Employment Standards TRIBUNAL

An appeal

- by -

United Properties Ltd.
("United" or "Employer")

- 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:	Paul E. Love
FILE No.:	2002/109
DATE OF DECISION:	June 10, 2002

DECISION

OVERVIEW

This is an appeal by an employer, United Properties Ltd. ("Employer"), from a Determination dated February 12, 2002 (the "Determination") issued by a Delegate of the Director of Employment Standards ("*Delegate*") pursuant to the *Employment Standards Act, R.S.B.C. 1996, c. 113* (the "*Act*"). The Delegate found that the Employer had not given adequate notice to terminate three employees, Rosemary Carre, Cynthia Melowski and Leslie Forbes, and therefore the Employees were entitled to compensation for length of service in the amount of $15,167.97. The appeal submission by the Employer, was a bare submission without evidence. With regard to the appeal involving Ms. Forbes, it was apparent that the appeal was so bereft of evidence or detail, that I could not assess the appeal of the Employer. I therefore dismissed this appeal. With regard to the appeal involving Ms. Melowski, the Employer advanced only that it had provided a reference for Ms. Melowski and as a result of the reference, Ms. Melowski obtained employment with another employer. This does not discharge the employer's obligation to pay compensation for length of service. It is apparent that the Employer paid the Determination as it concerned Ms. Carre. As the Employer did not raise any ground of appeal with regard to the Determination involving Ms. Carre, I dismissed the appeal. Payment or non-payment of a Determination is a matter involving the Director or Delegate and the employer and employee, and is not a matter for review by the Tribunal.

In the Employer's appeal submission I note that the Employer indicated that an application had been taken under the *Company Creditor's Arrangement Act*. I have, however, not been provided with any order staying proceedings. In the circumstances of this case it is proper to proceed with the merits of this appeal, and dismiss the Employer's appeal. The right of the Director to enforce payment of the Determination is a matter, that may be an issue in any *Company Creditor Arrangement Act* proceedings.

ISSUE:

Did the Employer establish any error in the findings of the Delegate with regard to entitlement of the Employees to compensation for length of service?

FACTS

I decided this case after considering the appeal notice and attachment filed by Victor D. Setton c/o United Properties Ltd., Leslie Forbes, Cynthia Melowski, and the Delegate.

The Employer was in the business of developing real estate in the lower mainland area of British Columbia. Rosemary Carre, Cynthia Melowski and Leslie Forbes (the "Employees") were employed in the Employer's business. This business apparently involved the development of townhouse and condominium units ("units") for various projects. Rosemary Carre, worked from January 4, 2000 to July 13, 2001 as a controller and received an annual salary of $60,000. Cynthia Melowski worked from August 26, 1991 to July 13, 2001 as an architectural and design coordinator. While she has a masters degree in architecture, she is not a registered architect. Leslie Forbes worked from July 1, 1982 to July 13, 2001 as a design coordinator and salesperson.

The Delegate found that the Employees received two weeks "verbal notice" of termination of their employment. The Employees received two days written notice of termination of their employment. The Employees ceased working for United on July 13, 2001, and have not been recalled to work by the Employer. The Employees received regular wages to July 15, 2001. The Employer filed for protection from its creditors under the Company Creditor Arrangement Act on July 16, 2001.

The Delegate found that the Employer did not comply with s. 63(1) and (2) of the *Act* concerning notice. The notice given was inadequate, and it is clear that notice for the purpose of the *Act* is written notice. The Delegate found that each employee was entitled to compensation for length of service as follows:

Rosemary Carre:

Compensation for length of service	$1714.27
Interest	$ 53.18
Total	$1767.45

Cynthia Melosky:

Compensation for length of service	$8244.38
Interest	$ 255.75
Total	$8500.13

Leslie Forbes:

Compensation for length of service	$4752.95
Interest	$ 147.44
Total	$4900.39

The Delegate found that the total amount due and owing by the Employer with respect to the three employees was $15,167.97. The Determination contains a detailed calculation with respect to each employee, however, since the Employer has not alleged any errors in the details of the calculation, it is unnecessary to include this information in this Decision.

Employer's Argument:

In filling out the appeal form, the Employer sought to cancel the Determination on the basis of "other reasons" which were attached to the Notice of Appeal. I quote from the "Reasons for Appealing the Determination" which comprises the entire material submitted by the Employer to appeal the Determination of the Delegate:

> **Leslie Forbes**
>
> Leslie Forbes worked for United Properties Ltd. under the direction of her husband Terry Forbes. She was always given preferential treatment and was paid substantial commissions over the years. Her payment for the administration of show suites was considered to be a retainer. She owes the company the sum of $23,976.87 paid to her as an advance against unearned commissions. There was never a n agreement to have this amount forgiven.

