Employment Standards TRIBUNAL

An appeal

- by -

Deryk Upton operating as Biotech Sales Agency
("Upton")

- 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: Lorne D. Collingwood

FILE No.: 2002/091

DATE OF HEARING: July 5, 2002

DATE OF DECISION: July 22, 2002

DECISION

APPEARANCES:

Deryk Upton	On his own behalf
Vanessa Simmons-Chase	On her own behalf

OVERVIEW

Deryk Upton operating as Biotech Sales Agency (I will use "the employer" and "the Appellant" for ease of reference.) has appealed, pursuant to section 112 of the *Employment Standards Act* ("the *Act*"), a Determination issued by a delegate of the Director of Employment Standards (the "Director") on February 1, 2002. The Determination orders Mr. Upton to pay Vanessa Simmons (now Simmons-Chase) wages, $2,590.77 in total, vacation pay and interest included.

The Determination is that Upton employed Simmons from April 25, 2001 to July 17, 2001, that he failed to pay the employee for work in April and July, that she is entitled to be paid for the work, and that the employee is entitled to additional wages because she has been required to pay a portion of her employer's business costs. Mr. Upton, on appeal, questions whether the employee did in fact start work in the 25th of April, 2001. He has gone on to claim that he should not be required to pay for the business costs, nor work in July, because the employee handed important intellectual property over to his one client and caused great, indeed, fatal damage to his business. It is also suggested that there is reason to believe that the employee quit prior to the 17th of July.

An oral hearing was set for June 17, 2002. Mr. Upton failed to attend the hearing but he gave a satisfactory explanation for his absence, a flat tire suffered while on way to the hearing. The Appellant had indicated, earlier, in a written submission, that he was uncomfortable with his ability to make himself heard through written submissions alone. That led me to order a new date for a hearing. July 5, 2002 was eventually set as the date of the hearing.

On the 5th, I proceeded to hear from the parties. Mr. Upton raised objection after objection as I proceeded and he twice requested that we adjourn the hearing. I failed to see merit in his objections or any reason to adjourn.

I have heard from the Appellant, both in writing and in person, and I have found that this is not a case in which there is reason to vary or cancel the Determination. Upton acted as the marketing arm of a manufacturer and that manufacturer terminated his contract, suddenly and without notice. The manufacturer then hired Simmons-Chase, Upton's one and only employee. Mr. Upton is bitter about that turn of events, indeed, he sees something sinister in it. His appeal being what it is, however, he was required to produce evidence to show that the employee did not start work until after the 25th of April. He has failed to do that. And he does not produce evidence to establish that there was misconduct by the employee. Most importantly, I am satisfied that the employee is entitled to be paid as set out in the Determination regardless of whether there was misconduct or not. Mr. Upton does not have a case, indeed, I am led to believe that the appeal is vexatious and one to dismiss pursuant to section 114 of the *Act*.

ISSUES ARISING DURING THE HEARING

Mr. Upton, while in the midst of presenting his case, asked for an adjournment so that he could read documents, he said that he wanted to review 30 pages of documents, so that he could determine whether any contained wording which required that the employee keep certain information confidential. While I expect that this would only have meant delaying the hearing by about an hour, the request was denied. Only the employee had submitted that type of document and the Tribunal had sent those documents (6 pages in all) to Upton in March. I was not shown most of the documents to which the employer referred but they are of course the employer's documents in that all would have been issued by the employer. As such, the Appellant had ample time to read each and every one of his documents prior to the hearing. Mr. Upton's problem was that he had failed to prepare for his appeal and, as I did my best to explain to Mr. Upton, that is not reason to adjourn a hearing, even for just an hour. The Appellant and the Respondent are expected to come prepared for their hearing.

Once the Appellant had been given an opportunity to present his case, I turned of course to Simmons-Chase for her side of matters. The employee, a woman in her early twenties, if that, was supported by her mother and, before beginning her response, she sought her mother's advice on where to start. Mr. Upton objected to that. When I indicated that I would allow the employee to present her case as she wished, so long as she stuck to what was relevant, Mr. Upton asked for another adjournment. He said that he wanted the same chance to bring an assistant. He was told that he should have arranged for his assistant prior to the hearing and that I was not prepared to adjourn for the reason that he had just decided that he wanted an assistant, and at that point. I had at that point heard the Appellant's entire case and he was entitled only to his chance to reply to the employee. Setting yet another day for a hearing would have been most unfair to the employee who would then have to take a third day off work and arrange for her witness and mother to attend yet another hearing.

The employee claims that, in April, she was driven to work by her husband. And it was her plan to have the husband appear as a witness. On hearing from the employee, I decided that it was unnecessary for me to hear from the employee's witness. I explained my decision and, in doing so, indicated that I was satisfied that I could decide the appeal on the basis of the evidence which was at that point before me. The Appellant then demanded that he be allowed to "cross-examine the witness". He was asked why it was important to hear from the witness. I found that the Appellant was intending to question the witness on whether the first day of work was or was not the 25th of April. I ruled that I would not hear from the witness as there was no reason to. It was clear to me that the delegate did have reason to believe that the employee started on the 25th: The employee had shown me her day book and it was entirely consistent with her claim from what I could see. And the employer had not given me any reason to believe that the delegate's conclusion is in error, on the contrary: He had said that he did not know when it was that the employee started work.

REMAINING ISSUES

The matter of whether April 25, 2001 was or was not the first day of the employment is an issue to address. If it is not the 25th, there is then the issue of when did the employee start work.

At issue is the matter of whether the employee is or is not entitled to be paid for work performed in July, 2001 and reimbursed for business travel expenses. In his written submissions, the Appellant accepts that the employee worked to July 17, 2001 and that she paid a portion of his business costs. He argues, however, that he should not be made to pay for that work, and that he should not have to reimburse the

employee for moneys paid towards the employer's business costs, because the employee is guilty of misconduct and caused great, indeed, fatal damage to his business.

During the course of the hearing, Mr. Upton began to claim, for the first time, that it appeared that the employee had terminated the employment on the 1st of July, if not before that, and that it therefore follows that she is not owed wages for the work in July.

What I must ultimately decide is whether it is or is not shown by the Appellant that the Determination ought to be cancelled or varied or a matter(s) referred back to the Director for reason of an error or errors in fact or law.

FACTS

Deryk Upton entered into what is said to have been a business arrangement with Biotech Laboratories ("Laboratories"). Under this arrangement, Upton was to undertake the marketing of a line of bath products for Laboratories in the United States and Canada. Laboratories supplied Upton with office space.

Upton operated as Biotech Sales Agency Inc..

Upton hired the former Vanessa Simmons in April, 2001. The employee has claimed all along that she started work on the 25th of April. The employer, at the investigative stage, claimed that it was not until the 30th of April that the employee started work. The decision of the delegate is that the first day of work is most likely April 25 because the employee was carpooling and that is what the employee's appointment book appears to indicate. He notes that the employer did not produce any payroll records to the contrary.

The employer, on appeal, merely questions whether the employee started work on the 25th. He claims that if the employee did start work on that date, does it not make sense that she would have complained about not being paid for work performed prior to the 30th. The employee claims that she certainly did complain about not being paid for work on the 25th, 26th and 27th of April, and that she was told by Upton that she could take three days as if it were vacation. As matters are presented to me, it is not made clear that the employee did in fact start after the 25th. Upton does not produce evidence to show that, on the contrary, he tells me that he really has no idea of when it was that the employee started work. His very words are that "I am not so damn sure when she started."

I have examined the appointment book that the employee claims to have kept and find that it both appears to be in order and consistent with the employee's claim that she started work on the 25th.

Laboratories wanted Upton to attend the June convention of the National Association of Chain Drug Stores. Upton decided that Simmons-Chase should also attend the convention. Upton paid for her airfare. Simmons-Chase paid her hotel bill ($1,022.01) and for meals ($39.77 Cdn. by the delegate's calculations) on the understanding that she would then be reimbursed for those amounts by her employer. It is a condition of employment that the employer pay for travel, lodging and meals (See "Offer of Employment/Conditions"). The employer has not done so.

It is claimed by the employer that the employee quit without telling him on the 1st of July. There are not facts to support this assertion. Not even the employer suggests that Simmons-Chase failed to report for work as is usual in July, to and including the 17th of that month.

On the 17th of July, Upton was taken aside by Jim Vukets, the General Manager of Laboratories, and told that Laboratories had decided to terminate its contract with Upton and that it was doing so immediately. Upton tells me that he was threatened and that he left without taking his manuals and the documents that are said to be of such importance. That gave Laboratories access to them.

On the 17th of July, the employee was hired by Laboratories at somewhat more money than she was earning before.

The employee contracted Upton and asked that she be paid to the 17th and reimbursed for the above noted hotel and restaurant expenses. The employer refused to pay her any moneys and accused her of "handing over information", "dirty dealing" and "underhanded tactics". He also threatened her with a lawsuit.

The employer complains that the employee and Laboratories colluded to replace him and that the employee has turned intellectual property over to Laboratories which is vital to his business and confidential. The intellectual property to which he refers is, I find, information with respect to contact persons, sales which were "in the works", sales cycles and the best way to approach the persons who are now Upton's former customers. I find that he is also referring to manuals and conference materials (conference of chain drug stores) which were left behind by him on the day that he was terminated. The employee denies that she turned over any important information to Laboratories while she was employed by Upton. She notes that the manuals and conference materials were left behind when Upton was terminated. She tells me that did not take over Upton's work: Laboratories has stopped making the products that Upton was to market. The employee also tells me that it was not until the 16th that she learned, from Vukets, that Upton was going to be terminated the next day and that she was offered a job with Laboratories. I find that there is in fact no evidence of the alleged collusion, no evidence to show that the employee accepted a job with Laboratories prior to the 17th, and no evidence to establish that the employee turned over any confidential information over to Laboratories in the period that she was employed by Upton. There is no evidence to show any dirty dealing on the part of the employee and/or any underhanded tactics on the part of the employee.

ARGUMENT

The Appellant argues that he should not be required to reimburse Simmons-Chase for her business trip costs, nor should he be required to pay for work by the employee in July. The employer's reasoning is that there was misconduct, he is entitled to 'damages', and that as the amount of the latter is greater than the amount of wages owed, the Determination should be cancelled.

ANALYSIS

The Appellant refuses to pay his former employee and, on being ordered to do so, he appeals the Determination. But Mr. Upton does not have what even remotely resembles a coherent case. And he is mad at the employee. He blames her for the loss of his job.

I am inclined to believe that the appeal is vexatious and one to dismiss pursuant to section 114 (c) of the *Act*.

> 114 (1) The tribunal may dismiss an appeal without a hearing of any kind if satisfied after examining the request that
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> (c) the appeal is frivolous, vexatious or trivial or is not brought in good faith.

It is without sufficient grounds and it appears to be nothing more than an attempt to thwart and annoy the employee. I realize that a party can be mad at the other and the appeal can be groundless yet stem from a genuinely held belief that the determination is wrong. In such cases, the appellant is merely mistaken. In this case, the Appellant displays a venom which is pervasive and so disturbing that I am led to believe that the appeal is simply vexatious.

The Appellant questions whether the employee did in fact start on the 25th but the Appellant does not produce evidence to show that the employee started work on some other day. He admits that he does not know what is the first day of work. That is not to show that the delegate's decision is in error. And I doubt that it is. The employee's day book appears to confirm that the 25th is the first day of work.

There are not facts to show that the employee quit prior to the 17th. The facts are to the contrary. The employee did not announce that it was her intention to quit. The employee continued to report for work as usual, to and including the day when Upton's contract with Laboratories was cancelled.

The employer believes that it follows from the facts that his contract was abruptly cancelled and Laboratories hired Simmons-Chase, that there was collusion, and/or misconduct, and/or conflict of interest. It does not. There is not any evidence of collusion, that the employee accepted a job with Laboratories prior to the 17th, or that the employee turned over any confidential information over to Laboratories in the period that she was employed by Upton. There is no evidence to show any dirty dealing on the part of the employee and/or any underhanded tactics on the part of the employee. I am not shown that the employee had a hand in Laboratories' decision to cancel its arrangement with Upton at all. I believe that Laboratories decided on its own that it would cancel Upton's contract and offer Simmons-Chase a job within Laboratories.

Even if I am wrong in the above conclusions, it does not follow that the employer is entitled to withhold wages from the employee as he has. If there was misconduct, for example, if the employee was knowingly acting to undermine her employer such that there is a clear conflict of interest, the employer could at that point terminate the employee for just cause. But that is all. The misconduct does not entitle the employer to withhold wages.

An employer may not withhold wages or require an employee to pay any portion of its business costs even where there is misconduct.

> 21 (1) 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**.
>
> (2) An employer must not require an employee to pay **any of the employer's business costs** except as permitted by the regulations.
>
> (3) Money required to be paid contrary to subsection (2) is deemed to be wages, whether or not the money is paid out of an employee's gratuities, and this Act applies to the recovery of those wages.
>
> (my emphasis)

The *Act* requires that employers pay all wages due for work within 8 days of the pay period in which it is worked or 6 days of termination where the employee terminates the employment (the case here).

> 17 (1) At least semimonthly and within 8 days after the end of the pay period, an employer must pay to an employee all wages earned by the employee in a pay period.

> 18 (2) An employer must pay all wages owing to an employee within 6 days after the employee terminates the employment.

In summary, it is not shown that the employee did not start work on 25th. The employer fails to show that there was any misconduct by the employee but there are not, in any event, circumstances where the employer can withhold wages or require the employee to pay business costs. There is in fact no evidence to show that the employee quit prior to the 17th, the point where it is clear that she became an employee of Laboratories.

The appeal is dismissed. The Determination is confirmed.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination which is against Deryk Upton operating as Biotech Sales Agency, in favour of Vanessa Simmons (now Simmon-Chase), and dated February 1, 2002, be confirmed in the amount of $2,590.77 and to that amount I add whatever further interest has accrued pursuant to section 88 of the *Act*.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal