

An appeal

- by -

Sunbird Ventures Inc.
("Sunbird")

- 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: James Wolfgang

FILE No.: 2002/230

DATE OF HEARING: September 6, 2002

DATE OF DECISION: October 4, 2002

DECISION

APPEARANCES:

Jeannette Steves for Sunbird Ventures Inc.

Mike Steves for Sunbird Ventures Inc.

The Respondent did not attend the hearing.

OVERVIEW

This is an appeal by Sunbird Ventures Inc. (“Sunbird”) pursuant to Section 112 of the *Employment Standards Act (the “Act”)* of a Determination issued by the Director of Employment Standards (the “Director”) dated March 27, 2002. The Determination found Sunbird had temporarily laid off Jose L. Stump (“Stump”) for a period that exceeded 13 weeks in a twenty week period and therefore she was considered terminated and owed \$550.71 as payment in lieu of notice.

The appeal deadline was April 23, 2002. The Tribunal received an appeal from Sunbird on April 29, 2002. They had originally sent an appeal dated April 11, 2002 to the Employment Standards Branch in Nanaimo, which was returned to them. Sunbird then forwarded the appeal to the Tribunal with a request for an extension of time. A series of letters followed between the parties. The deadline was extended until April 29, 2002 making the appeal timely.

In a letter to the parties dated June 6, 2002 the Tribunal stated, if the late appeal were granted, it would be heard by written submissions. This later changed to an oral hearing scheduled for September 6, 2002.

There was no penalty assessed by the Branch.

A hearing was held September 06, 2002, in which Stump, the Respondent, did not attend, either in person or by telephone conference call.

ISSUE

Is Stump entitled to compensation in lieu of notice for her lay off?

THE FACTS AND ARGUMENT

Sunbird employed Stump as a secretary on September 14, 1999. Sunbird claim Stump worked at all three work locations in other classifications at times and even drove a garbage truck for one day. Stump argues she was only a secretary, however, there is conflicting evidence from Stump in that regard.

The date of layoff is in dispute. Sunbird claim the layoff occurred August 03, 2001 and Stump claims it was July 31. Stump was recalled to work on November 01, 2001 and worked until December 10, 2001. There is a further dispute over whether Stump left work on December 10, 2001 and did not return or whether she was sent home by Sunbird.

Sunbird stated three employees were scheduled for layoff on July 31, 2001. When the time came business had picked up and one employee's layoff was cancelled. Stump and another employee, Angela Hunter, ("Hunter") were kept on until August 03, 2001. Sunbird claim Stump made out the Records of Employment ("ROE") on August 02, 2001. They were left for Jeannette Steves' ("Steves") signature however the date had been filled in by Stump.

Sunbird submitted a letter from Hunter dated April 11, 2002 that stated both she and Stump worked until August 03, 2001. Stump claims that letter is incorrect, as she did not work in August and did not work with Hunter until November 1, 2001. Sunbird agrees Hunter and Stump did not work together in August, however they claim Hunter could overhear Stump dispatching trucks from her workplace.

Stump claims she and Hunter were laid off on July 31, 2001. She made out the ROE for both her and Hunter and left them for Steves to sign and date. Stump claims the normal practice in the office was for her to prepare the ROE's and leave them for Steves' to sign and date.

Sunbird claim Stump requested the company apply the three days worked in August to replace three days she took off work in July. The days were July 18, 19 and 20, 2001. This was to improve her weekly earnings for that period, making her EI higher. Sunbird claimed they would agree if Human Resources Development Canada ("HRDC") would accept the substitution of days. According to Sunbird, Stump indicated it was acceptable and the change was made showing the last day worked as July 31, 2001. The ROE for Hunter was also changed to reflect the same. Stump claims there was no discussion around the transfer of days from August to July as she did not take July 18,19 and 20, 2001 off work. She claims Steves filled in the date of August 02 on the ROE's.

Following the Determination, Sunbird submitted a number of receipts to the delegate that were not presented during the initial investigation. Sunbird claim they show Stump was at work on August 1, 2 and 3, 2001. They claim these receipts are in Stump's handwriting, which is quite different from Steves', and are dated August 1, 2 and 3. They also supplied time sheets for Stump showing she had worked August 1-3, 2001. Sunbird also supplied two time sheets for the period July 16 to 31, 2001; one showing Stump working July 18, 19 and 20 and the other showing she did not work July 18, 19 and 20. Sunbird claim the time sheet showing Stump did work July 18,19 and 20 was changed after explaining the situation to HRDC who advised Sunbird to change the time sheets.

Stump claims two of the time sheets are forgeries, as she only completed one time sheet during her employment in the office. This was the one showing her working July 18, 19 and 20. She does admit she was required to complete time sheets when working outside the office.

At the hearing, Sunbird produced copies of the payroll for Stump, showing the page for the period August 1-3, 2001 had been changed.

Stump was recalled November 01, 2001 to work at the re-cycle depot rather than the office. The pay and hours were the same. She worked until December 10, 2001 when she went home. Stump writes, she was told by Mike Steves on December 10 that it would be her last day of work until further notice. She left after working part of the day. Stump claims she was told there might be work on January 7, 2002.

According to Sunbird, Stump went home at her request, as her child was sick and further, her niece was visiting and she wanted time off to be with her. Stump claims she left work early on December 10th because it was snowing and she had difficulty driving in snow.

Sunbird claimed, as one of their other employees was off sick, they attempted to recall Stump for work on December 21st. They said Stump refused, saying they had agreed to give her the time off and she would return January 7, 2002. She did not return to work on January 7, 2002 and was terminated for abandoning her position on January 9, 2002.

Stump claims she was not called until January 8, 2002 when Sunbird's number came up on her call display. She claims one of the reasons she did not answer the telephone was the fact someone from Sunbird had called EI, complaining she would not return to work. As a result her benefits were cut off. Further Stump claimed Sunbird was going bankrupt as the bank returned one of her pay cheques when Revenue Canada froze Sunbird's bank account on June 01, 2001. She also claimed she was often paid late and when that happened the cheques were backdated.

Sunbird produced photocopies of 11 paycheques issued to Stump for the period January 5, 2001 to July 6, 2001. Payday was on the 5th and 20th of the month and the cheque for the May 20th payday was not issued until May 25th and the July 5th cheque was issued on July 6th. The cheque for June 20, 2001 is missing and Sunbird claims that cheque was returned when the bank account was frozen by Revenue Canada. They claim Stump removed that cheque from their files without authorization. They also produced photocopies of what they claim are the reverse side of 7 of the 11 cheques. The photocopies of the reverse side of the March 5, April 20, June 5 and July 6 cheques are missing.

Stump completed an Employment Standards Branch Complaint form on December 21, 2001 and filed it with the Employment Standards Branch on January 2, 2002. This occurred while Stump was still an employee of Sunbird.

ANALYSIS

Was Stump's last day of work July 31, 2001 or was it August 3, 2001? If it were July 31, 2001, Stump would be entitled to pay in lieu of notice for the layoff. If she worked August 1, 2 and 3, 2001, as claimed by Sunbird, she was recalled within the 13-week period and would not be entitled to pay. The Determination found Stump's last day of work was July 31, 2001 and she was entitled to pay in lieu of notice.

I have carefully reviewed the written material supplied by both Sunbird and Stump. There are a large number of questions that have not been answered however we have little opportunity to now establish the facts. This was a result of neither Stump nor the delegate attending the hearing. Without the benefit of the opportunity to cross-examine on the evidence it is all but impossible to determine the correct information.

It is unfortunate the delegate for the Director did not interview Hunter as I believe that evidence would have been beneficial in determining the last day worked by Stump. It is equally unfortunate that Sunbird did not call Hunter as a witness as this could have greatly assisted their case.

Sunbird attended the hearing, presented their evidence and were cross-examined in respect to that evidence. As a result, that evidence is preferred over the evidence of Stump.

Contrary to the Determination, all of the material now before the Tribunal strongly supports the position Stump's last day of employment was August 3, 2001. Therefore she is not entitled to pay in lieu of notice for the layoff on August 3, 2001.

This then directs us to the circumstances around Stump leaving work on December 10, 2001. The delegate did not address that issue as he considered Stump to be a new hire on November 1, 2001 and, by leaving her employment on December 10, 2001, would not be eligible for pay in lieu of notice even if terminated by Sunbird. With the finding that the last day worked was August 3, 2001 this would mean she had continuous employment and we then must consider what happened on December 10, 2001. Did Stump abandon her position on December 10, 2001 and not return in January? Stump claims she was laid off by Sunbird on that date and there was no assurance of work in January 2002. She claims she was not called until January 8, 2002 and, because the action of Sunbird had caused her to lose her EI, she refused to answer the telephone.

Stump was not recalled to work in the office, which was her regular job, but to the re-cycle depot on November 01, 2001. Sunbird claim she had worked there on several occasions before. Stump admits she had worked at the re-cycle depot but was re-classified as a secretary. She claimed Sunbird deliberately recalled her to work at the re-cycle depot in an attempt to get her to quit.

If Stump were correct, recalling her to work at the re-cycle depot when her regular duties were as a secretary would normally constitute a change of the employment relationship to warrant a claim of constructive dismissal. Had Stump refused the recall she may have been able to make such a case however she worked at the re-cycle depot for nearly six weeks before either being laid off or going home of her own volition.

The difficulty with this case is the extreme amount of conflicting information. When that occurs one must rely on the opportunity to cross-examine the parties at a hearing in respect to their evidence. When Stump chose not to attend the hearing, either in person or by telephone conference call, that opportunity was lost. It is very difficult to rely on written submissions when they are diametrically opposed to each other.

The Tribunal has previously dealt with the question of non-attendance by one or more of the parties. In Reconsideration BC EST #D051/97 of BC EST #D448/97 (H B Kayson Ltd. op. as Guru Lucky Sweets and Restaurant) the panel found, in part:

The non-attendance of a party does not change the onus, which remains on the appellant to demonstrate error or a basis for the Tribunal to vary, cancel or confirm a Determination. As a matter of evidence, however, a non-attending party takes the risk that the attending party will tender sufficient and weighty evidence for the appellant to have met its tactical burden to persuade an Adjudicator to vary or cancel a Determination. A party who fails to appear at a hearing does take a risk that information or evidence helpful to (sic) Adjudicator may not be available to the Adjudicator. This proposition applies equally to an Employer, and Employee or the Director's delegate. In the case of an appellant, non-attendance is generally fatal to an appeal. In the case of any other party, the non-attendance may or may not be fatal, depending on the circumstances of the case, the issues on appeal and whether the appellant meets the persuasive or tactical burden.

The Adjudicator, however, did have *viva voce* evidence from the appellant, which was not substantially different from the evidence the appellant provided to the Director's delegate. The Employer raised an issue of credibility in the appeal, which was not answered by Ms. Sandhu. Apparently the Adjudicator was persuaded that the Employer's information was credible and trustworthy.

There is an issue of credibility in this case and the absence of two of the parties gives the appellant an opportunity to present their evidence in the best light without the benefit of cross-examination. There was evidence presented at the hearing that was not provided to the delegate during the investigation. I do not

believe this was a case where an employer deliberately withheld evidence from the investigation until after the Determination was issued. Sunbird presented the originals of the payroll records and receipts issued in August in what appears to be Stump's handwriting. The one receipt that was issued for a cash payment had an initial "J" indicating the person who took the payment. Sunbird have a policy requiring the person receiving cash to sign the receipt for security reasons and Sunbird claim Stump used an initial "J" as her signature.

I believe there is sufficient evidence to establish Stump chose not to return to work for Sunbird in January whether they recalled her or not. She dated her Employment Standards Branch Complaint form on December 21, 2001 and filed it with the Branch on January 2, 2002. In her complaint form Stump stated:

Don't wish to deal with this company as cheques have bounced, paydays late & won't pay me severance due.

This was while she was still an employee and well before her return date of January 7, 2002 or the telephone call from Sunbird on January 8, 2002.

On the balance of probabilities, Stump left her position in December either at the direction of Sunbird or herself, possibly with the idea of returning in January 2002. When Sunbird contacted EI and her benefits were terminated Stump decided not to return to work for them. Stump therefore either quit or abandoned her position in January and is not entitled to pay in lieu of notice.

This does not mean I am satisfied Sunbird did everything reasonable to recall Stump in January. The Tribunal has found leaving a message on an answering machine is not considered proper notice of recall. Sunbird wrote to Stump in October 2001 informing her she was being recalled. There is evidence other employees of Sunbird were given notice of layoff and recall in writing however no evidence was provided indicating this was the case in January for Stump. After the difficulty they had in October it would seem prudent to carefully notify Stump of her recall in writing. That, however, is not the determining factor in this case.

Stump was given the opportunity to attend the hearing by telephone conference call and she declined to do so. In *BC EST #D547/99* (Eagle Self Storage Ltd) the option of participation by telephone conference call was also offered. In that case the Adjudicator found, in part:

Eagle's appeal was heard at the Tribunal's offices in Vancouver on December 17th, 1999; Eagle's sole witness was Mr. Jacob Krahn, its president and director. Neither the respondent employee, Ms. Selby nor the Director attended. Ms. Selby's failure to attend is particularly problematic. Although she currently resides in England, she was offered--on two separate occasions--the option of participating in the appeal hearing by way of a telephone conference call but refused. Thus, in a case that turns on credibility, I have before me only the essentially uncontradicted evidence of Mr. Krahn and no other *viva voce* evidence.

She chose not to attend the hearing at her peril and I find Stump is not entitled to pay in lieu of notice for being laid off over 13 weeks in a 20-week period as awarded in the Determination.

ORDER

In accordance with Section 115 of the *Act* the Determination by the Director dated March 27, 2002 is cancelled.

James Wolfgang
Adjudicator
Employment Standards Tribunal