Employment Standards TRIBUNAL

An appeal

- by -

538592 B.C. Ltd. operating as Sweet Pea Produce
("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

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 2002/023

DATE OF HEARING: May 15, 2002

DATE OF DECISION: May 23, 2002

DECISION

APPEARANCES:

Fred Popowich, Director & Officer	on behalf of 568592 B.C. Ltd.
Anna Burgess	on her own behalf

OVERVIEW

This is an appeal filed by 568592 B.C. Ltd. formerly operating as "Sweet Pea Produce" (the "Employer") pursuant to section 112 of the *Employment Standards Act* (the "*Act*"). The Employer appeals a Determination issued by a delegate of the Director of Employment Standards (the "Director") on January 2nd, 2002 (the "Determination") pursuant to which the Employer was ordered to pay its former employee, Anna Burgess ("Burgess"), the sum of $768.15 on account of 2 weeks' wages as compensation for length of service (see section 63 of the *Act*) together with concomitant vacation pay and section 88 interest.

This appeal was heard at the Tribunal's offices in Vancouver on May 15th, 2002 at which time I heard the testimony of Mr. Fred Popowich (the Employer's principal) on behalf of the Employer and Ms. Burgess on her own behalf. No one appeared at the appeal hearing on behalf of the Director. In addition to the witnesses' testimony, I have also considered the various documents and submissions submitted by the parties to the Tribunal.

ISSUES ON APPEAL

While acknowledging that there was no just cause for termination, and that Ms. Burgess did not receive 2 weeks' written notice, the Employer says that Ms. Burgess was not entitled to any compensation for length of service by reason of various provisions contained in section 65 of the *Act*.

Subsections 65(1) to (3) are reproduced below [subsection (4), dealing with group terminations, is not relevant here]:

> Exceptions
>
> 65 (1) Sections 63 and 64 do not apply to an employee
>
> (a) employed under an arrangement by which
>
> (i) the employer may request the employee to come to work at any time for a temporary period, and
>
> (ii) the employee has the option of accepting or rejecting one or more of the temporary periods,
>
> (b) employed for a definite term,
>
> (c) employed for specific work to be completed in a period of up to 12 months,

(d) employed under an employment contract that is impossible to perform due to an unforeseeable event or circumstance other than receivership, action under section 427 of the Bank Act (Canada) or a proceeding under an insolvency Act,

(e) employed at a construction site by an employer whose principal business is construction, or

(f) who has been offered and has refused reasonable alternative employment by the employer.

(2) If an employee who is employed for a definite term or specific work continues to be employed for at least 3 months after completing the definite term or specific work, the employment is

(a) deemed not to be for a definite term or specific work, and

(b) deemed to have started at the beginning of the definite term or specific work.

(3) Section 63 does not apply to

(a) a teacher employed by a board of school trustees, or

(b) an employee covered by a collective agreement who

(i) is employed in a seasonal industry in which the practice is to lay off employees every year and to call them back to work,

(ii) was notified on being hired by the employer that the employee might be laid off and called back to work, and

(iii) is laid off or terminated as a result of the normal seasonal reduction, suspension or closure of an operation.

FINDINGS AND ANALYSIS

Background Facts

For the most part, the relevant facts are not in dispute. The Employer formerly operated a small fresh produce retail market in Coquitlam. Ms. Burgess was not a "casual employee" nor was she hired for a specific term (both of these arguments were raised before the Delegate and properly rejected). Ms. Burgess was employed--under an indefinite contract of employment--as a full-time cashier at the market until her termination on or about July 20th, 2001 when Mr. Popowich (the Employer's principal and key employee) telephoned her and told her not to report for work since the business was being closed.

In the months prior to the closure, the business was listed for sale but as of the date of closure a buyer had not been found. Since the business was only on a month-to-month lease, it was Mr. Popowich's intention to close the business, and sell off the equipment and inventory, if a buyer could not be found. Although Ms. Burgess was aware that the business was listed for sale, and that her employment might not continue in such circumstances, at no time did she ever receive prior written notice of termination.

Indeed, and as noted above, the event that triggered Ms. Burgess' termination was not a sale but rather the closure of the business. The business closure was triggered by a deterioration in the health of Mr. Popowich's mother and the ensuing emotionally difficult family decision that was taken regarding her care.

I now turn to the Employer's arguments regarding section 65.

Section 65 defences

At the outset, I should note that if an employer can bring itself within any of the section 65 exceptions, it need not pay an employee compensation for length of service even though the employee is being dismissed without cause. It is important to note that section 65 establishes "exceptions" to the employer's usual obligation to either give written notice or pay compensation in lieu of notice and, thus, it is incumbent on an employer to bring itself strictly within the statutory language--these exceptions must be narrowly construed (see e.g., *ARFI Holdings Ltd*., BC EST # D054/97; *Covert Farms Ltd*., BC EST # D077/99; Re *Daryl-Evans Mechanical Ltd. et al.,* 2002 BCSC 48).

The Employer asserts that it is entitled to the benefit of section 65(1)(f) of the *Act* since Mr. Popowich offered Ms. Burgess a similar position with another entirely separate company, operating a wholly independent business, that was controlled by other family members. Ms. Burgess rejected this proposal out of hand since it would have involved travelling from Coquitlam to North Vancouver in the midst of a transit strike and in circumstances where she did not have personal transportation available to her. I am of the view that Ms. Burgess did not reject an offer of "reasonable alternative employment" in those circumstances.

Further, and in any event, given that such an offer was made on behalf of an entirely independent employer, section 65(1)(f) has no application. As the 3-person Tribunal panel noted in *Mitchell et al.* (BC EST # D314/97):

> We agree with the Director that section 65(1)(f) of the *Act* is intended to create a defence only in circumstances where the current employer has made an offer of reasonable alternative employment which was not accepted by the employee. On the other hand, if the "third party employer" could be characterized as one and the same as the current employer (say, by reason of a section 95 designation), the section 65(1)(f) defence would govern. (italics in original text)

I should note, simply for the sake of completeness, that the *Mitchell* decision was largely confirmed on reconsideration, however, the reconsideration panel did not address section 65(1)(f) of the *Act*. The above interpretation of section 65(1)(f) was also accepted in *ABM Janitorial Services Company Ltd*. (BC EST # D194/96).

The Employer says that Mr. Popowich's mother's illness (which was an ongoing situation that had persisted for many years) created a situation that triggered the section 65(1)(d) exception because it became impossible for Ms. Burgess' employment contract to be honoured. This argument was rejected--and quite correctly--by the Delegate.

While I do not doubt that Mr. Popowich's mother's illness (and, more particularly, the unsettling family decision that had to be made regarding her care and treatment) created a difficult personal situation for Mr. Popowich, his mother's illness did not, in any conceivable fashion, create a situation such that it was impossible for Ms. Burgess to carry out her duties or for the business to continue beyond July 19th, 2001 (as would, say, a fire that destroyed the employer's premises). Further, I note that the critical care decision regarding the mother was not made until some 6 weeks after Ms. Burgess' employment ended. The notion that the mother's illness rendered the Employer wholly unable to give Ms. Burgess prior

written notice of termination, or made it impossible for Ms. Burgess to continue performing her employment duties, is completely untenable.

Finally, the Employer says that the value of produce that was given to Ms. Burgess when the business was closed ought to be "set off" against the Employer's liability under section 63. First, although Ms. Burgess was given--in what I consider to be a genuine spirit of gratitude for her service to the company--some produce (that might otherwise have spoiled) when the business closed, I do not find that this gift was in lieu of, or given in partial payment for, the Employer's liability under section 63. Second, goods in kind cannot satisfy the section 63 obligation to pay a certain number of weeks' "wages" (see section 1 of the *Act*) as compensation for length of service (see also section 20 of the *Act*).

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of $768.15 together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal