Employment Standards TRIBUNAL

An appeal

- by -

Tony Manufacturing Ltd.
("Tony Manufacturing" 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.: 2003A/203

DATE OF DECISION: September 30, 2003

DECISION

OVERVIEW

This is an appeal by an employer, Tony Manufacturing Ltd. ("Tony Manufacturing" or "Employer"), from a Determination dated May 30, 2003 (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*"). Penni Cooper (the "Employee"), filed a complaint that she had not been paid compensation for length of service, or annual vacation pay in accordance with the *Act*. The Delegate found that the Employee had been laid off and had not been recalled within 13 weeks following the lay-off. During the layoff the Employer sold the assets of its business to Trans Canada Truss Inc. ("Trans Canada"). During the investigation, the Employer alleged that Trans Canada had offered work to Ms. Cooper, and that Ms. Cooper was unavailable for work or had refused the work. The Employer argued that the Employee had resigned from employment. The Delegate contacted witnesses supplied by the Employer, who did not support the Employer's allegations. While the Employer alleged a breach of natural justice the Employer did not develop this argument in the appeal submission. The Delegate provided a reasonable opportunity to the Employer to participate in the investigation. The Delegate was faced with contradictory evidence, and the Delegate preferred the evidence of the Employee, particularly since the independent witnesses suggested by the Employer tended to corroborate the Employee's position, and did not verify the Employer's version of the facts.

In this case, there was no evidence that the Employer gave working notice to the Employee or recalled the Employee within 13 weeks of the layoff. The layoff was a termination within the meaning of the *Act*, and the Employee as entitled to compensation for length of service. The Delegate found an entitlement to the sum of $2,626.88, which included interest, annual vacation pay, and compensation for length of service.

ISSUE:

Did Ms. Cooper resign from her employment, and was she thus ineligible for compensation for length of service?

FACTS

I decided this case, on the basis of written submissions, after considering the notice of appeal filed by the Employer, the written submissions of the Employer and Delegate and reading the Determination and the record supplied by the Delegate. The Delegate issued the Determination and the written reasons on May 30, 2003. The Employee did not file any written submission in this appeal.

Penni Cooper worked in the design department of Tony Manufacturing Ltd., located at or near Kelowna, British Columbia. During the course of her employment, she experienced seasonal layoffs. During the course of the last layoff, Tony Manufacturing Ltd. sold its assets to Trans Canada Truss Inc. ("Trans Canada"). Ms. Cooper was not offered employment by Trans Canada, nor was her employment terminated from Tony Manufacturing Ltd. when the asset transfer took place. At the time of the layoff she was earning $2200 per month, and working 40 hours per week.

During the course of the investigation, the Employer's representative, Mark Hatton, alleged that Ms. Cooper was notified of a meeting with Trans Canada, was offered work by Trans Canada, and turned down an opportunity to work. The Employer alleged that Ms. Cooper advised him that she did not want to work for the new owners and was considering going back to school to pursue a career in book keeping or, was going to take a job elsewhere. The Employer's representative further alleges that Ms. Cooper had taken work in the United States during the layoff period, and therefore was not available for recall.

During the course of the investigation, the Employer's representative, Mark Hatton, alleged that all employees who attended for a meeting scheduled by Trans Canada, were offered uninterrupted employment. This allegation was investigated by the Delegate. The information from Mr. Elhafi was that no such meeting took place, that Trans Canada retained only two of the employees of Tony Manufacturing Ltd., and that Ms. Cooper expressed interest in a position with Trans Canada, and submitted a resume, but no position was available to her. The Delegate preferred the information provided by Steve Elhafi, the manager at Trans Canada, over the allegation made by the Employer.

During the course of the investigation, the Employer insisted that the Delegate contact Leslie McNamara, a former employee of Tony Manufacturing Ltd., who was working for Trans Canada. Ms. McNamara verified to the Delegate that Ms. Cooper was laid off when the asset sale from Tony Manufacturing to Trans Canada took place. She verified that she did not make any calls to Ms. Cooper on behalf of Trans Canada offering work to Ms. Penny. Ms. McNamara further verified that there was no job for Ms. Cooper, because Trans Canada brought in its own people.

The Delegate considered the submission of the Employer, that Ms. Cooper "could have gone to work for Trans Canada or returned to work with Tony Manufacturing Ltd.", and found that the allegation lacked credibility.

The Delegate found that Ms. Cooper was on a temporary layoff, which became a permanent layoff after the employee was on layoff for more than thirteen weeks. The Delegate found that the Employer did not pay any compensation for length of service. The Delegate found that Ms. Cooper was entitled to four weeks severance.

The Delegate found that the Employee was entitled to the sum of $2,626.88, consisting of annual vacation pay in the amount of $81.13, compensation for length of service in the amount of $2030.40, and accrued interest in the amount of $515.35.

Employer's Argument:

The Employer argues a breach of natural justice by the Delegate during the course of the investigation. The Employer argues that the Employee took full time employment with another employer during the 13 weeks following a temporary layoff from employment. The Employer says that the Employee was not available for work, and therefore was not entitled to compensation for length of service. The Employer seeks to cancel the Determination.

Employee's Argument:

The Employee did not provide a submission in this proceeding.

Delegate's Argument:

The Delegate provided a record of the proceedings. The Delegate says that the Employer made no attempt to recall Ms. Cooper to employment during the 13 week period following layoff. The Delegate says that the Employee was not offered employment during the 13 weeks following layoff.

The Delegate submits that the appeal should be dismissed.

ANALYSIS

In an appeal of a Determination, the burden rests with the appellant, in this case the Employer, to establish an error in the Determination, such that I should vary or cancel the Determination. In this case the Employer relies on the grounds set out in sections112 (1)(b) of the *Act* (breach of natural justice), and 112 (c) (new evidence):

> 112(1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:
>
> (a) the director erred in law;
>
> (b) the director failed to observe the principles of natural justice in making the determination;
>
> (c) evidence has become available that was not available at the time the determination was being made.

The Employer did not develop any argument of breach of natural justice. It appears that this matter was investigated fully by the Delegate. The Delegate followed up on suggestions of the Employer's representative to verify his statements with Leslie McNamara and Steve Elfalfi. Neither of these persons had any continuing connection to the Employer, or the Employee and were in essence neutral, independent informants. Neither of these persons confirmed the Employer's versions of the facts. In fact, it appears that each of these persons contradicted the Employer's version, and provided some measure of corroboration for Ms. Cooper's complaint. In my view the Delegate complied with the duty pursuant to section 77 of the *Act* to afford the Employer a reasonable opportunity to participate in the investigation:

> If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.

The Delegate was faced with contradictory evidence tendered by the Employer and the Employee. The information provided by the Employer, and informants interviewed by the Delegate at the request of the Employer was contradictory. The Delegate quite properly applied the approach in *Faryna v. Chorny (1952) 2 D.L.R. 354 (B.C.C.A.)*, when considering the conflicting evidence of different witnesses:

> ... the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

There is no evidence in this case of any attempt by the Employer to provide "working notice" to Ms. Cooper. There is no evidence of any attempt by the Employer to recall the Employee within the notice period. In my view, there is no basis for concluding that Ms. Cooper quit or resigned her employment with the Employer. The case law is clear, that amounts received by the Employee from other employment during the notice period, cannot be applied to reduce an Employer's obligation to pay an

Employee compensation for length of service. Given that the Employer's version of the facts was contradicted by other "neutral witnesses", the Delegate quite properly did not accept the Employer's evidence on the point of "unavailability" of Ms. Cooper for work.

In my view, the appeal of this matter is simply an attempt by the Employer to revisit the fact finding process of the Delegate. I see no basis for finding any error in the investigation of this matter.

Section 1 of the *Act* defines "termination of employment" and "temporary layoff". Termination of employment includes a layoff other than a temporary layoff. Temporary layoff means:

> (a) in the case of an employee who has a right of recall, a layoff that exceeds the specified period within which the employer is entitled to be recalled to employment, and
>
> (b) in any other case, a layoff of up to 13 weeks in any period of 20 consecutive weeks.

When Ms. Penni was not recalled within 13 weeks, she was terminated by operation of section 63 of the *Act*. Pursuant to section 63 of the *Act*, when a temporary layoff, has become a permanent layoff after more than 13 weeks, the Employee is entitled to compensation for length of service. The only exceptions to the Employer's obligation to pay compensation is where the Employee is given a working notice, or where the Employee terminates the employment, retires from employment or is dismissed for just cause. Here the Employee was not given working notice, and was not recalled within the 13 week period, and she did not resign her position with Tony Manufacturing. She did not retire from her position, nor was she dismissed for just cause. She is therefore entitled to compensation for length of service pursuant to the *Act*.

For all the above reasons, I dismiss the appeal.

ORDER

Pursuant to s. 115 of the *Act* the Determination dated May 30, 2003 is confirmed.

Paul E. Love
Adjudicator
Employment Standards Tribunal