> We are not prepared to forgive her loan. We feel that it is unfair that we are now being requested to pay Ms. Forbes further amounts for compensation in view of the above.
>
> **Cynthia Melosky**
>
> Ms. Melosky called me at home to assist her in finding her another job and I was able to intervene on her behalf on at least two occasions. I called a prospective employer who was considering her for employment and based on my personal recommendation, Ms. Melosky was successful in obtaining her new position. She called to thank me and indicated that she would forever be in my debt. It is now ironic that she has proceeded with a claim for further compensation. I do not think that she is entitled to the amount claimed of $8,500.13
>
> **Rosemary Carre**
>
> We have settled this claim in the amount of $1,767.45 as determined by the Director of Employment Standards.

General Comments

United Properties Ltd. is currently operating under the protection of the Companies' Creditors Arrangement Act and is suffering serious financial difficulties.

Employee's Argument:

Ms. Melosky submitted that she was employed for ten years, and that she was entitled to receive compensation for length of service. Ms. Forbes indicated that she worked in a "dual capacity", on commission for sales, and $1,000 per month salary for her "interior design coordinator function". Ms. Forbes indicated that she worked on various projects on the commissioned sales basis on some projects where the units were over priced, and the real estate marked was "falling".

Delegate's Argument

The Delegate submitted that the fact that Ms. Melosky found employment elsewhere after lay-off from United, did not relieve United of its statutory obligation to pay compensation for length of service. With regard to the appeal concerning Ms. Forbes, the Delegate indicated that insufficient evidence was adduced by the Employer to show that amounts paid to Ms. Forbes, at regular intervals, were advances of commission earnings, or overpayment of wages, as alleged by United during the Delegate's investigation.

ANALYSIS

In an appeal under the *Act*, the burden rests with the appellant, in this case, the Employer to show that there is an error in the Determination, such that the Determination should be canceled or varied. I have reviewed the Employer's appeal with regard to Ms. Forbes, Ms. Melosky, and Ms. Carre separately, in the sections below.

Leslie Forbes:

The Employer asserts that payment to Ms. Forbes was "considered to be a retainer", and that she owes the company the sum of $23,976.87 as "an advance against unearned commissions. I note that this argument was raised before the Delegate. The Delegate found that the Employer was unable to substantiate its "advance" theory, in the light of what appeared to be regular payments, without any attempt to reconcile the "commissions" against the "advances". The Employer has provided no documents or evidence to permit me to review the findings of the Delegate. All the Employer has provided is a two paragraph attachment to the notice of appeal, setting out its assertion, without any supporting proof. The Employee provided me with a lengthy written submission outlining that she was paid for "design duties" monthly, and paid a commission on sales. The Employee says that the sales for some projects never materialized, or were delayed, because of a falling property market and the fact that the units were over priced.

In my view, the Determination clearly indicates an entitlement by Ms. Forbes to compensation for length of service and vacation pay. The Delegate pointed out that the Employer never reconciled the "advances" during the course of the employment relationship. This appeal is so bereft of evidence, that I dismiss this appeal.

Cynthia Melosky:

With regard to the appeal of the Determination as it concerns Cynthia Melosky, all the Employer has asserted is that the Employer provided a reference to her, and she obtained employment, and that the Employer does not think that she is entitled to the amount determined as compensation for length or service and interest, in the amount of $8500.13. In my view, the Employer has not raised any ground of appeal, for proper consideration by the Tribunal. Compensation for length of service is not "reduced" or "mitigated" by the fact that the Employee finds alternative work. While it is laudable that the Employer provided a reference, the provision of a reference does not reduce compensation otherwise owing. While the Employer "does not think that she is entitled to the amount claimed of $8,50013," the Employer has not identified any error with regard to the calculation, and therefore I dismiss the appeal concerning Ms. Melosky.

Rosemary Carre:

The Employer says that it settled this claim in the amount of $1,767.45 as set out in the Determination. The Delegate confirms that "the matter involving Rosemary Carre has been resolved". In my view, the appropriate course is for the Tribunal to dismiss the appeal of the Employer concerning Rosemary Carre, as the Employer has not identified any grounds for appealing the Determination. The Tribunal is not involved in the collection of amounts in a Determination, and presumably the Delegate would not seek to enforce a Determination which has been paid.

I note that I have confirmed the Determination dated February 12, 2002. In doing so I note that the Employer has alleged that an application has been made under the *Company Creditor Arrangement Act*. I have not been provided with a copy of any "stay order" which has been issued. If a stay order has been issued, there may be an issue of whether the Determination is enforceable against the Employer, but that is a question to be dealt with in proceedings, if any, under the *Company Creditor Arrangement Act*.

ORDER

Pursuant to s. 115 of the *Act* I order that the Determination dated February 12, 2002 is confirmed.

Paul E. Love
Adjudicator
Employment Standards Tribunal