Employment Standards TRIBUNAL

An appeal

- by -

B. & C. List (1982) Ltd.
(the "Appellant")

- 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: E. Casey McCabe

FILE No.: 2001/235

DATE OF HEARING: June 15, 2001

DATE OF DECISION: July 19, 2001

DECISION

APPEARANCES:

Dugald Christie	for the employer
Jeanne Mastin	for herself

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") by the employer, B. & C. List (1982) Ltd. (the "employer") from a Determination issued by the Director of Employment Standards on February 27, 2001. That Determination found the employer liable for one week of pay in lieu of notice for Jeanne Mastin. This appeal was heard by way of an oral hearing on June 15, 2001. The employer called two witnesses, Dugald Christie and Harvey Shamanski. Jeanne Mastin testified for herself.

ISSUE(S) TO BE DECIDED

1. Was Ms. Mastin owed compensation in lieu of notice?

FACTS

Ms. Mastin was hired by the employer on May 11, 2000 to act as an Administrative Assistant to Mr. Christie of the Western Canada Society to Access Justice. The employer provided the office space for the Society as well as paying the salary of Ms. Mastin. No issue was taken with the Delegate's finding that B. & C. List (1982) Ltd., was the employer.

The Western Canada Society to Access Justice is a non-profit organization dedicated to providing free legal advice to those too poor to afford lawyer fees. Mr. Christie is the President of the Society and he testified that he has not earned any money in that position for the past two years.

Ms. Mastin was originally hired at a rate of $11.00 per hour for a 40-hour workweek. On September 6, 2000 Ms. Mastin was informed by Mr. Jack Hyman that the employer could no longer afford to maintain that position. He offered her a full time job with the employer as a telemarketer at a rate of $8.00 per hour. Ms. Mastin worked as a telemarker for the morning of September 7, 2000. The employer determined that she was not working out in that position and subsequently offered to return Ms. Mastin to her previous position at $11.00 per hour but only for 20 hours per week. Ms. Mastin worked under these conditions for about a week and a half before leaving to take a full time position elsewhere. The Delegate determined that Ms. Mastin

had been "constructively dismissed" under Section 66 of the *Act.* No issue has been taken with that finding in these proceedings.

The Employer appealed the Determination on a number of grounds. Broadly speaking the grounds of appeal fell into two categories. Firstly that Ms. Mastin had been given a choice as to whether she would receive notice or accept the new position. Secondly that the Employer had been denied a fair hearing by the Delegate because of the failure of the Delegate to adhere to the principle of *audi alterem partem.* I determined that any failure by the Delegate to allow a fair hearing would be corrected by the ability of the Employer to call witnesses at this proceeding and to cross-examine Ms. Mastin. The hearing proceeded on the question of whether Ms. Mastin was owed compensation in lieu of notice.

At the beginning of the hearing I offered to attempt to mediate a settlement between the parties on a without prejudice basis. Both parties agreed to this procedure and settlement negotiations began. These efforts were unsuccessful and I therefore reconvened the hearing.

ANALYSIS

For the most part the parties were in agreement about the facts of this case. The main dispute was over what was said, and who was present, in the meeting of September 6, 2000. Mr. Harvey Shamanski was employed by B. & C. List under contract to manage the telephone project on the Access to Justice program. He testified that he was present at the September 6 meeting where Mr. Hyman told Ms. Mastin that she had the option of either accepting the new position or receiving notice for the termination of the employment. Ms. Mastin testified that while she did have a meeting with Mr. Hyman on that date, Mr. Shamanski was not present, and that she was not told that she would receive notice if she decided not to take the new position. Ms. Mastin recalled that meeting took place in Mr. Hyman's brother's office, and that the only other person present was Mr. Hyman's brother.

In determining questions of credibility the duty of the trier of fact cannot be satisfactorily exercised simply by stating one witness is believed over the other. The classic statement of the duty in determining issues of credibility was given by O'Halloran, J.A., in a decision by the B.C. Court of Appeal decided some 50 years ago. In *Faryna* v. *Chorny*, [1952] 2 D.L.R. 354, the learned justice stated:

> If a trial Judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility, and cf.

> *Raymond* v. *Bosanquet* (1919), 50 D.L.R. 560, at p. 566, 59 S.C.R. 452 at 460, 17 O.W.N. 295. A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial Judge, and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.
>
> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.

Upon review of the evidence and with these factors in mind I find as a fact that Mr. Shamanski was present at the meeting. There is no question that a meeting took place. All parties agree that there were three people present at the meeting, and that whoever the third person was, he did not actively participate in the discussion. Mr. Shamanski was quite clear in his evidence and does not appear to have any reason to make up such a story. I am also satisfied that Ms. Mastin was given the choice of either accepting the new position or being terminated. While it may be true that the employer never explicitly stated that she would be given a notice period if she chose the termination option I find as a fact that the September 6, 2000 meeting did provide Ms. Mastin with verbal notice of termination of her employment.

The question then becomes whether this verbal notice was sufficient for the purposes of the *Act.* Section 63 deals with the question of liability resulting from length of service. All parties agree that the employer's maximum liability is one week's notice. Section 63(3) states:

> *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 week's notice after 12 consecutive months of employment;*

> *(iii) 3 week's notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 week's 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.*

The employer, properly in my opinion, conceded that Ms. Mastin was not given written notice. However she did continue to work for a period of time after the change in her job duties. Section 63(3)(b) does not state that *written* notice need be given when the liability is discharged by a combination of notice and compensation in lieu of notice. This section must be read in context of the whole *Act* however. The Tribunal has long held that verbal notice is insufficient to meet the requirements of Section 63(3). (see *G.A. Fletcher Music Co.,* [1997] BCEST # D213/97). As well, where an employee continues working beyond the notice period, the employer is obliged to give further written notice.

In the case of a "constructive dismissal" under Section 66 of the *Act*, the requirement for new notice if the employee works beyond the notice period would not seem to apply. Where Section 66 applies, the employee is entitled to a certain amount of time before determining whether to accept the new position. In such a situation, the liability on the employer is discharged provided that the notice of the change in the employment conditions meets the statutory requirements.

In this case, the verbal notice was given on September 6, for a change to take place on September 7. In the following week, Ms. Mastin worked approximately 24 hours. Even if the employer is correct that verbal notice is sufficient, the fact is Ms. Mastin was entitled to a week's notice of the change in the working conditions. The employer did not give a week's notice. I do not mean to be taken to say that any changes in working conditions give rise to the duty to give notice. However, where conditions of employment are "substantially altered", the employer is required to give notice of such change.

The employer further argued that even if proper notice had not been given, then the hours worked after the change in working conditions should be used to mitigate the amount owing Ms. Mastin. The employer's first position is that all the hours worked after the change in conditions should be used in mitigation; alternatively, the hours worked in the statutorily required week's notice period should be considered in mitigation. It was common ground that Ms. Mastin worked more than the 40 hours she would receive for the week's notice before she left her employment.

There is no doubt that Section 63(3)(b) allows an employer to use hours worked in the notice period to be used in mitigation of the amount owing provided that the notice and the payment equal the amount that the employer is liable to pay. However in the case of deemed termination

under Section 66, the hours worked in mitigation must be worked before the change in working conditions that leads to the deemed termination takes effect. On the facts before me, only the hours worked after noon on September 6, 2000 meet this test. Clearly, the hours worked and the notice are not the equivalent of the amount the employer is liable to pay. I find therefore that the hours worked after verbal notice was given cannot be used to mitigate the amount the employer is liable to pay.

If I am wrong on this point, I find that the notice required under s.63(3)(b) must be written notice. The reasoning behind the requirement for written notice was canvassed fully in *G. F. Fletcher (supra)* and need not be repeated here. Implicit in all of Section 63 is that the notice must be in written form. I do not find that the fact that s.63(3)(a) explicitly states that it must be written notice, and s.63(3)(b) does not so state necessarily leads to the conclusion that verbal notice and compensation satisfies the obligation of the employer. If the legislature intended verbal notice to be sufficient it would have clearly stated so in section 63(3)(b).

The final argument of the employer, through Mr. Christie, was that the employer could not afford to pay. Mr. Christie testified to the fact that the Society would have to pay the notice period due to an arrangement the Society has with the Employer. I have no reason to doubt that Mr. Christie is telling the truth as to his lack of ability to pay. I was impressed with Mr. Christie's obvious commitment to the Society and its work. Ensuring that those who are too poor to afford legal representation have access to legal advice is a noble service to provide. The employer should be commended for providing office space and some funding for the Society.

The determination however clearly applies to the Employer and not to the Society. The fact that the Society may end up paying for the notice period is simply not relevant to the question of whether the employer is liable for compensation in lieu of notice. In this case it was the Employer who hired Ms. Mastin, and it was the Employer, through Mr. Hyman, who changed her conditions of employment without giving adequate notice. The Employer is legally obligated to pay Ms. Mastin, not the Society. Even if ability to pay was a relevant factor in determining liability (which it is not), there is no evidence before me showing that the Employer does not have the ability to pay Ms. Mastin. I therefore reject the final argument of the Employer.

ORDER

The Determination dated February 27, 2001, is confirmed.

E. Casey McCabe
Adjudicator
Employment Standards Tribunal