

An appeal

- by -

V.I. Renter's Centre Ltd.

- 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: John M. Orr

FILE No.: 2001/487

DATE OF DECISION: September 13, 2001



DECISION

OVERVIEW

This adjudication is the second decision involving two appeals filed on behalf of V.I. Renter's Centre Ltd. ("VIRC" or "the company") pursuant to section 112 of the *Employment Standards Act* ("the *Act*") from a determination dated October 02, 2000 (#ER 096976) by the Director of Employment Standards ("the Director").

The first appeal was filed by John Ruffolo ("Ruffolo") who was a shareholder and director of the company until June 30, 1999. He filed the appeal because he was served with the determination and he claims the Director's delegate told him that it was up to him to file an appeal if he didn't agree with the determination.

The second appeal was filed by Samantha Carson ("Carson") who purchased Ruffolo's shares and was a director of the company from June 30, 1999 to October 25, 1999. She says that she filed the appeal for the same reasons as Ruffolo. She was served with the determination and was told that it was up to her to appeal if she did not agree with the determination.

April Dawn Rogers is currently the owner and operator of the company. She says that she acquired the company on October 25, 1999 from Carson. She says that she was not served with a copy of the determination and has not filed an appeal on behalf of the company but joins in the appeals filed by Ruffolo and Carson.

The first decision in these matters is dated March 27, 2001 and followed a hearing that took place in Victoria on March 26, 2001. The first decision referred the matter back to the Director for further investigation. The Director has now filed a report and the parties have had the opportunity to make written submissions.

The Tribunal has determined that this appeal should properly be decided based on written submissions

FACTS

Barbara Miller ("Miller") worked as a commissioned sales agent for VIRC from August 5, 1998 to approximately May 15, 1999. In May 1999 Ms Miller says she took an unpaid leave, which was open ended with no specific arrangements for return to work. Mr. Ruffolo was the owner of the company at the time and he claims that Miller took her annual vacation and simply did not return at any time before he sold the company on June 30, 1999.



There are two substantial issues that arise between Miller and VIRC. The first relates to a cheque dated April 23, 1999. Miller misplaced the cheque and never cashed it. She simply wants a replacement cheque. She says that the cheque was payment for services performed as part of her contract (employment or otherwise). Ruffolo claims that the cheque was an advance paid to Miller in expectation of services that she was to perform but never did.

The second substantial issue relates to the termination of Miller's employment. Miller submits that she was on an open-ended unpaid leave from VIRC. She claims that in early August 1999 she contacted Carson, the new owner of VIRC, to let her know that she was now ready to return to work. Carson had no knowledge of Miller and did not re-hire her. The Director's delegate found that the failure to re-hire was unjust dismissal.

ISSUES

There are two issues to be decided in this case. The first is whether VIRC owes Miller \$476.73 for the misplaced and uncashed cheque. The second issue is whether Miller is entitled to compensation for length of service.

ANALYSIS

As stated in the previous decision in this matter BCEST #D150/01, this is an unusual situation because neither of the people who filed the appeals had any standing to act on behalf of the company in October 2000 when the determination was issued. As such, the appeals should ordinarily be dismissed summarily. However the consequences of dismissing the appeals would be that the company would be out of time to appeal and therefore there would be no opportunity to address the substantive issues.

I found that the issue was complicated because Ms Rogers claimed that, as the owner of the company since October 1999, she was never served with the determination and that no proper officer or director of the company was served. The Director's delegate did not appear at the original hearing and could not address the issue of proper service on the company. There was no proof of service in the materials that had been forwarded to me by the Director.

I have now received submissions from the Director and I am satisfied that the Company was served. I am also prepared to confer whatever status is necessary to the parties who have filed appeals to ensure that the Company is properly given standing to address this appeal no matter who filed the appeal on behalf of the Company.

It is important for the parties who have owned shares in VIRC from time to time and who have been officers of the company to understand that it is the company that is the party to these proceedings. The changing "ownership" is of no significance to the company's liability that may have accrued at various times over the corporate history.



This decision is not addressing the liability of anyone who may have been a director of VIRC at one time or another.

The Misplaced and Uncashed Cheque

The onus on this appeal is generally on the party appealing from the determination to satisfy me that the determination is wrong. The evidence and submissions made by and/or on behalf of the company on this issue are confusing and inconsistent. I have considered those submissions carefully but I am not satisfied that the cheque represented an advance on future unperformed work. This simply is not consistent with the probabilities surrounding the circumstances at the time that Miller was leaving on holidays.

The cheque represents a “promise to pay” and although the original was misplaced and not cashed it remains an outstanding promise made on behalf of the company to pay that amount to Ms Miller. However the delay in honoring payment was caused by Miller having misplaced the cheque and therefore I find that it should not carry interest prior to the date of this decision. Interest should commence from the date that this decision is issued.

Compensation for Length of Service

Much of the substance of the submissions in this case related to whether Miller was an employee or an independent contractor. I find that I do not have to address that issue because if Miller were an employee she had no statutory right to holidays or extended leave and the onus then is clearly on Miller to establish that she had been granted an extended leave with a right to return at any time.

While Ruffolo concedes that he granted annual vacation to Miller (even though she had no statutory right to such vacation) he denies that she had any form of extended open-ended leave. In this situation the onus is clearly on Miller to show that she had been granted such an extended leave. If she had not been granted such a leave and simply failed to return from holidays then she abandoned her position and is not entitled to compensation.

Miller’s story of being granted a leave to go on a cruise at some undetermined time in the future is simply incredible. It seems far more probable that she had embarked on a new business venture that subsequently failed. Whatever the explanation, I am not satisfied that Miller has met the onus of establishing that she had been granted an open ended extended leave in addition to her annual vacation and therefore I find that the company is not liable to pay compensation for length of service.

**ORDER:**

Pursuant to section 115 of the Act I order that the determination is varied to find that V.I. Renter's Centre Ltd. must pay to Barbara Miller the sum of \$476.73 without interest up to the date that this decision is issued but with statutory interest thereafter.

John M. Orr
Adjudicator
Employment Standards Tribunal