Employment Standards TRIBUNAL

An appeal

- by -

Just Kiddin' Adventure Playground Ltd.
(the "employer")

- 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: M. Gwendolynne Taylor

FILE No.: 2001/566

DATE OF DECISION: October 22, 2001

DECISION

OVERVIEW

This is an appeal brought by Just Kiddin' Adventure Playground Ltd. (the "employer") pursuant to section 112 of the *Employment Standards Act* (the "*Act")* from a Determination issued by a delegate of the Director of Employment Standards (the "Director") on July 25, 2001. The Director determined that the employer owed Tamea Morton ("Morton"), a former employee, the sum of $61.53 for compensation for length of service, plus interest.

The employer appealed the Determination on the basis that the Director erred in interpreting the law and that there was a different explanation of the facts. The employer asked the Tribunal to cancel the Determination.

ISSUES

1. Did Gibson file a complaint within the statutory time limit?

2. If the answer to #1 is no, does the Tribunal have the authority to direct the Director to investigate the complaint under section 76(3)?

EVIDENCE AND SUBMISSIONS

Morton worked for the employer from July 19, 2000 to November 26, 2000, as a cashier at the rate of $7.15 per hour. The issues before the Director were whether Morton was a temporary employee as described in section 65(1)(a) of the *Act* and whether she was entitled to compensation for length of service. Morton had been hired on a summer works program, on an "as and when", on-call, basis.

The employer submitted that between September and December, Morton worked some of the shifts offered but turned down others. In December she asked the employer for a Record of Employment so that she could apply for Employment Insurance Benefits. The employer initially showed "quit" on the ROE. Morton had wanted the employer to issue the ROE showing "shortage of work." The employer contacted Employment Insurance, explained the circumstances, and says he was advised that he could not indicate "shortage of work" if there was no shortage of work. Because Morton had been unavailable for work and the manager felt her work was not up to standard, the employer changed the ROE to "dismissed." The employer said that Morton had been told her work was not up to standard.

The employer submitted that Morton was not entitled to compensation for length of service because she was a casual employee.

Morton stated that the only occasion on which she turned down work was the one time she told the manager she could not stay one hour late. After that, the employer reduced her hours so that she was no longer working enough to meet her needs. The manager told her the employer had left instructions that she was not to be scheduled for work. She submitted that she did not quit.

The Director's delegate found, because the employer gave as a reason for dismissing Morton that she was not available for work, that Morton was not a temporary employee as defined in section 65:

> **65** (1) Sections 63 and 64 do not apply to an employee
> (a) employed under an arrangement by which
> (i) the employer may request the employee to come to work at any time for a temporary period, and
> (ii) the employee has the option of accepting or rejecting one or more of the temporary periods,

The Director's delegate then considered whether the employer was responsible for the Section 63 obligation of given appropriate notice or compensation in lieu of notice. If Morton quit, or if the employer dismissed her for just cause, the employer would not be required to give appropriate notice or compensation.

> **63** (1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.
>
> (2) The employer's liability for compensation for length of service increases as follows:
> (a) after 12 consecutive months of employment, to an amount equal to 2 weeks' wages;
> (b) after 3 consecutive years of employment, to an amount equal to 3 weeks' wages plus one additional week's wages for each additional year of employment, to a maximum of 8 weeks' wages.
>
> (3) The liability is deemed to be discharged if the employee
> (a) is given written notice of termination as follows:
> (i) one week's notice after 3 consecutive months of employment;
> (ii) 2 weeks' notice after 12 consecutive months of employment;
> (iii) 3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice;
> (b) is given a combination of notice and money equivalent to the amount the employer is liable to pay, or
> (c) terminates the employment, retires from employment, or is dismissed for just cause.

(4) The amount the employer is liable to pay becomes payable on termination of the employment and is calculated by
   (a) totalling all the employee's weekly wages, at the regular wage, during the last 8 weeks in which the employee worked normal or average hours of work,
   (b) dividing the total by 8, and
   (c) multiplying the result by the number of weeks' wages the employer is liable to pay.

(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.

The Director's delegate noted that for an immediate dismissal the employer would have to demonstrate that the conduct was so serious the employer could not allow the employee to remain at work for the appropriate notice period. Additionally, an employer has to show what steps were taken to assist an employee meet the employer's performance standard.

The Director's delegate found that Morton was dismissed without written notice after she requested a ROE indicating the reason as shortage of work. The delegate found the employer did not substantiate his claim that Morton was dismissed because she turned down work and was not meeting the employer's standard. The delegate determined that Morton was dismissed without just cause.

In filing the appeal, the employer noted that he is not concerned about paying the amount ordered, but that he is concerned that he understand his obligations for both this *Act* and Employment Insurance. In his view, he followed this *Act* to the letter. He stated his view of the facts that Morton was unavailable for work on a regular basis, the employer did not reduce her hours, and the manager spoke with Morton numerous times about work habits.

With the appeal, the employer submitted a statement dated August 1, 2001, from the manager. There were no submissions from the manager in front on the Director's delegate.

DECISION

The employer has not satisfied me that the Director's delegate misinterpreted the *Act* or took an unreasonable view of the evidence. The employer's evidence supports the delegate's finding that Morton was not a temporary employee as described in section 65(1)(a). I find nothing in the evidence to refute that finding. Part of the employer's reason for saying Morton was dismissed for just cause was her refusal of work. That clearly establishes that, in the employer's view, Morton was not entitled to refuse work, which takes her out the definition in s. 65(1)(a)(ii).

On the issue of whether Morton was dismissed for just cause, the employer cites the work refusal and poor performance issues. Morton's evidence was that the manager ceased giving her any work. Although both grounds involved the manager, the employer did not provide evidence from the manager to the Director's delegate. The delegate accepted Morton's evidence.

Unless there are compelling reasons why evidence could not be presented to the Director, it is my view that the Tribunal should not accept new evidence. In this case, the employer has not given reason why the manager's evidence was not presented earlier. Having reviewed correspondence from the Director's delegate to the employer, it appears that there was ample opportunity for the employer to know the direction the delegate was heading and to provide evidence to support the employer's position. The new evidence is very brief and does not provide details of when Morton refused work, what the verbal discipline was or what the "countless efforts" were to improve Morton's performance. I find it is not appropriate to consider the manager's submission. However, I also note that it would be of limited use.

The employer has not demonstrated that the Director's delegate misinterpreted the law or the facts. I acknowledge the employer's concern that there may be conflicts in abiding by this *Act* and the Employment Insurance obligations. My one observation on this is that the employer may have misinterpreted "on-call" employee.

ORDER

Pursuant to section 115, I confirm the Director's Determination dated July 10, 2001.

M. Gwendolynne Taylor
Adjudicator
Employment Standards Tribunal