Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

Peoples Wholesale Inc.
("Peoples")

- 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.: 2001/337

DATE OF DECISION: July 23, 2001

DECISION

OVERVIEW

This is an application filed by Peoples Wholesale Inc. ("Peoples") pursuant to section 116 of the *Employment Standards Act* (the "*Act*") for reconsideration of an adjudicator's decision issued on April 11th, 2001 (B.C.E.S.T. Decision No. D171/01). By way of this latter decision, the adjudicator confirmed a Determination that was issued by a delegate of the Director of Employment Standards on November 27th, 2000.

THE DETERMINATION

The Director's delegate ordered Peoples to pay a total sum of $5,412.30 to two former employees, Janet Biller ($2,812.71) and Stephanie Perrault ($2,599.59), representing, for each employee, 8 weeks' wages as compensation for length of service (see section 63) together with section 88 interest. Peoples maintained that neither employee was entitled to be paid any compensation for length of service since each received the requisite 8 weeks' written notice provided for in section 63(2)(b) of the *Act.* Both employees were given essentially identical written notices, dated November 8th, 1999, which stated: "As of the date of this letter you are hereby given 8 weeks notice that your services are no longer required by this company."

Peoples maintained that about one week or so after it terminated the employees it endeavoured to contact (by telephone and registered mail) them to request that they work through the balance of their respective 8-week notice periods but that neither employee responded to the employer's entreaties. Ms. Biller's position was that she was offered a choice of either being laid off or continuing to working but at substantially reduced hours and when she rejected the latter, she was given her termination notice. Ms. Biller says that she was told to leave work immediately and was not permitted to work out the 8-week notice period. Ms. Perrault's position was not materially different from Ms. Biller's.

The delegate held, at page 4 of the Determination, that "neither Biller nor Perrault were permitted to work out their notice period". A week or more after the employees' terminations, Peoples "learned that the employees should have been permitted to work out the eight week notice period" at which point letters were sent to the employees inviting them to return to work but neither employee responded. The delegate concluded, at page 6 of the Determination:

> Both Biller and Perrault had worked for the Employer in excess of consecutive eight years so the Employer's liability with respect to [compensation for length of service] for each is the maximum of either weeks wages or notice in lieu of wages. Each employee was given a

> written notice of termination in the amount of eight weeks, the full liability under the Act.
>
> However, neither employee was given the opportunity to work out their notice period...
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> In order to comply with Section 63(3)(a), notice of termination of employment must be written, which it was...it must be written **working** notice, which it was not. In reality, for both Biller and Perrault the last day of employment was the date the letter was issued, November 8, 1999.
>
> Employees are entitled to work during their notice period...Further, the conditions of employment must remain the same during the notice period. Both employees had been working 4-5 shifts per week, which they should have continued to do during the eight week notice period. During the eight week notice period the employer could not have their hours reduced to only 1 or 2 days a week.
>
> There was not evidence provided by the Employer that, even if the Complainants had agreed to return to work in response to the registered letter, the Complainants would have worked the "regular" 4-5 shifts per week. In any event, the act of termination had already occurred and can not be subsequently undone simply because the Employer suddenly realized they face some financial liability.

Peoples appealed the Determination to the Tribunal and at an oral hearing held on March 29th, 2001 advanced four grounds of appeal: i) the employees chose termination over reduced working hours in order to secure higher employment insurance benefits; ii) following termination, the employees refused to return to work when requested to do so; iii) the employees planned to quit, in any event, in January 2000; and iv) the Determination ought not to have referred to collection proceedings. The adjudicator rejected all four grounds for reasons with which I entirely agree.

THE RECONSIDERATION APPLICATION

Peoples' application for reconsideration is contained in a letter to the Tribunal dated April 18th, 2001. The five grounds for reconsideration are as follows:

> a) We feel there is a strong question as to whether natural justice was applied.
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> b) We feel there are mistakes in stating the facts.

c) Two very significant pieces of written evidence was overlooked.

d) We strongly disagree with [the adjudicator's] irrelevancy in the fact it was their choice to be laid off, instead of a taking a drastic cut back in hours with the rest of the staff. There would not have been a termination without their request. He quotes Section 66 of the act. How can this apply? They were not singled out. This was store wide to try and keep the company and everyone working.

e) No consideration was given regarding the conflicting instructions Peoples was given by numerous members of the Prince George Employment Standards office. We did exactly as instructed and in good faith, not only in our desire to comply with the Standards but also for the best interest of our employees.

ANALYSIS

This application, in my opinion, is not meritorious. I shall briefly address each of the above-noted five grounds.

At the appeal hearing, the agent for Peoples requested that each employee be excluded from the hearing room while the other testified. The adjudicator refused this request and his reasons for so doing are set out at pages 2-3 of his decision. I entirely agree with his ruling. Peoples also says that the delegate was biased but this allegation is wholly unproven. Although Peoples asserts that there was some delay in investigating the initial complaints, Peoples has not shown how this delay resulted in a breach of the rules of natural justice. Certainly, so far as I can see, Peoples was given a full and fair opportunity to put its case forward--both before the delegate and the adjudicator. Peoples' principal complaint appears to be grounded in the fact that their position did not prevail.

As for the second ground, the Tribunal has repeatedly stressed that the reconsideration provision of the *Act* is not to be used as a second opportunity to challenge findings of fact made by the adjudicator, unless such findings can be characterized as lacking any evidentiary foundation whatsoever. There is nothing before me to suggest that any of the adjudicator's findings of fact lacked an evidentiary foundation.

I have reviewed the two so-called "significant pieces of written evidence", namely, two internal "Discussion Records" that purport to record conversations between each of the two employees and one Gordie Brown (whom I presume is a People's manager). These two documents, hearsay in nature, rather than assisting Peoples, in fact, undermine its legal position inasmuch as the documents confirm that the two employees were, in effect, constructively dismissed (see section 66 of the *Act*).

The fourth ground essentially advances the legally untenable position that the "choice" offered to the employees in this case (termination or reduced hours) released Peoples from any obligation to pay compensation for length of service. This argument was fully, and in my view, absolutely correctly, addressed by the adjudicator in his decision. The fact that all employees might have been offered the same "Hobson's choice" only establishes, if anything, that *all* such employes were constructively dismissed.

Finally, if Peoples is of the view that it received improper advice from the local Employment Standards Branch office, that is an issue between the Branch and Peoples. It does not affect Peoples' statutory obligations vis-à-vis the two employees with respect to the matter of compensation for length of service. Peoples remains free to commence a separate legal action against the Branch if it wishes. I pass no comment on the merits of any such action.

ORDER

The application to vary or cancel the decision of the adjudicator in this matter is refused.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal