Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

B. & C. List (1982) Ltd.

- 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: John M. Orr, Panel Chair
David B. Stevenson
Norma Edelman

FILE No.: 2001/598

DATE OF DECISION: November 28, 2001

DECISION

OVERVIEW

This is an application by B. & C. List (1982) Ltd. ("the employer") under Section 116 (2) of the *Employment Standards Act* (the "*Act*") for a reconsideration of a Decision #D387/01 (the "Original Decision") that was issued by the Tribunal on July 19, 2001.

Ms. Jeanne Mastin ("Mastin") was employed by B. & C. List (1982) Ltd. from May 11, 2000 until September 25, 2000 when Mastin went to work for a different employer. Ms. Mastin was initially hired as a lawyer's administrative assistant. On September 6, 2000 the employer advised Mastin that it could no longer afford to maintain her full time position. She was offered a different position as a telemarketer at a lower rate of pay. The following day Mastin worked in the telemarketing position for a morning but it was clear to both parties that telemarketing was not within Mastin's skill area. The employer then offered to return Mastin to her previous position but only for half time, twenty hours per week. Mastin worked under these conditions for approximately a week and a half before leaving to take a full-time position elsewhere.

The Director determined, under section 66 of the Act, that the conditions of employment for Mastin had been substantially altered by these events and determined that the employer had therefore terminated her employment. She was then entitled to compensation for length of service.

The employer appealed the Determination and the adjudicator in the original decision found that broadly speaking the grounds of appeal fell into two categories.

> "Firstly that Ms Mastin had been given a choice as to whether she would receive notice or accept the new position. Secondly that the employer had been denied a fair hearing by the Delegate because of the failure of the Delegate to adhere to the principle of *audi alterem partem.*"

The adjudicator continued:

> "I determined that any failure by the delegate to allow a fair hearing would be corrected by the ability of the employer to call witnesses at this proceeding and to cross-examine Ms Mastin. The hearing proceeded on the question of whether Ms Mastin was owed compensation in lieu of notice."

One of the significant issues presented by the employer was that, in their submission, Ms Mastin had not been dismissed under the *Act* or otherwise. The employer relied upon Ms Mastin's agreement to continue to work under the new terms of employment. The adjudicator found as a fact that Ms Mastin was given the choice of either accepting the new

position or being terminated. The employer argued that this agreement acted as an *estoppel* to prevent Ms Mastin from making application for compensation for length of employment.

The adjudicator discussed at length issues about whether or not notice had been properly given under the *Act*, the effects of "verbal notice", and mitigation. The adjudicator concluded that the determination should be confirmed.

The employer has applied to the Tribunal for a reconsideration of the original decision on two grounds. Firstly, the adjudicator had failed to address the issue of *estoppel* and secondly the adjudicator had misapplied the concept of mitigation.

ANALYSIS

In our opinion, the matters raised in this application for reconsideration are worthy of examination (se Milan Holdings Ltd., BC EST #D313/98). On reviewing the original decision and the submissions of the employer we are satisfied that the relationship between section 66 of the Act and the requirement in section 63 to pay compensation for length of service on the termination of employment needs clarification. We conclude that the principle of *estoppel* has no application and that mitigation is not a factor that needed to be considered.

Section 66 of the *Act* provides as follows:

> **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.

The significant and uncontested fact in this case is that the conditions of Mastin's employment were altered. The Director reviewed the totality of the circumstances and decided that the conditions of employment were "substantially altered". The Director then determined that because the conditions of employment had been substantially altered that the employer had terminated the employment. Once the Director has determined that the employment was terminated, the termination is effective as of the time that the conditions were substantially altered. Although the Director does not specify whether the substantial alteration occurred on September 6th or 7th it is clear that the latest the termination occurred was in the afternoon of September 7th. The employer's liability for compensation for length of service under section 63 of the Act crystallized at that time.

