

An appeal

- by -

Photogenis Digital Imaging Ltd./PDI Internet Café Incorporated

- 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: Kenneth Wm. Thornicroft

FILE No.: 2002/386

DATE OF HEARING: November 13, 2002

DATE OF DECISION: December 10, 2002

DECISION

APPEARANCES:

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| Bableen K. Rana, Barrister & Solicitor | for Photogenis Digital Imaging Ltd. & PDI Internet Café Incorporated |
| Alice Thompson | on her own behalf |
| James Pook | on his own behalf |
| Adele Adamic, Barrister & Solicitor & Joanne Kembel, I.R.O. | for the Director of Employment Standards |

INTRODUCTION

This is an appeal filed by Photogenis Digital Imaging Ltd. (“Photogenis”) and PDI Internet Café Incorporated (“PDI”) pursuant to section 112 of the *Employment Standards Act* (the “Act”). I shall refer to Photogenis and PDI jointly as the “Employer”.

The Employer appeals a Determination that was issued by a delegate of the Director of Employment Standards (the “Director”) on June 20th, 2002 (the “Determination”). By way of the Determination, the Director’s delegate ordered the Employer to pay the sum of \$6,528.60, representing 18 weeks’ wages, to Ms. Alice Thompson (“Thompson”) and the further sum of \$7,229.41 to Mr. James Pook (Pook”) representing 26 weeks’ wages. These awards were made in favour of each of Ms. Thompson and Mr. Pook pursuant to section 83 of the *Act* which provides, in general terms, that an employer must not take any retaliatory action against an employee because that employee has asserted their rights under the *Act*.

By way of the Determination, the Employer was also assessed a \$0 penalty pursuant to the provisions of section 98 of the *Act* and section 29 of the *Employment Standards Regulation*.

This appeal was heard at the Tribunal’s offices in Vancouver on November 13th, 2002 at which time I heard the testimony of Mr. Dave Baron and Mr. Wai William Mo on behalf of the Employer. Ms. Thompson and Mr. Pook each testified on their own behalf. Ms. Joanne Kembel, the investigating officer, testified on behalf of the Director. In addition to the witnesses’ testimony, I have also considered the various documents and submissions submitted by the parties to the Tribunal.

At the outset of the appeal hearing, counsel for the Employer (whom, I understand, was only recently re-engaged after having earlier formally withdrawn from the matter) applied to adjourn the appeal hearing. However, in light of all the relevant circumstances (including the lateness of the application and the fact that the respondents had travelled to attend the hearing at significant personal inconvenience and cost) that application was refused. After the adjournment application was refused, counsel for the Employer indicated that she was prepared to continue to represent the Employer and the hearing proceeded.

RELEVANT PROVISIONS OF THE ACT

Among other arguments, the Employer maintains that neither Ms. Thompson nor Mr. Pook is entitled to any compensation since both quit their employment [see section 63(3)(c) of the *Act*]. The Director's delegate determined that the Employer terminated the employment of Ms. Thompson and Mr. Pook without just cause and, further, that each of their terminations amounted to a contravention of section 83(1)(a) of the *Act*:

Employee not to be mistreated because of complaint or investigation

83. (1) An employer must not

(a) refuse to employ or refuse to continue to employ a person...

because a complaint or investigation may be or has been made under this Act or because an appeal or other action may be or has been taken or information may be or has been supplied under this Act.

If an employee is terminated contrary to section 83(1), the Director has a broad remedial authority under sections 83(2) and 79(3) and (4) of the *Act*:

83. (2) If satisfied that a person has contravened subsection (1), the director may make any determination authorized by section 79 (3) or (4).

Determination

79. (1) On completing an investigation, the director may make a determination under this section...

(3) If satisfied that a person has contravened a requirement of this Act or the regulations, the director may do one or more of the following:

- (a) require the person to comply with the requirement;
- (b) require the person to remedy or cease doing an act;
- (c) impose a penalty on the person under section 98.

(4) In addition, if satisfied that an employer has contravened a requirement of section 8 or Part 6, the director may require the employer to do one or more of the following:

- (a) hire a person and pay the person any wages lost because of the contravention;
- (b) reinstate a person in employment and pay the person any wages lost because of the contravention;
- (c) *pay a person compensation instead of reinstating the person in employment;*
- (d) pay an employee or other person reasonable and actual out of pocket expenses incurred by him or her because of the contravention.

(my *italics*)

THE DETERMINATION

The Employer operated two separate but partially integrated businesses in contiguous premises situated a shopping mall in Burnaby, B.C. The principal of both businesses was Mr. Dave Baron. Ms. Thompson worked in both the café, as a server, and in the retail store, as a graphic artist, during the period from September 29th, 2001 to January 18th, 2002. Mr. Pook (who is Ms. Thompson's partner) was employed in the café from September 24th, 2001 to January 18th, 2002.

Ms. Thompson filed an unpaid wage complaint on or about January 16th, 2002; there is no doubt that this was a valid complaint--Mr. Baron's position was that due to the very poor financial performance of the

business he was not able to ensure that employees' wages were kept current. Mr. Pook filed his complaint on January 21st, 2002, a few days after his employment ended.

The Director's delegate, Ms. Kembel, first contacted Mr. Baron, by telephone, on January 18th at approximately 11 A.M. Ms. Kembel's recollection of this conversation--supported by contemporaneously prepared handwritten notes--is detailed at pages 2-3 of the Determination:

At 10:59 a.m. on January 18, 2002 the writer [Ms. Kembel] contacted [Mr. Dave] Baron by telephone to inform him of a complaint filed by Thompson, alleging unpaid regular wages for a period of approximately three weeks. Baron's immediate response was that the company had no money to pay wages. Baron claimed that a creditor, Pitney Bowes, had frozen his accounts...He stated that he had no personal obligation to the business. When the writer explained corporate officer liability to Baron, Baron commented that he would lay off all his staff.

In the telephone conversation on January 18, 2002, Baron referred several times to Thompson before the writer actually named her. Thompson was working that day and had approached him asking for wages to be paid to her and the other staff. As a result, he guessed that it was Thompson who had contacted [the Employment Standards Branch]. He stated that he would pay her up to today and lay her off because of this. The writer then confirmed that Thompson was, indeed, the Complainant, and informed Baron of the provisions of section 83 of the [Act]. Baron stated that he would lay her off anyway and claim "shortage of work". When asked if there really was a work shortage, Baron replied that the employees were all taking advantage of him, robbing him, and that he would pay all the employees and then lay off every one of them and close his doors.

Baron admits to having "laid off" the two complainants. He states that he did this because of a shortage of work. However, the Record of Employment that he submitted on February 4, 2002, was issued on January 31, 2002, and noted "E" (quit) as the reason for leaving.

Ms. Kembel's subsequent telephone conversations with both Ms. Thompson and Mr. Pook are also set out in the Determination, at pages 3 through 5:

Thompson contacted the Employment Standards Branch on January 16, 2002, complaining on behalf of all of the employees of both stores that none of the employees had been paid for more than three weeks. She claimed that Baron was telling the employees that there were no funds available to pay their wages...She contacted the Employment Standards Branch and asked that the Employment Standards Branch contact the Employer to intervene on their behalf.

On January 18, 2002, at 11:19 a.m., Thompson called back to say that Baron had just told her to go home. She said he did not explain whether she was laid off or fired nor did he say why he wanted her to go home. Thompson stated that she asked Baron whether he wanted her to finish the job on which she was working, as it was to meet a deadline of later that same day. Baron told her to finish the job and then go home. She stated that Baron was angry and commented that the business should support itself and that he did not want to pay anything out of his own pocket.

Thompson followed Baron's instructions and left once the job was completed...

Pook was scheduled to work on the evening of January 18, 2002. He states that he knew that Thompson was sent home earlier in the day and agrees that he is her partner or common-law husband. Pook states that his shift was to begin at 7 p.m. and then when he reported for work, Baron was waiting for him at the door. Baron took Pook aside and "went on for an hour-long diatribe about how pathetic our lives were and how he was angry that we'd gone behind his back". Pook states that he, in fact, had done no such thing. First, Thompson was the only complainant to

the Employment Standards Branch. However, Baron “put us together because we were personally involved and fired me that night”.

During the course of her investigation, on June 7th, 2002, Ms. Kembel also spoke with a witness, Mr. Wai William Mo (“Mo”), who had similarly filed an unpaid wage complaint when his paycheque was returned “N.S.F.”. Mr. Mo subsequently withdrew his complaint after his wages were eventually paid. Ms. Kembel's conversation with Mr. Mo (corroborated by her nearly verbatim notes taken contemporaneously) was detailed in the Determination (at p. 5) as follows:

Mr. Mo explained that in approximately October 2001, almost everyone was left unpaid. The employees knew that business was not good and that they waited a pay period or two but Thompson did not want to wait. Instead, Thompson filed a complaint and “Dave fired her because of that”. Mr. Mo was not present at the time of Thompson’s dismissal but claims that all of the employees knew that he fired her because she complained. When asked whether this might have been in January 2002, rather than October 2001, Mr. Mo acknowledged that it could be; that it was whenever Thompson was fired.

The delegate concluded that the Employer dismissed both Thompson and Pook contrary to section 83(1)(a) of the *Act*. The delegate’s findings with respect to the Thompson and Pook terminations are set out below (at pp. 5-6 of the Determination):

...I reject Baron’s contention that there was a shortage of work.

I find that Baron clearly dismissed Thompson because she contacted the Employment Standards Branch with a complaint about unpaid wages. In fact, the dismissal came within minutes of the telephone call from the Employment Standards Branch for Thompson and within hours for Pook. I further find that the Employer’s issuance of Records of Employment indicating that Thompson and Pook had quit was further retaliation against them as a result of contacting the Employment Standards Branch...

I find that Baron dismissed Pook because of his personal involvement with Thompson and because of a complaint that Baron believed Pook to have filed with the Employment Standards Branch.

As for the matter of compensation, in the case of a section 83 claim the *Act* allows the Director to make an order of compensation in lieu of reinstatement [see sections 83(2) and 79(4)(c)]. The delegate concluded that reinstatement would not be appropriate and thus awarded Thompson 18 weeks’ pay and Pook 26 weeks’ pay. The delegate’s rationale for each of these awards was as follows (Determination, p.6):

I find that the five months that it took Thompson to secure employment is reasonable. She should be compensated for these five months as though she had worked them with the Employer.

I accept Pook’s optimism as to his ability to find work soon now that it is summer and he has moved to a location where work may be available. I find that six months’ compensation at his rate and average hours is reasonable compensation for him.

ISSUES ON APPEAL

The employer has raised several grounds of appeal which may be summarized as follows:

- there was a failure to comply with section 77 of the *Act*-- “If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.” The Employer did not specifically raise section 77 but this provision nonetheless underlies the Employer’s argument with respect to the “fairness” of delegate’s investigation.
- the complainants were not discharged contrary to section 83 but, rather, they each quit;
- in any event, the compensation awarded to each of them was overly generous in all the circumstances.

I shall deal with each issue in turn.

FINDINGS AND ANALYSIS

Section 77

In my view, this argument is totally devoid of merit. The evidence before me clearly indicates that the delegate contacted the Employer’s principal, Mr. Baron, to discuss the complainants’ unpaid wage claims--indeed, Mr. Baron concedes as much (see his affidavit sworn July 17th, 2002, paragraph 3). In his testimony before me, Mr. Baron acknowledged discussing the matter of Thompson’s and Pook’s unpaid wage claims with the delegate but says that the matter of section 83 was not discussed--for reasons set out below I do not find Baron’s evidence on this point to be credible.

“Quit” v. Section 83 Termination

The Employer’s position that the two complainants “quit” is not, in my view, a tenable position. Mr. Baron testified that the business was not doing well and that he and Ms. Thompson had some conflict between them particularly in regard to the latter’s practice of contacting clients directly. Nevertheless, in general, Mr. Baron believed that she was a capable and competent employee.

In any event, Mr. Baron testified that in January 2002 “I asked the employees to wait” for their pay and that he would, as he had in the past, “make it up eventually”. He also testified that he “laid off” Pook on January 16th and that on January 18th he advised Ms. Kembel during their telephone conversation that “I laid them off and that they’d get their wages”. Baron testified that “I did not fire James Pook; he was laid off for shortage of work” and that when he sent Ms. Thompson home on the 18th (before the end of her shift), “I told her to go home and I’ll call you back when I need you; shortage of work was the reason”.

Thus, *on his own evidence*, Baron suggests that the employees were not being paid their wages as they fell due (which of itself could be characterized as a “constructive dismissal” under section 66) and that each of Thompson and Pook was “laid off” due to a “shortage of work”. Baron maintains that he asked both Thompson and Pook to return to work but even if such a request was made (and I have grave doubts about that), an employee who is asked to return to a working environment where the business is failing, their accrued wages have not been paid and where they might well not be paid for any further work they might do, can hardly be characterized as having voluntarily “quit”.

As for the matter of section 83, I am satisfied that, on the balance of probabilities, the Employer terminated both Thompson and Pook as a result of the unpaid wage complaint filed by Thompson. If the Employer laid off each of them due to a shortage of work, why did the Employer chose to issue each of them Records of Employment which indicated that they had “quit”? I agree with the delegate that this act

was a further attempt to punish the complainants by undermining their respective claims for employment insurance benefits.

The key testimony with respect to section 83 is that of Ms. Kembel. I find her to be a wholly credible witness and I further note that her evidence was almost entirely corroborated by her contemporaneous notes. Ms. Kembel testified that she telephoned Mr. Baron on the morning of January 18th to discuss unpaid wage claims; she did not specifically identify either Ms. Thompson or Mr. Pook. However, during their conversation Baron nonetheless identified Thompson as the complainant which, in turn, led Ms. Kembel to confirm that fact. Ms. Kembel testified that Mr. Baron was angry [a point that Mr. Baron conceded in his testimony before me; in paragraph 7(d) of his affidavit Mr. Baron also conceded that “my tone may have seemed combative”]. In his affidavit, paragraph 7(c), Mr. Baron also stated: “I acknowledge that the complainant, Ms. Thompson, was sent home immediately following the January telephone conversation with the Director’s Delegate mainly because it was late in the day and that given my emotional nature at the time, I simply did not want to deal with the issue and have it end with emotional words.”

Mr. Baron’s anger during his conversation with Ms. Kembel is further demonstrated by his assertion (wholly unfounded so far as I can determine) that Ms. Thompson was “embezzling” from him and that she (and other employees) were “dishonest”. Mr. Baron stated that he intended to fire Ms. Thompson which then prompted the delegate to read to him the provisions of section 83 of the *Act*. Baron replied that he would lay off Ms. Thompson (and the other employees) and close the business down. The delegate informed Mr. Baron that a layoff, in those circumstances, would still likely amount to a contravention of section 83. Mr. Baron discussed his financial difficulties and maintained that he ought not to be made to personally fund his business operations. At this point, the delegate referred Mr. Baron to his potential personal liability for unpaid wages under section 96 of the *Act*. About twenty minutes later, Ms. Kembel received a telephone call from Ms. Thompson; the latter had been told to “go home”.

With respect to Ms. Thompson, Baron testified that he was “angry at her” in part for having filed a complaint with the Employment Standards Branch. Ms. Thompson testified that there had been a continuing problem with respect to the timely payment of wages. Ms. Thompson served as an informal “spokesperson” for all of the employees and dealt with Mr. Baron directly from time to time about the matter. On January 18th, Mr. Baron approached her and told her to “go home”; she did not leave immediately as she stayed to complete the project she was currently working on. She left the premises some time later that same day. She spoke with Mr. Pook and suggested that he report for work--he did so at about ten minutes before his usual 6- to 7-hour shift began at 7 P.M.

Mr. Pook testified that when he reported for work he was pulled aside by Mr. Baron who then proceeded to berate him for some considerable period of time which ended with Mr. Baron telling Mr. Pook “you’re fired; get out of here”. Mr. Pook immediately left the premises. During Mr. Baron’s diatribe, he mentioned the Employment Standards Branch complaint whereupon Mr. Pook told Baron that only Thompson had filed a complaint (Mr. Pook’s complaint was not filed until the following Monday). Mr. Pook did not report for work on Monday nor was he called into work by Mr. Baron. On Tuesday, Mr. Baron called Mr. Pook to inquire if he would like to teach a previously scheduled 2-hour training session (not part of his regular employment duties) but Mr. Pook--in light of his termination and his doubts about whether he would be paid for the session--indicated that he was not interested.

Contrary to Mr. Baron’s testimony, Mr. Pook and Ms. Thompson both stated that neither of them was called to return to work during the following week. As previously noted, Mr. Baron testified that he did

not “fire” Mr. Pook but rather laid him off due to a shortage of work. However, at the same time, Mr. Pook’s record of employment was not issued on that basis and Mr. Baron testified before me that he was having a “difficult time trusting” Ms. Thompson and Mr. Pook.

When Ms. Thompson and Mr. Pook returned to the Employer’s premises on the Saturday one week after their terminations in order to retrieve some personal effects and final pay, Mr. Mo told them that they were “banned” from the store and they immediately left. Their final paycheques were received about one week later. Mr. Baron denied that he had issued such instructions. Mr. Mo testified that although Mr. Baron “gets mad and jumps up and down” Baron did not instruct him (Mo) to “ban” either of Ms. Thompson or Mr. Pook from the store. Mo did concede that he asked the two of them to leave because “I’m still working there and I don’t want any trouble”. Mo also denied telling Ms. Kembel that Ms. Thompson was fired for having filed a complaint, however, I find Ms. Kembel’s evidence (corroborated as it is by her notes) to be the more credible. Nevertheless, in my view, not much turns on Mr. Mo’s evidence.

I have before me the following essentially uncontested facts:

1. Ms. Thompson was told to “go home” on January 18th as was Mr. Pook (who was also told that he was fired);
2. Mr. Baron, who by his own admission, was on the afternoon of January 18th in a highly aggravated, “emotional” and “combative” state, sent each of the complainants home before the end of their respective shifts;
3. Mr. Baron’s actions came shortly after the delegate confirmed to him that Ms. Thompson had filed an unpaid wage complaint which, in turn, triggered his stated desire to either lay them off (Mr. Baron’s evidence) or fire them (Ms. Kembel’s evidence) since, among other things, they (and other employees) were dishonest;
4. Neither Ms. Thompson nor Mr. Pook returned to work after January 18th and they were told, when they did return at the end of the next week, to leave the premises.

I do not accept that either Ms. Thompson or Mr. Pook “quit” their employment. They were dismissed, either directly or constructively. I do not accept that they were asked to return to work and refused to do so. There was no just cause for their termination nor is there any credible suggestion that prior to hearing from Ms. Kembel on January 18th, Mr. Baron was seriously contemplating their respective terminations.

With respect to section 83, however, it must be determined precisely why the employee was terminated. In this case, the complainants’ dismissals must have been predicated, at least in some measure (see *West Coast City and Nature Sightseeing Ltd.*, B.C.E.S.T. Decision No. D048/96), on the fact that an unpaid complaint was filed (or, in the case of Pook, was contemplated). It will, of course, be a rare case where the employer admits to having taken action by reason of a complaint. Usually, one will have to draw reasonable inferences from proven facts.

This case is quite unlike, say, *Burnaby Select Taxi Ltd.* (B.C.E.S.T. Decision No. D091/96) or *Performance Development Ltd.* (B.C.E.S.T. Decision No. D446/97), where the employer was not aware of the fact that a complaint had been filed. Here, the Employer was specifically advised by the delegate that a complaint had been filed. Almost immediately afterwards, and in an admittedly angered state, Mr.

Baron told Ms. Thompson to leave the workplace. Later that same day, and at the outset of Mr. Pook's shift, he was told much the same thing. Neither was ever asked to return to work and when they attended at the Employer's premises about one week later they were told to leave. I note that none of the other employees was treated in a similar fashion and, as noted above, I reject any suggestion that either of the complainants "quit".

The sequence of events leads me to conclude that Mr. Baron terminated the employment of both Ms. Thompson and Ms. Pook largely (though perhaps not entirely) because of the fact that an unpaid wage complaint had been filed under the *Act*.

I now turn to the question of the appropriate remedy.

Compensation for retaliatory discharge

I agree with the viewpoint, expressed by the delegate in the Determination, that it would not have been appropriate to order the reinstatement of either complainant. However, in my opinion, if compensation is to be awarded it must be commensurate, in an economic sense, with reinstatement. In other words, an employee should not be better or worse off depending on the remedy awarded (reinstatement versus compensation).

Ms. Thompson was awarded 5 months' wages on the basis that it took her that long to secure new employment. Mr. Pook was awarded about 6 months' wages on the basis that he would be able to find new employment within that time frame--the Determination was issued approximately 5 months after his employment ended.

However, in my view, the period of actual or anticipated unemployment is but one factor to be considered when determining an appropriate amount of compensation under section 79(4)(c) of the *Act*. Previous Tribunal jurisprudence suggests that other factors--such as length of service, efforts to find new employment (*i.e.*, mitigation efforts), actual earnings from other employment sources (*i.e.*, successful mitigation), the nature of the previous employment--should also be given some weight (see, *e.g.*, *Afaga Beauty Service Ltd.*, B.C.E.S.T. Decision No. D318/97 and *W.G. McMahon Canada Ltd.*, B.C.E.S.T. Decision No. D386/99).

In the instant appeal, both Ms. Thompson and Mr. Pook earned some wages during their respective "compensation periods"--Ms. Thompson earned something in the order of \$2,000 (gross wages before statutory deductions) during a 4-month period after her former employment ended; Mr. Pook also had some earnings in the months following January 2002 but he was unable to provide any particulars except that his earnings were not significant.

I note that both Ms. Thompson's and Mr. Pook's respective periods of employment were of very short duration--less than 4 months in each case. Throughout their employment, the Employer experienced significant financial difficulties. As events ultimately transpired, the café business that employed Mr. Pook ceased operating in April 2002. Throughout their employment, both Ms. Thompson and Mr. Pook were actively seeking other employment. Mr. Mo testified that his employment ended in late April or early May, 2002 and it is, I believe, a fair assumption that even if the complainants' employment had not ended in late January, it would have ended, in any event, by the early spring of 2002.

Mr. Pook was employed at the minimum wage and Ms. Thompson's employment was only a dollar above minimum wage for café work (although it was \$22 per hour for graphic artist work). I note that in the greater Vancouver area, during the first quarter of 2002, the labour market for minimum wage jobs was reasonably robust.

Given that awards made under section 79(4)(c) cannot be estimated with precision since there is no clear formula (as is the case, for example, with compensation for length of service payable under section 63 or group termination pay under section 64), I do not think it appropriate for the Tribunal to, as it were, "micro-manage" such awards. In my view, such awards should only be disturbed where the award is based on a clearly erroneous footing or where the award does not take into account relevant factors.

In my view, and with a full consideration of all of the factors that I conceive to be relevant (discussed above), the awards to each of Ms. Thompson and Mr. Pook were, as a matter of law, overly generous. I would vary the Determination by reducing each of the awards to reflect 3 months' wages (13 weeks). I consider that an award of 13 weeks' wages would place each of the complainants in much the same economic position as would have been the case if their employment had not been wrongfully terminated in January 2002 contrary to section 83.

Since there was no dispute about the delegate's calculations with respect to the complainants' weekly wages, I shall use those figures. Thus, I would vary the Determination as follows:

Ms. Alice Thompson:

\$362.70 per week (including vacation pay) x 13 weeks = \$4,715.10

Mr. James Pook:

\$278.05 per week (including vacation pay) x 13 weeks = \$3,614.65

Total Amount Payable = \$8,329.75

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be varied to indicate that the Employer is ordered to pay Ms. Alice Thompson the sum of \$4,715.10 and Mr. James Pook the sum of \$3,614.65 for a total amount payable of \$8,329.75. In addition, each of Ms. Thompson and Mr. Pook are entitled to interest on the foregoing sums to be calculated by the Director in accordance with section 88 of the *Act*.

In light of the fact that I have found that the Employer contravened section 83 of the *Act*, it follows that the \$0 monetary penalty levied by way of the Determination is confirmed.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal