Employment Standards TRIBUNAL

An appeal

- by -

Andy Tollasepp
("Tollasepp" or "Employee")

- 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.: 2002/430

DATE OF DECISION: November 5, 2002

DECISION

OVERVIEW

This is an appeal by an employee, Andy Tollasepp, from a Determination dated July 19, 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 found that changes to Mr. Tollasepp's shift schedules implemented by the Employer, with three weeks advance notice, were not substantial alteration of conditions of employment, because there was no measurable effect on the wages. Mr. Tollasepp resigned after receiving the notice. In my view the Delegate erred in failing to consider the effect of the changes on the employment relationship, and conditions of employment as set out in section 1 of the *Act*. Here, the changes were substantial because prior to the change, for fifteen years, the Employee had a certain shift schedule which called for him to work, and be paid for work on Friday and Saturday night. The Employer implemented a change that placed the Employee "on call" to be paid if events were scheduled and took place on Friday and Saturday nights. This change deprived the Employee of the certainty of an income stream from his scheduled work, which he "built upon" with other "on call" work in the film industry, and other "on call" or event work with the Employer. Further, the Delegate erred in failing to determine the facts relating to the availability of work following the notice, which was also fundamental to the Delegate's conclusion of "no measurable effect on wages. In the circumstances of this case the Delegate did not exercise her discretion to determine whether the employment of the Employee was at an end as required by section 66 of the Act, because of the Delegate's error with regard to her failing to find a "substantial alteration to a condition of employment". I therefore remitted to the Delegate the issue of whether the substantial change in the condition of employment, terminated the employment relationship.

ISSUES:

Did the Delegate err in determining that the notice was not a substantial alteration of conditions of employment?

FACTS

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

Andy Tollasepp was employed by Richards on Richards, a nightclub, as a lighting director from 1987 to December 8, 2001. For a fifteen year period he had a set schedule of working Friday and Saturday evenings, and would be paid $150.00 per shift. There were other occasions during a month when he would be called upon to perform his work duties for special events and concerts. R.C. Hawley, General Manager of the Employer gave Mr. Tollasepp a notice on or about December 8, 2001, effective January 2002, " Re Notice of Schedule Changes", which reads as follows:

> Due to cut backs within the company, we would like to give you notice of your schedule changes. As of January 2002 we will not be using a lighting technician on the regular weekend evenings unless for a concert date. As of any other changes you will be scheduled and / or notified, otherwise all concert dates will continue as usual.
>
> If you would like to discuss the changes, please feel free to talk to R.C. Hawley anytime.

The Delegate found that the Employer had given three weeks, rather than eight weeks notice of the change. The Delegate concluded that Mr. Tollasepp did not know how his pay would be affected or altered by the change in the scheduling, as he "only assumed that there wouldn't be any bookings based on previous years". The Delegate analyzed a schedule of events provided by the Employer and concluded that "he would have had regular employment albeit not always on Friday and Saturday nights, but most certainly he would have been needed for some weekends".

The Delegate rejected the evidence of Mr. Tollesepp that Mr. Tollesepp offered to work "concert nights", and determined that Mr. Tollesepp quit his employment. It appears that from time to time Mr. Tollesepp would cancel his shifts, with the consent of the Employer, so that he could work on call in the film industry. Mr. Tollesepp was a member of International Alliance of Theatrical and Stage Employees, Local 891. When Mr. Tollesepp cancelled his shifts he made arrangement for coverage by another person.

Mr. Tollesepp resigned his position with the Employer, on or about December 8, 2001, as a result of receiving the notice of change. The Employer did not want the Employee to quit, and the manager and the book keeper made an effort to "talk" Mr. Tollesepp out of his decision to resign his position. Mr. Tollesepp maintained his resignation, on the basis of a constructive dismissal arising from the Employer's changes to his schedule of work.

It appears that January and February are generally slow months for shows for the Employer. There was evidence before the Delegate including a statement from Ms. Jolen Chong of the Employer, to the effect that "normally January and February are generally slow, but she said that it appeared it was going to be busy in the upcoming months with concert dates". The evidence before the Delegate from Mr. Tollesepp, contained in a letter to Human Resource Development Canada was

> January through to March are bleak at best. It is not uncommon for the club to operate without a single show in a month, or sometimes two months in a row regardless of the time of year.
>
> I was now looking at the prospect of no work and certainly it was made clear to me that my 6 regular work hours were non existent. With these crucial anchor nights having been taken away effective January 1, 2002, and the knowledge that there was only one event scheduled for the month of December, my situation called for necessary means of survival to be put into action.