Section 63 is part of the legislative scheme to "ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment". Generally speaking, section 63 contains provisions relating to an employer's liability to pay an employee length of service compensation upon termination of employment. Length of service compensation is, from the employee's perspective, a statutory benefit earned with continuous employment. It is a minimum statutory benefit. From the employer's perspective, it is a statutory liability that accrues to each employee with more than 3

consecutive months of employment. While length of service compensation is often referred to as "termination" or "severance" pay, it is related to termination only to the extent the termination of employment, actual or deemed, triggers the benefits or liability, depending on the perspective. Subsection 63(3) identifies three circumstances where the statutory liability of the employer to pay length of service compensation is deemed to be discharged: first, if the employee is given written notice of termination equivalent to the employer's statutory liability to the employee; second, if the employee is given a combination of notice and compensation equivalent to the employer's statutory liability to the employee; and third, if the employee terminates the employment, retires from employment or is dismissed for just cause.

In this case termination occurred when the conditions of employment were substantially altered. While there were discussions about notice and alternative employment there was no actual notice prior to the events that have been determined by the Director to constitute termination. It was also never suggested that she had terminated her own employment at that time or that she had retired or was dismissed for just cause. The liability of the employer to pay compensation for length of service was not discharged by the operation of any of the three circumstances identified in Section 63(3).

The appropriate quantum of compensation accrues to the employee at the moment of termination. Section 63(4) provides that the amount the employer is liable to pay "becomes payable on termination of employment." The amount of compensation is included in the definition of "wages" and, pursuant to Section 18(1) is required to be paid to the employee within 48 hours of termination.

While we concur with the outcome of the original decision that the determination dated February 27 2001 should be confirmed, we conclude that it was not necessary for the adjudicator to have entered into an analysis of the subsequent actions of the employer or the employee as they were not relevant to the analysis as to whether compensation for length of service was payable.

In the grounds for reconsideration the employer notes that the adjudicator did not mention the "key point" of their submission that Mastin was *estopped* by her agreement to accept the part time position. While the adjudicator does not refer specifically to "*estoppel*" such a principle has no application, as the right to compensation for length of service is statutory and was already vested prior to any such agreement. *Estoppel* is a public policy doctrine designed to advance the interests of justice. It is not intended to allow an employer to enter into an agreement with an inferior to avoid a statutory obligation. As the Supreme Court of Canada has put it:

> "Besides the unequal situation which makes an *estoppel* inapplicable, there is another consideration: the public interest and morality require that the perpetrator of a wrongful act should not profit thereby."
> *Bank of Montreal v. Ng [1989] 2 S.C.R.429*

More specifically the Privy Council has held that *estoppel* cannot operate so as to impede a statutory obligation: Marine Electric Co. v. General Dairies Ltd. [1937] 1 D.L.R. 609 (P.C.). This principle was applied by the Supreme Court of Canada in Hill v. Nova Scotia (Attorney General) [1997] 1 S.C.R. 69. As stated above it is our opinion that the compensation for length of service is a vested statutory right and no agreement entered into, or any actions, by the employer and the employee can operate as an *estoppel* to impede the application of the Act.

On another issue the employer submits that the adjudicator was in error in stating that hours worked in mitigation must be worked before the change in working condition. The employer submits that mitigation comes after and not before the alleged dismissal. We concur that in general civil litigation the duty to mitigate damages would generally arise subsequent to the act giving rise to damages, but in our opinion, mitigation has no application to the vested right to compensation for length of service: see Peoples Food Market Ltd v. B.C. (Director of Employment Standards) [1987] B.C.J. No.478 (Lamperson, J.) applied in Phil Van Enterprises Ltd., BC EST #D284/96.

We conclude that the Determination was correct and to the extent that the original decision confirmed the Determination it was also correct. In our opinion the grounds raised in the application for reconsideration do not merit a cancellation or variation of the original decision and therefore the application for reconsideration is dismissed.

ORDER

The application for reconsideration herein is dismissed.

John M. Orr **Adjudicator** **Employment Standards Tribunal**	**David B. Stevenson** **Adjudicator** **Employment Standards Tribunal**	**Norma Edelman** **Vice-Chair** **Employment Standards Tribunal**