

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-

Pics Photo Ident Card Systems Ltd.
(the "Employer")

and

David Campbell
("Mr. Campbell")

and

Helena Campbell
("Mrs. Campbell")

-of three Determinations issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	MARK THOMPSON
FILE No.:	96/633 & 96/634
DATE OF HEARING:	JANUARY 20, 1997
DATE OF DECISION:	MARCH 27, 1997

DECISION**APPEARANCES**

David Campbell	on his own behalf
Helena Campbell	on her own behalf
Steven Simonyi-Gindele	on behalf of Kanester & Associates, Trustee in Bankruptcy
Dennis Hrehoric	on behalf of the appellant
Paul Mann	on his own behalf
Wendy Oloman	on her own behalf
Bill Jackson	on his own behalf
Leg Pilchak	on his own behalf
Diane H. MacLean	for the Director of Employment Standards

OVERVIEW

This is an appeal, pursuant to Section 112 of the *Employment Standards Act* ("the Act"), against Determination No. CDET 004182, and Determination Nos. DDET 000453 and 000454, all issued October 2, 1996 by Ms. MacLean as the Director's delegate. A hearing was held in Burnaby, B. C. on January 20, 1997. During the course of the hearing, it became apparent that additional information on several matters would be necessary. Mr. Simonyi-Gindele and Ms. MacLean agreed to obtain the information and forward it to the Tribunal.

PICS Photo Ident Card Systems (the "Employer") went into receivership on May 31, 1996 and ultimately filed an assignment into bankruptcy on July 16, 1996. Determination No. CDET No.004182 concerned wages and other payments owed to twenty former employees by the Employer in the amount of \$78,661.05. Determination No. DDET 000453 found that Mr. David Campbell and Determination No. DDET 000454 found that Mrs. Helena Campbell respectively were liable for \$37,744.55, as Directors/Officers of the Employer. The appeal concerned the status of six former employees: Mr. Richard McFadyen, Mr. William Meier, Mr. Paul Mann, Ms. Wendy Oloman, Mr. William Jackson, and Mr. Les Pilchak. The legal and evidentiary issues differed slightly for each person named in the appeal.

FACTSRichard McFadyen

Mr. Campbell and Mrs. Campbell and the Trustee in Bankruptcy appealed those parts of the determinations that dealt with Mr. McFadyen's commissions. In the course of the investigation leading to the determinations, Mr. McFadyen produced a copy of a memorandum from himself to Mrs. Campbell with the subject heading of "Review of Meeting," dated June 9, 1995. The subject line on the memorandum was "Review of Meeting." It contained three paragraphs, the first entitled "Responsibilities" which outlined Mr. McFadyen's duties. The second paragraph bore the title "Compensation" and contained details of a compensation package, which provided that the "base salary to remain as is with the addition of 3% of gross profit", with details on the calculation of gross profit. The third paragraph was "Sales Department" and contained a general sentence on that subject. The memorandum concluded:

I am very pleased with the progress made in our meeting and remain positive as to the potential I am sure we will realize. I wish to thank you both for the confidence shown in me.

Both Mr. McFadyen and Mrs. Campbell signed the memorandum, with the handwritten date of June 13, 1995. There was a notation that Mr. Campbell received a copy of the memorandum. In Determination No.004882, the delegate found on the balance of probabilities that the memorandum constituted an agreement between the Employer and Mr. McFadyen. The Determination also calculated the amount owing to Mr. McFadyen based on the formula in the June 1995 memorandum.

In her appeal and in oral testimony in the hearing for this case, Mrs. Campbell insisted that the Memorandum was merely what the title indicated, i.e., "Review of Meeting." Mrs. Campbell stated that she was the vice president for operations for the Employer at the time of the meeting. Mr. David Campbell was the president, and Mrs. Campbell reported to him.

Because Mr. McFadyen reported to Mrs. Campbell, he initiated a meeting to discuss his duties and compensation with her. There was some interest in tying more of Mr. McFadyen's compensation to sales in the hope that he would obtain new business for the *rum*. The discussions in the meeting focussed on the method of calculating Mr. McFadyen's commission. Mrs. Campbell was emphatic that she was not authorized to enter into a contract for compensation on behalf of the Employer. The authority for such decisions lay with Mr. Campbell. Mrs. Campbell further stated that Mr. McFadyen wrote the memorandum, and her signature merely indicated that she agreed with the summary of the discussions between herself and Mr. McFadyen.

Mr. Campbell testified that at a minimum he and Mrs. Campbell jointly decided on personnel matters. At the time, he was president of the Employer, and Mrs. Campbell did not have the authority to decide on a contract of employment. The memo did not indicate an agreement, and Mr. Campbell and Mr. McFadyen met separately later because Mr. Campbell did not agree with the terms contained in the June memorandum.

If the Tribunal found that the June 1995 memorandum did constitute a contract, Mrs. Campbell presented two alternative methods of calculating the commission due to Mr. McFadyen. One method generated a gross profit of \$250,306 and the other a gross profit of \$152,003. In each case, Mr. McFadyen's commission would have been three per cent of the gross profit, less than the amount contained in the determinations.

The determinations found that the Employer deducted an amount from Mr. McFadyen's wages to be paid into an RRSP and that there was no evidence that the money had been remitted to the RRSP. The determination found that Mr. McFadyen was entitled to be repaid the amount. Neither Mr. Campbell nor Mrs. Campbell was able to provide evidence concerning the RRSP payment.

Mr. McFadyen did not appear at the hearing to present evidence on the appeal.

William Meier

The three determinations included orders for payments to Mr. Meier for compensation for length of service, regular wages, deductions from pay, vacation pay and interest. In support of the appeal, Mr. Simonyi-Gindele submitted a statement from Mr. Meier withdrawing any claim against the Employer. The Director's delegate requested that any decision on Mr. Meier's status under the determinations be postponed until the Employment Standards Branch received a similar statement from Mr. Meier. Mr. Simonyi-Gindele agreed. On January 31, 1997, Ms. MacLean received a statement from Mr. Meier withdrawing all claims against the Employer, the directors and the Employment Standards Branch.

Paul Mann

The only item in the determinations in question for Mr. Mann was his vacation pay. The determinations provided that Mr. Mann be compensated in the amount of \$762.00 for vacation pay. Mr. Mann testified at the hearing and presented a copy of his pay stub dated May 29, 1996 showing vacation pay accumulated in the amount of \$1,653.90. Mr. Mann testified that he did not take vacation from June 1995 through the end of his employment with the Employer at the end of May 1996, so the amount to which he was entitled should reflect the accumulation for approximately eleven months. Mr. Simonyi-Gindele stated that he would examine the Employer's records and pay the amount Mr. Mann claimed if the information he examined supported the claim. After the hearing, Ms. MacLean corresponded with Mr. Simonyi-Gindele in connection with three employees, including Mr. Mann. She established a deadline of February 20, 1997 for the completion of the submissions. While Ms. MacLean received information on the other employees, the Trustee in Bankruptcy did not provide additional information on Mr. Mann's vacation pay.

WendyOloman

The issue in dispute for Ms. Oloman was her length of service compensation. The determinations provided that Ms. Oloman should receive \$1,352 in length of service compensation. Mrs. Campbell, Mr. Campbell and the Trustee in Bankruptcy disputed this part of the determinations on the grounds that Ms. Oloman had resigned her employment on March 15, 1997. During her employment, Ms. Oloman was production co-ordinator. She was responsible for entering orders, purchasing and sending orders to production. She described her experience with inside sales as "very limited."

Mrs. Campbell testified that the Employer was in financial difficulty in February 1996 and issued a layoff notice to staff about February 23 because it could not guarantee payment of wages. Management offered the employees the option of returning to work under the previous conditions of employment, with payment to be in shares in the company.

According to Mrs. Campbell, Ms. Oloman returned to work for two weeks under the terms offered and resigned on March 15. On May 24, 1996, Mr. Tony Wallinger offered Ms. Oloman a sales position with the Employer with compensation based on commission. Ms. Oloman called Mrs. Campbell to discuss the position offered. Ms. Oloman was interested in her old position, but Mrs. Campbell said that the Employer needed sales quickly, so management wanted to employ a sales person on commission. Ms. Oloman enquired if there was any flexibility on the salary and asked Mrs. Campbell to send her a written description of the duties of the new position. She did not receive the description. Ms. Oloman did not find new employment until July.

Ms. Oloman denied that she resigned on March 15 either in writing or verbally. She pointed out that she worked for part-time on a day-to-day basis for three weeks in February and March. After March 15, she received only one call for work from the Employer until May. Ms. Oloman pointed out that she did not claim vacation pay or any length of service compensation in March. She had been seeking other employment while she was working part-time for the Employer and stated that the Employer understood that she was looking for other work at that time. On one occasion, the production manager called her to work, but she declined because she had an appointment for a job interview. Ms. Oloman presented copies of the last three pay stubs issued to her by the Employer. Her gross pay for the week ending February 23 was \$650.00, that being the last period when she was working full time. For the period ending March 1, she received \$455.00, and she received \$730.00 for the period ending March 15.

Mr. Simonyi-Gindele asked that he be given the opportunity after the conclusion of the hearing to verify the hours of work and amounts that Ms. Oloman was paid after February 23. He provided Ms. MacLean with the information available, and Ms. MacLean forwarded it to me. The gross pay amounts for the March 1 and 15 pay periods matched Ms. Oloman's pay stubs. Mr. Simonyi-Gindele acknowledged that the computer system the Employer used did not record the number of hours actually worked, but pointed out that Ms. Oloman did not claim non-payment of wages. He argued that Ms. Oloman had received more than 50 per cent of her regular pay for the last two pay periods and thus had been recalled to her original position.

Mr. Dennis Hrehoriec testified that Ms. Oloman reported to him after the February 23 layoff notice. He believed that there was work to be done during March. He called Ms. Oloman several times to come into work, but she stopped responding. Although he believed that he called Ms. Oloman after March 15, she did not respond on more than one occasion, so he stopped calling her. He was under the impression that she did not want to work, but Ms. Oloman never told him that she was not returning to work. Ms. MacLean pointed out that this information was not presented during her investigation of Ms. Oloman's complaint.

William Jackson and Les Pilchak

The legal and factual issues for these individuals were similar. Both had been employed as salespersons by the Employer and received layoff notices on February 23, 1996. They did not work for the Employer after that date. Mrs. Campbell testified that they were offered continued full-time employment on the same terms as other employees. The Employer issued a Record of Employment stating that the reason for the layoff was lack of work. In the determinations, Ms. MacLean found that Mr. Jackson and Mr. Pilchak were entitled to compensation for length of service and vacation pay because their employment was deemed to have been terminated 13 weeks after the layoff notice. The appeal of the determinations was based on the assertion that Mr. Jackson and Mr. Pilchak were offered employment after the layoff notice of February 23, but declined to return to work.

Mr. Campbell testified that he discussed recalling Mr. Jackson and Mr. Pilchak with Mr. Wallinger before the expiry of the 13-week period after which they would become eligible for length of service compensation. Management preferred to rehire Mr. Pilchak and Mr. Jackson because they were experienced and would not require training in order to work effectively. Mr. Campbell called Mr. Pilchak and Mr. Jackson on two occasions, but did not speak to them. Instead Mr. Campbell left messages that he wanted to talk to them. In neither case was there a reply.

In her investigation, Ms. MacLean found that Mr. Wallinger called Mr. Jackson and Mr. Pilchak on May 23. He was unable to reach them or leave a message. On May 24, Mr. Wallinger called Mr. Pilchak and spoke to his father. Mr. Wallinger told Mr. Pilchak's father that the company was restructuring, but did not recall Mr. Pilchak to work.

Mr. Jackson testified that he was not recalled. He spoke to Mr. Campbell at the beginning of March and asked if the Employer could guarantee that he would be paid. Mr. Campbell said that he could not, so Mr. Jackson told Mr. Campbell to call him if the situation changed. Mr. Jackson received Mr. Wallinger's message to call him on May 24. He assumed that the message concerned the vacation pay the Employer owed him. The message did not state that the Employer wanted to recall Mr. Jackson. On May 28, he told Mr. Simonyi-Gindele that he would come back to work if he received his length of service compensation and vacation. Mr. Simonyi-Gindele stated that he met with Mr. Jackson and Mr. Pilchak on May 28. He confirmed that they asked for their length of service compensation and recalled telling Mr. Campbell and Mrs. Campbell to recall them before the expiry of the 13-week statutory period.

Mr. Pilchak testified that he did not receive any message from the Employer during the 13 weeks following his layoff. He would have come back to work if recalled. He did receive a message from Mr. Wallinger, who was never his supervisor, on May 24. Mr. Pilchak assumed that the message concerned his vacation pay. At his meeting with Mr. Simonyi-Gindele on May 28, he asked how to obtain the monies owed him by the Employer.

Mr. Simonyi-Gindele asserted that the Employer did attempt to recall Mr. Jackson and Mr. Pilchak, but they avoided calls. Mr. Jackson, Mr. Pilchak and Mr. Simonyi-Gindele all testified that they met on May 28 to discuss the return to work of the former employees and that Mr. Jackson and Mr. Pilchak wanted payment of length of service compensation and vacation pay.

Evidence was led concerning Mr. Jackson's and Mr. Pilchak's alleged efforts to start a business to compete with the Employer. Mr. Pilchak denied any such actions vigorously. Whatever the accuracy of the allegations, which were based completely on hearsay, they are not relevant to the decision in this case.

ANALYSIS

Richard McFadyen

The appeal concerning Mr. McFadyen turns on the intent of the June 13 memorandum. After considering the evidence before me, I conclude on the balance of probabilities that the memorandum was not intended as a statement of agreement between Mr. McFadyen and the Employer. While contracts of employment can be informal, there should be evidence of mutual agreement, and such evidence was lacking in this case. Mrs. Campbell's signature might have been taken as evidence of agreement on behalf of the Employer, but I was persuaded by her testimony and that of Mr. Campbell that no agreement existed. The evidence before me indicates that the Employer owes Mr. McFadyen the amount deducted from his wages for an RRSP contribution.

William Meier

The evidence before me is that Mr. Meier wished to withdraw his complaint against the Employer.

Paul Mann

Mr. Mann presented evidence that his vacation pay had accumulated to \$1,653.90. The Trustee in Bankruptcy did not use the opportunity to present evidence in rebuttal. Based on the evidence before me, I conclude that Mr. Mann's evidence was correct.

Wendx Oloman

Some of the controversy surrounding Ms. Oloman's case may have been due to a misunderstanding of the terms of the *Act*. Section 62 of the *Act* defines "week of layoff" as:

A week in which an employee earns less than 50% of the employee's weekly wages, at the regular wage, averaged over the previous 8 weeks.

In this case, the evidence demonstrates that Ms. Oloman's the period through March 15 when she worked part time did not constitute "a week of layoff". Thus, her layoff commenced on March 15. Based on the evidence before me, I find that the Employer did not recall Ms. Oloman after March 15. She testified that she was willing to work on a part-time basis, although she was searching for full-time employment and declined at least one call to work so that she could attend a job interview. The Employer took no formal action to recall her except for the offer of employment from Mr. Wallinger on May 24, 1996.

Section 65(1) of the *Act* exempts employers from obligation to pay length of service compensation if the employee "has been offered and has refused reasonable alternative employment by the employer." In this case the uncontroverted evidence was that, although Mr. Wallinger offered Ms. Oloman the only position then available from the Employer, it was substantially different from the position she previously held. Therefore it was not "reasonable alternative employment" as defined in the *Act*.

Section 1(1) of the *Act* defines "termination of employment" as including "a layoff other than a temporary layoff." It further states that a "temporary layoff" means "a layoff of up to 13 weeks in any period of 20 consecutive weeks." Therefore, I conclude that Ms. Oloman was terminated as defined in the *Act* 13 weeks after March 15, i.e., June 14, 1996.

William Jackson and Les Pilchak

Mr. Jackson and Mr. Pilchak were laid off on February 23, 1996. The issue in their case was whether the Employer recalled them prior to the expiry of the 13-week period that would trigger a finding of a permanent layoff, i.e., May 24, 1996. The Employer's evidence was that Mr. Campbell and Mr. Wallinger telephoned Mr. Jackson and Mr. Pilchak on May 23 and 24, did not talk to either person directly. Instead they left messages asking them to call the Employer. A telephone message asking an employee on layoff to call the employer cannot be determined to be a recall for work as required by the statute. Mr. Simonyi-Gindele's meeting with Mr. Jackson and Mr. Pilchak occurred after the expiry of the 13-week period. For the Employer to rely on a recall to be relieved of its obligation to pay length of service compensation, a direct statement of recall, preferably in writing, would be required. Therefore, I conclude that Mr. Jackson and Mr. Pilchak were not recalled.

ORDER

In summary , I order under Section 115 of the *Act* that Determinations Nos. CDET 004182, DDET 000453 and 000454 be varied as follows:

1. Mr. McFadyen is not entitled to wages in the amount of \$10,800.
2. Mr. Meier is not entitled to compensation from the Trustee in Bankruptcy or the Directors/Officers of the Employer.
3. Mr. Mann's entitlement to vacation pay should be based on \$1,653.90, the amount owed to him at the time of his layoff.

The determinations are confirmed with respect to the repayment of deductions from Mr . McFadyen's pay and the payments due to Ms. Oloman, Mr. Jackson and Mr. Pilchak.

Mark Thompson
Adjudicator
Employment Standards Tribunal