Employment Standards TRIBUNAL

An appeal

- by -

Ultra Information Systems Canada Inc.
(the "Appellant")

- 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: W. Grant Sheard

FILE No.: 2003A/224

DATE OF DECISION: October 15, 2003

DECISION

SUBMISSIONS BY

Lynn Spraggs	on behalf of the Appellant Employer
Christal Murphy	on her own behalf
Erwin Schulz	on behalf of the Director

OVERVIEW

This is an appeal based on written submissions by Ultra Information Systems Canada Inc. (the "Appellant"), pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), of a Determination issued by the Director of Employment Standards (the "Director") on July 8, 2003 wherein the Director's Delegate (the "Delegate") found that the Respondent was entitled to wages, compensation for length of service, and interest for a total due of $7,997.68.

ISSUES

1. The use of new evidence not raised prior to the Determination being issued.
2. Did the Director observe the principles of natural justice in making the Determination?
3. Did the Respondent quit such that no compensation for length of service is payable?
4. Was the Delegate's calculation of set-off claimed by the Appellant against wages due to the Respondent correct?
5. Was the complaint delivered in time?
6. When is the Respondent entitled to receive wages due?

ARGUMENT

The Appellant's Position

In an appeal form dated August 5, 2003 along with a letter of the same date and a 6 page written argument all filed August 7, 2003 the Appellant says that its grounds for appeal are that the Director erred in law, the Director failed to observe the principles of natural justice in making the Determination, and evidence has become available that was not available at the time the Determination was made. The Appellant seeks to change or vary the Determination.

In the supporting letter the Appellant says that the Respondent has used the *Labour Standards Act* (sic) as a haven to circumvent normal procedures that have been established for the collection of debt. Further, the Appellant says that the underlying facts require a more in-depth analysis to ensure that natural justice is allowed to take its course. The Appellant says that new evidence in the form of emails between the Respondent and another employee were not available at the hearing and the Appellant was not aware there would be no written submissions accepted following the hearing.

The Appellant asserts that the Delegate did not address a number of questions. For example, the Appellant queries whether the Respondent was justified in quitting.

The Appellant acknowledges that it has a debt to the Respondent to be paid at a future date when the company is again solvent, that they were "deemed wages" and were not withheld but rather a debt that remains unpaid and outside the jurisdiction of the Director. The Appellant says that the time for appealing a Record of Employment issued on May 17, 2002 was "violated" and that any issues relating to that ROE are outside the jurisdiction of the Director.

Regarding new evidence, the Appellant says that, after the hearing before the Delegate another employee who had received email from the Respondent searched through emails he had filed and located these email which are now attached to the Appellant's submission. The Appellant says that these email corroborate or substantiate the oral evidence the Appellant provided at the hearing before the Delegate. In particular, the Appellant says that they corroborate the evidence that a termination letter was written for the Respondent so that she would be able to use it as a reference and not to reflect that she had actually been terminated.

The Appellant says that between February 28 and May 15 "everyone was essentially volunteering their time". With respect to the issue at the hearing regarding an alleged loan from the Respondent and other employees to the Appellant of wages due to them, the Appellant says "UIS could not pay the money and have it physically loaned back to the company because the bank accounts were "frozen" due to NSF funding."

With respect to a set-off claimed for overpayment of holiday pay, the Appellant says that the Respondent was paid for time taken off (as opposed to sick benefits) because there was an expectation by the Employer that during the course of the year the Employee would work the required number of days. Further, "they will be allowed to take the day off against their annual allowed vacation. If they take more time off than expected, they are required to make it up."

The Appellant also asserts that the Delegate failed to award compensation for length of service based on the last or latest 13 week period of employment which the Appellant says was $277.00 per week for a total of $554.00 for two weeks of compensation, not $1,500.00 as found by the Delegate.

The Respondent's Position

In a written submission dated August 19, 2003 and filed with the Tribunal August 21, 2003 the Respondent only replies to the Appellant's production of new evidence. The Respondent says that this evidence is not new and that the Appellant had access to the employee who provided it and indeed called that employee as a witness at the hearing before the Delegate. The Respondent says that in the written information package sent to all parties prior to the hearing before the Delegate, it was clearly indicated that no new information would be heard once the hearing had been completed.

The Director's Position

In a memorandum dated August 18, 2003 filed with the Tribunal August 20, 2003 the Delegate simply provides a copy of the record that was before him at the time the Determination was made.

THE FACTS

The Appellant employed the Respondent commencing January 2000 as a graphic artist. Early in 2002 the Appellant encountered financial difficulties and was unable to meet its payroll obligations.

On May 17, 2002 the Appellant and its employees entered into a "work-share" agreement under the Employment Insurance provisions of Human Resources Development Canada. This effectively reduced the Respondent's work week from 40 hours per week to 16 hours per week.

This arrangement remained in place until August 23, 2002 when the Respondent's employment ended. She received a Record of Employment indicating the reason for leaving as a shortage of work. She also received a letter from the Appellant stating, in part "it is necessary that we terminate your current employment with UIS effective today".

The parties met on March 25, 2003 in an attempt to resolve this matter. In that meeting they agreed upon a statement of facts which were attached to the Determination as Attachment number 1. In that agreement the parties agreed there were net wages payable of $6,251.70 but there were three issues in dispute. Those issues were when these wages were payable, whether compensation for length of service was due of $1,500.00 (ie. whether the employee quit or was terminated) and whether there would be a reduction due to a set-off or counterclaim for petty cash advances, payment of vacation pay, and overpayment of amount of salary.

Lynn Spraggs gave evidence at the hearing before the Delegate on behalf of the Appellant to the effect that, on February 11, 2002 he held a meeting with all of the employees of the Appellant indicating that the Appellant would be unable to pay wages beyond February 28, 2002 and that he offered the employees an arrangement whereby, if they chose to continue to work, their wages would be "deemed" to be paid to them and then "loaned" back to the Employer. No loan agreement or other documentation was signed in respect of this agreement at that time.

On May 15, 2002 Spraggs held another meeting with the employees and they discussed a work-share agreement whereby they would receive 40% of their salary from the Appellant and 60% benefit through Employment Insurance. The Appellant said that Murphy agreed to continue working under that work-share agreement was accordingly issued a ROE indicating that her period of employment of January 1, 2000 and up to May 17, 2002 with the reason for issuing the ROE being "H" ("work-sharing").

The Appellant stated that the Respondent quit her employment voluntarily on August 21, 2002 when the Appellant was informed that she intended to quit. Spraggs, on behalf of the Appellant, met with the Respondent and he agreed to provide her a letter which said that her job was being "phased out". Spraggs stated at the hearing that providing this letter was bad judgment on his part.

The Respondent gave evidence before the Delegate that she did not agree to loan the wages due to her to the employer and she did not sign a promissory note one year later as other employees did in respect of these wages due. The Respondent acknowledged that she worked from May 19 to August 23, 2002 under the work-sharing agreement, but when the Appellant had fallen behind in paying her wages on August 23, 2002 she raised this issue with the Appellant and was then issued a Record of Employment and a letter stating that she was being laid-off due to shortage of work. She said that her layoff was without notice. She acknowledged that she had received three petty cash advances totaling $60.00 and that her claim should be reduced accordingly. She denied that she had been overpaid for vacation pay or that she had

been overpaid salary at $3,000.00 per month rather than $2,500.00 per month as asserted by the Appellant.

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 cancelled or varied.

1. *Use of new evidence.*

The issue of the use of new evidence at appeal which was not presented to the Delegate at the investigation of the complaint has been considered several times by this tribunal. Indeed, in the case of *Specialty Motor Cars (1970) Ltd.,* BC EST #D570/98 there is reference to the "Tri-West/Kaiser Stables Rule". This issue was decided in *Tri-West Tractor Ltd.,* BC EST #D268/96 and *Kaiser Stables Ltd.,* BC EST #D058/97. In *Tri-West (supra),* the adjudicator there held evidence inadmissible because:

> "This Tribunal will not allow appellants to 'sit in the weeds', failing or refusing to cooperate with the delegate in providing reasons for the termination of an employee and later filing appeals of the Determination when they disagree with it…The Tribunal will not necessarily foreclose any party to an appeal from bringing forward evidence in support of their case, but we will not allow the appeal procedure to be used to make the case that should have and could have been given to the delegate in the investigative process."

Notwithstanding this exclusionary rule, the adjudicator in *Specialty Motors* (supra) held as follows:

> "However, it should also be recognized that the *Kaiser Stables* principal relates only to the admissibility of evidence and must be balanced against the right of parties to have their rights determined in an administratively fair manner. Accordingly, I would reject any suggestion that evidence is inadmissible merely because it was not provided to the investigation officer. There may be legitimate reasons why particular evidence may not have been provided to the investigating officer and, in my view, an adjudicator ruling on the admissibility of such evidence will have to weigh a number of factors including the importance of the evidence, the reason why it was not initially disclosed and any prejudice to parties resulting from such nondisclosure. I do not intend the foregoing to be an exhaustive listing of all relevant criteria."

In the present case it appears that this evidence, of emails between the Respondent employee and another employee does not appear to be significantly important in that there is nothing definitive in it that indicates that the employee intended to quit or seek a letter and ROE from the Appellant indicating that she was not quitting when in fact she was. Further, I do not find that there is any compelling reason advanced why these email were not initially disclosed at the hearing before the Delegate. I do not find any significant prejudice to the parties resulting from such non-disclosure. Weighing all these factors I am not allowing the evidence.

2. *Did the Delegate fail to observe the principles of natural justice in making the Determination?*

Although the Appellant asserts that the Director failed to observe the principles of natural justice in the appeal form filed, the Appellant does not make any submission specific to this assertion. Natural justice may require or consist of many things, but at a bare minimum the parties must be given an opportunity to present evidence, question the evidence of the opposing party litigant and make a submission to the adjudicating body with respect to what it ought to find (see *re Rudowski,* [2000] BCESTD #476 (QL), (9

November 2000), BCEST #D485/00 (Love, Adj.); reconsideration of BCEST #D316/00.). In this case there is no evidence offered that the parties were not given an opportunity to present their evidence, question that evidence or make a submission to the Delegate or any other failure to adhere to the principles of natural justice. I find that the Appellant has failed to meet the onus upon it to demonstrate on a balance of probabilities that the Delegate failed to meet the principles of natural justice in investigating and arriving at the Determination.

3. *Did the Respondent quit such that no compensation for length of service was due?*

In the Determination the Delegate stated as follows:

> ”However, the documents presented at the hearing indicate that the employment relationship was terminated by UIS, not by Murphy. The Record of Employment, signed by Spraggs states that she was laid off due to a shortage of work and her expected date of recall was “unknown”. Similarly, the letter from Spraggs to Murphy confirms that UIS was terminating the relationship. The letter goes on to state:
>
> “Please be assured that in the event we are able to revive the unit you will be offered employment again.”
>
> These documents, created by the employer do not support a finding that Murphy resigned her employment. While Spraggs indicates these documents reflect poor judgment on the part of the employer, I cannot conclude that they do not accurately reflect the decision made by UIS at the time. Even if Murphy initiated the events that led to her departure from UIS, it was the employer that ultimately made the decision to end the relationship and issue the documents to confirm its decision.”

It is apparent that the Delegate had conflicting oral evidence from the Appellant and the Respondent on this issue, but had documentary evidence corroborating the Respondent’s assertion that she was terminated. In the circumstances, I cannot find that the Delegate made any error.

With respect to the Appellant’s assertion that the Delegate erroneously awarded $1,500.00 for two weeks compensation for length of service I note that Section 63(4) of the *Act* provides that the Employer’s liability is calculated by

> “(a) totalling all the employee’s weekly wages, at the regular wage, during the last eight weeks in which the employee worked normal or average hours of work,
>
> (b) dividing the total by eight, and
>
> (c) multiplying the result by the number of weeks’ wages the employer is liable to pay.”

It is apparent from the evidence that the last eight weeks of normal or average hours of work which this employee worked were at the rate of $3,000.00 per month and I cannot find that the Delegate erred in awarding $1,500.00 for this purpose.

4. *Was the Delegate’s calculation of set-off claimed by the Appellant against wages due to the Respondent correct?*

The Appellant and the Respondent were in agreement at the hearing before the Delegate that the Respondent had received $60.00 in cash advances from petty cash and that the Respondent’s claim should

be reduced accordingly which the Delegate then applied. With respect to the Appellant's assertion that the Respondent was overpaid for vacation pay, the Delegate noted in the Determination that none of the payroll documents presented specify which days were taken as annual vacation as opposed to other absences such as sick days, bonuses, lieu time for overtime worked etc. An employee called as a witness at the hearing before the Delegate testified, that to her knowledge, any vacation time taken by the Respondent had received prior approval. Furthermore, the Appellant's payroll documents did not indicate the amount of vacation pay that the Respondent may have received. The Delegate noted that Section 59(1)(a) of the *Act* requires that an employer must not reduce an employee's annual vacation or vacation pay because the employee was paid a bonus or sick-pay period. The Delegate found that he was unable to determine that the Respondent received any overpayments in vacation pay because he was unable to determine what amount of her wages was vacation pay as opposed to such things as bonus or sick pay. The Appellant has failed to demonstrate any error in this finding.

With respect to the Appellant's assertion that the Respondent was erroneously paid $3,000.00 per month for most of 2001 and 2002 rather than $2,500.00 per month as she ought to have been paid the Delegate noted that the Employer failed to present any documentation or other evidence to support this position. Similarly on this appeal, I find that the Appellant has failed to demonstrate any error in the finding of the Delegate in this regard.

5. ***Was the complaint delivered in time?***

The Appellant asserts that the time for complaining about the first ROE issued on May 17, 2002 (with the reason for issuing the ROE being "H" "work-sharing") had passed such that this complaint was not filed in time and the Director had no jurisdiction to issue a Determination.

Section 1 of the *Act* provides that a temporary lay-off becomes a dismissal when it exceeds 13 weeks in any period of 20 consecutive weeks. Section 62 provides that a week of lay-off means a week in which an employee earns less than 50% of the employee's weekly wages, at the regular wage, averaged over the previous eight weeks. Section 74(3) provides that a complaint of a contravention of Parts 2 to 8 of the *Act* must be delivered within 6 months after the last day of employment.

In this case the complainant had her hours reduced from 40 to 16 hours per week at the time of the first ROE on May 17, 2002 and, as such, she began a period of temporary lay-off. That temporary lay-off exceeded 13 weeks and became a dismissal on August 16, 2002. The second ROE was issued on August 23, 2002 with the reason indicated for issuing the ROE as "shortage of work". The record provided by the Delegate indicates that this complaint was delivered December 16, 2002. In either case, that complaint was delivered within 6 months of the termination of employment and within time. I find that the Director did have jurisdiction to issue the Determination.

6. ***When is the Respondent entitled to receive wages due?***

As noted by the Delegate in the Determination, Section 21(1) of the *Act* provides as follows:

> *"Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose."*

Section 22 provides that:

> (1) "An employer must honour an employee's written assignment of wages."
>
> (4) "An employer may honour an employee's written assignment of wages to meet a credit obligation."

The Delegate required payment within 23 days of the Determination noting that the wages withheld from the Respondent did not fall within the guidelines of Section 21 or 22 in that the Employer did not have the necessary written authorization to withhold wages. Further, the Delegate noted that Section 4 of the *Act* specifically states that the requirements of the *Act* are minimum requirements that cannot be waived and that any agreement to the contrary has no effect.

I find that the Appellant has failed to demonstrate any error in the Determination in finding that the wages owing were payable as required by the *Act* (within 48 hours of the Employer terminating the employment, per S. 18(1) of the *Act*).

ORDER

Pursuant to section 115 of the Act, I order that the Determination of this matter, dated July 8, 2003 and filed under number ER118-462, be confirmed.

W. Grant Sheard
Adjudicator
Employment Standards Tribunal