Employment Standards TRIBUNAL

An appeal

- by -

Oriental Interiors Ltd.
("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.: 2002/130

DATE OF HEARING: June 12, 2002

DATE OF DECISION: June 25, 2002

DECISION

APPEARANCES:

Clifford Sihoe, Manager/Director	for Oriental Interiors Ltd.
Sam King Wai Pang	on his own behalf
Bernadette Bruaset	Interpreter (Cantonese)

OVERVIEW

This is an appeal filed by Oriental Interiors Ltd. (the "Employer") pursuant to section 112 of the *Employment Standards Act* (the "*Act*"). The Employer appeals a Determination that was issued by a delegate of the Director of Employment Standards (the "Director") on February 22nd, 2002 (the "Determination"). The Director's delegate determined that the Employer owed its former employee, Sam King Wai Pang ("Pang"), the sum of $4,193.83 (including section 88 interest) on account of 8 weeks' wages as compensation for length of service payable pursuant to the combined effect of sections 63 and 66 of the *Act*.

This appeal was heard at the Tribunal's offices in Vancouver on June 12th, 2002 at which time I heard the testimony of Mr. Clifford Sihoe, on behalf of the Employer, and Mr. Pang (via an interpreter) on his 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 provided by the parties (including the Director) to the Tribunal.

BACKGROUND FACTS

The relevant facts are not in dispute. The Employer operates a retail furniture business. This business has not flourished during the last several years and is now, as recounted by Mr. Sihoe, "in survival mode". Mr. Pang, a long-serving employee (over 10 years), was advised on or about October 31st, 2001 that his working hours would be reduced from 5 days per week (Monday to Friday) to 3 days per week (Thursday, Friday, Saturday) effective the following Monday. Mr. Pang's wage rate at this point was $13 per hour; the Employer's proposal would have resulted in a 40% reduction in his gross income. Quite apart from the pay cut, Mr. Pang was also concerned about working on Saturdays since his wife also worked on that day and he typically cared for their children while his wife was working.

On the Monday, Mr. Pang advised the Employer that the work-week reduction was unacceptable to him and, accordingly, since the Employer was unwilling to allow Mr. Pang to continue to work full-time, he quit.

I am satisfied that the Employer intended to reduce Mr. Pang's work-week due to what it considered to be legitimate business reasons. The reduction was not a disguised attempt to force Mr. Pang to quit. Nevertheless, the reduction was not negotiated--it was unilaterally imposed--and would have resulted, as Mr. Sihoe candidly admitted before me, in a substantial reduction in Mr. Pang's compensation. The

Employer hoped that in due course Mr. Pang's hours could be increased but in late October 2001 the wage reduction was nonnegotiable and for an indefinite period. This was a "take it or leave it" proposal; the Employer may well have hoped that Mr. Pang would continue to work under the new conditions but it was not prepared to continue the status quo.

RELEVANT LEGISATION

This appeal raises issues with respect to sections 63 and 66 of the *Act*, reproduced below:

> Liability resulting from length of service
>
> 63. (1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.
>
> (2) The employer's liability for compensation for length of service increases as follows:
>
> (a) after 12 consecutive months of employment, to an amount equal to 2 weeks' wages;
>
> (b) after 3 consecutive years of employment, to an amount equal to 3 weeks' wages plus one additional week's wages for each additional year of employment, to a maximum of 8 weeks' wages.
>
> (3) The liability is deemed to be discharged if the employee
>
> (a) is given written notice of termination as follows:
>
> (i) one week's notice after 3 consecutive months of employment;
>
> (ii) 2 weeks' notice after 12 consecutive months of employment;
>
> (iii) 3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice;
>
> (b) is given a combination of notice and money equivalent to the amount the employer is liable to pay, or
>
> (c) terminates the employment, retires from employment, or is dismissed for just cause.
>
> (4) The amount the employer is liable to pay becomes payable on termination of the employment and is calculated by
>
> (a) totalling all the employee's weekly wages, at the regular wage, during the last 8 weeks in which the employee worked normal or average hours of work,
>
> (b) dividing the total by 8, and
>
> (c) multiplying the result by the number of weeks' wages the employer is liable to pay.
>
> (5) For the purpose of determining the termination date, the employment of an employee who is laid off for more than a temporary layoff is deemed to have been terminated at the beginning of the layoff.
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> ****
>
> Director may determine employment has been terminated
>
> 66. If a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated.

ISSUES ON APPEAL

The Employer says that Pang is not entitled to any compensation for length of service since he voluntarily resigned his employment [see section 63(3)(c) of the *Act*].

Further, the Employer says that the Tribunal ought to conclude, as did an Employment Insurance Board of Referees panel that Mr. Pang "voluntarily" left his employment (see federal *Employment Insurance Act*, ss. 29 and 30).

In its appeal documents, the Employer also raised the issue of bias on the part of the investigating delegate. This allegation was not advanced at the appeal hearing. Further, the material filed in support of this latter allegation does raise even a prima facie case of bias or reasonable apprehension of bias. This latter ground of appeal is entirely without merit.

I should note that the Employer does not take issue with the delegate's calculations in the event that Mr. Pang is legally entitled to compensation for length of service.

FINDINGS

The Board of Referees' decision

I shall first address the Board of Referees' decision, dated February 21st and issued on February 22nd, 2002. The issue before this latter adjudicative body was whether there was a "voluntary leaving" which would cause Mr. Pang to be indefinitely disqualified from receiving employment insurance benefits. The 3-person board concluded:

> "[Mr. Pang] chose to pack up his things and quit rather than work the reduced work week.
>
> The legal test for voluntary leaving '*is that a claimant must prove he or she had no reasonable alternative to taking leave when they did, having regard to all the circumstances*'.
>
> It is clear that [Mr. Pang] could have remained working the reduced work week until business picked up or he found a full-time job. The employer stated that they wanted [Mr. Pang] to stay and in fact, they would like him to return to work for them...
>
> The appeal on the issue of **voluntary leaving** is dismissed."
>
> (emphasis in original text)

Although it did not use the phrase, the Employer's argument on this point is essentially one of issue estoppel, a matter that has been addressed by the Tribunal in a variety of contexts (see e.g., *Polycryl Manufacturing (1988) Inc*., BC EST # D360/01). Issue estoppel may be characterized as a discrete component of the broader doctrine of *res judicata*. The latter doctrine operates so as to prevent the rehearing of a cause of action that has previously been determined in another forum. Application of *res judicata* serves the twin purposes of ensuring judicial finality with respect to a particular dispute and avoiding the possibility of different decision-makers reaching different conclusions with respect to the same dispute. Issue estoppel, on the other hand, applies in circumstances where a particular issue between the parties (as distinct from a *cause of action or dispute*) has previously been finally determined.

In other words, "issue estoppel prevents the relitigation of an issue that a court or tribunal has decided in a previous proceeding" and "prevents a party from relitigating an issue already decided in an earlier proceeding, even if the causes of action in the two proceedings differ" [see *Minott v. O'Shanter Development Company Ltd. (1999)*, 42 O.R. (3d) 321 at 329].

However, the principal of issue estoppel does not apply unless the essentially *identical* legal issue was previously, and finally, decided by a legally competent decision-maker: *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)* [1967] 1 A.C. 853. In this case, the issue before the delegate, namely, whether or not Mr. Pang was "constructively dismissed" under section 66 of the *Act* is, quite simply, an entirely different question from that addressed by the Board of Referees (namely, whether, despite the reduced work week, Pang ought to have accepted the Employer's proposal since he had no other reasonable employment alternative). The doctrine of issue estoppel cannot apply in this case.

Further, it should be noted that the Board of Referees' decision and the Determination were both issued on the same day and thus, in a technical sense, the Board of Referees' decision is not a prior decision, however, I do not rest my decision on this particular point.

Section 66 ("Constructive Dismissal")

Section 66 codifies the common law doctrine of "constructive dismissal" (see e.g., *Stordoor Investments Ltd.*, BC EST # D357/96). In *Farber v. Royal Trust Company*, [1997] 1 S.C.R. 846, the Supreme Court of Canada adopted the following definition of a constructive dismissal:

> "A constructive dismissal occurs when an employer makes a unilateral and fundamental change to a term or condition of an employment contract without providing reasonable notice of that change to the employee. Such action amounts to a repudiation of the contract of employment by the employer whether or not he intended to continue the employment relationship. Therefore, the employee can treat the contract as wrongfully terminated and resign which, in turn, gives rise to an obligation on the employer's part to provide damages in lieu of notice."

In *Farber*, the Supreme Court of Canada observed that demotions, loss of prestige and status, a change in the method of calculating an employee's pay and "*a significant reduction in an employee's income by the employer amounts to a constructive dismissal*".

In this case, clearly, there was a constructive dismissal. One would be hardpressed to characterize a 40% reduction in gross pay as anything other than a "significant reduction". The Employer, through Mr. Sihoe, conceded as much. This unilateral action by the Employer was characterized by the delegate as a dismissal under section 66 of the *Act*; I completely agree with that characterization. It matters not, as noted in *Farber*, that the Employer did not intend to dismiss Mr. Pang; its unilateral action amounted to a dismissal as a matter of law quite apart from any underlying intention.

The Employer could have avoided its monetary liability under sections 63 and 66 had it given Mr. Pang an appropriate amount of notice of the intended change in his work week (see *Irvine*, BC EST # D005/01), but it did not do so. In the result, there was no voluntary resignation as a matter of law since the employment relationship between the parties had already ended--and at the behest of the Employer--as a result of Mr. Pang's constructive dismissal. The defence afforded to an employer under section 63(3)(c) has no application where, as here, the employee's resignation was triggered by a set of circumstances that constituted a constructive dismissal.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of $4,193.83 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