

**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 -

Conway Information Systems Inc.  
("Conway")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** John M. Orr

**FILE NO.:** 97/466

**DATE OF HEARING:** September 25, 1997

**DATE OF DECISION:** October 6, 1997



At any rate the next morning, Tuesday November 5, 1996, Ms Richard telephoned Mr Ford for clarification. Again the evidence differs on where the significant conversation took place. Ms Richard says that it was on the telephone call but Mr Ford says that she attended the office. Wherever it took place, the essence of this second conversation was that Ms Richard wanted some assurances as to her continued employment. She asked Mr Ford whether she would be paid for the week off. She says that the answer was "No". Mr Ford says that he would have paid her out of her 4% holiday pay entitlement. She wanted some assurances about coming back to work after the one week and she says that Mr Ford said "Don't bet on it". Mr Ford says that he never intended to terminate her employment but always anticipated that she would return to work on the following Monday.

Ms Richard became very concerned that her continued employment was in jeopardy and suggested to Mr Ford that she should be "laid off" which would enable her to collect unemployment insurance benefits in the meantime. Mr Ford agreed that this should be done and issued a Record of Employment (ROE) showing that Ms Richard was laid off.

Mr Ford alleged in his appeal that this reference to "layoff" in the ROE was simply for Ms Richard's benefit but that in fact she was not laid off. At the Hearing Mr Ford testified in answer to my questions that he had in fact agreed to the layoff and that the ROE was not a deception on the Unemployment Insurance Commission.

Conway never recalled Ms Richard to work and the position still has not been filled.

Ms Richard remained on layoff and was available for work in Victoria until January 15, 1997 when she took other employment in Vancouver.

## **ANALYSIS**

Mr Ford's documentation presented in support of the appeal and his testimony make it very clear that his recollection of the details of the events is not very reliable. Ms Richard's evidence was clear, careful and in my opinion more reliable. Mr Ford wanted Ms Richard to take a week off work but he was reluctant to admit that this was intended to be without pay. However it is unlikely that this matter would ever have arisen if Ms Richard had been offered a week off with pay.

In my opinion the preponderance of the evidence points to the conclusion that Mr Ford wanted to reduce costs and when Ms Richard suggested a layoff he agreed to this option. I am satisfied that Ms Richard was laid off as of October 31, 1996. She was never recalled to work. Section 63 (5) of the *Act* provides:

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.*

Temporary layoff is defined in the *Act* as follows:

*"temporary layoff" means*

- (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;*

In this case Ms Richard was laid off from November 1, 1996 and was never recalled to work by Conway. The layoff was in excess of 13 weeks over a 20 week period and not a temporary layoff. Her employment is therefore deemed to have been terminated at the beginning of the layoff.

The issue arises about the effect of Ms Richard having accepted other employment on January 15, 1997 approximately 10 weeks into the layoff period. Did she at that point terminate her own employment with Conway ? There was no evidence before me as to the nature of Ms Richard's new employment, in particular whether it was temporary or permanent. It is not known whether she would have returned to Conway if given the opportunity. The fact is that she was never given that opportunity. I find that her new employment does not relieve the employer of the obligation to show that the layoff was only temporary. If the layoff was not temporary then Ms Richard's employment was deemed to be terminated at the beginning of the layoff and therefore she is entitled to compensation for length of service pursuant to section 63.

## **ORDER**

I order, under Section 115 of the *Act*, that the Determination is confirmed.



**John Orr**  
**Adjudicator**  
**Employment Standards Tribunal**