BC EST #D427/99

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of two appeals pursuant to Section 112 of the

Employment Standards Act, R.S.B.C. 1996, c. 113

-by-

Carole Brookfield
("Brookfield" or the "employee")

-and-

Karen Eakin (now known as Karen Love)
("Love" or the "employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR:	Kenneth Wm. Thornicroft
FILE Nos.:	1999/306 & 1999/307
DATE OF HEARING:	September 20th, 1999

DATE OF DECISION: October 6th, 1999

DECISION

APPEARANCES

Karen Love (formerly Eakin)	on her own behalf
Lloyd Duhaime, Barrister & Solicitor	for Carole Brookfield
David Oliver, I.R.O.	for the Director of Employment Standards

OVERVIEW

I have before me two appeals brought pursuant to section 112 of the *Employment Standards Act* (the *"Act"*) from a Determination issued by a delegate of the Director of Employment Standards (the "Director") on April 27th, 1999 under file number 075168 (the "Determination").

The appeals were heard together in Victoria on September 20th, 1999 at which time I heard the testimony of both appellants. Mr. David Oliver appeared and made submissions on behalf of the Director. The Director's delegate determined that Karen Eakin, now known as Karen Love ("Love" or the "employer"), owed her former employee, Carole Brookfield ("Brookfield" or the "employee"), the sum of $1,585.53 on account of unpaid vacation pay, 10 days' wages as compensation for length of service and interest. The delegate rejected Brookfield's claim for unpaid overtime pay for lack of evidence. Further, by way of the Determination a $0 penalty was also levied pursuant to section 98 of the *Act* and section 29 of the *Employment Standards Regulation.*

ISSUES TO BE DECIDED

Love and Brookfield have each filed appeals with respect to the Determination.

Brookfield originally appealed the dismissal of her overtime wage claim but her solicitor subsequently advised the Tribunal that "[Brookfield] abandons her appeal with regards to overtime" (Brookfield's Appeal Submission dated August 30th, 1999). Thus, the only issue raised by Brookfield concerns her entitlement to compensation for length of service.

Love appeals the Determination on the basis that, firstly, Brookfield, being an independent contractor rather than an employee, was not entitled to file a complaint under the *Act;* secondly, in any event, Brookfield quit; thirdly, even if Brookfield is entitled to compensation for length of service, the delegate failed to take into account certain monies that were paid by Love to Brookfield on account of severance pay. Finally, Love says that the delegate erred in calculating Brookfield's vacation pay entitlement.

I shall deal with each appeal in turn.

FACTS AND ANALYSIS

Brookfield's Appeal

As noted above, Brookfield abandoned her appeal with respect to the delegate's dismissal of her complaint as it related to unpaid overtime. However, Brookfield says that she is entitled to additional compensation by reason of the fact that Love refused to allow Brookfield to work out her "notice period" which Brookfield says ended as at July 5th, 1997.

Brookfield commenced her association with Love in May 1996 and on June 15th, 1997 submitted a resignation letter to Love in which Brookfield stated that "my last day of work will be 25 June, 1997". In my view, whatever may have been Brookfield's subjective intention, the only reasonable objective interpretation to be attached to those words is that Brookfield intended to quit as of June 25th, and not July 5th, 1997.

In any event, however, whether the resignation was intended to be effective as of June 25th, or some later date, is irrelevant. An employer need not accept a resignation effective as of some future date when the employee proposes to quit. Under the *Act* (though not the common law), an employee is not obliged to tender *any* notice whatsoever. Nevertheless, an employer may accept the employee's proffered notice, in which case a valid and enforceable "termination agreement" comes into effect. However, an employer may reject an employee's proffered notice and, in effect, unilaterally terminate the relationship but in such circumstances the employer must give proper written notice of termination or pay compensation for length of service as required by section 63 of the *Act.*

An employer need not give notice or pay compensation for length of service if the employer has just cause for termination but Love does not assert that she had just cause in this case. Love simply says that Brookfield quit--and, indeed, Brookfield *intended* to quit--but Brookfield tendered her resignation on the basis that her last working day would be June 25th, 1997 (or perhaps some later date). Love rejected Brookfield's tendered resignation and proceeded to unilaterally, and immediately, terminate Brookfield's services. On June 15th, 1997 Love responded to Brookfield's letter of resignation with a handwritten letter to Brookfield which stated, in part, "I have opted to finish our working relationship as of 15th June/97 and pay you full benefits accordingly". In my view, this latter letter constitutes a clear rejection of the terms of Brookfield's tendered resignation and amounts, in law, to a termination without notice.

This is not a case about a resignation since the terms upon which the resignation was tendered were never accepted by Love. Given Brookfield's tenure--one year's completed service--she was entitled to two weeks' wages as compensation for length of service [see section 63(2)(a) of the *Act*]; *i.e.,* the equivalent of the 10 days' pay awarded to her in the Determination.

In my view, Brookfield's submission that she was entitled to be paid for the entire duration of her proposed notice period--extending to July 5th--is untenable. That proposed notice period was not

accepted by Love; Love was free to terminate Brookfield but in so doing was obliged to give written notice or pay compensation for length of service in accordance with the provisions of the *Act.* In light of Brookfield's one year of completed service, Love's maximum liability under the *Act* was 2 weeks' wages, the very amount fixed by way of the Determination.

Love's Appeal

The evidence before me shows that although the parties endeavoured to structure their relationship so that Brookfield appeared to be an independent contractor, the essence of the relationship was clearly that of employer-employee. Love exercised a substantial measure of direction and control over Brookfield who, in turn, was economically dependent upon the monthly salary and bonus paid to her by Love. The delegate carefully considered the facts and governing legal principles and I see no reason to question his conclusion that Brookfield was an employee for purposes of the *Act.*

As noted above, the evidence shows that Brookfield intended to quit but was, in fact, terminated by Love without any written notice. Thus, Love was liable to pay 2 weeks' wages as compensation for length of service. In light of section 4 of the *Act,* Brookfield's signed "acknowledgement" of Love's termination letter cannot be said to amount to a waiver of her entitlement to be paid compensation for length of service. Leaving aside the effect of section 4, I would not, in any event, conclude that Brookfield's "acknowledgement" amounts, in law, to a waiver of her right to claim compensation for length of service.

At the conclusion of the appeal hearing, Love maintained that she had, in fact, paid Brookfield's salary to the end of the month. Brookfield denied this assertion but Love insisted that she had "financial records" to corroborate her position. Accordingly, I adjourned the appeal hearing on the basis that Love would be given until September 27th, 1999 to deliver proof that Love had paid Brookfield's full salary for the month of June. Although Love did submit copies of cancelled cheques and bank records, these documents do not in any fashion corroborate her position. Indeed, on the basis of the financial records before me, it would appear that Love did not pay all of Brookfield's regular wages for even the first half of June 1997.

Finally, I am not satisfied that the delegate erred in calculating Brookfield's vacation pay entitlement.

ORDER

Pursuant to section 115 of the *Act,* I order that the Determination be confirmed as issued in the amount of **$1,585.53** together with whatever further interest that may have accrued, pursuant to section 88 of the *Act,* since the date of issuance. Further, given my finding that Love did, in fact, breach the provisions of the *Act* relating to the payment of wages, the $0 penalty is also confirmed.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal