

An appeal

- by -

Green Plastic Company Ltd.
("Green Plastic")

- 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: Lorne D. Collingwood

FILE No.: 2001/797

DATE OF HEARING: March 20, 2002

DATE OF DECISION: April 19, 2002

DECISION

OVERVIEW

Green Plastic Company Ltd. (I will use “Green Plastic” and “the employer” for ease of reference.) has appealed, pursuant to section 112 of the *Employment Standards Act* (“the Act”), a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on October 26, 2001. In the Determination, Green Plastic is ordered to pay Qui Wei (Sandy) Xu (“Xu”) \$905.83 in wages, vacation pay and interest included.

The Determination is that the employee was not paid for 14 days of work in January of 2001 and that, as there is not evidence to show that Xu quit, she is entitled to compensation for length of service. Green Plastic, on appeal, claims that the employee is not entitled to be paid for 14 days of work but less than that and that Xu did resign. I have found that there are not plain, clear facts to show that Xu exercised the right to quit and that she is entitled to length of service compensation. I have also found that the Determination needs to be recalculated.

An oral hearing was held in this case.

APPEARANCES:

Jian Jun Yan & Bao Dong Tian	For Green Plastic
Qui Wei Xu	On her own behalf
Iray Yu	Interpreter

ISSUES

At issue is the amount to which the employee is entitled to be paid for work in January. The employer argues that Xu worked 8 and ½ eight hour days, not 14 eight hour days, the decision of the delegate.

I must decide whether there are or are not facts to show that the employee quit.

The employer is seeking \$11,958.04 in damages but this is not a matter for the Tribunal. I do not, as an Adjudicator of the Employment Standards Tribunal, have the power to award damages as are sought by the employer. It is for me to decide whether it is or is not shown that the Determination ought to be cancelled or varied, or a matter referred back to the Director, for reason of an error or errors in fact or law.

FACTS

Qui Wei (“Sandy”) Xu worked for Green Plastic from August 23, 2000 to January 22, 2001.

Green Plastic makes polyethylene sheeting. It buys scrap plastic and it reprocesses that scrap and other plastic for customers.

The parties have difficulty expressing themselves in English, the employer in particular. There is also a wide gulf between what is alleged by the parties and, as matters are presented to me, not a lot of evidence to support much of what is claimed. That said, I have had the benefit of hearing from the parties, the employer with the aid of an interpreter, and I find that the important facts are as follows:

Green Plastic originally had three owners, Zhi Li, Jian Jun Yan and Guo Liang Lu. The three men had a falling out, however. Li and Yan were, by January of 2001 if not before that, rather fed up with the way that Lu was running the company and they sought to gain control of the company and oust Lu as President and general manager. Lu, who was the primary investor and 40 percent shareholder in the company, fought to protect his investment. He obtain legal counsel. He seized, with the help of the employee, financial records and other corporate records on the 20th of January, 2001. It was not until the 25th of March, 2001 that the dispute between the shareholders was settled, Lu agreeing at that point to selling his share of the company to Li and Yan.

Xu was caught in the middle of this shareholder turmoil but she was not entirely impartial. Her loyalties were with Lu. Lu is a long time friend of Xu’s husband. And Xu had enjoyed working for Lu. They had a good work relationship.

The employer’s position is that Xu quit on the 19th of January and, if not on that day, then on the next day of work, the 22nd. The employee denies that she quit. She claims that she was fired by Yan on the 22nd. The delegate has decided that the termination was probably at the hand of the employer in that there are not plain, clear facts to show that the employee did quit. She has this to say in the Determination (at page 5):

“... It’s clear there was a disagreement among the 3 owners of the company, and Xu was caught in the middle. Whatever she did for one “side” would be resented and objected to by the other “side”. In this case, following the direction of one Director got her in trouble with the other Directors. She couldn’t win. Green Plastic has presented no evidence that Xu deleted any files. Lu, the Director at odds with the other 2 Directors, states he removed some company property and later returned it to one of the other Directors. The company has confirmed receipt of those items.

If Xu quit on the Friday, January 19, 2001 as purported by Green Plastic, why would she return on Monday, January 22, 2001? It is more conceivable that Yan was angry when he discovered company records were removed over the weekend.

If he believed Xu was loyal to Lu, which seems to be the case here, he would naturally suspect she was party to the removal on the weekend and that she might have copied or deleted records from the computer. Were her actions sufficient to say the company had cause to terminate her without pay in lieu of notice? The company is not taking that position -- it states she quit. She adamantly denies this, and is supported by Lu's statement as a witness to the events of January 22, 2001."

It is of assistance to know that there was a meeting of some sort between Li, Yan Tian and Xu on the 19th. The parties do not agree on what was said. Indeed, the parties are far apart on this like many issues. It is the employer's claim that Xu was told that she was going to be assigned new duties and that she lost her temper on hearing that news, that she asked to be laid off at that point so that she could collect Employment Insurance ("EI") and that she at some point went so far as to say that she was quitting (testimony of the employer on appeal). Xu, on the other hand, claims that Yan, Li and Tian approached her near the end of the workday, demanded that she give them her computer's password (and therefore access to important files), she refused to do so, the men then became angry at her and threatening and that she left work at that point, upset and afraid for her personal safety. As matters are presented to me, I find that there is not evidence to show that the employee did in fact announce a plan to quit. I reach no other conclusions in respect to the meeting on the 19th as it is not a necessary part of deciding the appeal.

As noted above, Lu, on the 20th, went to Green Plastic's offices and he took a variety of corporate records. He was accompanied by Xu. It is clear that Xu copied files which were on her computer and that she turned them over to Lu.

The employer alleges that Xu deleted important computer files on the 20th and that she had a hand in sabotaging some of its plastic film making materials. Xu denies all of that. I find that there is not clear evidence of sabotage, nor is it made clear that the employee did anything wrong.

If files were copied and/or deleted, it was on Lu's instructions. Lu is still an owner of the company. Lu, if he is not at this point still legally the President of Green Plastic on the 20th, at least considered himself to be President.

The RCMP were contacted by the employer on the 21st, and there was an investigation of some sort, but the police have not taken any further action in regard to the employer's complaint.

The employer submits a record that is said to be proof that Xu deleted corporate files from the company's computer on the 20th but the record refers only to the computer's inability to find program files. It is not shown what caused the computer to malfunction. Program files are readily available and easily replaced. I am not shown that when they were replaced that it was discovered that any corporate records were removed or deleted.

Xu went to work on the 22nd and she had Lu and Lu's wife in tow. According to the employer, Xu was caught deleting computer files on the morning of the 22nd and that, on being caught, she

said. “I am deleting your computer data. Call RCMP. I don’t care.” and that she then shouted “Go to death.” and walked out. Xu claims that she had no plans to quit and that she needed her job. She tells me that she knew that Li and Yan were upset to find that they no longer possessed certain records (she had been contacted by the RCMP the night before) and so Mr. and Mrs. Lu were brought along for protection. She tells me that when Yan saw her with Lu, there was an argument and she was fired.

There are not independent witnesses to the exchange on the 22nd.

I find that the employee did not apply for EI until after meeting with the delegate, almost two months after the termination.

The Determination reflects a decision that Xu worked 14 days in January and also that she received only 3 days of paid vacation (page 5). As matters are presented to me, it is agreed that Xu worked January 9, 10, 11, 12, 15, 16, 17, 18 and at least part of the 19th. I am satisfied that she reported for work on the 22nd. I find, moreover, that it is likely that the employee worked January 8, 2001. The employer may not now remember who worked on the 8th but, months ago, it was the employer’s memory that the employee did work on the 8th. That is shown by the employer’s own record of work in January.

The employer presents a record of days worked in December, 2000. That record shows days for which the employee was paid in that month. The accuracy of the record is accepted by both parties.

The employer claims that the December record shows that Xu received 6 days of paid vacation in that month. I find, however, that the record indicates that Xu received only 4 days of paid vacation. It shows that she was paid for the 25th and the 26th as well but it cannot be that that pay is vacation pay. Those were days are statutory holidays.

ANALYSIS

Where an employee resigns his or her employment, the employer’s liability to pay compensation for length of service is discharged.

63 (3) The liability is deemed to be discharged if the employee

- (a) is given written notice of termination as follows:
 - (i) one week’s notice after 3 consecutive months of employment;
 - (ii) 2 weeks’ notice after 12 consecutive months of employment;
 - (iii) 3 weeks’ notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks’ notice;
- (b) is given a combination of notice and money equivalent to the amount the employer is liable to pay, or

(c) terminates the employment, retires from employment, or is dismissed for just cause.

(my emphasis)

It is an employee's right to resign. It is not something that an employer can require, nor may an employer deem that an employee has resigned. The Tribunal has said that there must be plain, clear facts to show that the right to quit has been voluntarily exercised.

It is the view of the Tribunal that there is both a subjective and an objective element to quitting. An employee may announce an intention to quit (the subjective part of resigning), yet not act to carry out the quit. Only where an employee acts or conducts herself or himself (the objective part quitting) in a way which is clearly inconsistent with continuing the employment (taking another job, for example) will the Tribunal find that an employee has quit.

The delegate has in this case decided that there are not plain, clear facts to show that Xu quit. There was not clear evidence of any plan to resign and that Xu acted or conducted herself so as to carry out a plan to quit. There is not now. It is alleged by the employer that the employee did announce a plan to quit but that is denied by the employee and there is not an independent witness, nor is there a document, to confirm that the employee said anything like "I quit". There is, moreover, not evidence of any act or conduct which is inconsistent with continuing the employment. I note that Xu did not have another job to go to and that it was not until two months after the termination that Xu applied for EI.

Given the nature of the case before her, the delegate was required to decide credibility. That is never an easy task. The manner of the witness is to be considered (Is the witness clear, forthright and convincing or evasive and uncertain?) but also factors such as the ability of the witness to recall details; the consistency of what is said; reasonableness of story; the presence or absence of bias, interest or other motive; and capacity to know.

The essential task is to decide what is likely to be true in all of the circumstances. As the Court of Appeal noted in *Faryna v. Chorny* (1952) 2 D.L.R. 354, B.C.C.A.,

"The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities that a practical and informed person would readily recognize as reasonable in that place and in those conditions."

This being an appeal, it is not for me to second guess the delegate's assessment of witnesses but to decide whether her conclusions are reasonable or not, given the evidence. The delegate has had the benefit of hearing from witnesses in the first instance.

It is my conclusion that the delegate's decision in respect to credibility is a reasonable decision. It is not at all unreasonable to conclude that the employee was caught in the crossfire between the shareholders and that she was fired when it became clear that Lu had taken possession of an important part of company's records and Xu's loyalty lay with Lu, not Li and Yan.

The employer has not shown me that there are plain, clear facts to support a conclusion that the employee quit.

The delegate has found that the employer is not arguing just cause but that may be to put too fine a point on it. The employer does not understand such things. As the employer presents matters to me, I find that it is convinced that it should not be made to pay length of service compensation because Xu assisted Lu as she did and she is guilty of some sort of wrongdoing. That amounts to argument that it had just cause. But that said, I find that as matters are presented to me there is in fact no evidence of just cause. The employer may not fire an employee just because she is loyal to a particular shareholder. There is no evidence to show that the employee was failing to do perform the duties of an employee. There is in fact no evidence of sabotage or wrongdoing by the employee.

The Determination is confirmed in respect to the awarding of compensation for length of service.

The Issue of Wages and Vacation Pay

The delegate has decided that the employee is entitled to be paid for 14 days of work in January of 2001 and that the employee received only 3 days paid vacation. I am satisfied find that Xu worked 10 and ½ days in January of 2001. I am satisfied that Xu reported for work on the 22nd. It follows that she is entitled to 4 hours of pay given section 31 of the *Act*.

- 34** (1) If an employee **reports for work** on any day as required by an employer, the employer must pay the employee for
- (a) at least the minimum hours for which the employee is entitled to be paid under this section, or
 - (b) if longer, the entire period the employee is required to be at the workplace.
- (2) An employee is entitled to be paid for a minimum of
- (a) **4 hours at the regular wage**, if the employee starts work unless the work is suspended for a reason completely beyond the employer's control, including unsuitable weather conditions,

(my emphasis)

Xu did not receive vacation pay in January. She received 4 days of paid vacation in December of 2000, not 3 days.

There is a need to recalculate the Determination. The amount of wages owed for work performed in January, 2001 is not 14 days (\$1,164.80, vacation pay included) but 10.5 days. The amount of wages to which the employee is entitled for work in January, 2001 is not \$416.00 (\$748.80 of the \$1,164.80 having been paid by the employer) but \$840 plus vacation pay of \$33.60 (which is 4% of \$840) minus the \$748.80 that has been paid, or \$124.80.

Xu is entitled to \$270.40 in vacation pay on the basis of her T4 slip (It lists her as having earned \$6,760.00.). The amount of vacation pay which was paid out is not \$240 but \$320 (4 days at \$80 a day).

The employee is owed \$400.00 in compensation for length of service plus 4 percent vacation pay on that (\$16), a total of \$416.00.

The total amount owed is \$491.20 ($\$124.80 + 270.40 - 320 + 416$) plus interest.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated October 26, 2001 be varied. The employee is entitled to \$491.20 in length of service compensation and other wages, plus whatever interest is owed pursuant to section 88 of the *Act*.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal