Employment Standards TRIBUNAL

An appeal

- by -

Shirley Corrigal op. as Chairs Plus Furniture Mfg.
("Chairs Plus" or "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: Paul E. Love

FILE No.: 2002/307

DATE OF DECISION: August 20, 2002

DECISION

OVERVIEW

This is an appeal by an employer, Shirley Corrigal doing business as Chairs Plus Furniture Mfg ("Chairs Plus" or "Employer"), from a Determination dated May 8, 2002 (the "Determination") issued by a Delegate of the Director of Employment Standards ("*Delegate*") pursuant to the *Employment Standards Act, R.S.B.C. 1996, c. 113* (the "*Act*").

The Delegate issued a Determination finding Ms. Kostiuk, (the "Employee"), was entitled to compensation for length of service. The Delegate found that the Employer had placed in the Employee on a call in status, and had not called her for work, within 13 weeks after the date of the layoff. There was an incident between the Employee's boyfriend and the Employer several days after the change in Ms. Kostiuk's status, and the Employer did not call her for work after that incident. The Employer alleged that Ms. Kostiuk had quit because she announced that she was looking for other work, had taken other part time work, and had not called in to see if hours were available to her. The appeal material filed by the Employer contains admissions that the Employer "assumed" that Ms. Kostiuk had quit, and that it had not recalled Ms. Kostiuk to work after the incident with her boyfriend. In this case, the Delegate decided correctly that the Employer's failure to recall Ms. Kostiuk, amounted to a termination without notice of Ms. Kostiuk's employment, and that she was entitled to compensation for length of service. The facts alleged by the Employer did not demonstrate that the Employee quit her employment. It is clear that the Employer did not prove that it had cause to dismiss Ms. Kostiuk, and that Ms. Kostiuk did not retire or resign from her employment. The Employer did not demonstrate any error in the Determination, and therefore I confirmed the Determination.

ISSUES:

1. Did the Delegate err in finding that the Employer terminated Ms. Kostiuk, by failing to recall her to work within thirteen weeks of the date that it placed her on a "call in"status?

2. Did the Delegate err in failing to find that Ms. Kostiuk quit her employment?

FACTS

I decided this case after considering the submission of the Employer, Employee and the Delegate.

The employer, Shirley Corrigal doing business as Chairs Plus Furniture manufactures chairs and other upholstery projects, in the Kelowna area. Karen Kostiuk commenced working as an industrial sewer in 1998, and continued until August 2001. Ms. Kostiuk went on pregnancy-related leave in May 2000, followed by maternal and parental leave. Ms. Kostiuk returned to work in November of 2000. By this point, the nature of the employer's work had changed, Ms. Kostiuk was given training in upholstery work. Ms. Kostiuk and was told by the Employer in August of 2001 that she would be on call strictly for industrial sewing work. There was an incident between Ms. Kostiuk's boyfriend and the Employer "several days" after the Employer notified Ms. Kostiuk of the change in her work status. After this incident, Ms. Kostiuk was never called in for work by the Employer. The Delegate found that Ms. Kostiuk was terminated. The Delegate applied s. 63 and s. 1 of the *Act*, and found that the termination

arose because Ms. Kostiuk was not recalled to work within a thirteen week period after her last day of work. The Delegate found that was Ms. Kostiuk had worked at least three full years with Chairs Plus, and was entitled to three weeks compensation for length of service. The Delegate found that Ms. Kostiuk was entitled to $1,410.44 as compensation for length of service, inclusive of vacation pay, plus interest in the amount of $48.56. The Delegate found that the Employer violated s. 63 of the *Act*.

Employer's Argument:

The Employer says that "it had standing notice from Karen that she was seeking other employment, because we couldn't guarantee her hours". The Employer says that Ms. Kostiuk worked the pay period ending July 7, 2001, and was not called in again until August 14, 15, 2001. The Employer says that "at that time we stated again to her that she would continue on a on call bases, for the sewing that she could handel (sic") ... as far as I am concerned Karen has been on a standing notice of lay off since the R.O.E. was issued in Jan/01. The Employer says that Ms. Kostiuk was offered another position in the company but the pay was less and she refused the job.

Employee's Argument:

The Employee argues, that this appeal should be dismissed, pursuant to s. 114 of the *Act*, on the basis that it frivolous, vexatious, trial and not brought in good faith. The Employee says that the Employer's submission does not indicate "what is erroneous", and has not tendered "new and compelling evidence". The Employee argues that the Tribunal's appeal process should only be used when there is a "demonstrable breach of natural justice or where there is compelling new evidence that was not available during the initial investigation or if there was a fundamental error of law"

Delegate's Argument

The Delegate submits that the Employer assumed that Ms. Kostiuk quit her job, when the true facts are that there is no evidence that the Employee quit her job.

ANALYSIS

In an appeal under the *Act*, the burden rests with the appellant, in this case, the Employer to show that there is an error in the Determination, such that the Determination should be canceled or varied. The Employer has raised two issues in this appeal, which I shall deal with below.

I note that in the findings of the Delegate, this case turned on the Employer's failure to recall Ms. Kostiuk within thirteen weeks after she last worked:

> By not recalling her to work within 13 weeks after she last worked, the employer terminated the employee. No written working notice was given, nor was compensation paid. Just cause was not established. Chairs Plus has violated s. 63 of the *Act*.

The Determination does not address the issue of quit or fire, but from my reading of the Delegate's submission in this appeal, I do not conclude that this is a new issue raised for the first time on appeal. I cannot conclude from my review of the Employee's submission that this issue was raised for the first time on appeal. Had I been persuaded that this was a new issue, raised for the first time on appeal, I would have dismissed this case on a summary basis, on the authority of *Tri-West Tractor Ltd. , BCEST #D268/96*.

The grounds of appeal raised by the Employer in the appeal form are that there is an error in the facts, and that she feels that Ms. Kostiuk quit her employment. In the employer's appeal submission the Employer admits that Ms. Kostiuk was not called for work after the Employer had an encounter with Ms. Kostiuk's boyfriend:

> He is stating that in AUG/01 she would be on call in notice. How we do the call in, is the employee would call a couple of times a week to see what was coming up of which Karen would always do, but after the encounter with Sean she never called, so we assumed she quit.
>
> In regards to us mentioning the job that Evelyn at McLeans Restaurant next door to us, She noticed that Karen was working short hours, and she had apart time position open for delivery, she came to us to tell us for Karen to come and se her, because between us and her, Karen could get more hours.
>
> Karen took that job and was right next door every day. That is another reason we assumed she quit, she cold have stopped in any day to see if we had any work for her but she didn't.

In my view, the Employer's appeal submission does not raise any issue of error in the Delegate's Determination. In the submission the Employer admits that it did not recall Ms. Kostiuk to work. If an Employer does not recall an Employee to work within 13 weeks of the date the Employee last worked this is deemed to be a termination of employment. The termination of employment arises by virtue of the effect of the definition of temporary layoff, and the definition of termination of employment, set out in section 1 of the *Act*:

> S. 1. "Termination of employment" includes a layoff other than a temporary layoff
>
> "Temporary layoff" means
>
> (a) in the case of an employee who has a right of recall, a layoff that exceeds the specified period within which the employee is entitled to be recalled to employment, and
>
> (b) in any other case, a layoff of up to 13 weeks in any period of 20 consecutive weeks;

Once the employee is terminated by the Employer, the Employer is obliged to pay compensation for length of service unless an employer establishes that it had just cause to terminate the Employee, or the Employee resigned or retired. There is no allegation of just cause raised by the Employer, and there is no allegation of "retirement".

The Employer says that Ms. Kostiuk was on call. The Employer has admitted that it did not call Ms. Kostiuk after the encounter with Ms. Kostiuk's boyfriend. The Employer has alleged that the Employee should have called in. In my view there is no requirement for an Employee on a temporary layoff to contact an Employer regarding a recall to work: *Evergreen Exhibitions Ltd., BCEST #D035/96*. In my view, there was ample evidence before the Delegate that this was a "deemed termination" by the

Employer's failure to recall Ms. Kostiuk to work within 13 weeks. I note that it is unnecessary for me to resolve the actual facts that occurred in the "encounter" or the incident between Ms. Kostiuk's boyfriend and the Employer. It was apparent that this incident may have been the cause of the Employer's failure to recall Ms. Kostiuk, but she was not involved in the incident. I agree with the Delegate that the actions of Ms. Kostiuk's boyfriend, in her absence, have no bearing on the issue of her right to recall or her rights under the *Act*.

Quit:

The Employer appears to argue that the Employee quit and therefore the Employee was not terminated by the Employer. The Employer admits in its appeal submission that it "assumed" the Employee quit.

The Tribunal has developed a body of case law dealing with the issue of quit or termination. This can be summarized briefly, as follows. The decision of an Employee to resign or quit employment, is the decision of the Employee, and there must be evidence of the Employee's intention to quit as well as some objective evidence of the quit. The burden is on the Employer to prove a quit. If the Employer does not prove a quit, then a finding of "termination" will follow.

If one applies the usual approach in analyzing the issue of quit or termination, it is evident that the Employer's assumption, and facts alleged in support of the assumption, falls far short of proof of a quit or a resignation. Even if Ms. Kostiuk accepted alternative, part time employment with another Employer, this does not demonstrate a "quit" with Chairs Plus. There is no evidence to suggest that by taking part time employment with the "other employer" that Ms. Kostiuk limited her availability for work with Chairs Plus, or acted in a way that was inconsistent with an ongoing on call status with Chairs Plus. There is no evidence that Ms. Kostiuk ever turned down work with Chairs Plus. The evidence was that Chairs Plus did not call her for work.

The Employer appears to argue that Ms. Kostiuk resigned because she said that she was looking for work. It appears that Ms. Kostiuk advised the Employer that she was looking for other work, after the Employer changed her status from "full time" to "on call". Any statements made by the Employee must be construed in light of those circumstances. Ms. Kostiuk's comments cannot be construed as a "resignation". At best, Ms. Kostiuk has indicated that she intends to seek additional hours of employment, with another Employer. The Employer's assumption that Ms. Kostiuk quit her employment, does not constitute proof of a quit. In my view, the more cogent view of the evidence was that found by the Delegate. The failure of the Employer to recall Ms. Kostiuk within thirteen weeks of the last day she worked constituted a termination within the meaning of the *Act*, and triggered an entitlement to compensation for length of service under s. 63 of the *Act*.

For all the above reasons, I dismiss the Employer's appeal, and confirm the Determination.

ORDER

Pursuant to s. 115 of the *Act* I order that the Determination dated May 8, 2002 is confirmed with interest in accordance with s. 88 of the *Act*.

Paul E. Love
Adjudicator
Employment Standards Tribunal