

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C. 113

- by -

Christine Keryluk
("Keryluk")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: James Wolfgang

FILE NO.: 1999/82

DATE OF HEARING: May 10, 1999

DATE OF DECISION: May 31, 1999

DECISION

APPEARANCES	Christine Keryluk	for herself
	Nicholas W. Hlady	for Keryluk
	Dr. C.S. Vinnels	for himself
	Lynn Johnston	for Vinnels
	Gerry Olmstead	for the Director

OVERVIEW

This is an appeal by Christine Keryluk (Keryluk) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) from a Determination dated January 25, 1999 issued by a delegate of the Director of Employment Standards (the “Director”). Keryluk claims Vinnels failed to pay overtime, did not pay for all hours worked, failed to comply with her employment contract regarding sick leave, did not pay for patient cancellations with less than 24 hours notice and terminated her employment without proper notice or pay compensation in lieu of such notice. Keryluk is also seeking cost of relocation and personal damages in the amount of \$10,000.

The Determination found the complaint of Keryluk to be untimely as it had been filed outside the time limits prescribed in Section 74(3) of the *Act*.

ISSUES TO BE DECIDED

This appeal requires me to decide whether the Director properly refused to investigate Keryluku’s complaint because it was filed beyond the statutory limitation period. If not, what compensation is Keryluk entitled to?

FACTS

Dr. Vinnals had employed Keryluk as a Dental Hygienist from June 17, 1996 to November 20, 1997. She worked three days per week on a regular basis.

Keryluk signed a contract of employment with Vinnals in December 1996 which gave her set up/cleanup time of 15 minutes in the morning and under some limited conditions at the end of the day. It also provided for eight days of sick leave per year but limited to not more than four days in any month. The hourly rate was also increased by \$1.00 per hour. Other items not related to this case were also included.

Keryluk claims she came under pressure to make changes in the agreement in late 1997. In her last week of work her paid hours were reduced by one half hour per day although she claims she continued to work the extra hours. Her last day worked was November 20, 1997 and she then left to attend a funeral out of province. During that time she telephoned Vinnals' office and said she was stressed out and needed to take some time off. She attended her doctor who put her on stress leave for an indeterminate time. She was paid sick pay on November 25, 26 and 27.

On December 02, 1997 a Record of Employment was issued by Vinnals showing the reason as stress leave and the expected date of recall as "unknown". He issued a final payment of vacation pay on December 15, 1997. A hand written draft letter by Keryluk dated January 8, 1998 requesting "my remaining four days of sick pay for the month of Dec./97" was claimed to having been sent on "Feb 3/98". Keryluk claims the letter actually sent to Vinnals was a typewritten version but no copy exists. She did not make any further claim for sick pay until her letter of July 28, 1998.

During April spring break, Keryluk's husband went to Vinnals' office and picked up her personal effects.

Keryluk sent a letter dated July 28, 1998 in which she refers to being wrongfully dismissed and proposes a severance package. That package included a request for the overtime, the remainder of her sick days, the cost of relocation and fifty percent of the loss of income from November 1997. She includes a settlement date of August 31, 1998 in the letter. Keryluk claims she believed she was still on stress leave from Vinnals until August. When she became aware Vinnals no longer employed her she filed a complaint. The complaint dated August 07, 1998 was delivered to the Employment Standards office on August 13, 1998.

Vinnals claims he and the office staff were unaware Keryluk was suffering from a severe case of stress until after her departure in November. They associated the request for stress leave with the death of the relative as they were contacted while she was away attending the funeral. They claim they fully expected her to return to work and that was the reason the ROE did not indicate a termination. They claim they tried unsuccessfully to contact Keryluk on several occasions but were unable to speak with her directly.

They further claim they have no memory or record of receiving the letter Keryluk claims was sent on February 3, 1998.

Vinnals supplied a letter from the person hired temporarily to replace Keryluk. In that letter Faye Sinal(Sinal), the replacement hygienist, states she was hired as a relief hygienist for Keryluk and the position would end on the return of Keryluk. She states that in early 1998 Keryluk's partner came the office and picked all Keryluk's personal items. Shortly after Sinal was offered the position on a permanent basis.

Keryluk indicated she had not quit in April 1998 when her personal effects were picked up at the office.

In a letter dated August 5, 1998 Vinnals responded to the letter from Keryluk dated July 28, 1998. In that letter Vinnals took the position all matters had been resolved and if Keryluk wished to take further action he enclosed the name of his lawyer and suggested she contact him.

Vinnals never issued a letter to indicate Keryluk was terminated. The delegate of the Director conducted an investigation and took the position Keryluk's last day of employment was November 27, 1997 (the last day of her sick pay) and her complaint of August 13, 1998 was untimely. He did not make a determination on whether Vinnals terminated Keryluk or she quit.

ANALYSIS

Keryluk was under medical care for several months after November 20, 1997 and has only recently returned to working part-time.

We know at some point the employment relationship between Keryluk and Vinnals ended however we do not have any evidence of the exact date when this occurred. From the evidence we know it was after December 2, 1997 (the date of the ROE) and on or before before August 05, 1998 (the date Vinnals responded to Keryluk's letter requesting a settlement package)

I believe in the case of Vinnals, that took place after the issuance of the ROE. In a letter dated January 19, 1999 Vinnals claims the action he took in respect to Keryluk had been on the advice of an official in Employment Standards.

The evidence of the office manager was contained in notes which she indicated were made in the summer of 1998. She states:

“We had paid her for her 3 days at the end of November for “sick “days, 4% holiday pay and I called Labor(sic) Standards who informed me the(sic) as far as L.S. goes Christine had quit and we were not obligated to pay any more funds.

I gave her her(sic) separation papers and we hired Faye full time. ”.

We do not know what information was given to the Employment Standards Branch when they made the statement to the office manager that Keryluk had quit and the employer was not obligated to pay any more funds. Without that information I cannot place much weight on that evidence.

That evidence is also inconsistent with the letter signed by Sinal, the relief hygienist. She indicates it was made clear to her she, “...was only in the position until Ms. Keryluk returned”. Further in the letter she stated:

“In early 1998, Ms. Keryluk’s partner came in to the office to pick up all her personal items such as Diploma, posters and operating stool. It was only after it was apparent that Ms. Keryluk had no intention of returning that I was offered a permanent position”.

The assumption by Sinal that Keryluk had no intention of returning at that time is without substance. I was not provided any evidence that would lead me to that assumption. The employer has failed to prove that the requisite subjective and objective elements of a resignation by Keryluk took place.

The separation papers or ROE was issued on December 02, 1997, only a week after Keryluk took stress leave. The evidence of Vinnals indicates at that time they expected Keryluk to return to work at the end of her stress leave. The personal effects were picked up some time later, during spring break, which was in April.

Keryluk evidence is she wrote a letter in February 1998 requesting her sick pay. She did not receive any response to that letter. Vinnals denies receiving that letter. The next correspondence from Keryluk was the letter of July 28, 1998. There appears to be no record of any contact between Keryluk and Vinnals other than by letter.

Vinnals’ office manager indicated several attempts were made to contact Keryluk however no direct contact was made. There was some limited contact between Keryluk’s husband and Vinnals office but the content of those discussions are inconclusive.

We have no evidence Keryluk had any intention of quitting and in her letter of July 28, 1998 she states she was “”wrongfully dismissed”. Vinnals never gave Keryluk any notice of termination although he had every opportunity to do so.

In Reconsideration BC EST #D149/99 the Adjudicator states:

“While the employer might have been within its rights to terminate Stevenson--with proper notice--after June 1997 and prior to March 1998 [see *Sylvester v. B.C.* 146 D.L.R. (4th) 207 (S.C.C.)--it never did so”.

A similar situation exists in this case. There was an obligation on the employer to bring closure to this matter and they failed to do so. They could clearly have notified Keryluk of their intentions when they offered the permanent position to Sinal. That puts the date of termination at or near spring break in April 1998.

Keryluk’s complaint was filed August 13, 1998 and is within the 6 month limit prescribed in Section 74(3) of the *Act* and her complaint is therefore timely.

Keryluk is entitled to one week’s compensation in lieu of notice. I heard no evidence whether Keryluk’s claim for payment for time worked was resolved. She is entitled to payment for whatever time she worked in the last week including overtime. As she was on leave I do not find in favour of any claim for sick leave. In regard to the claim for payment for patient cancellation I find the *Act* in section 31(3) requires 24 hours notice of a change of shift. Failure to provide such notice may result in a penalty on the employer however there is no requirement to pay for the lost time. The cost of relocation and personal damages are not matters properly before the Tribunal and I therefor make no ruling.

ORDER

Pursuant to s. 115 of the *Act*, I order the Determination dated January 25, 1999 is cancelled. The matter is referred back to the Branch for the calculation of the proper amount to be paid in accordance with the above award plus the calculation of interest pursuant to section 88 of the *Act*.

James Wolfgang
Adjudicator
Employment Standards Tribunal