

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1995, c. 38

-by-

Peninsula Consumer Services Co-Operative
("Peninsula ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: C. L. Roberts

FILE NO: 96/337

DATE OF HEARING: December 10, 1996

DATE OF DECISION: December 20, 1996

DECISION

APPEARANCES

Gary M. Catherwood, Russel & DuMoulin Pat Fafard Mike Fecteau	For the Appellant
Verne Slosse, general manager, Douglas Street Canadian Tire Store	witness for the Appellant
Gerry Omstead	For the Director
Ken Ryan	On his own behalf

OVERVIEW

This is an appeal by Peninsula Consumer Services Co-Operative ("Peninsula"), pursuant to Section 112 of the *Employment Standards Act* ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued on May 9, 1996, in which the Director found that the employer had violated Sections 58(3) and 63(1) of the *Employment Standards Act*. A finding that Peninsula had also violated Section 21(1) was not appealed.

ISSUE TO BE DECIDED

The two issues on appeal are whether Peninsula owes Ryan

- a) vacation pay; and
- b) compensation in lieu of notice.

FACTS

Ken Ryan ("Ryan") began employment with Peninsula on September 21, 1987, and was successively promoted to Assistant Hardware Manager, and then Gas Bar and Hardware Manager, the job he held until June 30, 1995, which was his last day of employment.

In June 1995, the store manager Bert Jaeger ("Jaeger") prepared a performance appraisal on Ryan, and gave it to Pat Fafard, ("Fafard"), Peninsula's general manager. On June 30, 1995, Ryan met with Fafard to discuss the performance appraisal. Although there is disagreement as to whether Ryan was shown a copy of the appraisal, it was agreed that the document was not discussed in detail. The parties agree that Ryan was told that his performance was unsatisfactory, and that his strengths as an employee were in sales, not in administration. Fafard's evidence was that at some point in the discussion, Ryan was asked whether he was looking for other work. Ryan agrees that

he was generally interested in other employment, but was not actively seeking other employment opportunities. Fafard also testified that he asked Ryan how long it would take him to find a new position. Ryan indicated that he could find other employment in one month, and that he wanted to remain at Peninsula while he looked for other work. Fafard would not consider that option, and offered Ryan a four week severance package in order for him to seek alternative employment. Fafard further indicated that his offer of the severance package would be open for acceptance until July 3. After further discussions, that date was extended until July 4. After completing his shift on June 30, Ryan visited a Canadian Tire Store branch and submitted an application for employment.

On July 4, Ryan showed up at Peninsula to meet with Fafard. Fafard was not present, although the receptionist advised him that Fafard was expecting his telephone call. Ryan cleaned out his desk, gave the keys to a junior employee, arranged for his shifts to be covered that week, and left Peninsula at approximately 11:30 a.m. to do other business. He arrived at his home at approximately 3:00, and found two telephone messages to call Fafard at work, which he did. Fafard was on coffee break, so a message was left. That message indicated that Fafard was to "call back". Fafard waited at the office until 6:00 p.m., but received no call from Ryan.

On July 5, Ryan began work at Canadian Tire. Fafard became aware of that fact, and visited Ryan at the store and asked him whether he had resigned. The response was non committal. On July 8, Fafard and Jaeger delivered a letter to Ryan notifying him that if Peninsula had not heard from him about his intention to stay on with Peninsula by July 10, his employment would be terminated.

On July 10, Ryan delivered a letter to Fafard, dated July 4, in which he indicated that he was accepting the offer of severance. Ryan also demanded, among other things, wages and compensation.

On July 24, Peninsula sent Ryan a letter indicating that he had been terminated as a result of his action in taking up employment with Canadian Tire and being absent without leave.

The parties agreed that no warning letter had been given to Ryan prior to the June 30 meeting, and that all previous performance appraisals had been satisfactory or better.

The Director found that there was no just cause for the termination, as there was no evidence that any warnings were issued to him. The Director relied on a performance appraisal which stated that Ryan's poor performance was grounds for dismissal. The Director found that there was no disciplinary action taken by Peninsula, and determined, on a balance of probabilities, that Ryan was terminated. The Director concluded that Ryan was not given a viable option when he was offered a severance package, and that an average person would believe they had been terminated. The Director also relied on the Record of Employment (ROE), which identified as the reason for issuing the document as "E" - fired, rather than "quit", and the payout of the vacation pay, in finding that the employment had ended, and ordered payment of \$4,250.40 as compensation in lieu pursuant to Section 63 of the Act.

The Director relied upon the payroll records which showed that Ryan was paid out his vacation pay on the cheque issued for the period July 2 - 8, 1995, and Ordered payment of \$510.04 plus interest as vacation pay.

ARGUMENT

Peninsula argues that vacation pay, which is calculated on a May 30 - April 30 period, was taken by Ryan by April 30, 1995. Peninsula argued that for the period May 1 to June 30, 1995, the entitlement to vacation pay was 303.60, that Ryan took one week of holidays during that period, and that in fact as Ryan was paid \$304.00 as vacation pay for the last pay period, Ryan has been overpaid and must repay Peninsula for that overpayment.

Ryan argued that as he traditionally took his holidays in August, he is owed vacation pay for 1995.

Peninsula's position is that Ryan either quit his position, or in the alternative, was properly terminated for being absent without leave. Peninsula also argues that Ryan was given an offer of severance as a result of the job performance discussions, that the offer was open for 4 days following those discussions, and that Ryan did not accept the offer. Peninsula argued, in the alternative that Ryan abandoned his position with Peninsula when he commenced working for Canadian Tire, without giving notice to Peninsula, and that he breached the employment contract, and that no warnings were required to be given.

Ryan argued that at the conclusion of the meeting, including Fafard's questions regarding his ability to find alternative employment, he understood that his options were to quit or be fired. He further argued that when Fafard did not show up for the meeting set for the morning of July 4, and did not call him back when he left a message for him, he understood that he was fired. Only after that did he clean out his desk, turn in his keys and accept the position with Canadian Tire.

ANALYSIS

Compensation In Lieu

Even though the details of the conversation between Ryan and Fafard on June 30 are in dispute, I accept that at the end of the discussions, Ryan honestly believed that he no longer had a position with Peninsula. His actions in applying for a position with Canadian Tire that evening support that understanding, as does his conversation with Verne Slosse on July 5. Although Ryan understood he had an option to accept a severance package up to July 4, I accept that he felt that was the only option available to him, as he had been effectively terminated. Fafard agreed, in cross examination, that if the discussions on June 30 did not "go positively", it would result in Ryan's dismissal. Although it was agreed that no explicit ultimatum was issued, I find Ryan believed he had no option to continue to work with Peninsula. Fafard's evidence was also that when Ryan stated he might be able to find other work within a month, he was offered a severance package. I am unable to find that Ryan would volunteer to find other employment unless he felt he had no option to do so. Ryan's actions in cleaning out his desk and handing in his keys on the afternoon of July 4 are consistent with those of an employee who thought he had been terminated.

The law is clear that prior to termination for poor performance, progressive discipline must be applied. Although it is apparent that the events which precipitated the offer of the severance package was a discussion of poor performance, there is no indication that progressive discipline was considered.

On the evidence presented, I am unable to conclude that the Director's finding that a reasonable person, in Ryan's position, would conclude they had been terminated, is in error. It would be unreasonable to conclude that the parties would enter into discussions about a severance package

had that not been preceded by a discussion about termination. As there had been no prior written warnings given to Ryan, I find that his conclusion that he was terminated was a reasonable one. Consequently, whether or not he accepted the severance package on July 4 or not is not material to my determination. However, I also conclude that although Ryan's attempts to accept the severance package were less than diligent, it was his intention to do so.

Counsel referred me to two decisions of the Tribunal: **BC EST # D005/96 P. A. Building Maintenance Ltd.** **BC EST # D047/96 Wilson Place Management Ltd.** I am unable to conclude that the facts of those cases are sufficiently similar to the facts of this case to be of any assistance in arriving at my determination.

On the evidence, I am unable to find that the Director's determination was in error, and dismiss the appeal in this respect.

Vacation Pay

With respect to the vacation pay, I find that Peninsula's vacation year ran from May 1 to April 30 of each year. The evidence shows that Ryan earned 2.5 vacation days effective April 1995, and was paid for 2.5 vacation days. Although Peninsula's records may not have been clear, I find that Ryan knew, or ought to have known, that the vacation period was calculated on a May to April year, and that he had taken all vacation earned as of April 30, 1995. Ryan signed a document acknowledging that he had used up all of his vacation time as of April 30, 1995. Although Ryan testified that he did not read the document and did not understand how his vacation entitlement was calculated, I am unable to find his evidence credible. The document is short and is written in plain English. I also note that Ryan was sent a letter in December 1990 confirming a discussion he had with the Hardware Manager shortly after he was promoted to Assistant Hardware Manager. The letter indicated that Ryan had 3 weeks vacation per year with the fiscal year being May 1 to April 30.

In any event, the evidence supports the claim that no vacation pay is owing. I allow the appeal in this respect.

ORDER

I Order, pursuant to Section 115 of the *Act*, Determination No. CDET 0002237 be varied to show that Peninsula owes Ryan compensation under Section 63 of the *Act* and made unauthorized deductions under Section 21 of the *Act*.

Carol Roberts
Adjudicator
Employment Standards Tribunal