BC EST #D149/99
Reconsideration of BC EST #D587/98

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an application for reconsideration pursuant to Section 116 of the

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

-by-

Ultra Care Cleaning Systems Ltd.

("Ultra Care" or the "employer")

-of a Decision issued by-

The Employment Standards Tribunal

(the "Tribunal")

ADJUDICATOR:	Kenneth Wm. Thornicroft
FILE No.:	99/85
DATE OF DECISION:	May 14th, 1999

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DECISION

OVERVIEW

This is an application filed by Ultra Care Cleaning Systems Ltd. ("Ultra Care" or the "employer") pursuant to section 116 of the *Employment Standards Act* (the "*Act*") for reconsideration of an adjudicator's decision to confirm a Determination issued by a delegate of the Director of Employment Standards (the "Director") on September 14th, 1998 under file number 060-314 (the "Determination").

The Director's delegate held that Ultra Care owed its former employee, Karen D. Stevenson ("Stevenson"), $1,585.72 on account of 4 weeks' wages as compensation for length of service (see section 63 of the *Act*), concomitant vacation pay (section 58) and interest (section 88). Ultra Care appealed the Determination arguing that it did not terminate Stevenson's employment; rather, she, in effect, abandoned her position.

The employer's appeal was heard in Vancouver on November 27th, 1998; the adjudicator's decision confirming the Determination was issued on February 4th, 1999. The adjudicator held that the employer had failed to present sufficient evidence proving both the requisite subjective and objective elements of a resignation by Stevenson. In other words, the adjudicator found that the employer failed to prove that Stevenson intended to resign nor had it shown that Stevenson's actions were consistent with her having resigned her employment with Ultra Care.

THE REQUEST FOR RECONSIDERATION

Ultra Care's request for reconsideration is contained in letter to the Tribunal dated February 8th, 1999. In this letter, the employer does not challenge the adjudicator's finding that Stevenson was entitled to compensation for length of service; rather, its request for reconsideration concerns only Stevenson's monetary entitlement:

> "...within the Determination there is no mention of the fact that while the first pay cheque ever issued to Stevenson was on February 15, 1994 **her employment was not continuous.** This issue was discussed at the Appeal Hearing and it was noted that Stevenson had quit as of September 13, 1995 (at which time all monies owed were paid to Stevenson) and later was re-hired on October 1, 1996...Should not any severance owing be calculated from this period?" (**boldface** in original)

In a subsequent letter to the Tribunal, dated February 11th, 1999, Ultra Care took the position that Stevenson was rehired in February rather than October, 1996. If the employer is correct that Stevenson's most recent period of consecutive employment dates from February 1996 to March 1998, Stevenson's entitlement to compensation for length of service under section 63 of the *Act* is only 2, rather than 4, weeks' wages.

By way of a still later letter to the Tribunal, dated February 15th, 1999, the employer submitted that it did not terminate Stevenson's employment; rather, she was [during a period when she was away from work on some sort of medical leave] "a continued employee, on our payroll books, and she would be notified as soon as a suitable vacancy was available". Since Stevenson's notice entitlement is predicated on her having been terminated without proper written notice, I propose to first address the "termination" issue.

ANALYSIS

Termination of Employment

The relevant facts, as found by the adjudicator, are as follows. Stevenson was employed by Ultra Care as a janitor. In June 1997 she complained of a sore hip and eventually asked for a leave of absence to recuperate. Stevenson sought, and was given, a leave of absence to the end of the summer. A Record of Employment ("ROE") was issued to Stevenson on August 19th, 1997 which stated that she was on "leave of absence" (code N) and that her "expected date of recall" was "unknown"; on this same day, the employer paid out Ms. Stevenson's accrued vacation pay.

Stevenson arranged with the employer for her niece to replace her during the summer. Some time later, suffering from the ill effects of stress, Stevenson obtained a medical certificate suggesting that she would not be fit to return to work until mid-March 1998. It is not clear from the adjudicator's decision whether or not this medical certificate was provided to the employer although the employer apparently denied ever having been provided with the certificate.

In any event, the employer made several efforts to locate Stevenson in August 1997 but was unable to contact her--Stevenson had moved from North Vancouver to Chilliwack but had not given this information to her employer. With the fall rapidly approaching, the employer simply allowed Ms. Stevenson's niece to continue on--the niece continued until February 1998 at which time she commence maternity leave.

On March 15th, 1998, Stevenson contacted Ultra Care and asked to return to work--this request was refused on the basis of lack of availability of work. In May 1998, Stevenson was offered another position (at a different location), however, Stevenson rejected the offer. On May 20th, 1998, the employer arranged for a letter to be picked up by Stevenson; this letter states:

> "Please be advised that at the present time all janitorial positions are filled within Ultra Care. We will keep your contact number on file and, should things change, advise you of any upcoming vacancies."

The employer's May 20th, 1998 letter was the one and only written communication to Ms. Stevenson which indicated that she would not be returned to her former duties. As noted above, the employer's present position is that Stevenson was never terminated but rather, after June 1997, was a "continued employee" who "would be notified as soon as a suitable vacancy was available".

The ROE issued by the employer on August 19th, 1997 did not indicate a September 1997 expected recall date and thus the employer's position that it expected Stevenson to return to work in September is undermined by its own document. The more probable scenario is that suggested by Stevenson, namely, that when she was medically fit to return to work (likely mid-March 1998 as stated in the medical certificate) she would so notify the employer. The employer consented to Stevenson's leave of absence request on that basis.

Stevenson notified the employer that she wished to return to work in March 1998 only to be rebuffed. While the employer might have been within its rights to terminate Stevenson--with proper written notice--after June 1997 and prior to March 1998 [see *Sylvester v. B.C.* 146 D.L.R. (4th) 207 (S.C.C.)]--it never did so. In my view, the employer's May 20th, 1998 letter can only be reasonably interpreted as a refusal to allow Stevenson to return to work and as such, it amounts to a termination without proper notice.

Stevenson's Notice Entitlement

Having confirmed the adjudicator's conclusion that Stevenson was terminated without notice or termination pay, there remains a question concerning her actual notice entitlement. If, as was determined by the delegate and confirmed by the adjudicator, Stevenson's employment spanned the period February 1994 to March 1998, she was entitled to 4 weeks' wages as compensation for length of service. On the other hand, since the termination pay (or written notice in lieu thereof) mandated by section 63 of the *Act* is based on *consecutive* months or years of employment, if Stevenson resigned in mid-September 1995 only to be rehired in February 1998, her termination pay entitlement is only 2 weeks' wages.

In support of its submission on this latter point, Ultra Care has tendered a letter of resignation dated August 30th, 1995 from Stevenson and an ROE, dated September 14th, 1995. Stevenson's resignation letter reads as follows:

> "I am writing you this letter to inform you as of September 13, 1995 I no longer wish to be an employee with your company. I have thoroughly enjoyed my stay in your employ, however, I feel there is no room for advancement with you, so I have decided to move on. I wish you nothing but the best in the future."

The September 14th ROE indicates that Stevenson "quit" her employment which ran from February 1st, 1994 to September 10th, 1995. The ROE also indicates that Stevenson will not be returning to work. For her part, Stevenson does not deny submitting the resignation letter but says that she, in fact, never resigned and continued to work throughout the balance of 1995. Stevenson has provided a virtually complete set of pay stubs spanning the period from January to September 15th, 1995 but then there is a "gap" until September 1996. Thus, there is no evidence before me to contradict the employer's assertion that Stevenson quit in September 1995 and was not rehired until February 1996 other than the more recent ROE dated August 19th, 1997 which indicates that Stevenson was employed from January 4th, 1994 until July 29th, 1997. The employer's position, of course, is that this latter ROE was incorrect at least insofar as the dates of Stevenson's employment were concerned. The employer's payroll records also corroborate the employer's assertion that Stevenson was not on its payroll from mid-September 1995 until February 1996.

More troubling, and this has been confirmed in writing by the adjudicator, the employer's representative specifically raised the matter of Stevenson's resignation at the appeal hearing (this assertion was not denied by Stevenson) but for some reason this evidence was not referred to by the adjudicator in his reasons for decision. In my view, this is not the sort of evidence that ought to have been excluded by the adjudicator--and, indeed, there was no such ruling--under the *Tri-West/Kaiser Stables* exclusionary rule (see B.C.E.S.T. Decision Nos. D268/96 and D058/97, respectively) because this is manifestly not a case where employer refused to participate in the original investigation of the complaint nor was it otherwise "sitting in the weeds" on this point (see *Specialty Motor Cars,* B.C.E.S.T. Decision No. D570/98).

This is not a situation where the employer seeks to introduce new evidence at the reconsideration stage. Had that been the situation, I would not have considered the evidence regarding Stevenson's resignation to be properly before me--see *Canadian Chopsticks Manufacturing Co. Ltd.,* BC EST #D079/99 (Reconsiderationof BC EST #D369/98). While it is clear that the employer provided inaccurate information regarding Stevenson's period of service to the delegate during the investigation of Stevenson's complaint, its error was recognized and corrected by the time the matter was before the adjudicator on appeal. I also note that Stevenson's tenure did not appear to be a central focus of the delegate's investigation.

Therefore, in my view, the employer's oversight should not obscure the obvious fact that *Stevenson was not continuously employed* since 1994 and, accordingly, was *not* entitled, under the *Act,* to an award of 4 weeks' wages as compensation for length of service. Based on the evidence that was before the adjudicator (and recall that the adjudicator did *not* exclude the employer's evidence regarding Stevenson's earlier resignation), the adjudicator's decision is clearly wrong at least with respect to the quantum of Stevenson's entitlement to compensation for length of service. In my opinion, the reconsideration provision was designed to address the very situation presented by this application, namely, where--based on the evidence presented at the appeal hearing--an incorrect decision was rendered and it is in the interests of justice that the error be rectified.

ORDER

The application to vary the decision of the adjudicator in this matter is granted and, accordingly, the employer shall pay Stevenson the sum of $768.50 together with additional interest to be calculated by the Director pursuant to section 88 of the *Act*. In all other respects, the adjudicator's decision is confirmed.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal