Employment Standards TRIBUNAL

An appeal

- by -

Lorna de Zilva
("de Zilva")

- 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: Carol L. Roberts

FILE No.: 2002/082

DATE OF DECISION: May 8, 2002

DECISION

OVERVIEW

This is a decision based on written submissions by Lorna de Zilva, Brenda M. Wanner on behalf of TRS Staffing Solutions (Canada) Inc. ("TRS") and Murray Superle on behalf of the Director of Employment Standards.

OVERVIEW

This is an appeal by Lorna de Zilva, pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued February 1, 2002. Ms. de Zilva filed a complaint with the Director alleging that TRS failed to pay her compensation for length of service contrary to Section 63 of the *Act*. The delegate found no contravention of the *Act*, and closed the file.

ISSUE TO BE DECIDED

Whether the Director erred in determining that Ms. de Zilva was not entitled to compensation for length of service.

FACTS

For the purposes of this appeal, the relevant facts are as follows. Ms. de Zilva commenced employment with the Vancouver office of TRS, a recruiting business, as a staffing consultant on February 6, 1995. Prior to that date, Ms. de Zilva worked for Fluor Daniel Ltd., the parent company of TRS, and carried over benefits from that position.

On October 1, 1998, TRS offered Ms. de Zilva a position as a staffing co-ordinator in its Calgary office, because its Vancouver operations were slowing down. That same day, Ms. de Zilva became disabled. She received short term, and then long term, disability benefits. Ms.de Zilva remained on sick leave until her benefits expired on January 31, 2001. There is no evidence Ms. de Zilva was able to return to work.

On June 16, 1999, Ms. de Zilva wrote to TRS seeking information as to the position, salary and office location she would be returning to at the end of her disability leave.

On June 18, 1999, TRS advised Ms. de Zilva that the Vancouver office of TRS had been closed, and that all of its full-time employees had been given two weeks' notice and severance payment. The letter further advised Ms. de Zilva that, upon being notified of her ability to return to work, TRS would give her one week notice of termination for every year of service from March 1990.

Ms. de Zilva did not respond to that letter in writing. However, she says that when she removed her personal possessions from the Vancouver office in June, 1999, she told TRS that she could not move to Calgary.

On February 6, 2001, TRS sent Ms. de Zilva a letter indicating that her employment was terminated on January 30, 2001.

On February 21, 2001, TRS's regional manager, Sheila Gordon, wrote to Ms. de Zilva confirming that TRS's letter of June 18, 1999 constituted notice of the closure of the Vancouver office. She stated that, had Ms. de Zilva been able to return to work, she would have been entitled to 9 weeks severance pay, but that Ms. de Zilva's eligibility for severance had expired during her disability leave.

The Delegate determined that the letter of June 18 did not constitute notice of termination. In his view, the letter merely set out what would transpire in the event Ms. de Zilva was to return to work.

The Delegate determined that, as of January 30, 2001, TRS had no indication from Ms. de Zilva that she was able to return to work, and concluded that Ms. de Zilva was unable to fulfil the contract of employment. The Delegate found that TRS decided to end Ms. de Zilva's employment because she was unable to return to active employment for over two years, and thus, by virtue of section 65(4)(d), no compensation for length of service was owed.

ARGUMENT

Ms. de Zilva contends that, if the letter of June 1999 constituted notice, it had no effect since it coincided with a period of time in which she was unavailable for work due to medical reasons, according to s. 67(1)(a) of the *Act*. She submits that her failure to advise TRS in writing that she would not move to the Calgary office should not deprive her of her right to compensation on severance.

TRS argues that Ms. de Zilva did not respond to the offer of alternate employment in Calgary, and never returned to work at any time. It contends that Ms. de Zilva obtained long term disability benefits for two years that she would not have received had she been terminated, and that notice could not have been given since Ms. de Zilva did not return to work.

The Delegate argues that the Determination should be upheld.

ANALYSIS

The burden of establishing that a Determination is incorrect rests with an Appellant. On the evidence presented, I am unable to find that burden has been met.

Section 63 of the *Act* sets out an employer's liability for compensation for length of service.

Section 65 (1) provides that section 63 does not apply to an employee

> (d) employed under an employment contract that is impossible to perform due to an unforeseeable event or circumstance other than...

Section 67 provides that a notice given to an employee [under part eight] has no effect if

> (a) the notice period coincides with a period during which the employee is ...unavailable for work due to... medical reason.

In *Mohammed Khan* (BC EST # D067/01), the Tribunal examined the provisions of s. 63, 65 and 67 in a situation similar to Ms. de Zilva's. Mr. Khan became permanently disabled as a result of a workplace injury, and was unable to return to his pre-injury job. The Tribunal held that the employer was not obligated to give notice of termination by virtue of the operation of s. 65 and 66. In arriving at this conclusion, the Tribunal said this about section 67(1):

> The *Act* speaks to notice periods which coincide with periods when the employee is "unavailable" for work". The words "annual vacation, leave, strike or lockout" all denote temporary circumstances. The words "medical reason" are not defined in the Act. In my view, considering the context of the words in the *Act*, "medical reason" must mean a medical reason of a temporary nature or at best a medical reason which is "indeterminate". The legislature could not have intended "a permanent medical disability which prevents an employee from resuming employment" to give rise to an entitlement to compensation for length of service. If the legislature intended, as a minimum standard that permanently disabled employees, unable to return to their pre-injury job, would have an entitlement to a severance package from the employer, one would expect this minimum standard to be clearly expressed within the *Act*. ...The *Act* was intended to prevent employers from terminating employees because they were off work temporarily for medical reasons. The *Act* was not intended to give a permanently disabled employee compensation and preferential treatment, in a "cease operations"' situation because of the disability.

The Tribunal found that Mr. Khan was incapable of performing the contract of employment, through no fault of his own or of his employer. Among other things, the Tribunal found that the employer was not required to pay Mr. Khan compensation for length of service because the performance of the contract was impossible under s. 65(1)(d):

In my view, the disability in this case does amount to a contract impossible to perform due to an unforeseeable event, and therefore the employer was not required to give notice of termination of employment.

I find little to differentiate the facts of this case to that of Khan. Ms. de Zilva received disability benefits for over two years. There is no evidence she is able to return to work. In the words of the Tribunal in *Khan*, the *Act* was not intended to give Ms. de Zilva preferential treatment by way of compensation for two years as well as severance, because of her disability. If it were otherwise, TRS would not be able to give notice to Ms. de Zilva at any time while she remains unavailable for work for medical reasons. It would be absurd to conclude that, if Ms. de Zilva is suffering from a long term disability, TRS is prevented from ever giving her notice, for any reason.

ORDER

I Order, pursuant to Section 115 of the *Act*, that the Determination dated February 1, 2002 be confirmed.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal