Employment Standards TRIBUNAL

An appeal

- by -

Peoples Wholesale Inc.
("Peoples")

- 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: David B. Stevenson

FILE No.: 2001/18

DATE OF HEARING: March 29, 2001

DATE OF DECISION: April 11, 2001

DECISION

APPEARANCES:

on behalf of Peoples Wholesale Inc.	Clarence Moore
on behalf of the individuals	Janet Biller Stephanie Perrault

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by Peoples Wholesale Inc. ("Peoples") of a Determination that was issued on November 27, 2000 by a delegate of the Director of Employment Standards (the "delegate"). The Determination concluded that Peoples had contravened Part 8, Section 63 of the *Act* in respect of the employment of Janet Biller ("Biller") and Stephanie Perrault ("Perrault") and ordered Peoples to cease contravening and to comply with the *Act* and to pay an amount of $5,412.30.

Peoples says the circumstances in which Biller and Perrault were given their notices of termination and the events which followed their request for severance pay did not justify either the conclusion that Peoples had contravened the *Act* or an order requiring Peoples to pay the individuals the amount of $5,412.30

ISSUE

The issue raised in the appeal is whether Peoples has shown the Determination was wrong.

PRELIMINARY ISSUE

Peoples raised a preliminary request at the hearing to have each of the individuals excluded from the hearing room while the other gave evidence. The concern that Mr, Moore expressed was that one might hear the answer given by the other and adjust her evidence accordingly. I did not grant that request and gave reasons for the decision at the time. Mr. Moore, appearing on behalf of Peoples asked that I provide my reasons in this decision and I said I would. Simply put, my decision was based on an application of the statutory objective stated in Section 2(d) of the *Act*, to provide "fair and efficient procedures for resolving disputes", and an application of principles of natural justice, which require that each party have a full opportunity to present their evidence and have an opportunity to meet the case presented against him or her. It would be a denial of fair hearing and consequently a breach of the rules of natural justice to exclude a party from hearing evidence that could potentially prejudice their position before the Tribunal and which, not having heard, they would not have a full opportunity to meet. I am also guided in my conclusion by the general rule applied in the Courts that parties to an action are entitled to be present at all stages of the proceedings unless good cause is shown for exclusion. In *Bird et al. v. Vieth et al.* (1899), 7 B.C.R. 81 at p. 82, Chief Justice McColl, speaking for the full court, said:

> In our judgment the parties to an action have the right to be present during the trial, unless some good reason is shown why any of them should be excluded, and the mere circumstance that these defendants would, or might, be called as witnesses did not entitle the plaintiffs to require their exclusion. It is sufficient for the disposition of this appeal that no reason whatever was even suggested for the exclusion, other than the plaintiff's supposed right to call for it.

In this case, no good reason was shown to exclude the individuals.

I would also note that the Tribunal has the authority to conduct an appeal in the manner it considers necessary, which includes the authority to control its own process. The Tribunal undoubtedly has authority to exclude a party from the hearing room and may do so in the face of gross or contemptuous misconduct, or for equally grave causes, but nothing of that sort was present in this case.

THE FACTS

There was little argument on the facts of this case. Biller worked for Peoples from May of 1988 to November 8, 1999 and Perrault worked for Peoples from September of 1987 to November 8, 1999.

Mr. Moore, appearing for Peoples, provided an overview of the situation facing Peoples in late 1999 which led to the termination of the individuals. While addressing the situation in a less specific way, the Determination described the circumstances as follows:

> Peoples was having to make some basic changes to their operations as a result of a downturn in business.

I was told that the "basic changes" described in the above passage required Peoples to reduce the number of total hours worked by employees at Peoples by a significant amount. It was perceived by Peoples that one way of accomplishing the reduction of hours was to "drastically" cut back the hours of work for each of the employees. It was also perceived that if some of the employees chose not to accept the reduction in hours and left their employment at Peoples, there would be less need to reduce the hours of work of the remaining employees. To that end, it was decided to offer some employees the option of taking reduced hours or being permanently laid off. Biller and Perrault were given that option. As noted in the Determination, Biller had averaged 35.62 hours of work a week over the 52 weeks preceding November 8, 1999 and Perrault had averaged 31 hours a week over the same period.

There was no disagreement that Biller and Perrault were given the two options: to have their hours reduced to 1 or 2 days a week or to be permanently laid off. Each was provided that option during a meeting with Gordie Browne, the store's manager at the time, in the morning on November 8, 1999. Mr. Browne did not testify and I accept the evidence of Biller and Perrault about what transpired during their meeting with Mr. Browne.

Suffice to say, both Biller and Perrault chose to be laid off and each were given a letter, the body of which said:

> As of the date of this letter you are hereby given 8 weeks notice that your services are no longer required by this company.

Both individuals were, however, told to leave the store right away. Biller asked if she could work until the end of the week and was told she could not; she also asked if she could work out the balance of the day and was given the same answer. On November 8, 1999 neither individual was given the option of working out the 8 week notice period without alteration of any condition of employment.

The conclusion made in the Determination was that Biller and Perrault were terminated effective November 8, 1999 and were entitled to length of service compensation on either of two analyses: first, on the basis that a reduction in their hours of work from 4-5 shifts a week to 1-2 shifts a week was a substantial alteration in a condition of employment, which under Section 66 was determined by the Director to be a termination; or on the basis that the individuals were not allowed to work out the notice period contained in the letter.

On November 15, 1999, Biller and Perrault each delivered a letter to Peoples requesting "severance pay". One of the matters raised in this appeal arose from the contention that following receipt of the letters from the individuals, Peoples communicated with representatives of the Director, and were told the employees could be called back to work out the balance of their notice period. On or about November 15, 1999, Mr. Browne sent each individual a letter, which stated, in part:

> . . . it would appear that you have changed you mind, that's fine please come in I am sure there is something we can work out.

Biller said she never received the letter addressed to her. Perrault received her letter on November 18, 1999 and also received a telephone call from Mr. Browne asking her to return to work. She declined the invitations in both communications.

ARGUMENT AND ANALYSIS

Peoples first argued that some effect should be given to the fact that the individuals chose to permanent lay-off over a reduction in hours of work, mainly, it was suggested, because taking an immediate termination allowed higher EI benefits than would be available if they continued working at reduced hours. In my view, that argument is irrelevant to a consideration of the individuals' entitlement to length of service compensation in light of the conclusion in the Determination that, under Section 66 of the *Act*, the proposed reduction in the individuals hours was a termination for the purposes of the *Act* and gave rise to the same rights and obligations under Section 63 as a permanent lay-off.

The second argument raised by Peoples was that the employees were asked to return to work out the balance of the notice period and either failed or refused to do so. The difficulty with that argument is that the Determination specifically concludes the individuals were terminated on November 8, 1999. There was ample support for that conclusion in the Determination, in the material on file and in the evidence I received at the hearing. In other words, there is no basis for concluding that finding was wrong. Subsection 63(4) states, in part:

63. (4) The amount the employer is liable to pay becomes payable on termination of the employment and is calculated by . . .

On November 8, 1999, the individuals' right to length of service compensation provided in Section 63 had crystallized and vested in each of the individuals. Peoples could not divest the individuals of that right through the vehicle of requesting the individuals to return to work on November 15, 1999. There is no obligation in the *Act* requiring an employee to return employment with an employer following termination. This was not a case of a temporary lay-off where the laid off employee has been called back to work within the period described in the definition of temporary lay-off in Section 1 of the *Act*. The conduct of Peoples on November 8, 1999 quite clearly evidenced an intention on their part to end the employment relationship as of that date. The Record of Employment issued to each of the employees indicated that both were "not returning". I find the following comment of the Director in the Determination to be accurate and appropriate:

> . . . the act of termination . . . cannot be undone simply because the Employer suddenly realized they face some financial liability.

Peoples also asserted that both individuals planned to quit Peoples in January 2000 in any event and argued their entitlement to length of service compensation should take that fact into consideration. Both individuals denied any such intention. There are two answers to this matter. First, it is not relevant to the issue raised in this appeal. Second, even if it was relevant, I can find no evidence to support the assertion.

Finally, Peoples raised some concern over the wording of the Determination which indicated that the Determination may be filed in the Supreme Court of British Columbia and enforced through collection proceedings. That is not a proper matter for appeal. I also note that the Director has provided an explanation for that wording in a letter dated January 4, 2001, addressed to Mr. Moore which I trust has alleviated his concern.

For the above reasons, the appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination, dated November 27, 2000, in the amount of $5,412.30, be confirmed, together with any interest that has accrued pursuant to Section 88 of the *Act*.

DAVID B. STEVENSON

David B. Stevenson
Adjudicator
Employment Standards Tribunal