Employment Standards **TRIBUNAL**

An appeal

\- by -

Get the Picture Imaging Inc.
(“Get the Picture”)

\- 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.:	2001/387
DATE OF HEARING:	July 30, 2001
DATE OF DECISION:	August 21, 2001

DECISION

OVERVIEW

The appeal is pursuant to section 112 of the *Employment Standards Act* ("the *Act*") and by Get the Picture Imaging Inc. (which I will refer to as "Get the Picture", "the employer" and also "the Appellant"). Get the Picture appeals a Determination issued on April 24, 2001 by a delegate of the Director of Employment Standards ("the Director"). In that Determination, Get the Picture is ordered to pay Joyce Kiyon $3,979.64 in compensation for length of service, vacation pay and interest.

The delegate found that Kiyon was laid off, that the period of her layoff was longer than 13 weeks in a period of 20 weeks and that she was, therefore, terminated by the employer. The delegate did not find evidence that shows that Kiyon was recalled to work by the employer, nor that she was offered reasonable alternative employment.

In appealing the Determination, the Appellant claims unfair treatment by the delegate, that important evidence was overlooked by the delegate and that Kiyon was in fact offered what is reasonable alternative employment. I find no evidence of unfairness, however. It is not shown that the Determination is in error and that it must be cancelled or varied. I have therefore decided to confirm the Determination.

An oral hearing was held in this case.

APPEARANCES:

Michael Hrushowy	On behalf of Get the Picture
Joyce Kiyon	On her own behalf

ISSUES TO BE DECIDED

It is said that the delegate failed to consider important facts.

A lack of fairness on the part of the delegate is alleged.

The issue is whether the employee is or is not owed length of service compensation. And underlying that issue is the question, Was Kiyon offered reasonable alternative employment? In that latter regard, the employer tells me that Kiyon was offered full time work at Get the Picture on the condition that she take further training but the employee refused to take any additional training. The employer also argues that reasonable alternative employment was found for her at another company.

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

FACTS

Joyce Kiyon began working for Get the Picture on October 4, 1989. She continued to work for Get the Picture after the company was sold to Michael Hrushowy.

Get the Picture has proved to be a money losing venture for Hrushowy and his family. The demand for photo processing is falling due to the popularity of digital cameras. Get the Picture has also faced increased competition from “big box” department stores who are able to charge lower prices.

It is Hrushowy’s hope that a move into digital imaging will lead to financial improvement but the demand for photofinishing has been falling for a number of years. It had fallen to such an extent that the Appellant was forced to lay Kiyon off on September 22, 2000. Kiyon can operate the equipment which is used for production photofinishing and she could order stock but, according to the employer, he was unable to use her in other crucial aspects of the business.

In a written submission, Hrushowy states that Kiyon would “always have permanent employment with Get the Picture if she would learn all the departments of our imaging business”. He specifically describes the shortcomings of the employee as an inability to handle cash sales, sell custom framing, cut mattes and glass for picture framing, and perform “basic computer digital imaging”.

Kiyon claims that she is quite able to handle the cash and sell custom framing, that she has been doing that work for several years. She also claims that there was no need for her to learn how to cut mattes and glass as a person was on staff for that work. I accept the employee on both points, the employer providing nothing which is clearly to the contrary. On meeting the employee, I find that she certainly does appear capable of doing jobs like handling cash and selling custom framing. I find that the employer did have a person who specialised in picture framing. I find, moreover, that Kiyon supervised operations for the previous owner. As such, it is likely that she can handle the cash, indeed, do quite a bit more than just photofinishing and ordering stock.

Kiyon did lack basic computer skills and she did not know how to use a scanner. I find, moreover, that by “basic computer digital imaging” the employer means nothing more than scanning and saving scanned images as a computer file. When a customer wants a photo altered in some way, the employer wants staff to scan the photo and save as a computer file but the job of manipulating the image is given to a contractor who specialises in that work.

Hrushowy tells me that he personally told Kiyon that, if she were to learn how to use a computer and a scanner, Get the Picture would again provide her with full time employment. Kiyon, on the other hand, denies that the employer told her to take some more training and that there was an offer of full time employment. I find that there is not evidence which confirms that Kiyon was in fact offered full time employment on the condition that she learn basic computer skills and how to use a scanner, or any other training.

The employer claims that he arranged for Kiyon to take training. It does not produce evidence to show that.

The employer claims that it was by design that Kiyon did not take additional training. In that regard, the employer has this to say, "it appears she (Kiyon) had planned on retiring with a substantial severance package". The facts in that respect are that Kiyon did not retire but that she is now gainfully employed and has learned to use a computer, Excel and other software as well. Kiyon is not, moreover, of an age where she can retire and, of course, $3,979.64, the amount of the Determination, is not enough on which to retire, at least for long.

Kiyon was offered work with another employer at or about the time that she was laid off. Kiyon decided that she would not work for that other employer out of a belief that the owner has a serious drinking problem and it would not be a good place to work.

Hrushowy claims that he tried to bring Kiyon back to work for the busy Christmas season but that he was unable to do so. He tells me that he was a busy with a customer when Kiyon dropped into his shop before Christmas and so he could not speak with her at that point. He also tells me that he telephoned Kiyon twice but was unsuccessful. In that latter regard, he claims that Kiyon has call display and her failure to return his calls was therefore by design. Kiyon, on the other hand, tells me that she has had Telus voice mail since September of 2000 and that Hrushowy could therefore have left a message. I find that there was no attempt to recall the employee other than the alleged attempt and that neither the employer's claim, that he attempted to recall Kiyon, nor the employee's claim, that she had voice mail, is confirmed by the evidence which has been submitted to the Tribunal.

Kiyon's layoff did in fact stretch beyond 13 consecutive weeks.

Get the Picture, on appeal, claims that Lori Burnett is a key witness and that the delegate obviously failed to take her statements into account. I find that the delegate interviewed Burnett and that it is clear that she did consider what Burnett had to say. That is clear from the Determination.

The Appellant complains, "How can Joyce Kiyon testify what Lori Burnett did or did not hear while on the premises?" In the Determination, the delegate states that it was Burnett, not Kiyon, that stated that she did not overhear conversations between Hrushowy and Kiyon.

It is said that the delegate brow beat Burnett and that she gave false information to the delegate as a result. I find that there is in fact no evidence which shows any inappropriate behaviour on the part of the delegate. Burnett is not produced on appeal. I have had no chance to hear from her directly, and under oath, and I simply do not know, therefore, whether she does in fact think that the delegate acted inappropriately or was unreasonably persistent in questioning her.

ANALYSIS

The Appellant claims a lack of fairness and that important evidence was overlooked by the delegate but it neither shows a lack of fairness, nor a failure to consider important evidence.

I do accept that the delegate asked Burnett a number of tough questions. But she is expected to do so. Delegates are required to decide who is credible. They are expected to test for the truth.

And while there are limits to doing so, it is not shown that the delegate is, in this case, guilty of any sort of wrongdoing. There is in fact no evidence of that at all.

There are certain steps to take and a certain amount of advance notice is required in recalling an employee to work. As matters are presented to me, it is not clear from the evidence that the employer made any attempt at all to bring the employee back to work. What is clear is that the employer did not make a serious attempt to recall the employee. The employer dropped the idea of recalling Kiyon without so much as an ordinary letter in a situation that demanded registered mail or use of a courier.

The period of the layoff is 13 weeks in a period of 20 consecutive weeks and, as such, the layoff became permanent.

> **1** "**temporary layoff**" means :
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> > (a) in the case of an employee who has a right of recall, a layoff that exceeds the specified period within which the employee 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; … . (my emphasis)
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> **63** (5) For the purpose of determining the termination date, the employment of an employee who is laid off for more than a temporary layoff is deemed to have been terminated at the beginning of the layoff.

In the absence of written notice of termination, an employee may be entitled to compensation for length of service under section 63 of the *Act* but section 63 does not apply where an employee is offered reasonable alternative employment, what is alleged here.

> **65** (1) Sections 63 and 64 do not apply to an employee
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> …
>
> (f) who has been offered and has refused reasonable alternative employment by the employer.

In this case it is argued that in arranging a job with another employer, the employer offered the employee reasonable alternative employment. I am satisfied that it did not. It is the employer that must offer the employment, not some other employer. And the terms and conditions of the new job must be roughly equivalent to those of the old job. If the employee had taken the job that the other employer apparently had to offer, she would have lost that to which she is entitled under the *Act* as the entitlements are not transferable. For example, she would not be entitled to 8 weeks' notice of termination and 6 percent vacation pay any longer but only 4 percent vacation pay and she could be dismissed without notice in the first 3 months of the new employment.

There is, moreover, no evidence to support a conclusion that Kiyon was offered alternative employment at Get the Picture. Indeed, I am led to believe that no offer was made. It appears

very unlikely. Kiyon needed a job. She would have wanted to remain working for Get the Picture because that would have allowed her to retain her rate of pay and benefits. It is therefore likely that Kiyon would have taken computer training and that she would have learned how to use a scanner if it meant full time employment by the employer, especially since it is something which is easily done.

I am familiar with scanners, computers and the computer software that is used for altering the appearance of photos and other images and I have trained people on the use of the equipment. My experience is that scanning is easily learned and that the same can be said of saving images and documents with a computer. It is not complicated. It is not something that takes weeks to learn. All that is required is some instruction and practice. The employer could have trained Kiyon on the use of scanners and its computers but it made no attempt to do so.

I am, most importantly, satisfied that it is not reasonable alternative employment that is offered where a job is offered on condition of further training and the employer does not offer to pay or provide the training. As the Appellant presents matters in this case, it is only the prospect of further employment that is offered. The job offer is conditional on training and, as such, there is no job to accept or reject until that training is taken. And as Kiyon was laid off and the layoff became permanent prior to completion of the training which the employer required, it follows that she was terminated before it was ever open to her to accept or reject the job offer. The result is the same as if there had been no offer at all.

The delegate has awarded length of service compensation in this case. From what I can see, that is the right decision.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated April 24, 2001 be confirmed in the amount of $3,979.64 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