

**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 -

Kirkpatrick Personnel Ltd.

(“Kirkpatrick”)

- of a Determination issued by -

The Director Of Employment Standards

(the “Director”)

**ADJUDICATOR:** Lorne D. Collingwood

**FILE NO.:** 96/087

**DATE OF DECISION:** April 4, 1996

## **DECISION**

### **OVERVIEW**

The appeal is by Kirkpatrick Personnel Limited ("Kirkpatrick") pursuant to Section 112 of the *Employment Standards Act* ("the Act") against Determination #000622 of the Director of Employment Standards, a decision dated January 5, 1996. That Determination was issued as a result of a complaint by Elaine Fink ("Fink"), a former employee of Kirkpatrick. Fink claimed that Kirkpatrick failed to give notice of termination as required by the Act and that she was owed certain severance moneys as a result. She was awarded two weeks pay, \$1,291.19.

### **FACTS**

Kirkpatrick Personnel is an employment agency supplying temporary help as well as people for permanent positions. Fink ceased to be an employee of Kirkpatrick on June 2, 1995. At that time she held the position of Personnel Consultant.

On May 19, 1995 Karin Kirkpatrick met with Fink. They disagree on what transpired at that meeting.

A letter to Fink, dated May 29, 1995, sets out what is said by Kirkpatrick to be subjects discussed at their May 19, 1995 meeting. The letter states, "You were given notice on May 19th that your employment under the current terms would be terminated on June 2nd, 1995". The letter then goes on to list three options that are said to have been offered Fink. They are as follows, I quote from the letter:

- "To leave and receive your salary to June 2nd, 1995 with commission paid to you for any leads you generated which result in job orders up to June 30th, 1995.
- To work the two weeks to market to result in more job orders and to use the office and facilities to aid in your personal job search.
- To work the two weeks under the previous agreement and then go to a 100% commission basis with no base salary."

The letter goes on to set out what Fink's responsibilities would be, beginning June 5, 1995, and the basis for paying commissions.

Fink continued working for Kirkpatrick until June 2, 1995 when there was another meeting and her employment was terminated.

### **ISSUES TO BE DECIDED**

Given the appeal there are four matters to decide. Was notice of termination required? If so, Was proper notice of termination given? And following that, should notice not have been given, What severance moneys are owed Fink, if any, given the length of her employment by Kirkpatrick? A fourth issue which arises with the appeal goes to whether commissions paid Fink after termination should have been deducted from the severance pay found owing.

## ANALYSIS

The parties have opposing views in respect who made the decision that Fink would leave. Did she quit or did Kirkpatrick terminate her employment? If it is the latter then Kirkpatrick had to give Fink notice of her employment's termination, clear notice.

The complete lack of hard evidence that Fink had decided to leave, and evidence which indicates that Fink was rather committed to working for Kirkpatrick, leads me to conclude that it was Kirkpatrick that terminated Fink's employment, but for that Fink would have stayed and begun working under the new terms of employment offered by the employer, or similar terms, clearly such things are often negotiable. I note in that regard evidence that Fink lent Kirkpatrick money through a credit card advance and that she declined the first of the three options offered by Kirkpatrick, to leave with two weeks pay. She was then asked by Kirkpatrick if she was planning to stay under the new terms of employment, and is said by the employer to have said, "she did not know what she wanted to do". That indicates that she had not ruled out staying, she was at least considering the idea. On the day of her termination, she is said by the employer to have asked for changes in the way the company was run. That attempt at negotiating better employment terms is another sign of an interest in staying. Finally, I note that it was Kirkpatrick that called the June 2, 1995 meeting that led to Fink's termination, not Fink. All this leads me to conclude that Fink was planning to stay and would have but for her being terminated by Kirkpatrick. It flows from that conclusion that notice was required.

Determination #000622 flows from the investigating officer's finding that Kirkpatrick failed to give Fink proper notice of her termination. I agree with that conclusion. Notice of termination is to be in writing. Written notice of termination was never given.

Notice of a sort was given, on May 29, 1995, by the letter of that date to Fink from the employer. But the letter starts out by saying that "employment under the current terms would be terminated" (my emphasis) and it then proceeds to offer Fink a choice between leaving her employment and staying under new 100% commission terms. The reference to current terms being terminated and the offer of new terms of payment, starting June 5, 1995, leads me to conclude that the letter is not notice of termination, it is an offer of new employment terms.

Having found that Kirkpatrick was required to serve Fink with notice of termination, and having found that Fink was not given the required clear, written notice, the employer is obligated to pay Fink severance moneys. As the termination took place in June, 1995, before the *Act* came into in effect, the legislation which preceded it applies, Section 42 in particular. That section provided for two week severance pay after six months of service. As Fink was employed for more than six months, she is entitled to two weeks pay.

The final issue before me is the matter of whether commission moneys owed Fink are to be considered as severance moneys already paid. They are not, the employer confuses the basis for calculating severance with the obligation to pay. Severance moneys are owed as a result of the employer's failure to give notice of termination as required and are the full responsibility of the employer. Commission moneys are of course Fink's moneys, she earned them.

**ORDER**

Pursuant to Section 115 of the *Act*, I order that Determination #000622 be varied in terms of reasons, the old act having been found to apply, but confirmed in two important respects, namely, that two weeks severance pay are owed Fink in lieu of notice, and that Fink is owed \$1291.19.

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**Lorne D. Collingwood**  
**Adjudicator**  
**Employment Standards Tribunal**

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