

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

- by -

Christine Keryluk

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: James Wolfgang

FILE No: 2000/061

DATE OF DECISION: February 7, 2000

DECISION

OVERVIEW

Christine Keryluk (Keryluk) filed a complaint with the Branch against Dr. C.S. Vinnels (Vinnels) on August 13, 1998. A Determination dated January 25, 1999 found Keryluk's complaint was untimely. Keryluk appealed the Determination and a hearing was held May 10, 1999 with Decision 182/99 rendered May 31, 1999. The decision overturned the Determination and referred the matter back to the Branch for the calculation of monies owed.

The Branch completed the calculations on November 8, 1999 and recommended that Vinnels pay \$7,098.32 to Keryluk.

Vinnels has challenged the findings of the Branch in letters dated November 23, 1999 and December 6, 1999. The Tribunal will not proceed with the application for reconsideration until the matter of quantum has been resolved.

ISSUE TO BE DECIDED

Are the calculations and the amount recommended by the Branch to be paid to Keryluk correct and, if not, what is the correct amount?

FACTS

Vinnels employed Keryluk as a dental hygienist on a three-day per week basis. Keryluk last worked November 20 and was paid sick leave as per her employment contract until November 27, 1997. She then left on stress leave. Vinnels issued a Record of Employment on December 02, 1997, showing her reason for leaving was "Stress Leave" and indicated her date of recall was "unknown".

Vinnels hired a temporary replacement for Keryluk and her position was made permanent around spring break in April. The actual date of when Vinnels replaced Keryluk is not conclusive. No documentation has been supplied indicating when Vinnels ended the employment relationship. The Decision found spring break to be the most probable date when Keryluk was terminated and, therefore her complaint to the Branch dated August 13, 1998 was timely and the matter was referred back to the Branch for the calculation of the correct amount owed to her.

The Determination dated November 8, 1999 dealt with overtime pay, sick pay, regular wages, false representation and compensation for personal damages and cost of relocation, notice of change of shift and compensation for length of service. It found Vinnels owed Keryluk \$355.00 for overtime, \$3,456.00 for sick pay, \$414.00 for regular wages, nothing for the claim of false representation, nothing for the claim of change of shift notice, and \$1,836.00 for compensation for length of service plus vacation pay of \$242.44 and interest of \$794.99 for a total of \$7,098.32.

At the hearing my notes indicate Keryluk stated she had started work part time in February 1999. Since the hearing, counsel for Vinnels has supplied a letter from Dr. D. I. Lazaruk indicating Keryluk started working part time for him on February 16, 1998. I must assume my notes are incorrect.

ANALYSIS

The question before me is one of quantum, however Vinnels' argument goes, not to quantum, but to the very question of whether Keryluk had any entitlement. Before deciding on the question of quantum, two points in Vinnels letters dated November 23, 1999 and December 6, 1999 should be addressed.

The most significant point is Vinnels claim Keryluk's employment ended November 27, 1997. If this were the case the Employer had an obligation to issue a Record of Employment indicating the employee had quit. The only R.O.E. issued was dated December 2, 1997 and showed Keryluk was on stress leave and her return date was unknown. Until that R.O.E. is replaced Keryluk was still an employee on leave of absence. The first indication in writing from Vinnels indicating Keryluk was no longer employed occurred on August 5, 1998 in reply to her letter of July 28, 1998 in which she claims she was "wrongfully dismissed". In that letter he indicates, in his opinion, all matters have been resolved and refers Keryluk to his lawyer if she wishes to pursue the matter further.

Secondly, we must remember Keryluk was only working part time for Vinnels. There was nothing in her employment contract forbidding her from working for other dentists. She began working for Dr. Lazaruk on February 16, 1998 one or two days a week. There was no reason for her to terminate her employment with Vinnels to take a part time position with another dentist. There is a conflict between the letter of Dr. Lazaruk and the evidence of Keryluk over whether she was seeking full time or part time work. The fact is she went to work part time.

In a letter dated June 9, 1999 Vinnels states, in part:

Also, if her February employment had been taken into consideration, the August date of her complaint was beyond the six-month time limit for a complaint to Employment Standards.

If we take the date February 16, 1998 when she began working for Dr. Lazaruk as the date Vinnels terminated the employment of Keryluk, the application by Keryluk to the Branch, dated August 5, 1998 and received by the Branch August 13, 1998 would be timely.

Further, I have not dealt specifically with the response of Keryluk to the submissions from Vinnels although they were considered.

I find the calculations and the amount of the Determination dated November 8, 1999 to be correct with four exceptions. In respect to the calculation of Regular Wages, I find a difference between the records provided and the amount calculated by the delegate for the periods October 16-30 and

November 04-14, 1997. The delegate finds 3.75 hours are owed in October and my calculation produces 4.75 hours, a difference of 1 hour. In November the delegate finds 4 hours and my calculation is 5.75, a difference of 1.75 hours, for a total of 2.75 hours. There are two errors in the overtime calculation. In the pay period September 16-30 it should be \$63.00 not \$27.00. In November 04-14, the amount owed should be \$94.50 instead of \$94.00. This would increase the amount owed Keryluk by \$99.00 for regular wages and by \$36.50 for overtime pay plus an additional \$5.42 in vacation pay for a total of \$140.92 plus any additional interest determined by the Branch.

ORDER

In accordance with Section 115 of the *Act*, the Determination dated November 8, 1999 is varied as indicated above. Interest is to be calculated in accordance with Section 88 of the *Act*.

James Wolfgang
Adjudicator
Employment Standards Tribunal