EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act R.S.B.C. 1996, C.113

- by -

Microb Resources Inc. operating as
Salt Spring Island Roasting Company

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Frank A. V. Falzon

FILE No: 1999/517

DATE OF DECISION: March 30, 2000

DECISION

OVERVIEW

Is an employee, who quits her job less than 13 weeks after experiencing a more than 50% weekly wage reduction because reduced hours of work, entitled to termination pay under the *Employment Standards Act* ? That is the interesting question raised in this employer appeal from the Director's July 13, 1999 Determination that answered this question in the affirmative.

For the record, I confirm that the employer filed his appeal outside the time specified for appeals as of right. He application for leave to file a late appeal was opposed. On October 19, 1999, another adjudicator granted leave to appeal pursuant to s. 109(1)(b) of the *Act*.

The Determination in question found the employee entitled to a series of benefits under the *Act*. The employer's appeal is limited to that portion of the Determination dealing with the question of termination pay.

BACKGROUND

The employee was a cook hired by the employer in March, 1997 to work at its Salt Spring Island Café. While there was no promise of guaranteed hours, she worked on a full time basis for the better part of two years.

In February, 1999, the employer cut her hours. The basis for that decision was described as follows in the Determination (p. 3):

> [The employer] indicated that he met a consultant and his bank manager who indicated to him that he had to review his business practices and get the costs under control. He said that he cut [the employee's] hours of work, not with the intention of having her leave his employment but to do something that might help. He said that at the same time he increased the hours of work of another employee by the name of Cameron. He indicated that he switched the positions of these two individuals. He said that he wanted to give Cameron's methods a chance and see how things worked out. He said that it was really not his intentions [sic] to do it cheaper, but he had to reduce labour costs. [The employer] said that [the employee] was a great person. [The employee] stated that she felt that it was a money issue. She felt that Cameron's wages were approximately $2.00 less per hour than hers and that by putting him in that position with the hours that she used to work the terms and conditions of her employment were changed.

The employer and the employee both appeared at the Tribunal hearing. The employer confirmed that he switched the positions of the employee and Cameron on a trial basis

based on his assessment that Cameron appeared able to work faster and was at the same wage rate the employee had started at. After the "switch", the employee began actively seeking other employment to fill the gaps in her reduced hours.

In late March or early April, 2000, Cameron gave notice of his intention to quit. The employee waited a week or so to determine whether the employer would offer her more hours. This did not come to pass. On April 15, 1999, she quit her employment. As the Director's delegate emphasized and as was not contested at the hearing, the economic reasons for the employee's decision were entirely reasonable and understandable. The question under the *Act* is whether the circumstances give rise to a right to statutory benefits for termination pay.

THE DETERMINATION UNDER APPEAL

The employee filed her employment standards complaint on March 18, 1999, just a few weeks before she quit. Those parts of the Determination which upheld the complaint as it relates to overtime pay, minimum daily pay, statutory holiday pay and an improper $25 charge for a lost key have not been appealed.

On the issue of termination pay, the Determination noted that the employee's hours were drastically reduced and relied on s. 66 of the *Act* which provides as follows:

> 66. If a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated.

The Determination addresses this issue as follows:

> I find that there was a substantial alteration of the conditions of employment…. The concern that was before me was the length of time [the employee] continued to work at the reduced earnings before quitting. I reviewed all the information provided to me in my investigation and from that information have accepted the time period as acceptable. I believe that it is not unrealistic for [the employee] to continue to work in the hope that the employer will review Cameron's performance and reinstate her into the position including the hours that she previously had. [The employee] finally made the decision to quit. Had [the employee] waited an additional 5 weeks at the reduced earnings the Act itself would have considered her terminated.
>
> The Act defines a temporary layoff as a layoff of up to 13 weeks in any period of 20 consecutive weeks. As I mentioned above a week of layoff is a week in which the employee earns less than 50% of the employee's weekly wage averaged over the previous 8 weeks.
>
> An additional purpose of the Act is to promote the fair treatment of employees and employers. The Act allows the employer to temporarily lay off an employee

> for a period of up to 13 weeks in any period up to 20 consecutive weeks. The Act does not specifically deal with the issue of the period of time the employee has to decide to stay with the employer under the altered conditions or leave the employer. I believe that it is not unreasonable to allow for a similar period as what the employer has under the definition of temporary layoff.

ANALYSIS

In my opinion, the Director erred in law in relying on s. 66 of the *Act* as providing authority to order termination pay in the circumstances here.

In explaining the basis for my conclusion, it is appropriate at the outset to confirm the fundamental point that the benefit in question is a statutory benefit. The right claimed is one created by and asserted under the *Act*. The Tribunal's task is therefore to determine whether the statute contemplates the benefit ordered by the Director. If the statute, read fairly, does not provide the benefit in question, the remedy is for the Legislature to amend the statute, or for the employee to rely on other remedies, such as those that might exist at common law.

I confirm as well that the Tribunal is not to interpret the statute in a narrow fashion. As the Supreme Court of Canada has made clear in *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, employment standards legislation must be read in a "broad and generous manner" (para. 36), in accordance with s. 8 of the *Interpretation Act* and in accordance with the following passage from Driedger's second edition on the *Construction of Statutes*:

> Today there is only one principle or approach, namely, that the words of Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

The Court's cautions all reinforce the duty to interpret the legislation with the greatest possible fidelity to the intention of the Legislature.

The subject of "termination of employment" is addressed in Part 8 of the *Act*.

Briefly, an employer who fires an employee is subject to graduating statutory liability to compensate that employee based on length of service, starting with one week's wages for an employee on the job for 3 consecutive months, extending to liability for 8 weeks' wages for employees employed for 11 or more years: s. 63(2). This statutory liability is discharged if the employee is given proper written notice of termination, or a combination of money and notice. The longer the employee has been working, the greater the required period of notice: s. 63(3).

Significantly, the Legislature has also made the policy decision that the statutory liability

is discharged if the employee "terminates the employment, retires from employment or is dismissed for just cause": s. 63(3)(d). The Legislature has in this instance struck the balance between employers and employees by stating that people who voluntarily leave their employment are not entitled to termination pay. The Legislature did not see fit to include any grounds whereby it might be reasonable to quit and still receive termination pay, but it does confer on the Director the discretion to effectively "deem" an employee terminated "if a condition of employment has been substantially altered": s. 66.

Where does all this leave the "laid off" employee? Significantly for the issue arising on this appeal, the "laid off" employee has been given special attention by the Legislature. That the Legislature has done so is not surprising. Especially in the non-union sector, laid off employees can find themselves in the "nether world" of having neither been fired nor having quit. To provide some degree of certainty for both employees and employers, the Legislature has enacted special rules to govern them.

Section 1(1) of the Act says this:

> "termination of employment" includes a layoff other than a temporary layoff.

This definition makes clear the Legislature's policy judgment that a laid off employee is deemed to be terminated, *unless the person is on "temporary layoff".* The *Act* then specifically defines "temporary layoff":

> "temporary layoff" means:
>
> (a) in the case of an employee who has a right of recall, a layoff that exceeds the specified period within which the employee is entitled to be recalled to employment, and
> (b) *in any other case, a layoff of up to 13 weeks in any period of 20 consecutive weeks*.

The italicized words make clear that an employee laid off for less than 13 of 20 consecutive weeks is on temporary layoff. Such person is not considered terminated under the *Act*.

The decision to use 13 of 20 consecutive weeks as the measure for temporary layoff reflects yet another legislative judgment regarding the appropriate balance between employee entitlements and employer obligations under the *Act*.

Section 1 of the Act does not define "layoff". However, there is a special definition for Part 8 – the very part of the *Act* dealing with termination benefits:

> 62. In this Part, "week of layoff" means a week in which an employee earns less than 50% of the employee's weekly wages, at the regular wage, averaged over the previous 8 weeks.

Section 62 is yet another example of a balance that the Legislature has struck between employers and employees. Section 62 creates the legal reality whereby a week of layoff is not limited to the employee who is told to go home because there is no more work. Under s. 62, employees whose hours at the regular wage are cut back may be laid off even while they continue to work. Where an employee earns less than half their regular weekly wages (averaged over the previous 8 weeks), they are on a week of layoff even though they are still working "part time".

When one reads s. 62 with the definition of "temporary layoff", it is crystal clear that the employee whose hours are cut back more than 50% for one week will be in exactly the same legal position as the person who was sent home for the week. Both are on a "week of layoff". Where the layoff continues for up to 13 weeks in any 20 consecutive week period, the layoff is temporary and no statutory termination is recognized. However, where that 13 week threshold is crossed, the person is deemed terminated, and entitled to termination pay, even while they continue to work part time.

Clearly, these provisions, which extend lay off status beyond employees sent home with zero hours, were designed to be generous and fair to employees. Like all such provisions, however, the legislature was required to draw a line somewhere. Just as the employee who is required to stay at home must wait 13 weeks before being deemed terminated (no longer on temporary layoff), the same is true of the employee whose layoff derives from a reduction in hours. The Legislature clearly did not intend, and it would be patently unfair, that the employee whose weekly hours were reduced should be in any better position regarding termination pay than the employee with no hours at all. Indeed, the Director expressly stated at the hearing that, as the Director administers the *Act*, the employee with no work at all is not entitled to termination pay unless and until the 13 weeks expires. If the employee quits before that time, there is no entitlement to termination pay.

In the present case, it is common ground that the employee found herself laid off for less than 13 of 20 consecutive weeks before she decided to quit. Under the provisions just described, the employer was not obliged to pay termination pay.

In the Determination, the Director posed the question how long it was reasonable for the employee to continue working at the reduced wage before quitting. From the perspective of her entitlement to termination pay, the answer to that question is provided by the legislation itself.

Within this context, was it legally correct for the Director to base the Determination on s. 66 of the Act ? For convenient reference, s. 66 is repeated below:

> 66. If a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated.

The Director argues that, notwithstanding the provisions above, the employee's conditions of employment were substantially altered. The *Act* defines "conditions of employment" as meaning "all matters and circumstances that in any way affect the employment relationship of employers and employees": s. 1(1). This Tribunal has previously held that a change in hours of work can fall within this definition: *Re JB's Bagatelle Ltd.*, [1999] B.C.E.S.T.D. Nos. 33 and 34; *Re Ballendine*, [1997] B.C.E.S.T.D. No. 30.

In the *Bagatelle* decisions, the Tribunal approved the use of s. 66 to cases where hours of work in the case of long term employees were reduced by exactly 50% and just over 50%. On the facts as set out by the Adjudicator in those cases, it does not appear that s. 62 of the *Act* was argued, or even applicable, since a "layoff" is triggered only where the wage reduction is less than 50%. I leave to future Panels the question whether or when s. 66 ought to be applicable to employees whose hours exceed the layoff threshold in the *Act*.

In *Re Ballendine*, the Tribunal did have to confront the question of how to reconcile s. 66 and s. 62. In that case, an employee relied on s. 66 to claim termination pay when his hours were cut as a result of another employee being hired. The employee quit his job before the 13 week period expired. The Adjudicator said this:

> The only factor which may be relevant in this case is the change of hours….
>
> It may appear unfair to Ballendine that, during a work shortage, as an employee of Trojan for some 16 years, he was expected to share work with a new, and perhaps junior employee. Nevertheless, there is no obligation under the Act for the employer to offer him the right of first refusal based on his length of service with the company, and Docherty's failure to do so cannot be considered an adverse change to Ballendine's employment conditions. I am satisfied that Ballendine was aware of the work shortage and in fact that he was on layoff status….
>
> Temporary layoff is defined in Section 1 as a layoff up to 13 weeks in any period of 20 consecutive weeks. The provision enables employers to lay off employees for a period without terminating them. It is designed to give some flexibility to employers in their determination of the individual workers who will be affected by the reduction in the employer's operations (see M. Thompson, Rights and Responsibilities in a Changing Workplace: A Review of Employment Standards

> in British Columbia, at p. 150). I am satisfied that Ballendine was on lay off as of July 10. Had he been on layoff status for greater than 13 weeks, termination would have been deemed, entitling him to severance pay. Ballendine advised Trojan that he had obtained full time employment on August 6, within the 13 week period. As a consequence, he is not entitled to compensation in lieu of notice.

I agree with the approach taken in *Re Ballendine*, and reflected in other decisions such as *Re Hunter*, [1998] B.C.E.S.T.D. No. 574.

In my opinion, the Legislature has, in ss. 1, 62 and 63 of the *Act*, created a comprehensive code which sets out a careful balance between the interests of employers and laid off employees. As a matter of statutory construction, the general discretion in s. 66 cannot be construed to override the *Act*'s detailed and specific determination regarding who is on a week of layoff, and its clear direction that a temporary layoff is not the termination of employment. This is a clear case for the application of the principle *generalia specialibus non derogant*, also known as the "implied exception" principle: Sullivan, *Driedger on the Construction of Statutes* (1994, 3d ed.), pp. 186-188.

Like all good principles of statutory interpretation, the application of this principle supports the fundamental policy intent of the legislature. Part 8 recognizes an enhanced group of people who are deemed to be laid off. It has deemed all persons in that group to be terminated, and therefore entitled to termination pay, where their wages decrease by more than 50% over a 13 out of 20 week period. In exchange, employers who lay off employees retain that 13 weeks to re-organize their businesses without constantly triggering obligations to pay termination pay. In this context, to recognize a director's discretionary "override" under s. 66 to deem any temporarily laid off employee whose hours have been reduced as being terminated would upset this careful legislative balance and limit the ability of employers to organize their affairs, contrary to the intent of the section. It would also be unfair to those employees with no hours, whose conditions of employment have also arguably been "substantially altered" but respecting whom the Director, quite correctly, does not see s. 66 applying.

In submissions made subsequent to the July 13, 1999 Determination (for the first time in December, 1999), the Director advanced the suggestion that s. 66 was also triggered by the reduction in "status" in the employee being switched from the lead cook to a part time cook. This argument, which was not mentioned in the Determination under appeal, was not pressed at the hearing. Even if I were to consider a new rationale advanced so late in the day, I am not satisfied that the mere change in functions satisfied the s. 66 standard in this case, particularly given the nature of the employment, the fact that the employment contract never involved guaranteed hours, and the fact that the "switch" was originally on a trial basis.

I close this discussion by recognizing that while I regard the case before me, which involves a reduction in hours at the regular wage, as being legally clear, different issues may arise regarding

the applicability of s. 66 where a reduction in the weekly wage is wholly or partly attributable to a decrease in the hourly wage (note the reference to the "regular wage" in s. 62 and see *Canwest Countertops Ltd*., [1999] B.C.E.S.T.D. No. 20) or where other conditions of employment have changed substantially. Interesting questions may also arise regarding whether or when s. 66 may be used for employees whose hours are reduced, but not to the point where they are considered laid off.

ORDER

I have concluded that the employee here was clearly under a period of temporary layoff when she terminated her employment. The employee terminated her employment prior to the expiry of 12 weeks of temporary layoff. In those circumstances, and for the reasons given above, her quit discharged the employer's liability to pay compensation in lieu of notice under s. 63.

In the result, I order that the Determination under appeal be cancelled to the extent that it ordered the employer to pay termination pay under s.63 of the *Act*.

FRANK A. V. FALZON

Frank A. V. Falzon
Adjudicator
Employment Standards Tribunal