

An appeal

- by -

V.I. Renter's Centre Ltd.

- 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:** John M. Orr

**FILE No.:** 2000/741 and 2000/753

**DATE OF HEARING:** March 26, 2001

**DATE OF DECISION:** March 27, 2001

## DECISION

### APPEARANCES:

April Dawn Rogers	Director of V.I. Renter's Centre Ltd.
Barbara Miller	On her own behalf

No one appeared on behalf of the Director

### OVERVIEW

This matter involves two appeals filed on behalf of V.I. Renter's Centre Ltd. ("VIRC" or "the company") pursuant to section 112 of the *Employment Standards Act* ("the Act") from a determination dated October 02, 2000 (#ER 096976) by the Director of Employment Standards ("the Director").

The first appeal was filed by John Ruffolo ("Ruffolo") who was a shareholder and director of the company until June 30, 1999. He filed the appeal because he was served with the determination and he claims the Director's delegate told him that it was up to him to file an appeal if he didn't agree with the determination.

The second appeal was filed by Samantha Carson ("Carson") who purchased Ruffolo's shares and was a director of the company from June 30, 1999 to October 25, 1999. She says that she filed the appeal for the same reasons as Ruffolo. She was served with the determination and was told that it was up to her to appeal if she did not agree with the determination.

April Dawn Rogers is currently the owner and operator of the company. She says that she acquired the company on October 25, 1999 from Carson. She says that she was not served with a copy of the determination and has not filed an appeal on behalf of the company but joins in the appeals filed by Ruffolo and Carson.

### FACTS

Barbara Miller ("Miller") worked as a commissioned sales agent for VIRC from August 5, 1998 to approximately May 15, 1999. In May 1999 Ms Miller says she took an unpaid leave, which was open ended with no specific arrangements for return to work. Mr. Ruffolo was the owner of the company at the time and he claims that Miller took her annual vacation and simply did not return at any time before he sold the company on June 30, 1999.

There are two substantial issues that arise between Miller and VIRC. The first relates to a cheque dated April 23, 1999. Miller misplaced the cheque and never cashed it. She simply wants a

replacement cheque. She says that the cheque was payment for services performed as part of her contract (employment or otherwise). Ruffolo claims that the cheque was an advance paid to Miller in expectation of services that she was to perform but never did.

The second substantial issue relates to the termination of Miller's employment. Miller submits that she was on an open-ended unpaid leave from VIRC. She claims that in early August 1999 she contacted Carson, the new owner of VIRC, to let her know that she was now ready to return to work. Carson had no knowledge of Miller and did not re-hire her. The Director's delegate found that the failure to re-hire was unjust dismissal.

Much of the material filed on the two appeals relates to whether Miller was an employee or a contractor. The Director concluded that she was an employee.

## **ANALYSIS**

This is an unusual situation because neither of the people who filed the appeals had any standing to act on behalf of the company in October 2000 when the determination was issued. As such, the appeals should ordinarily be dismissed summarily. However the consequences of dismissing the appeals would be that the company would be out of time to appeal and therefore there would be no opportunity to address the substantive issues.

The issue is complicated because Ms Rogers claims that, as the owner of the company since October 1999, she was never served with the determination and that no proper officer or director of the company was served. The Director's delegate did not appear at the hearing and could not address the issue of proper service on the company. There was no proof of service in the materials that had been forwarded to me by the Director.

It is also alleged that neither Ms Carson nor Ms Rogers were interviewed by the delegate even though their involvement was known to the delegate. There is also the allegation that both Carson and Ruffolo were advised by the delegate that they should file appeals.

It was further alleged that the delegate had wished to cancel his determination but appeals had already been filed. It was stated that the delegate requested Carson and Ruffolo to withdraw their appeals and he would cancel the determination. They chose not to do so because they were concerned about the consequences.

On the other hand, if I cancel the determination Ms Miller may have no remedy against the company for her claimed unjust dismissal.

I am most concerned about due process in this matter and therefore I have concluded that the most fair approach to all parties involved is to refer this matter back to the Director to re-investigate the circumstances giving rise to the determination and to advise in regard to service on the company.

The delegate may want to consider whether a “leave of absence” carries with it the same rights of recall as a “lay-off”. It is not clear from the determination whether the Director considered that the employee had a right to return to work after taking a three month leave. The Director determined that Miller was an employee but, if that were so, it is not clear that the “employer” ever consented to such leave. Miller had not been “employed” for 12 months and therefore there was no entitlement to vacation. If Miller was a “contractor” paid solely on a commission basis then presumably she could decide unilaterally not to work for three months but there would be no right to severance pay.

I am referring this matter back to the Director for further consideration and submissions.

**ORDER:**

Pursuant to section 115 of the Act I order that the matter is referred back to the Director.

***JOHN M. ORR***

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**John M. Orr**  
**Adjudicator**  
**Employment Standards Tribunal**