

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-

Uniglobe Time Travel Inc.

(“Uniglobe”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 97/395

DATE OF HEARING: July 31st, 1997

DATE OF DECISION: August 21, 1997

DECISION

APPEARANCES

D. Bruce Dearing	for Uniglobe Time Travel Inc.
Christine M. Willey (née Bone)	on her own behalf
No appearance	for the Director of Employment Standards

OVERVIEW

This is an appeal brought by Uniglobe Time Travel Inc. (“Uniglobe” or the “employer”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by the Director of Employment Standards (the “Director”) on April 25th, 1997 under file number ER 081487. The Director determined that Uniglobe owed its former employee Christine M. Bone, now known by her married name, Christine M. Willey, (“Willey”), the sum of \$965.52 on account of unpaid vacation pay, one week’s wages as compensation for length of service and interest.

The appeal was heard at the Tribunal’s offices in Vancouver on July 31st, 1997 at which time I heard evidence and submissions from Mr. D. Bruce Dearing, the president, a director and shareholder of Uniglobe and from Ms. Willey on her own behalf. The Director was not represented at the appeal hearing.

FACTS

Willey was employed as a travel agent by Uniglobe from January 15th, 1996 until her termination, allegedly for cause, on December 2nd, 1996.

Uniglobe submits that the Determination is in error because Willey has in fact been paid more vacation pay than she is entitled to. In support of this particular submission, Uniglobe relies on a spreadsheet, apparently prepared by the firm’s accountant, that purports to show that Willey’s “Vacation Pay Bank” was “overdrawn”, as of December 15th, 1996, to the extent of \$386.50.

Ms. Willey, for her part, maintains that she never took any vacation time during the entire period of her employment with Uniglobe. Willey does admit to having taken some time off (three or four days) in lieu of overtime pay but says that this time off was specifically authorized by the office manager, Ms. Alena Spacek.

Ms. Willey’s employment was terminated on December 2nd, 1996, effective December 3rd, 1996. The employer’s termination letter sets out four grounds in support of its decision to terminate:

1. “unprofessional and inappropriate comments made to a company officer”;
2. “reoccurring inadequate notification regarding tardiness and/or failure to attend work”;
3. “reoccurring inadequate performance of job duties”; and
4. “unauthorised collection & taking of “time owing”.

Willey denies any wrongdoing and says that she never received either a verbal or written warning to the effect that her job was in jeopardy.

ISSUES TO BE DECIDED

1. Was Willey entitled to vacation pay as set out in the Determination?
2. Did Uniglobe have just cause to terminate Willey on December 2nd, 1996?

I will deal with each of these two issues in turn.

ANALYSIS

Vacation Pay

By reason of section 58(3) of the *Act*, Willey was entitled to be paid 4% of her earnings as vacation pay within 48 hours of her termination. The employer says that Willey received full pay on days that she did not work and after totalling all such days, submits that Willey is not entitled to any vacation pay.

The employer presented a spreadsheet at the appeal hearing which purports to show a “vacation pay bank” in a deficit position insofar as Willey is concerned. Willey testified that she never received such a spreadsheet at any time during her employment. This evidence was not challenged by the employer. Further, Willey says that she never took any vacation time, paid or unpaid, during her tenure at Uniglobe. While she does admit to having taken days off, Willey’s evidence is that this was time off in lieu of overtime pay and was authorized by the employer or were regularly scheduled days off.

Willey’s evidence, not challenged by the employer, is that her regular work schedule consisted of a two-week rotating schedule of four full days Monday to Thursday (9:00 A.M. to 5:30 P.M.) followed by a week of four full days Monday to Friday and a five-hour shift on Saturday. Thus, Willey’s evidence, which I accept, is that she was scheduled to be off every other Friday in lieu of working every other Saturday. The various Fridays not worked by reason of this two-week rotating schedule cannot be considered to have been paid vacation time.

At the hearing, Willey produced her personal “day-timer” which shows various entries for overtime which have been initialled by Alena Spacek, the person in charge when Dearing was away from the office (by his own testimony, Dearing “was out of the office quite a bit”; Willey’s testimony, which was not challenged by Dearing, is that he was in the office less than one-third of

the time during her tenure at Uniglobe). Accordingly, I have before me credible corroborated evidence that Willey took some days off in lieu of overtime worked.

This latter arrangement appears to have benefitted the employer at the expense of the employee in that the days taken off in lieu of overtime worked were taken on an “hour for hour” basis rather than at the higher “exchange rates” provided for in the *Act* [see section 42(2)]. Further, this entire arrangement appears to be outside the *Act* as the employer never established a “time bank” in accordance with section 42 of the *Act*.

On the balance of probabilities, I am satisfied that Willey did not take any vacation days nor did she receive any vacation pay during her tenure at Uniglobe.

I might note that the employer has apparently not met its statutory obligation under section 28 of the *Act* with respect to the maintenance of payroll records, which would include a record of any vacation payments made to Willey; nor has the employer complied with section 27 of the *Act* by itemizing any amounts purportedly paid on account of vacation pay on any of Willey’s wage statements.

Just Cause for Termination

I am not satisfied that the employer had just cause to terminate Willey on December 2nd, 1996. Accordingly, she was entitled to either one week’s written notice of termination or one week’s wages as compensation for length of service (see subsections 63(1) and (3)(a) of the *Act*). It is common ground that neither written notice nor termination pay was given in this case. The employer’s position is that neither notice or termination pay was required to be given because there was just cause for dismissal [see section 63(3)(c) of the *Act*].

During the appeal hearing, I specifically questioned Mr. Dearing as to the four matters set out in the termination letter dated December 2nd, 1996. The alleged “unprofessional and inappropriate comments” were allegedly made during a telephone conversation that occurred on December 2nd, 1996 between Dearing and Willey when the latter was unable to attend work due to a severe snowstorm. Having heard both witnesses’ respective versions of this telephone conversation, I am not satisfied that any inappropriate comments, which would have to amount to insubordination, were made by Willey during that telephone conversation. As for the employer’s claim that Willey was constantly tardy, I note that there is absolutely no record before me of such tardiness, nor is there any record of any disciplinary action having been taken by the employer with respect to Willey’s alleged tardiness. Nor are there any original employer documents that would corroborate Dearing’s assertion that Willey was an incompetent performer. Indeed, the *actions* of the employer suggest otherwise--she received a bonus following the completion of her three month probationary period; she received a salary increase in May 1996 and another increase in October 1996. In mid-November 1996 the employer arranged for Willey to write, at Uniglobe’s expense, a travel insurance licensing examination. Although the employer utilizes a form of “Service Deficiency” report, no such report was *ever* given to Willey. There is no credible evidence before me upon which I can conclude that Willey regularly was absent from work without leave; indeed, if that was the case, I cannot understand why there is absolutely no employer document that relates to such unexcused time off (such as a warning letter etc.).

In light of the foregoing, I cannot conclude, on a balance of probabilities, that the Director erred in finding that the employer did not have just cause to terminate Willey.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination in this matter be confirmed as issued in the amount of \$965.52 together with whatever further interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal