

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 -

Mt. Rocky Investment Ltd.
(" Mt. Rocky ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Michelle Alman

FILE No.: 2000/323

DATE OF DECISION: July 12, 2000

DECISION

OVERVIEW

This decision addresses an appeal filed pursuant to Section 112 of the *Employment Standards Act* (the "Act") by Mt. Rocky Investment Ltd. ("Mt. Rocky") from a Determination issued April 12, 2000, by a delegate of the Director of Employment Standards ("the Director"). The Determination concluded that Mt. Rocky had contravened section 63(2) of the Act in respect of the employment of Ms. Qing (Maureen) Zheng ("Zheng") and, pursuant to section 79(3) of the Act, ordered Mt. Rocky to cease contravening and to comply with the Act. The Determination indicated that Mt. Rocky owed \$719.99 as 2 weeks' wages, plus \$66.19 for interest owing on that amount from November 15, 1998, the date of Zheng's termination of employment, to April 12, 2000, the date the Determination issued. An attachment to the Determination also ordered, pursuant to section 29 of the *Regulation*, Mt. Rocky to pay a penalty of \$0.00 for violating Section 63(2) of the Act.

The parties made written submissions in these appeals. Mt. Rocky offered no submissions in reply to either the Director's or Zheng's submissions.

ISSUES

The issues to be decided are whether Mt. Rocky terminated Zheng's employment and failed to pay her compensation for length of service.

THE FACTS AND ANALYSIS

From November, 1996 until February, 1999, Mt. Rocky owned and operated an organic mushroom farm in Langley. The farm, for various reasons, always operated at a loss. Mt. Rocky had no more than 3 employees at the farm at any given time, and first laid off an employee, Jim Koster ("Koster"), in July, 1997. Mt. Rocky states in its submissions that it was aware of its obligations regarding notice under the Act, and as proof offered a copy of the written notice it gave to Koster indicating that it would pay him 2 weeks' wages in lieu of notice of layoff. Mt. Rocky also provided a copy of Koster's Record of Employment as proof that it paid Koster 2 weeks' wages in lieu of notice. Mt. Rocky further provided a copy of the written 6-week notice of layoff given January 15, 1999 to another farm employee, Parmjit Sandhu ("Sandhu").

On May 1, 1997 Zheng was hired for a 2-month period to work as the lab technician for the farm. In its written employment offer dated April 28, 1997 Mt. Rocky stated Zheng would work 40 hours per week and receive a salary of \$1,500.00 per month as well as the use of a 4-bedroom ranch house for a rent of \$700.00 per month. The offer letter also stated in essence that if Zheng's employment ended, Mt. Rocky required that she move within 1 month of her last day of work without further written notice. Zheng states in her submissions that her private use of the house was actually limited to the 4 bedrooms, as Mt. Rocky used the kitchen as a workers' lunch room, the dining room as a business office, and the garages as a workshop.

Zheng's work for Mt. Rocky continued past the original 2-month term of employment, apparently without a break, until she became pregnant in March, 1998. She requested maternity leave from Mt. Rocky in early November, 1998, and went on maternity leave beginning November 16, 1998. On November 13, 1998 Mt. Rocky provided Zheng with a letter stating that she was expected to return to work at the farm on May 16, 1999 after her maternity leave ended. The letter also requested that Zheng give Mt. Rocky 2 weeks' notice in the event that she would not be returning.

On November 10, 1998, one of Mt. Rocky's principals, Carole Tse ("Tse"), gave Zheng written notice which stated that, because Zheng was going on maternity leave and not actually doing work at Mt. Rocky, from November 16, 1998 she was no longer entitled to a "housing allowance" in the form of the \$700.00 monthly rental of the ranch house. The letter indicated Zheng would have to pay \$1,200.00 per month in rent starting November 16, 1998. The letter further stated that if Zheng did not wish to remain in the house, Mt. Rocky would accept 48 hours' notice of her intent to move. Zheng moved on November 14, 1998. Zheng states in her submissions that while moving on November 14, 1998, she told one of the Mt. Rocky principals that she was keeping her same telephone number. Zheng's submissions include copies of her household's telephone bills for November 10, 1998, December 10, 1998, and March 10, 1999, all indicating the same telephone number.

Mt. Rocky submitted that it closed the farm in February, 1999. Sandhu's January 15, 1999 layoff notice stated that his employment would conclude on February 28, 1999, which was apparently the final date of the farm's operation. In early March, 1999 Zheng called Tse to give Tse her new address for mailing Zheng's 1998 T-4 for Zheng's income tax return. Zheng's submissions include a copy of that T-4, with the original address (which is the same address as appears on Zheng's November 10, 1998 telephone bill) crossed out and replaced with the address on Zheng's March 10, 1999 telephone bill.

On April 30, 1999 Zheng called Mt. Rocky to tell them she would return to work on May 16, 1999. She spoke with Tse's husband, Art Yang ("Yang"), the second Mt. Rocky principal. Zheng alleges Yang told her Tse would call her back, and that instead on May 2, 1999 Yang called her to tell her she could return to work in mid-June, 1999. When Zheng requested written notice of layoff for the period between May 16, 1999 and mid-June, 1999 to allow her to apply for regular EI benefits, Yang told her that Tse would call her back. Zheng did not hear further from Mt. Rocky, despite her numerous calls and a trip to the farm on May 17, 1999 to start work. On that May 17, 1999 visit to the farm, Zheng found no one at work. She then posted in a mushroom grow-room a copy of the November 13, 1998 letter from Mt. Rocky indicating they expected her to return to work on May 16, 1999, and went to Human Resources Development Canada ("HRDC") to apply for regular EI benefits. About a week later Zheng was told by an HRDC employee that Mt. Rocky would let her return to work in mid-June, 1999. Zheng again called Mt. Rocky and left a message asking for her start date, but never received any reply.

Section 2 of the *Act* provides in part:

2 The purposes of this Act are as follows:

(a) to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment;

Section 54(2) of the Act states:

54(2) An employer must not, because of an employee's pregnancy or a leave allowed by this Part,

(a) terminate employment, or

(b) change a condition of employment without the employee's written consent.

Section 63 of the Act provides in relevant part:

63(1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.

(2) The employer's liability for compensation for length of service increases as follows:

(a) after 12 consecutive months of employment, to an amount equal to 2 weeks' wages;

...

(3) The liability is deemed to be discharged if the employee

(a) is given written notice of termination as follows;

(i) one week's notice after 3 consecutive months of employment;

(ii) 2 weeks' notice after 12 consecutive months of employment;

...

(4) The amount the employer is liable to pay becomes payable on termination of the employment and is calculated by

(a) totaling all the employee's weekly wages, at the regular wage, during the last 8 weeks in which the employee worked normal or average hours of work,

(b) dividing the total by 8, and

(c) multiplying the result by the number of weeks' wages the employer is liable to pay.

Section 67 of the Act states in relevant part:

67 (1) 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 is on leave...

And section 88 of the *Act* provides in relevant part:

88 (1) If an employer fails to pay wages or another amount to an employee, the employer must pay interest at the prescribed rate on the wages or other amount from the earlier of

(a) the date the employment terminates, and

(b) the date a complaint about the wages or other amount is delivered to the director

to the date of payment.

Mt. Rocky admits in its appeal submissions that it was aware of the notice provisions of the *Act*. Mt. Rocky argues that it should be excused from those provisions because it was required by business necessity to close its farm in February, 1999 while Zheng was still on maternity leave. It asserts that the *Act* is unfair to it as an employer because section 67(1) prevented it from avoiding liability for compensation owed to Zheng by giving her notice while she remained on leave.

As stated in section 2, the *Act* provides minimum standards for employees' wages and working conditions. It is remedial legislation and should be interpreted broadly. Section 63 of the *Act* is intended to allow an employee who loses employment a minimum period of financial support while she or he searches for new employment. The *Act* does not allow for relief from its notice or compensation in lieu of notice requirements for an employer closing up operations because, contrary to Mt. Rocky's submissions that the decision to close is "out of the control of the director," the timing of that decision is entirely within the employer's control.

Section 67(1)(a) of the *Act* disallows the use of notice to avoid liability for compensation for length of service if an employee is on a leave. The absence of a special exemption from the provisions of section 67 (1) (a) for an employer closing a business while an employee is on leave must mean that the Legislature intended the employee on leave to have the same entitlement to compensation for length of service as an employee who is actively at work. This is in keeping with the remedial purposes of the *Act* stated in section 2. When an employer chooses to close a business while an employee is on leave, that employer makes a business decision to incur liability for compensation for length of service in lieu of notice for the employee on leave.

Before the Determination issued, Mt. Rocky also alleged to the Director's delegate that it was unable to give Zheng written notice of termination when her maternity leave ended because it did not have a mailing address for Zheng. I find that the facts do not support this allegation, as Mt. Rocky had Zheng's mailing address at least by March, 1999. Mt. Rocky could have given Zheng notice in March, 1999, but it would have had no effect on avoiding liability for compensation for length of service. See *Kispiox Forest Products Ltd.*, Bcest #D238/00. I find, therefore, that Mt. Rocky violated the requirements of section 63 of the *Act* and owes Zheng compensation for length of service in the amount of \$719.99, as stated in the Determination dated April 12, 2000.

Zheng is entitled to interest on \$719.99 pursuant to the provisions of section 88 of the *Act*. The Determination sets the date of Zheng's termination of employment as November 15, 1998. The undisputed evidence also shows that Zheng last worked on November 13, 1998, and from her Record of Employment submitted by Mt. Rocky, her last pay period ended on November 15, 1998. Zheng commenced maternity leave on November 16, 1998, with both Zheng and Mt. Rocky then anticipating her return to work on May 16, 1999. Mt. Rocky submitted that it closed the farm in February, 1999, and as noted earlier, Mt. Rocky gave Sandhu notice of layoff effective February 28, 1999. I find that Mt. Rocky ceased operating the farm on February 28, 1999, and that February 28, 1999 was, therefore, the date upon which Zheng's employment ended. Mt. Rocky accordingly owes Zheng interest on \$719.99 from February 28, 1999, further to the provisions of section 88 of the *Act*.

Part of Zheng's compensation package with Mt. Rocky was her entitlement to use of the Mt. Rocky 4-bedroom ranch house for \$700.00 per month in rent. I find that, unless Zheng gave written consent to the change, Mt. Rocky's notification to Zheng on November 10, 1998 of a change in her rent because she was commencing maternity leave constituted a violation of section 54(2)(b) of the *Act*. Zheng did not refer in her submissions to giving written notice of consent to the change, nor did the Determination address this matter as a violation of the *Act*.

Where the Director finds a violation of the *Act* or *Regulation*, section 98 of the *Act* provides:

98. Monetary penalties--(1) If the director is satisfied that a person has contravened a requirement of this Act or the regulations or a requirement imposed under section 100, the director may impose a penalty on the person in accordance with the prescribed schedule of penalties.

The Director's delegate here properly applied the 3-step analysis described in *Narang Farms Ltd.*, BC EST Decision No. D482/98 by finding in this case a contravention of section 63(2) of the *Act*, exercising her discretion to determine whether a penalty was appropriate in the circumstances, and determining a penalty was owed in accordance with the provisions of section 29 of the *Regulation*. I am unable, however, to say that the Director's delegate considered the issue of a violation of section 54(2) of the *Act* and the effect of that additional violation on the appropriate amount of penalty to assess.

ORDER

Pursuant to section 115 of the *Act*, I order the Determination and Penalty issued April 12, 2000 referred back to the Director to address the matters raised in this decision.

Michelle Alman
Adjudicator
Employment Standards Tribunal