

An appeal

- by -

Sunset Video Limited
("Sunset")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

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

ADJUDICATOR: M. Gwendolynne Taylor

FILE No.: 2000/762

DATE OF HEARING: February 6, 2001

DATE OF DECISION: March 2, 2001

DECISION

APPEARANCES:

Leith Williams on her own behalf

Eric Williams on his own behalf

Allan Carlson on behalf of the Director of Employment Standards

Written submissions by Mike Mueller for Sunset Video Ltd.

OVERVIEW

This is an appeal by Leith Williams and Eric Williams (“the Williamses”) pursuant to section 112 of the *Employment Standards Act* (“the Act”) from a determination dated October 12, 2000 (#ER 060404) by the Director of Employment Standards (“the Director”).

In the determination the Director found that Sunset Video Ltd. (“Sunset”) had terminated the Williamses’ employment by placing them “on call”, thereby significantly altering the terms of their employment (section 66 of the *Act*). The Director found the Williamses were each entitled to recover the equivalent of two weeks wages at their respective regular wages, as compensation for length of service (section 63 of the *Act*).

Mike Mueller (“Mueller”), for Sunset, appealed the determination on the grounds that the Director’s interpretation and application of sections 66 and 63 were inaccurate and biased. Mueller says the Williamses were placed “on call” because of their chronic and persistent unavailability for work. He says they terminated their employment when they asked for their Records of Employment.

Mueller submits that the Director erred in applying section 63 to part time employees who themselves determine when they will be available for work, challenges the Director’s use of 1999 wages to determine the compensation, and questions whether it is possible to determine a “regular” wage for part time employees.

Sections 63 and 66 of the Act are attached to this decision as Appendix 1.

ISSUES

Did the Director err in finding that the employer effectively terminated the employment of Leith and Eric Williams by placing them on call?

Did the Director err in applying section 63 to part time employees?

Did the Director err in using 1999 wages as the basis for calculating the section 63 compensation? Is it possible to determine a “regular” wage for part time employees?

THE FACTS

The Director’s Determination sets out the facts thoroughly. I will not repeat all of them.

Sunset is a video rental store. Leith Williams began working there in June 1998. Her brother Eric Williams began working there in July 1999. They were employed as part time store attendants/clerks. Their shifts and hours of work varied according to their availability and the scheduling of other employees. On July 6, 2000, they both received notice that they were being placed “on call” in place of regularly scheduled shifts and were asked to return their store keys.

Sunset asks employees to complete availability sheets for scheduling purposes. The evidence presented to the Tribunal, which was also presented during the Director’s investigation, included availability sheets for the Williamses, time sheets for a number of employees, including the Williamses, the history of earnings for the Williamses and the “on-call” letters from Mueller.

A. Did the Director err in finding that the employer effectively terminated the employment of Leith and Eric Williams by placing them on call?

EVIDENCE

The main factual issue to be addressed is whether the employer substantially altered a condition of employment or, as Mueller contends, the Williamses altered their conditions of employment by being unavailable for work.

Mueller says the Williamses’ lack of availability threatened the business, his livelihood and the livelihood of other employees. He says he put them on call because they couldn’t find time in their personal lives for their part-time jobs. He notes that they were always wanting to change shifts with other employees “regardless of the other employees wants or needs” and that Eric Williams threatened to quit if Mueller didn’t give him time off to go camping. Mueller had to hire and train other employees to whom he then had an obligation to provide shifts.

Mueller agrees that the Williamses took jobs with Sunset because of work shift flexibility. However, he says he was constantly having to accommodate them. He disagrees with their submission that he drastically reduced their hours prior to placing them on call. His view is that they were unavailable, wanted more and more time off, were unpredictable and made last minute shift changes. He had other staff who wanted to work.

The Williamses contend they were available for work and that they did not control when they would work. Leith Williams noted in her evidence that she had preferences which were not always met. She was not in control.

A main point of contention concerning availability was a family vacation from May 2 to 14, 2000. Mueller says he agreed to time off for the family vacation on the understanding that they would not ask for more time and would be more available for work in the future.

Leith Williams submits that she and her brother intended to quit to go on the family vacation because they were only entitled to 10 holidays per year and they thought it would be crippling to small business to have two employees away. She said she gave Mueller 7 weeks notice to give him sufficient notice to find a replacements. He offered to give them time off for the vacation.

Leith Williams says in May 2000 Mueller agreed to promote her to store manager, with an increase in salary, almost full time hours (60 hours every two weeks) and more responsibility. In June, he told her he had hired someone else.

Mueller says the Williamses were unavailable for work a total of 24 days from May 1 to July 8, 2000. Two weeks of that was the family vacation. The Williamses disagree with Mueller's version of their availability during this time.

Leith Williams submits that she completed a time availability sheet in June indicating availability "any time" from Monday through Saturday and every second Sunday. For the Sundays she was not avail, she indicated it was a "preference NOT a demand or a necessity." She noted that in the previous summer she had worked 50 to 65 hours every two weeks.

Eric Williams says he was available full time every day except Tuesday evenings. Mueller says he was not available from June 21 to June 25. Williams says he was only scheduled for 1 day of that time and had an offer to go away for all 5 days. Leith Williams was not working that day so she offered to cover the shift. Mueller refused.

Mueller says Eric was not available from July 3 to 8 and Leith was not available from June 29 to July 8. The Williamses deny this. They contend they were available but he chose not to schedule them.

Mueller put them on call on July 6, 2000. He did not call them to work after that. A few weeks later they requested their records of employment. Initially, Mueller refused to give them unless they signed letters saying they had quit.

ARGUMENT

Mueller says the Director is inconsistent in saying that the employees' shifts varied according to their availability but that Mueller substantially altered the conditions of employment. If the employees control when they work, it is not possible for the employer to substantially alter the condition of employment. According to him, it cannot work both ways.

The Williamses say that Mueller put them on call in order to get them to quit so he would not have to pay severance. They note that he had already hired and trained staff so he would not

need them. They also submit that being required to hand in their keys demonstrated that their status was greatly diminished.

FINDING

To me, it is clear that the condition of employment was that the employees would indicate when they were available and the employer would work out a schedule accordingly. The evidence supports the view that the employer controlled when the employees would work. Obviously, it would not benefit the employer to schedule someone when he/she was not available. However, within the times of availability, scheduling was the employer's call.

Mueller contends that these employees were seldom available and, therefore, controlled when they would work. I have carefully reviewed the time sheets, availability sheets, and the evidence of both sides. In light of the June 2000 availability sheet for Leith Williams, I find Mr. Mueller's statement that she was not available lacking in credibility. There is not an availability sheet for Eric Williams for June 2000. I have considered the evidence and find that I prefer Eric Williams' evidence on his availability over Mueller's evidence.

Accordingly, I find that both Williamses were available for work following their return from the family vacation in mid-May 2000. I further find that Mr. Mueller decided he would replace them with other part time employees, which he did. On July 6, 2000, he placed both of them "on call" and required them to hand in their keys. He did not call them for work after that date.

I find that Mueller's actions substantially altered the terms of employment and the Director was justified in finding that he had terminated the employment of Leith and Eric Williams.

B. Did the Director err in applying section 63 to part time employees?

ARGUMENT

Mr. Meuller contends that the *Act* does not adequately deal with part time employees. He questions how it could be possible to determine a "regularly scheduled shift or a regular wage" when shifts change based on employees' availability.

The Director submitted that the *Act* does not impose a threshold number of hours an employee must work in order to qualify for the entitlements and protections of the *Act*. Section 63 does not distinguish between full and part time employees. For either, the reference is the length of employment, measured in months and years.

FINDING

I agree with the Director that there is nothing in section 63 to distinguish between full time and part time employees. Part time employees fit within the definition of “employee” under the *Act*. Accordingly, part time employees are entitled to the benefit of section 63.

B. Did the Director err in using 1999 wages as the basis for calculating the section 63 compensation? Is it possible to determine a “regular” wage for part time employees?

ARGUMENT

Mr. Mueller submits that the employees were more available early in their employment than they were in the last 8 weeks, which is the period referred to in section 63. He questions how one can determine a regular wage for part time employees who determine when they will be available for work.

The Director used the 1999 hours and wages for Leith Williams to determine “normal or average” hours of work for 2000. To calculate Eric Williams’ compensation the Director used the time immediately preceding the family vacation.

The Director agrees with Mueller that it is difficult to determine entitlement under section 63 when an employee’s wages vary according to the hours worked. If an employee’s hours have been reduced toward the end of the employment, the period of reduced hours is disregarded in favour of the normal or average hours of work. When an employee works irregular hours, to determine the normal or average hours of work, it is necessary to analyze the entire work term and identify representative weekly work regimes.

In case of Leith Williams, the Director referred to the period of employment one year prior. The Director acknowledges that was a subjective decision based on the premise that if she had similar availability and the business level was about the same, one would expect the number of hours scheduled by the employer to be similar.

In the case of Eric Williams, the Director referred to the period preceding the May 2000 vacation.

The Director noted that Leith Williams’ availability form showed that she had greater availability than the year before and that Eric Williams’ stated availability was the same.

The Director based the compensation calculation for Leith Williams on an average of 28 hours per week and for Eric Williams on an average of 21.25 hours per week. The Director found that both had been employed for 12 consecutive months and, accordingly, were entitled to 2 weeks wages.

ANALYSIS

Having found that section 63 applies to part time employees, it is essential to determine the “normal or average hours of work.” Mr. Mueller’s submission would leave part time employees without the benefits conferred by this section. There is nothing in the Act, or in Mr. Mueller’s submissions, that supports this conclusion.

The Director looked at the history of employment to a) determine whether there had been a reduction in hours worked prior to termination, and b) determine the normal or average hours of work.

I find no fault with the Director’s methodology or calculation. It is apparent that during the winter months, during the school year, Leith Williams would have different availability than during the summer months. Therefore, it is sensible to look at her hours of work the previous summer to estimate what her availability would have been. This finding is supported by her availability sheet which showed full time availability.

For Eric Williams, once the Director determined that his hours had been reduced, the only time period available which could be defined as regular or average, was that prior to the family vacation.

ORDER

Pursuant to Section 115 of the *Act*, I dismiss the appeal and confirm the Director’s Determination.

M. GWENDOLYNNE TAYLOR

M. Gwendolynne Taylor
Adjudicator
Employment Standards Tribunal