

**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 -

Fisher Optical Corporation operating as Alta Vision Laboratories

(the "Appellant")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

**ADJUDICATOR:** E. Casey McCabe

**FILE No.:** 2000/171

**DATE OF HEARING:** May 23, 2000

**DATE OF DECISION:** June 9, 2000

**DECISION**

**APPEARANCES:**

Paul Fisher                               for the employer  
Bentley Chilton                         for himself  
No one                                     for the Director of Employment Standards

**OVERVIEW**

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) from a Determination dated March 2, 2000 which found that the complainant was entitled to two weeks’ compensation for length of service.

**ISSUES TO BE DECIDED**

1. Was the complainant given proper notice in lieu of compensation that his employment would terminate on June 30, 1999?
2. Did the complainant’s performance of his job duties on July 2, 1999 negate any notice that may have been given?

**FACTS**

Fisher Optical Corporation is a registered company in the province of British Columbia which operates under the name Alta Vision Laboratories. The company produces lenses for eye glasses. At the material time the company held a contract with a major retail chain to provide ground lenses for that chain’s optical department. Early in 1999 the company received a notice that its contract with the major retail chain would terminate on June 30, 1999. The contract did terminate at that time and the employer’s workforce was reduced from thirteen employees to three.

The complainant was employed as a technician with the company. The complainant’s primary duties were to grind lenses that were sold in eye glasses through the major retail chain’s in-store outlets. The complainant commenced work on December 15, 1997. His last day was July 2, 1999.

Mr. Fisher, on behalf of the employer, testified that the employer had received notice of termination from the retail chain in early 1999. The employer testified that it informed the employees whose employment was derived from the contract work with the major retail chain of the loss of the contract and that their last day of work would be June 30, 1999. The employer also testified that it prepared a notice letter to this effect for the employees.

Regarding the complainant the employer testified that although it prepared a notice letter dated April 6, 1999 it did not give that letter to the complainant at the time. The employer testified that

he liked the complainant, despite certain work problems the complainant had centering around attendance, and that he generally had a soft spot for the complainant. As a result, he did not give the complainant the April 6, 1999 letter at the time. The employer testified that the complainant was subsequently given the letter with a pay stub but he was not sure during which pay period the complainant was given the letter. The employer thought it may have been in the last pay period in May. The employer testified that the employee was well aware of the June 30 termination date both through direct conversations between the employer and the complainant and the fact that the loss of the contract and jobs was a topic of conversation in the workplace.

The employer agreed that the complainant worked on July 2, 1999 despite the fact that, in the employer's opinion, notice for June 30 had been given and a record of employment was issued showing a layoff due to shortage of work on June 30, 1999. The employer testified that the complainant had asked the employer if he could come to work on July 2 to do some clean up. The employer further testified that he agreed to this because he was trying to help the complainant. The employer testified that he paid the complainant on a contract basis with funds that came out of the employer's personal account. However, the payment in the amount of \$600.00 was drawn on a Fisher Optical Corporation cheque.

The employer argued that notwithstanding the fact that the monies were drawn on a company cheque the payment was taken from the employer's shareholder loan. Therefore the employer argues that the payment of the monies for that day should be seen as a personal service contract rather than continued employment with Fisher Optical Corporation. The evidence also disclosed that the complainant received a second cheque also drawn on a Fisher Optical Corporation cheque. Those funds, similarly, were taken from Mr. Fisher's shareholder loan account rather than the company's general account. The second cheque that was given to the complainant showed on its face that the cheque was for holidays for the April to June, 1999 period plus payment for the July 1 statutory holiday along with payment for July 2, 1999.

The complainant testified that he commenced work with the company with December 15, 1997 and that his last day of work was July 2, 1999. The complainant denies that he received the April 6, 1999 notice of termination of employment for June 30, 1999. The complainant states that he was told in conversations with Mr. Fisher that the contract with the major retail outlet had been lost but that there was no specific date given for his termination. He stated that he was told that his continued employment would be dependant on the amount of work available. The complainant adamantly denied ever receiving the April 6, 1999 notice from the employer. He states that the first time he saw the April 6, 1999 letter was when the employer's documents were disclosed through the Employment Standards Branch investigation.

With respect to the June 30 termination the complainant testified that in a conversation with the employer on that date he was told that he could come to work on July 2 as there was work for him. The complainant denies asking to be allowed to come in on July 2 to clean up. The complainant states that he was told on June 30 that he would be employed as long as there was work and that there was work on July 2, 1999. The complainant testified that he reported to work that day and performed the usual duties of his technician's job. He did not perform any clean up duties out of the ordinary or any other special duties. He testified that at the end of the day he was told that there was no more volume and that, consequently, there was no longer work for him.

It should be noted at this point that the evidence disclosed that the complainant received two cheques in July, 1999. The first cheque was in the amount of \$600.00 with no deductions. The second cheque was in the amount of \$387.63 with no deductions. The second cheque indicated on its face that it was holiday pay for April to June plus pay for the July 1 statutory holiday and July 2 work. The employer testified that it attempted to put a stop payment on the \$600.00 cheque but it was too late. The complainant, therefore, received that \$600.00 cheque plus a cheque in the amount of \$387.63. As stated previously, the employer testified that despite the fact that the cheque was written on Fisher Optical Corporation stationery, the monies were in fact taken from the shareholder loan, rather than the company's general account.

## ANALYSIS

The first issue questions whether the notice given to the employee was adequate. Section 63(3) of the *Act* requires that notice be given in writing. In this case, the employer contends that the requirement to give written notice was met when the April 6, 1999 letter was put in a subsequent pay stub. The complainant denies having received the notice. It is clear that verbal notice was given to the complainant although it is not clear when exactly the verbal notice was to take effect.

For the purposes of this award it is not necessary to decide whether written notice was properly given under the *Act*. It is not necessary to make that decision because the evidence discloses that the complainant worked on July 2, 1999. Therefore, the complainant worked past the notice period. Section 67 of the *Act* reads:

67(1) A. *A notice given to an employee under this Part has no effect if*

*(a) the notice period coincides with a period during which the employee on annual vacation, leave, strike or lockout, or is unavailable for work due to a strike or lockout or medical reasons, or*

*(b) the employment continues after the notice period ends.*

The employer argues that the complainant was not employed as an employee of Fisher Optical Corporation on July 2, 1999 but rather worked under a personal services contract for Mr. Paul Fisher. I cannot accept that submission. Mr. Fisher argues that the evidence to support this arrangement can be found in the bookkeeping entries which show that the monies paid to the complainant after June 30, 1999 were monies that were taken from his shareholder loan rather than the company's general account. I cannot accept that argument as being conclusive of the employment relationship.

The evidence clearly disclosed that the complainant reported to work on July 2, 1999 and performed his normal duties. The employer argues that he did perform some cleanup duties in addition to his regular duties but I do not see that as detracting from the essential employment relationship. I find that the complainant did return to work on July 2, 1999 and that he performed those duties that he had performed for the previous eighteen months of employment. Therefore, I find that the complainant's return to work on July 2, 1999 entitled him to a new notice period or pay in lieu. I do not find the fact that complainant was paid with a Fisher Optical Corporation cheque that was ultimately drawn from Mr. Fisher's shareholder loan as defining the termination of the employment relationship on June 30, 1999. Rather the substance of the work performed

and the fact that Mr. Fisher consented to the complainant reporting to work on July 2, 1999 constitutes a continuation of the employment relationship.

**ORDER**

The Determination dated March 2, 2000 is confirmed.

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**E. Casey McCabe**  
**Adjudicator**  
**Employment Standards Tribunal**