An Application for Reconsideration

- by -

Comet Transport Ltd.
("Comet")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to Section 116 of the
*Employment Standards Act* R.S.B.C. 1996, C.113

**ADJUDICATOR:** Kenneth Wm. Thornicroft

**FILE No.:** 2003/023

**DATE OF DECISION:** June 13, 2003

# DECISION

## INTRODUCTION

This is an application filed by Comet Transport Ltd. ("Comet") pursuant to section 116 of the Employment Standards Act (the "Act") for reconsideration of an adjudicator's decision issued on March 25th, 2003 (BC EST # D095/03). By way of this latter decision, the adjudicator allowed the appeal of Ms. Henderika Koops ("Koops"), cancelled a determination that was issued in favour of Comet, and ordered Comet to pay Ms. Koops eight weeks' wages as compensation for length of service (see section 63 of the *Act*).

Comet's application for reconsideration, filed with the Tribunal on April 17th, 2003, seeks reconsideration of the adjudicator's decision on the following grounds:

- the adjudicator erred in finding that a condition of Ms. Koops' employment was substantially altered by Comet thereby resulting in Ms. Koops' deemed termination under section 66 of the Act; and

- If Ms. Koops was "constructively dismissed" pursuant to section 66, Comet was nonetheless not obliged to pay her any compensation for length of service since Comet offered--and Ms. Koops refused to accept--an offer of reasonable alternative employment [see section 65(1)(f) of the Act].

## PREVIOUS PROCEEDINGS

### *The Determination*

Ms. Koops was employed by Comet during the period from October 3rd, 1993 to February 25th, 2002 as an office administrator and was paid $12.25 per hour when her employment ended. Ms. Koops then filed a complaint with the Employment Standards Branch. Her complaint was the subject of an investigation; the complaint was *not* determined following a formal evidentiary hearing. I make this latter observation in light of the fact that the adjudicator--who did conduct a formal hearing--reached rather different factual conclusions after hearing the parties' evidence. In light of these differing adjudicative processes, it seems to me that the adjudicator was in a better position to make findings of fact with respect to disputed factual matters compared to the Director's delegate.

As set out in a determination issued by a delegate of the Director of Employment Standards on November 8th, 2002 (the "Determination"), Ms. Koops originally claimed eight weeks' wages as compensation for length of service based on her assertion that Comet substantially altered the conditions of her employment "which left her with no alternative but to resign from her position" (Determination, p. 1).

Section 66 of the *Act* states:

> **Director may determine employment has been terminated**
> 66. If a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated.

Ms. Koops claimed that on February 25th, 2002 she was told that effective the next day her usual shift schedule--6 AM to 2 PM--would be changed to a 10 AM to 6:30 PM schedule. Ms. Koops also alleged that she was told she would no longer be paid overtime in accordance with the provisions of the *Act* and that her duties would also be changed.

Ms. Koops, who is a single parent of a 10-year old and a 15-year old, maintained that the changed shift schedule would prevent her from adequately attending to her family responsibilities, particularly being home when her children arrived after school, helping them with their homework and dinner preparation. Ms. Koops rejected the new shift schedule and took an unpaid three-week "stress leave"--the need for this leave was supported by a doctor's note.

In the days following the commencement of her leave, she sought out new employment and on March 4th found new employment albeit at a wage rate $2 per hour less than she was earning at Comet. On March 5th she provided Comet with a letter in which she stated that "it would be virtually impossible for me to work these new hours" and that based on "my inability to work these new hours it is with some regret that I must inform you that I believe that you have rendered me unable to continue to offer Comet Transport my services effective immediately". Although Ms. Koops did not use the term, it is clear that she took the legal position that she had been constructively dismissed.

Comet took the position that its decision to change Ms. Koops' shift schedule was made for legitimate business reasons--these reasons are delineated at pp. 3-4 of the Determination. Comet did not deny that it unilaterally changed Ms. Koops' shift schedule or that a change to a salary system was discussed. Comet denied that it told Ms. Koops she would no longer be eligible for overtime pay or that her responsibilities would have been adversely affected by the shift change.

The Director's delegate made several findings of fact including a finding that the shift change would not have reduced Ms. Koops' responsibilities and that the shift change was made for legitimate business reasons. The delegate turned her mind to section 66 and stated (Determination, p. 5):

> I cannot conclude that the change in the shift time was tantamount to a demotion or substantial change in Ms. Koops conditions of employment. She was to continue to be employed as an office administrator and was expected to perform the same type of work...There is no evidence to support the conclusion that the employer reduced her rate of pay or her hours of work. There was some discussion of a salary rather than an hourly rate but the final numbers were never worked out. The number of hours worked per day was to remain the same, only the start and stop times were to change.

With respect to the matter of Ms. Koops' family responsibilities, the delegate observed that Ms. Koops' believed that the shift change would adversely affect her but that "an employer has the right to schedule hours of work to meet the business' needs" and that it also "has the right to manage the workplace and establish hours of work based on the business' requirements" (Determination, p. 6).

The delegate noted that the only issue before her was whether the shift change was a "substantial adverse alteration of a condition of employment" and concluded that such an adverse alteration was not present in the instant case. Thus, the delegate dismissed Ms. Koops' complaint.

***The Appeal***

Ms. Koops appealed the Determination and her principal assertion was that the change in her work schedule was a mere subterfuge designed to force her to resign her employment with Comet. The appeal was heard on March 4th, 2003 and in reasons for decision issued on March 25th, 2003 the adjudicator allowed the appeal and ordered Comet to pay Ms. Koops eight weeks' wages as compensation for length of service. In allowing the appeal, the adjudicator made several important findings.

First, the adjudicator observed that while "the Tribunal has no right to review the business efficacy of a decision made by the employer" (Reasons, p. 6), the Tribunal nonetheless does have the jurisdiction to determine if an employer has substantially altered an employee's conditions of employment.

Second, the adjudicator concluded that Comet did "substantially change" Ms. Koops' conditions of employment. In particular, the adjudicator held that:

- it was an implied term of Ms. Koops' employment contract that she would not be required to work a shift that would interfere with her ability to manage her family responsibilities as a single mother (Reasons, p. 6);

- during her nine years of employment, Ms. Koops had never been regularly scheduled to work past 5 PM (Reasons, p. 6);

- the explanation given by Comet regarding the immediate need to change Ms. Koops' shift was not an honest and bona fide explanation (Reasons, pp. 6-7);

- Comet's so-called "legitimate business reasons" for changing Ms. Koops' shift schedule (a point accepted by the delegate) did not pass muster under more rigorous scrutiny (Reasons, pp. 6-7); and, finally,

- Comet made no attempt whatsoever to accommodate Ms. Koops' family responsibilities once her concerns were made known to Comet--Ms. Koops expressed her concerns immediately after being advised of the shift change (Reasons, p. 7).

## ANALYSIS

*This application for reconsideration is timely (see Unisource Canada Inc.*, BC EST # D122/98 and *MacMillan Bloedel*, BC EST # D279/00). It also raises an important question of law, namely, the scope of section 66 of the *Act*.

However, after having considered this application, I must conclude that it is not, in my view, a meritorious application.

***Constructive Dismissal***

Comet says that the adjudicator did not apply the correct "test" as to whether section 66 was contravened. In particular, Comet says that the alterations made by it to Ms. Koops' conditions of employment were not fundamental changes. I cannot agree.

Given the adjudicator's findings of fact (which are not to be disturbed unless they could be characterized as wholly lacking an evidentiary foundation--which, in this case, they are not), I cannot conceive how Comet's unilateral changes to Ms. Koops' working schedule could be characterized as anything other than fundamental. It should be remembered that the adjudicator found that Ms. Koops had an implied contractual right not to be scheduled in a manner that interfered with her family responsibilities. It should also be noted that section 2(f) of the *Act* states that one of the purposes of the *Act* is "to contribute in assisting employees to meet work and family responsibilities" (my italics).

Further, to the extent that Comet's proposed shift schedule interfered with Ms. Koops' ability to meet her family responsibilities Comet had a duty, under provincial human rights legislation, to make a reasonable effort to accommodate Ms. Koops--something the adjudicator held Comet failed to do. The *Act* must be interpreted in a manner that is consistent with the quasi-constitutional status of human rights legislation--see *Insurance Corporation of B.C. v. Heerspink,* [1982] 2 S.C.R. 145, *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.,* [1985] 2 S.C.R. 536; see also section 4 of the B.C. *Human Rights Code*.

It follows that I wholly reject Comet's assertion the adjudicator made a "patently unreasonable" finding when she concluded that Ms. Koops had an implied contractual right to have her work scheduled in a manner that would not interfere with her family responsibilities and that the trampling of that right amounted to a substantial alteration of a condition of her employment.

The foregoing is not to suggest that Comet could not have changed Ms. Koops work schedule. However, if it wished to do so, it was obliged to give her proper notice of the proposed changes--see *Irvine*, BC EST # D005/01--and to make a reasonable effort to accommodate Ms. Koops' family responsibilities.

***Reasonable Alternative Employment***

In the alternative, Comet says that even if Ms. Koops was constructively dismissed under section 66, she was nonetheless not entitled to any compensation for length of service since her refusal to accept the changed work schedule constituted a refusal to accept an offer of reasonable alternative employment [see section 65(1)(f) of the *Act*]. I have two observations with respect to this latter submission.

First, I fail to conceive how an offer of employment that does not satisfy the employer's legal obligation to accommodate an employee's family status can be characterized as a "reasonable" offer of employment. Suppose an employer proposed a shift change that required the employee to work on his or her religious "day of rest". Would that proposal constitute a reasonable offer of alternative employment? I think not--see *Central Okanagan School District No. 23 v. Renaud,* [1992] 2 S.C.R. 970 and *Commission scolaire régionale de Chambly v. Bergevin,* [1994] 2 S.C.R. 525. In determining whether a "reasonable" offer has been made, a number of factors may be considered including the express and implied terms of the employee's existing contract of employment and the employee's personal circumstances that might militate against accepting the employer's proposal (see *Hopp*, BC EST # D433/97). In this case, the adjudicator held that Ms. Koops' employment contract included an implied term that she would not be required to work beyond 5 PM and that the proposed shift change did not adequately accommodate her family status as a single mother of two children.

Second, having reviewed the file, it appears that section 65(1)(f) was never raised by Comet either during the delegate's investigation or in the appeal proceedings before the Tribunal. Further, this argument was never raised by the delegate in her submissions to the Tribunal although she did otherwise support

Comet's position with respect to section 66. In my view, it is not appropriate for Comet to raise this argument, for the very first time, by way of an application for reconsideration.

**ORDER**

The application to vary or cancel the decision of the adjudicator in this matter is **refused**. Pursuant to section 116(1)(b) of the *Act*, the decision of the adjudicator in this matter is confirmed.

**Kenneth Wm. Thornicroft**
**Adjudicator**
**Employment Standards Tribunal**