complaint against the Employer and that "the issue at stake was whether Ms. Keen had received the termination notice she was entitled to". The Delegate advised Mr. Fynn to review the Employment Standards Branch website and particularly sections 63 and 97 of the *Act*. With respect to this letter, Mr. Fynn says, "If I received [it], I have been unable to locate it."

29. On June 29, the Delegate sent the Employer a Demand for Employer Records. By letter dated July 18, 2007 (the "July 18 Letter"), Mr. Fynn wrote to the Delegate on behalf of the Employer, as follows (in part):

> . . . the CLAUS management went out of their way to confirm all employees would be offered continuous employment with them, that there would be no interruption of their employ and that anybody wishing termination/severance pay from Kootenay Uniform & Linen Ltd. would have to reapply for their position and that their rehire by CLAUS would, in no way, be guaranteed. The fact that Ms. Keen accepted the terms of condition of rehire with CLAUS was clearly stated on her R.O.E. that "continuous employment accepted with new employer." We are, in now [*sic*] way, prepared to accept any responsibility for Ms. Keen's subsequent termination for just cause, by CLAUS, after accepting re-employment on this [*sic*] clearly stated conditions. To us it appears very back to front that she could accept being "rehired" – she was told unconditionally several times about these conditions – by the new owners and still be entitled to any form of severance from her previous employers. If she had asked for severance from Kootenay Uniform & Linen Ltd. it is entirely possible she would not of [*sic*] been rehired by the new owner (CLAUS) as her position would have been advertised.

30. On August 30, 2007, the Delegate issued the Determination.

31. The question that must be answered is whether the notice of the case against the Employer and the resulting opportunity to respond were insufficient to the extent that a breach of the principles of natural justice occurred. In this context, section 77 of the *Act*, which requires that the Director "...make reasonable efforts to give a person under investigation an opportunity to respond", merits consideration. The Tribunal dealt with this issue recently in *Inshalla Contracting Ltd*., BC EST # RD054/06:

> In the case of investigations under the Employment Standards *Act* the duty of fairness will almost invariably require notice to the employer and employee. The general principle is that notice must be adequate in all the circumstances in order to afford those concerned a reasonable opportunity to present evidence and argument, and to respond to the position of the other party. . . .

32. Was the notice to the Employer about the Kootenay Uniform complaint adequate to give it a reasonable opportunity to respond? I find that in all the circumstances, it was adequate. The Employer acknowledges receiving, at minimum, the Kootenay Uniform complaint and the Demand for Employer Records. The timing and content of the March 10 Letter suggests that Mr. Fynn received some notice of the Kootenay Uniform complaint before writing it; it appears likely that the March 10 letter was in response to the information given to Mr. Fynn in the March 1 conversation with the Employment Standards Officer. Both the March 10 and the July 18 Letters show the Employer to be responding to a potential liability for severance pay arising out of the termination of Ms. Keen's employment in October 2006. The timing and the content Employer's responses demonstrate that the Employer understood the nature of the Kootenay Uniform complaint and had a reasonable opportunity to present evidence and argument in response.

33. Mr. Fynn also argues that the Employer was denied natural justice because it missed an opportunity to gather evidence due to inadequate notice of the complaint. He says that in his capacity as Area Manager for Canadian Linen, he was provided with evidence regarding Ms. Keen's "moonlighting" work for one of Canadian Linen's customers. He suggests by the time he understood the full import of the Kootenay Uniform complaint, it was too late to obtain similar evidence from the same customer relating to the period before October 2006 (i.e. when Ms. Keen worked for the Employer). He also suggests that had he known about the Kootenay Uniform complaint before the April 4 mediation session regarding the Canadian Linen complaint, he could have tried to resolve the Kootenay Uniform complaint using the information he obtained and used to resolve the Canadian Linen complaint.

34. In response, the Delegate says that even if the Employer had obtained evidence of just cause to dismiss Ms. Keen, it would have been "after-acquired cause" and would not have been useful to justify termination of employment in any event. I agree with the Delegate. Tribunal jurisprudence is clear that employers may not avoid giving compensation for length of service by using evidence of just cause that was acquired after the employee was given notice of termination of employment: *Academy of Learning*, BC EST #D138/00; *BNW Travel Management Ltd.* BC EST #D170/04.

35. Finally, Mr. Fynn says that because of his role with Canadian Linen, he felt his loyalties were divided when dealing with the Kootenay Uniform complaint and therefore informed the Delegate that Wendy Fynn would be representing the Employer. Although the submissions are not clear on this point, this communication appears to have taken place some time after the July 18 Letter. Mr. Fynn says that the Delegate did not contact Ms. Fynn before making the Determination, and as a result the Employer was not given a full opportunity to respond. My view is that the Employer had a full opportunity to respond to the issues raised in the complaint throughout the investigation. The March 10 and July 18 Letters show that the Employer took advantage of the opportunity. If the Delegate had needed more information from

the parties, he could have contacted the parties; however, it appears that the Delegate believed he had sufficient evidence before him to make a Determination, and proceeded to do so.

36. I find that the Employer has not shown that the Delegate erred in law or failed to observe the principles of natural justice in making the Determination. I dismiss the Employer's appeal.

ORDER

37. Pursuant to Section 115 of the *Act*, I order that the Determination dated August 30, 2007 be confirmed in the amount of $2279.54, together with any interest that has accrued under Section 88 of the *Act*.

Yuki Matsuno
Member
Employment Standards Tribunal