

An appeal

- by -

Uniglobe Pacific Travel Ltd.
("Uniglobe")

- 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.: 2001/503

DATE OF HEARING: October 5, 2001

DATE OF DECISION: October 22, 2001

DECISION

APPEARANCES:

Michael Monahan and Maty Appaya on behalf of Uniglobe Pacific Travel Ltd.

OVERVIEW

Monica Stewart (“Stewart”) was employed by Uniglobe Pacific Travel Ltd. (“Uniglobe”) as a travel consultant. During her last 6 months of employment Stewart made over 15 errors through negligence or incompetence that cost the agency over \$7000. When Uniglobe terminated Stewart’s employment on December 1, 2000, they withheld her earnings in compensation for the losses Uniglobe incurred and Stewart complained to the Director of Employment Standards (the “Director”). Uniglobe’s registered office and administrative office did not receive notice of the complaint. When Uniglobe received the Determination Uniglobe paid the commissions and vacation pay due but argued there was no compensation for length of service was payable because Stewart’s employment was ended for cause.

ISSUE

The issues raised in the appeal are whether Uniglobe was served with Stewart’s complaint to the Director and whether Uniglobe had an opportunity to present their evidence in support of their position that Stewart’s employment ended for cause.

ARGUMENT

Uniglobe argues that they were not properly served with the complaint and therefore did not have an opportunity to inform the Director’s delegate of Uniglobe’s position on the complaint.

Uniglobe has a registered office and a head office at 1803 Douglas Avenue in Victoria. Stewart was hired and worked in the head office. The decision to end Stewart’s employment was made in Uniglobe’s head office. Uniglobe submitted that Stewart was transferred to a branch office in Esquimalt where no human resource decisions are made. Uniglobe’s Esquimalt office complied with all the requests from the delegate for information but the manager of Esquimalt office did not know that Uniglobe’s head office had not been served with the complaint. The office manager provided the delegate of the accountant’s printout of Stewart’s earnings based on the payroll input but no one from Uniglobe had any input about whether compensation for length of service was properly payable.

Uniglobe argued that it should be able to submit evidence it had about the decision to end the employment because it had not had the opportunity to give this evidence to the Director’s delegate because the people making human resources decisions were not consulted by the

delegate. Uniglobe argued that the office that hired and fired Stewart had the information about why compensation for length of service was not properly payable.

Stewart did not comment on Uniglobe's argument. The Director argued that the Tribunal could not consider the additional information after the Determination.

FACTS

The facts are not in dispute in this matter. Uniglobe hired Stewart to work in its head office on February 16, 1998. Stewart was transferred to the Esquimalt office in April 2000 where there is a much higher volume of activity. From September to December the manager of the Esquimalt office found that Stewart made numerous errors which cost Uniglobe thousands of dollars. Uniglobe sought explanations for the first 10 errors and received undertakings from Stewart to repay the money. On each occurrence the manager would bring it to Stewart's attention and Stewart would provide an excuse promise to correct the error and repay Uniglobe. After reviewing over \$6500 in losses on November 30, 2000 with the accountant and the head office directors the manager took a letter to Stewart ending her employment on December 1, 2000.

ANALYSIS

The onus of proving the Director has erred is on the appellant in an appeal to the Tribunal. The first issue raised by Uniglobe was that it was not advised of the complaint and could not respond to the delegate before the Determination was made and served on Uniglobe. The evidence is that all the communication with Uniglobe was with the manager and the accountant throughout the investigation. Neither the manager or the accountant knew that neither their head office nor their registered office had been served.

The *Employment Standards Act* ("Act") requires the Director, as the investigator, to make reasonable efforts to contact Uniglobe in order to give it an opportunity to respond. Specifically section 77 states as follows.

Opportunity to respond

- 77 If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.

On March 6, 2000, the Delegate wrote to Uniglobe setting out his conclusions and asking for comment. This letter was faxed but not received. The machine in the Esquimalt office is old and when there is no paper it does not hold the information in memory. No other office was sent this letter. The letter indicated that if no response was forthcoming a Determination would be made. The Determination was made on April 10, 2000 after no response was made.

I find that as a result of not advising the Uniglobe's head office of this matter that Uniglobe did not have an opportunity to respond.

On the merits of Uniglobe's evidence about the conduct of Stewart, I am satisfied that a series of steps were taken to try and correct her deleterious conduct without effect. Having found the same errors over and over again the only way Uniglobe could protect its interests was to end Stewart's employment.

I find that Uniglobe has cause to end Stewart's employment. As a result I find that Stewart was not entitled to compensation for length of service.

CONCLUSION

Based on the evidence presented I conclude that the appellant, Uniglobe, has shown that Stewart was not entitled to compensation for length of service but did not have the opportunity to respond as required by section 77 of the Act..

ORDER

Pursuant to section 115 of the Act, I order that the Determination in this matter, dated April 10, 2001 be varied to delete the compensation for length of service. The Director will make the necessary adjustments to the Determination as it effects the vacation pay and interest.

April D. Katz
Adjudicator
Employment Standards Tribunal