Employer's Argument:

The Employer submits that the Employee "jumped the gun" in quitting. The Employer submits that there was work available to Mr. Tollesepp, which did not differ significantly in the amount of work, which he would have had before the change was implemented.

Employees' Arguments:

The Employee submits, that the change made the Employer was a substantial alteration of his conditions of employment, as it provided the "crucial anchor nights", without which he would be unable to continue employment with the club. He argues that he was constructively dismissed, and he seeks compensation for length of service.

Delegate's Argument

The Director's Delegate had no further submissions to add to the Determination.

ANALYSIS

In an appeal under the *Act*, the burden rests with the appellant, in this case, the Employee, to show that there is an error in the Determination, such that the Determination should be canceled or varied.

This appeal relates to section 66 of the *Act*. Section 66 reads as follows:

> If a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated.

In reviewing section 66 it appears that one must consider a three stage analysis as follows:

(a) Was there an alteration of a condition of employment?

(b) Was the alteration substantial?

(c) Was the employment of the employee terminated?

While section 66 is similar to the common law notion of constructive dismissal, there is a difference. In constructive dismissal, the actions of employer, if they amount to "fundamental breach", result in a termination of the employment relationship by operation of law. In reviewing the language of the section 66 of the *Act*, it is apparent that "termination" does not necessarily follow from a finding of "substantial alteration" of a condition of employment. It is for the Director to determine if the employment has been terminated. If the Director determines that the employment was terminated, the employee is entitled to compensation for length service pursuant to the *Act*.

As pointed out by the Delegate, the *Act* does not define a "substantial alteration" of a condition of employment. The Delegate approached this issue on the basis of whether the amount of wages would be "substantially altered" by the change made by the Employer. The payment of wages is one condition of employment. The scheduling or timing of shifts is another condition of employment.

Was there an alteration of a condition of Employment?

The Delegate did not address the issue of whether the Employer altered a condition of employment, but considered the issue of substantial alteration. In my view, the Delegate erred in equating substantial alteration of wages to substantial alteration of conditions of employment. It is clear from section 66 that the concept of "substantial alteration" relates to "conditions of employment". Conditions of employment is a phrase which is defined in section 1 of the *Act*. It means

> all matters and circumstances that in any way affect the employment relationship of employers and employees

A condition of employment is a much wider concept than the payment of a wage. The failure to consider the effect of the change on "all matters and circumstances that in any way affect the employment relationship", and focus on an effect on wages is an error in the interpretation and application of section 1 and section 66 of the *Act*.

In my view, the status of the employee - regular or on call-, and the timing of shifts - weekends or weekdays, are also conditions of employment. The first question in the analysis is whether the Employer has altered a condition of employment. Here the answer clearly is yes, as the Employer has changed a shift schedule which has been in effect for some 15 years. It has also changed the status of the Employee from regular scheduled to "on call for events". The very fact that the Employer gave written notice to the Employee of this change speaks to the fact that scheduling was a condition of employment.

Was the alteration of condition of employment substantial?

The second issue is whether the change is substantial. The Delegate attempted to measure whether the change was "substantial" in terms of looking at the monetary effect on the Employee. She was unable to conclude that the change was substantial because she could not ascertain a "measurable reduction" in the wages, looking at the past record of earnings and the Employer's event schedule.

Part of the facts obscuring the "measurable effect" was that Mr. Tollesepp would, with the Employer's consent, not work certain shifts while working on an on call basis as an IATSE union member in the film industry. In my view the "earnings from IATSE work" are irrelevant to the analysis of a substantial alteration of the Employee's wages. This work was performed by Mr. Tollasepp, with the knowledge and consent of the Employer. If one chooses to engage in an analysis of "measurable reduction in wages", one would want to consider the issues of work opportunities scheduled at the time that Mr. Tollesepp was given the notice, and resigned. One would also wish to consider whether those opportunities were scheduled on weekdays or on Friday and Saturday nights.

I note that the Delegate did not make any finding concerning the amount of work available to the Employee following the giving of notice, or whether that work was on Friday or Saturday nights. The Delegate did not make any findings related to "how much work", or the Employee's knowledge relating to the amount of work, as of the date of the giving of the notice or Mr. Tollasepp's resignation. I note in this case, that there was a dispute between the Employer and the Employee concerning the amount of work available to the Employee. The Employer put forward a list of events, which would have required the services of Mr. Tollasepp. This list was disputed by the Employee. The Delegate did not attempt to resolve this dispute. The Delegate appears to have accepted the Employer's list of events, without determining why the Employee's evidence on this point was rejected. The Delegate comments in the Determination:

> Although Mr. Tollasepp disputes many of the dates that the employer indicated as nights needing a lighting person, it still appears that he would have had regular employment albeit not always on Friday and Saturday nights, but most certainly he would have been needed for some weekends.

In my view, the failure to resolve this disputed point of fact is an error. It is an error that would have affected the outcome of any analysis which was based on equating a substantial alteration of wages to the change in schedule. Before the notice, Mr. Tollasepp was entitled to be paid for the weekend work, and any other scheduled events. After the notice Mr. Tollasepp is only entitled to be paid for call in work. The failure to resolve which events were events requiring Mr. Tollasepp's services, and when those

events were scheduled (weekday or weekend), is fundamental to any analysis of "reduction of wages" arising from the changes implemented by the Employer.

In summary, the Delegate's conclusion with regard to no substantial alteration of conditions of employment is in error because the Delegate construed "conditions of employment" too narrowly as payment of wages, and did not consider the definition of condition of employment set out in section 1 of the *Act*. Further, the Delegate erred in failing to properly find facts which were in dispute, and analyzing those facts, to determine the amount of work available, the timing of the availability of work, and the Employee's knowledge of the work available, at the date of his resignation.

This Tribunal has held in Sunset Video Ltd., BCEST #D099/01 that the change to an "on call status", request for keys and failure to schedule employees for work was a substantial alteration. Further this Tribunal has held that it is not necessary for the Employer to have the intent to encourage the Employee to leave the work relationship: Moses, BCEST #D219/98. The evidence in this case illustrates that the Employer wished the Employee to remain, with the altered schedule. A business reorganization can have a substantial or fundamental effect on the employment relationship, regardless of whether the Employer wishes the Employee to remain working following the altered conditions. It is clear that an Employer can make fundamental changes in the working relationship, provided that the Employer gives the requisite notice provided by the *Act*: Irvine, 2001 BCEST # D005/01.

Regardless of what the facts turn out to be with regard to the availability of work, the Employee was placed into a position of uncertainty. This Tribunal has held that uncertainty with regard to work scheduling and closure of a business, amounts to a substantial alteration of a condition of employment, triggering an obligation to pay compensation for length of service: Comox Valley Business Management Inc. (c.o.b. ABC Family Restaurant (Courtenay), BCEST #D307/97.

In my view in order to analyze whether the "alteration" was a substantial alteration one has to look at the effect on the Employer and the Employee, and the employment relationship. In altering the work schedule, it is my view that the Employer was altering the relationship between the Employer and the Employees. Objectively viewing the change implemented by the Employer, the Employer must have viewed the change as a significant alteration in the working relationship, as it gave the Employee about three weeks advance notice of the change. The Employer acquired the "flexibility" to call in and pay or not to pay Mr. Tollasepp for weekend work, when it previously had the obligation to pay Mr. Tollasepp for week end work. This change creates a corresponding "uncertainty" for Mr. Tollasepp -whether he has to work and whether he would be paid for work. Mr. Tollasepp did not rely totally on this Employer for all his earnings, as he had other work in the film industry. Here there was apparently a fifteen year history of the Employee working Friday and Saturday nights. This was a schedule, and an income stream, on which the Employee could rely upon and build upon Mr. Tollasepp appears to have relied on the certainty of the schedule and the income stream provided by that certain work, in the way that he organized his life, other work obligations, and the acceptance of other work opportunities.

Did the substantial change terminate the employment of the Employee?

In my view the Delegate erred in failing to find that there was a substantial alteration of a condition of employment, for the reasons expressed above. The language of section 66, however, provides that the Delegate has a discretion to exercise, once the Delegate concludes that a condition of employment is substantially altered. It is clear, that had the Delegate reached the correct decision on this issue, the Delegate would then have been required to "determine if the employment of the employee has been

terminated." As a result of making that error did not exercise her discretion as required by section 66 of the *Act*.

There is still an undecided issue as to whether the employment of Mr. Tollasepp was terminated. In my view, this issue is properly within the decision making authority of the Delegate. It is clear from Jager, BCEST #D244/99, that the discretion is one that must be exercised by the Delegate, and the exercise of that discretion is reviewable by the Tribunal.

The proper remedy in this case to remit this matter to the Delegate to exercise her discretion on the basis of my finding that the changes to the schedule were a substantial alteration to a condition of employment. The Delegate is required to make a decision as to whether the "employment of an employee", Mr. Tollasepp, has been terminated, as a result of the alteration of the work schedule and status of Mr. Tollasepp, and provide reasons to the parties for any decision reached. If the Delegate concludes that Mr. Tollasepp's employment was terminated, the Delegate will then calculate the appropriate monetary remedy. The parties will then have access to the Tribunal's process to review the Determination made by the Delegate.

Further Comments:

Before leaving this matter, I wish to make a number of comments with regard to the Determination, which may be of assistance to the Delegate in the exercise of her discretion under s. 66 of the *Act*. I make these comments because it is now almost two years since the date of the Employee's resignation, and it is apparent that this matter must be sent back for further review by the Delegate, which may also result in a further appeal by the parties.

Changes without Intent to cause the Employee to Quit:

The Delegate comments that she does not "believe that the intent of the employer was for Mr. Tollasepp to quit." An Employer can make a substantial alteration in the conditions of employment in the hopes of retaining an employee on the changed condition. Employers may make a multitude of changes based on economic conditions, or make changes for reasons unrelated to "retention" of the affected employee. The issue of "intent to cause a quit" may in certain circumstances be influential with regard to a constructive dismissal, but an employee can be constructively dismissed without an employer making a change with the intent to cause an employee to quit. For example, an employer may decide that it would like to retain its employees, and pay them half of the prevailing rate. In such a case there has been a substantial alteration of a condition of employment, irrespective of the employer's intent. Whether "intention" is at all relevant to the exercise of the Delegate's discretion, I leave to the Delegate.

Effect of the Employee's Departure on the Employer:

In reviewing the facts of this case, the Delegate commented that Mr. Tollasepp's sudden departure "left them in a bind". Generally, an Employee who fails to object and take timely action with regard to a workplace change of a fundamental nature, introduced by the Employer may be held to have accepted that change. An Employee who fails to object and continues to work, an Employee may have "waived" his or her right to object to the change in working conditions. I further note that the *Act* contains no grievance or other procedure which permits an employee to effectively resolve a workplace "grievance" relating to a change of condition introduced on a unilateral basis by an Employer. The unionized Employee has the

right to have grievances determined by a resolution process agreed by the union and the employer, but the non-union employee has no such right. A non-union employee who cannot negotiate a change with the Employer is left with the option of agreeing to the change (or being held to have agreed to the change by continuing to work under the changed conditions) or resigning. Generally, an Employee who resigns has no right to compensation for length of service under the *Act*. In certain circumstances, the resignation will be treated as a constructive dismissal, and result in damages or compensation for length of service under the *Act*. The fact that an Employer is inconvenienced as a result of the Employee's election to treat the contract at an end is not, in my view, a factor to be considered in the exercise of discretion by the Delegate. The fact that an Employer was "left in a bind" is a natural consequence flowing from the Employee's decision to treat the change in conditions as substantial. Resignation is the only method which leaves the Employee with the potential remedy of damages for compensation for length of service, in the event of a unilateral and fundamental change to the conditions of employment. An employee may be wrong in his assessment of whether the change was of such a fundamental nature as to result in the end of an employment relationship, (or whether it was an inconsequential change) and the employee may ultimately have to bear the consequences of a "wrong decision" in that he would not receive compensation for length of service. In this case, the Employee correctly viewed the change as a substantial change in working conditions. Inconvenience to an Employer, arising as a result of the Employee's decision to treat the contract at an end, in my view, is irrelevant to the issue of whether the employment of the Employee has terminated. Whether inconvenience to the Employer is a relative consideration in the Delegate's exercise of discretion, I leave to the Delegate.

Amount of Notice:

The amount of notice given by the Employer seems to have had some influence with the Delegate as the Delegate commented at page 3 of the Determination:

> The employer attempted to give notice to the employee by providing a 'Notice of Schedule changes three weeks before the intended changes. Had the employer given the complainant an additional 5 weeks of notice of written notice of these changes, this complaint would be a non-issue.

Here the Employee was entitled to 8 weeks notice of such a change, and was provided with only three weeks notice. Partial notice of a change clearly is irrelevant to the issue of whether an Employer has substantially altered a condition of employment. Generally, in a dismissal case the giving of some notice, but inadequate notice, does not eliminate the Employee's right under the *Act*. There is no such concept as "near" or "ball park" notice. Whether partial notice is a factor for the Delegate to consider in the exercise of her discretion, or remedy, (if any) I leave to the Delegate.

ORDER

Pursuant to s. 115 of the *Act* I find that there was a substantial alteration of a condition of employment. I remit this case to the Delegate to exercise her discretion pursuant to s. 66 of the *Act*, to make a Determination and issue reasons, whether the employment of Mr. Tollesepp was terminated as a result of the substantial alteration of the condition of employment. If the Delegate determines that the employment of Mr. Tollasepp was terminated, the Delegate shall issue a remedy including compensation for length of service, vacation pay if entitled, and interest.

Paul E. Love
Adjudicator
Employment Standards Tribunal