Employment Standards TRIBUNAL

An appeal

- by -

Nova Industries Ltd.
("Nova")

- 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: Carol L. Roberts

FILE No.: 2003A/218

DATE OF DECISION: September 26, 2003

DECISION

OVERVIEW

This is an appeal by Nova Industries Ltd. ("Nova") of a Determination of a delegate of the Director of Employment Standards issued July 18, 2003.

On March 19, 2002, Barbara L. Wright complained that Nova failed to pay her compensation for length of service. Nova alleged that Ms. Wright had been laid off and that, when she was recalled to work, she refused to accept the position offered to her.

Following an investigation, the delegate concluded that Ms. Wright was not recalled to the position she had left, and ordered Nova to pay Ms. Wright compensation for job loss and vacation pay and accrued interest in the amount of $4,323.04.

Nova contends that the delegate failed to properly weigh and consider the evidence in arriving at that determination.

The parties were advised by the Tribunal's Vice Chair that the appeal would be adjudicated based on their written submissions and that an oral hearing would not be held. This decision is based on written submissions by Nova's general manager Michael Morden, Barbara Wright, and Paul Harvey on behalf of the Director of Employment Standards.

ISSUES TO BE DECIDED

Whether the delegate erred in law in

1. concluding Ms. Wright was offered reasonable alternative employment;
2. concluding Ms. Wright was prepared to work after the layoff; and
3. failing to properly consider the employers' views and surrounding circumstances regarding the reasonableness of the alternative employment.

FACTS

Ms. Wright worked as an administrative assistant for Nova for approximately eight years starting in January, 1994. She averaged 32 hours per week over a 4 day work week. Ms. Wright was laid off on November 30, 2001. Ms. Wright's Record of Employment (ROE) indicated that she had been temporarily laid off, and that her expected day of recall was "unknown". Ms. Wright alleged that Nova did not recall her, and that it refused to pay her compensation for length of service.

Ms. Wright advised the delegate that she had held several positions at Nova, and that she had always been flexible with her time. She stated that she had discussed employment scenarios from time to time with Mr. Morden, and those scenarios included closing the company to expanding it, and her role in the company. She further indicated that many of the scenarios would have involved a change of employment or hours of operation for her, and that she was never offered a firm offer of a 5 day a week "take it or leave it" scenario.

In response to Ms. Wright's complaint, Mr. Morden provided the delegate with a letter dated September, 2001. In that letter, or memorandum, Mr. Morden indicated that it was his intent to "formalize her status". It stated that her position would be altered

> to accommodate lack of work as well as the phasing out of another staff position. You will continue with a four day work week, at the same pay scale, however with additional hours being added to work on Tuesdays following statutory holidays. Your responsibilities will now be as administration support for installations and service, as well as some accounting roles.

Mr. Morden advised the delegate that Ms. Wright's position was amalgamated with another position, and that, in October, he offered Ms. Wright a full time position, without a change in her hourly rate. Mr. Morden also advised the delegate that Ms. Wright refused the full time position.

Mr. Morden further indicated that he had evidence Ms. Wright was offered full time employment just prior to the layoff decision being made. Ms. Wright denied this, indicating that she worked on a contract for another small office and that some months she had projects, and other months she did not.

Nova submitted a letter from one of its former employees, William Tarras, in support of its position. Mr. Tarras indicated that he spoke with Ms. Wright at the end of January to determine whether she was available to return to work at Nova. According to Mr. Tarras' letter, Ms. Wright indicated to him that she was happily employed elsewhere. Mr. Tarras stated that he had the distinct "impression" that Ms. Wright was not available for employment with Nova.

Nova also submitted a letter from a current employee, Mr. Brian Legge. Mr. Legge wrote that he had a conversation with Ms. Wright at the end of October, 2001 regarding a meeting she had with Mr. Morden. According to Mr. Legge, Ms. Wright indicated that Mr. Morden had offered her a five day work week and that she told Mr. Morden she did not want to work five days a week.

Nova contended that Ms. Wright was not entitled to severance since it offered her reasonable alternative employment, and she refused to accept it. It submitted that Ms. Wright knew that her position was subject to review, and that the company's changed financial circumstances could mean that she would be required to work full time. Mr. Morden submitted that, because Ms. Wright agreed to a review of her position, and that she might be required to work an additional eight hours per week, she was offered "reasonable alternative employment".

The delegate found that Ms. Wright had worked a 4 day week during the period of her employment. He concluded that there was no evidence Ms. Wright had been offered a 4 day work week, or a lesser work week. He also concluded that while Ms. Wright had been offered a work scenario prior to her being laid off that she refused, she had not been offered, and refused, one while she was on lay off. The delegate noted that Mr. Morden indicated that he had a discussion with Ms. Wright regarding amalgamating two positions into one in October, 2001, one month prior to her lay off. The delegate further noted that Mr. Morden indicated that Ms. Wright refused to work in the new position at that time; in his letter of May 22, 2002, Mr. Morden indicated that Ms. Wright "was offered full time employment just prior to the layoff decision being made."

The delegate refers to Mr. Morden's position that Ms. Wright knew about the changes to her days of work and should have expected them, and concludes, based on the October memo, that what Ms. Wright actually agreed to was a continued 4 day work week and the possibility of an upcoming review.

The delegate also concluded that Ms. Wright was not recalled after she was laid off since the evidence was that the job change was discussed with her before she was laid off. He also noted that Mr. Morden was of the view that the offer of a 5 day work week was a reasonable alternative, and because Ms. Wright rejected that offer, she had quit. He noted that the RoE prepared by Nova indicated that Ms. Wright did not quit, rather; she had been laid off.

The delegate reviewed the relevant sections of the Act, and noted that, to effect a proper recall, an employer only had to recall an employee back to 50% of their previous weekly wages or the hours the employee was working prior to layoff. The delegate found that Nova changed the conditions of Ms. Wright's employment, and that the offer of recall, if it was made, did not constitute a reasonable alternative offer since it exceeded the terms and conditions Ms. Wright worked under.

The delegate concluded that Nova failed to properly recall Ms. Wright, and that she was entitled to compensation for length of service plus vacation pay on those wages.

ARGUMENT

Nova argues that the delegate erred in law in failing to properly weigh all of the relevant evidence regarding whether the offer of reasonable alternative employment was made and in applying an overly technical analysis to that issue.

Nova also argues that the delegate failed to appreciate the evidence that Ms. Wright was not available or prepared to return to work after the lay off, and in failing to properly weigh the fact that an offer of reasonable alternative employment was made prior to the actual layoff, and that offer was turned down by Ms. Wright.

Finally, Nova submits that the delegate failed to properly consider Nova's views and the surrounding circumstances regarding the reasonable ness of the alternative employment offered and in finding that an offer to employment could not be reasonable if the hours exceeded what was in place before.

The delegate submits that the Determination should be confirmed for the reasons set out in the decision.

Ms. Wright submitted that Mr. Morden never contacted her to return to work, or offered her further employment opportunities at Nova. She acknowledges that, although she was working for another employer when Mr. Tarras contacted her in January, he did not offer her a position at Nova, and that, in any event, he had no authority to do so.

ANALYSIS

Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

a) the director erred in law

b) the director failed to observe the principles of natural justice in making the determination; or

c) evidence has become available that was not available at the time the determination was being made

The burden of establishing that the Determination is incorrect rests with an Appellant. I am unable to find that the delegate erred in law in concluding that Ms. Wright was entitled to compensation. I am not persuaded that the delegate failed to properly consider Nova's views, or that he failed to appreciate Ms. Wright's evidence.

Section 63 of the *Act* establishes a statutory liability on an employer to pay length of service compensation to an employee on termination of employment. For the purposes of a layoff, an employee is deemed terminated after 13 weeks of layoff (section 1 of the Act). Section 65 (f) provides that section 63 does not apply to an employee who has been offered and has refused reasonable alternative employment by the employer. Section 65(f) is clear. An employer is only relieved of the liability to pay compensation for length of service when it can establish that an employee has been offered, and refused, reasonable alternative employment by an employer after an employee has been laid off.

There is no evidence Nova attempted to recall Ms. Wright after she was laid off in November 30, 2002. All of the evidence provided to, and analyzed by, the delegate deals with interaction between Nova and Ms. Wright before this date. Without any evidence that Nova recalled, or attempted to recall Ms. Wright after she was laid off, the terms and conditions of any recall offer, or whether it constituted "reasonable alternative employment" is entirely irrelevant.

Nova contends that Ms. Wright was not available or prepared to return to work after the layoff. Even if Nova presented evidence that it attempted to recall Ms. Wright after November 30, 2002, there is no evidence Ms. Wright was unavailable or unprepared to return to work had such an offer been made. As this Tribunal has concluded, even if an employee has found other work during the temporary lay off 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. (*AVT Audo Visual Telecommunications Corporation* BC EST #D187/02)

The appeal is denied.

ORDER

I Order, pursuant to Section 115 of the Act, that the determination, dated July 18, 2003, be confirmed, together with whatever interest may have accrued since the date of issuance.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal