Employment Standards TRIBUNAL

An appeal

- by -

Chaytor Holdings Ltd. op/as Tim Hortons
("Chaytor")

- 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.: 2002/166

DATE OF HEARING: June 18, 2002

DATE OF DECISION: July 15, 2002

DECISION

APPEARANCES:

Constance Ladell, Esq. Jacqueline Chaytor	on behalf of Chaytor Holdings Ltd.
Linda Evans	on her own behalf

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") brought by Chaytor Holdings Ltd. operating as Tim Hortons ("Chaytor") of a Determination that was issued on March 4, 2002 by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded that Chaytor had contravened Section 63 of the *Act* in respect of the employment of Linda Evans ("Evans") and ordered Chaytor to cease contravening and to comply with the *Act* and to pay an amount of $2,436.00.

Chaytor says the Determination wrongly concluded that Evans did not quit her employment.

ISSUE

The issue in this appeal is whether Chaytor has shown the conclusion of the Director, that Evans did not quit her employment, was wrong.

THE FACTS

There is not a significant dispute about the facts. Chaytor operates two Tim Hortons franchises in Kamloops under a franchise agreement with Tim Hortons Corporation (the "franchisor"). Evans worked at one of the franchise locations as an Assistant Manager from September 9, 1995 to December 24, 2001. In late October 2001, the franchisor notified Chaytor, and other Tim Hortons franchisees, of a new Career Wear policy and program. The memo introducing the program to Chaytor stated, in part:

> To assist you in understanding our expectation, attached you will find our new Career Wear Policy which outlines dress requirements as well as standards for Personal Hygiene and Grooming. The standards help support our continuing commitment to our Food Safety program.
>
> Although you will be required to wear the new uniform immediately the full policy will take effect on . . . .

The new policy contained a requirement that no employee was allowed to wear more than one set of stud/post earrings and that no clip on or hoop earrings were allowed to be worn at all. Evans had, during her term of employment, worn several earrings in each ear and objected to the policy. She spoke with her Manager, Debbie Berube, with the principles of Chaytor, Mr. and Mrs. Chaytor, with the District Manager of the franchisor and with a representative of the franchisor at head office in Ontario. She had conveyed her disagreement with that aspect of the policy and indicated to Ms. Berube and Mr. and Mrs.

Chaytor that she was not going to comply with the policy. Her position on that was confirmed with Mrs. Chaytor during a conversation which took place on December 11, 2001. She also indicated to Mrs. Chaytor that if she had to comply with the policy, she was not going to stay. Mrs. Chaytor told her that her last day would be December 30, 2001 and confirmed that in a memo to Evans. The memo stated, in part:

> We regretfully accept your resignation from employment with our company effective December 30, 2001. We understand that you have chosen to terminate your employment rather than comply with the dress code guide lines, ...

Upon receipt of the memo, Evans protested to Ms. Berube that she had not resigned but was being "forced out" or "forced to resign" or words to that effect. That information was not conveyed to Mrs. Chaytor.

The Determination concluded that Chaytor had changed the terms and conditions of Evans' employment by providing her with the new career wear policy.

ARGUMENT AND ANALYSIS

Counsel for Chaytor says there are three errors of significance. The first is in the finding that Chaytor had changed Evans' terms and conditions of employment. She says that Chaytor was entitled to introduce new policies. Several policies had been introduced during Evans' employment and she had complied with those new policies. The new career wear policy was neither a substantial nor fundamental alteration of Evans' terms and conditions of employment. The second is the conclusion that Evans was not warned of the consequences of a failure to comply with new rules. She says a deadline was provided for compliance, that failure to comply would be an 'insubordinate' act and employees do not need to be warned of the consequences of insubordination. The third is in the finding that Evans did not voluntarily terminate her employment. She says that the conduct of Evans demonstrated both the subjective and objective elements of the act of quitting. Evans had stated repeatedly that she would leave rather than comply with the policy; she had remained silent in the face of the memo from Mrs. Chaytor confirming her resignation; and finally she carried out her stated intention to leave rather than comply with the new policy.

In the written reply to the appeal, the Director disagrees with the contention that Evans voluntarily resigned her position. The Director says the circumstances indicated that Evans was only fighting to avoid the requirement in the policy that mandated her to remove all but one set of earrings. It was not Evans' decision to leave her employment. That decision was made for her by Chaytor.

Evans says she always hoped Chaytor would not apply the offending part of the policy to her. She says all of the discussions she had with her manager, Mr. and Mrs. Chaytor, the district manager and head office were in an effort to continue her employment exempt from the policy. She also notes that, notwithstanding the memo from Mrs. Chaytor, her employment was ended on December 24, 2001.

This appeal concerns entitlement to length of service compensation. The Tribunal has consistently recognized that Section 63(1) of the *Act* establishes a statutory liability on an employer to pay an employee length of service compensation upon completion of three consecutive months of employment. It is not only a statutory liability on an employer, but in a sense it is also an "earned" benefit to the employee that accumulates as the length of service of the employee increases. The employer may discharge its statutory liability by giving the appropriate written notice, a combination of notice and

money or by the payment of an amount of money equivalent to the appropriate notice. In three circumstances, the actions of an employee may discharge the liability of the employer: if the employee quits, if the employee retires or if the employee engages in conduct that provides just cause for termination. The issue in this appeal, as it was in the Determination, is whether Evans quit her employment.

In considering that question, the Tribunal has adopted an analysis that was originally enunciated in *Wilson Place Management Ltd., operating Wilson Place*, BC EST #047/96:

> The act of resigning, or "quitting", employment is a right that is personal to the employee and there must be clear and unequivocal evidence supporting a conclusion that this right has been voluntarily exercised by the employee involved. There is both a subjective and objective element to the act of quitting: subjectively, an employee must form an intention to quit; objectively, that employee must carry out an act that is inconsistent with further employment.

While I appreciate the position of Chaytor in this matter, I am unable to conclude there was any error in the Determination. I do not accept that the comment made by Evans on December 11, 2001 was an expression of an intention to quit her employment. Counsel for Chaytor points to Evans' silence in the face of the memo from Mrs. Chaytor, but in fact she was not silent about that. She told Ms. Berube she felt she was being forced out and continued efforts to be exempted from the policy. All of the facts support a conclusion that Evans intention throughout was to have her employment continue without application of the earring provisions of the policy to her. Even if I accepted that Evans formed and expressed an intention to quit, she carried out no objective act in furtherance of such an intention. It was Chaytor who ended her employment, terminating her on December 24, 2001.

I find it unnecessary and unproductive to speculate about what might have occurred had Evans not complied with the policy had her employment been continued past the implementation date for the policy. Chaytor has not contended there was just cause to terminate Evans on December 24, 2001.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated March 4, 2002 be confirmed in the amount of $2,436.00, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal