

An appeal

- by -

Osburn Manufacturing Inc.
("Osburn")

- 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: April D. Katz

FILE No.: 2001/504

DATE OF HEARING: September 20, 2001

DATE OF DECISION: October 22, 2001

DECISION

APPEARANCES:

Allen Nel	on behalf of Osburn Manufacturing Inc.
Michael Best	on his own behalf

OVERVIEW

Osburn Manufacturing Inc. (“Osburn”) has appealed the conclusion of the Director of Employment Standards (“Director”) that Osburn owed Michael Best (“Best”) compensation for length of service when his employment ended in January 2001.

ISSUE

The sole issue in this appeal is whether Best is entitled to compensation for length of service.

ARGUMENT

Osburn argues that the Director’s delegate did not take all the relevant events and facts into consideration. In particular Osburn argues that the relevant facts would show that Best “was not going to return to work at Osburn and therefore is not entitled to severance pay”. Osburn then goes on to say that the Determination did not deal with Best’s visit on Tuesday where Osburn argues Best showed in two ways he did not plan to return. Osburn argues that Best asked for an ROE when he attended Osburn on Tuesday and said “he could not afford daycare for his children and therefore could have to go on welfare.” Osburn goes on “surely the employer has to be able to consider that the employee has no intentions of returning to work and therefore effectively has relinquished his position. If not, then business will not be able to function effectively.”

Best argues that he wanted to continue working but he was told by his supervisor before he went to Osburn that he had a choice of quitting or a mutual resignation. Best states that he did not attend Osburn until he had been told that his employment was ended and that is why he asked for his ROE. Best argues that he had arranged daycare and knew where he could obtain a subsidy. Best argues that if he was going on welfare it did not matter what caused his employment to end. Best submits that Osburn agrees that he disputed the indication on his ROE that he had resigned because he had not resigned.

FACTS

Best commenced working for Osburn on June 19, 1997. He was laid off on December 12, 1997 and resumed work on February 2, 1998. He was laid off December 23, 1998 and resumed work on April 12, 1999. He took sick leave from September 7, 2000 until October 23, 2000. When Best left work on September 7, 2000 he was a Turrett Press operator. When he returned Osburn did not allow him to return to his old position. Osburn was entitled to a performance review in July 2000. It did not happen until he pressed his request. He received a wage increase after the review. Osburn repeatedly asked to be returned to the Turrett Press and finally responded to an advertisement for the position. He was to resume his position on the press on January 16, 2001.

Best took sick leave to deal with issues surrounding his separation from his wife and custody of his 3 small children in the 2000. On January 14, 2001 his wife indicated she would not keep the children and left them with Best. Best called his supervisor and explained the situation on Sunday night, January 14, 2001. Best indicated he could not go to work Monday but would call his supervisor when he knew what was happening. On Monday January 15, 2001 Best went to BC Supreme Court and obtained an Interim Custody Order for his children. He called his supervisor and told him he had custody of the children but no daycare. His supervisor suggested Best take leave to straighten things out. Best asked his supervisor to find out what he could do.

On Tuesday January 16, 2001 Best obtained daycare spaces for his children and found out how to obtain subsidies for daycare. He called his mother on the mainland and she agreed to care for the children so that Best could return to work. Best phoned his supervisor with the good news and was told that Osburn had decided Best would not be coming to work and he could be terminated or have a mutual resignation.

Best's supervisor prepared a severance report that stated Best's employment ended for personal reasons. Osburn's accounts clerk returned it to the supervisor stating that he needed to amend the report to say that the resignation was mutual.

Best was very upset. He went to Osburn to collect his Record of Employment ("ROE") from the account's clerk on Wednesday. He was told the ROE was not ready and he became more upset. Best returned on Friday to collect the ROE and found out that the ROE stated he had resigned. He objected to this statement and voices were raised. The comptroller told Best that Best could not qualify for Employment Insurance.

Best was not told he could consider family leave. Best was misled about Employment Insurance. Employment Insurance contacted the Comptroller to verify Best's story of events and confirmed with the Comptroller that Best was entitled to Employment Insurance for family responsibilities. Osburn did not object to the change on the ROE designation.

ANALYSIS

The onus of proving the Director has erred is on the appellant in an appeal to the Tribunal. Osburn submits that the delegate erred in understanding that Best had demanded his ROE and had not attended work. Osburn position is that Best's conduct indicated that he had resigned.

The evidence in support of Osburn's position in a typed note written by the account's clerk on January 19, 2001 stating what had happened on Tuesday January 19, 2001 and Friday January 19, 2001. The note states that Best's supervisor had told her that Best was resigning.

Osburn states that Best had to go on welfare because he could not afford daycare. The evidence from Best was that he was eligible for daycare subsidies for his children and had arranged with his mother to provide interim care until the subsidies were arranged. His mother's letter confirms Best's evidence.

Based on the evidence provided it seems that Best's aggressive conduct was more consistent with his unhappiness that he had lost the job he had fought to obtain. He was unhappy that the ROE was not ready. When he returned and picked up the ROE he was very angry that it said he resigned. All the witnesses agree that he was angry about this entry on the ROE.

Best states he did not go to Osburn until he had been told his employment was ended. The delegate interviewed the supervisor who's evidence supports Best's evidence. I note that the supervisor was not called by Osburn to give evidence. I feel disadvantaged by not having had him present to clarify some of the conflicting evidence.

Based on the evidence provided I find that the evidence supports the delegate's conclusion that Osburn decided to end Best's employment. Osburn's submission on the appeal is consistent with this conclusion when they state "surely the employer has to be able to consider that the employee has no intentions of returning to work and therefore effectively has relinquished his position. If not, then business will not be able to function effectively." It appears to me that Osburn decided that Best's employment would end, not Best.

Best was entitled to family leave if he had asked for it. Osburn did not offer him any leave. Best could have organized childcare and returned to work with Osburn's help. The submissions from Osburn about whether Best has found new employment is irrelevant to Osburn's decision to end Best's employment on January 16, 2001.

CONCLUSION

Based on the evidence presented I find no basis on which to vary or cancel the Determination. Osburn has not discharged the onus on it to demonstrate an error in the Determination. I deny the appeal and confirm the Determination.

ORDER

Pursuant to section 115 (1)(a) the Determination dated June 14, 2001 is confirmed.

April D. Katz
Adjudicator
Employment Standards Tribunal