Employment Standards TRIBUNAL

An appeal

- by -

AVT Audio Visual Telecommunications Corporation
("AVT Audio Visual")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2002/098

DATE OF DECISION: May 9, 2002

DECISION

OVERVIEW

This is an appeal filed by AVT Audio Visual Telecommunications Corporation ("AVT Audio Visual") pursuant to section 112 of the *Employment Standards Act* (the "*Act*"). AVT Audio Visual appeals a Determination that was issued by a delegate of the Director of Employment Standards (the "Director") on February 5th, 2002 (the "Determination").

The Director's delegate determined that AVT Audio Visual owed four former employees, namely, Chad Klippert, Stacey Olesky, Yoan Sohn and Mark Turi, a total sum of $9,492.07 representing, for each employee, two weeks' wages as compensation for length of service (see section 63 of the *Act*), concomitant vacation pay and section 88 interest.

By way of a letter dated April 24th, 2002 the parties were advised by the Tribunal's Vice-Chair that this appeal would be adjudicated based on the parties' written submissions and that an oral hearing would not be held (see section 107 of the *Act* and *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). I have before me written submissions from three of the four employees and from the Director's delegate. Surprisingly, AVT Audio Visual has not filed any substantive submission with the Tribunal.

ISSUES ON APPEAL

AVT Audio Visual says none of the former employees is entitled to compensation for length of service because:

- **Chad Klippert** "was recalled by the Company [and] refused to come back and violated a non-competition clause by working with a competitor";
- **Stacey Olesky** "was terminated for cause";
- **Yoan Sohn** "was recalled by the company but cut off all communications with the Company and wouldn't make himself available for recall"; and
- **Mark Turi** "was recalled by the Company [and] refused to cooperate and indicated that he did not work for the Company any more".

AVT Audio Visual does not take issue with the Delegate's calculations. Thus, this is a situation where the Determination must be either confirmed or cancelled.

I shall now turn to the merits of this appeal.

FINDINGS AND ANALYSIS

As previously noted, AVT Audio Visual has not provided any detailed submission to the Tribunal The only documents filed by AVT Audio Visual in this matter are the preprinted Tribunal appeal form to

which which is attached a brief 1/2-page document headed "Reasons for Appeal". AVT Audio Visual has not provided any further documents or other material to support its appeal.

Very simply, AVT Audio Visual has manifestly failed to provide any sort of evidentiary foundation to support its various reasons for appeal. It must be remembered that the burden of showing that the Determination is incorrect lies on AVT Audio Visual. Given the dearth of supporting material before me, this appeal cannot succeed.

As noted in the Determination, AVT Audio Visual ran into financial difficulties in June 2001 and on July 3rd, 2001 gave notices of temporary layoff to all four employees. The layoff notices state that:

> "You are hereby notified that the Board of Directors is temporarily laying off all AVT staff. It is our intention to recall you as soon as possible; however, if the layoff exceeds 13 weeks, you will be considered terminated and become entitled to compensation in lieu of notice, as per your contract."

Under the *Act*, an employer is entitled to give notice of temporary layoff in which case the employee is not considered to be terminated, at least as of the date of the temporary layoff. However, if the employee remains continuously on layoff for a period in excess of 13 weeks, the employee is deemed to have been terminated as of the original "temporary" layoff date [see section 63(5) of the *Act*].

AVT Audio Visual says that Chad Klippert, Yoan Sohn and Mark Turi were all recalled prior to the expiration of the 13-week temporary layoff period. However, there is absolutely no evidence before me showing that such recalls were effected. Mr. Klippert denies having been recalled; the only contact he acknowledges is an inquiry from AVT Audio Visual as to whether he might be interested in returning if offered a position. An inquiry of that nature does not satisfy the requirements of a recall which must be a clear and unequivocal offer to return the employee to their former position and under the same terms and conditions.

AVT Audio Visual also says that Mr. Klippert has breached a non-competition agreement; Mr. Klippert denies ever having given such a covenant. There is no evidence before me of such a subsisting covenant nor any evidence regarding breach. In any event, such a covenant must be enforced by way of an application to the B.C. Supreme Court.

There is no evidence before me indicating that Yoan Sohn was recalled before the expiration of the 13-week temporary layoff period. The evidence that is before me, provided by Yoan Sohn and the Director's delegate, unequivocally indicates that there was no such recall.

Similarly, there is no evidence before me that Mark Turi was recalled before the expiration of the 13-week temporary layoff period nor is there any evidence that he voluntarily resigned during the 13-week period.

As for Ms. Olesky, she is alleged to have wrongfully disclosed confidential information. I do not have any particulars before me with respect to the alleged confidential information nor any evidence corroborating her alleged wrongful disclosure. I am wholly unable to determine if there was just cause for dismissal since the employer has not provided the necessary corroborating evidence.

It should also be noted that AVT Audio Visual's current position with respect to Ms. Olesky represents something of a departure from its original position before the Delegate--namely, that Ms. Olesky was not

recalled within the 13-week temporary layoff period because she had found other work, in other words, she voluntarily quit.

I might add that even if an employee has found other work during the temporary layoff period, that fact does not relieve the employer from making a formal recall offer; the employer cannot assume that the employee would reject a recall offer in favour of continuing with their new employer. An employer does not have any obligation to pay compensation for length of service if it makes an unequivocal recall offer (before the end of the temporary layoff period) that is refused (see *Slumber Lodge Motel Corp*., BC EST # D171/97; *Wong*, BC EST # D048/99), however, the employer's obligation cannot be avoided simply because the employee has found other work during the temporary layoff period. It is the employee's decision whether to accept a recall offer; the employer cannot unilaterally take that decision out of the employee's hands on the presumption that the employee would inevitably refuse a recall offer.

ORDER

Pursuant to sections 114(1)(c) and 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of $9,429.07 together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal