EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an application for reconsideration pursuant to Section 116 of the *Employment Standards Act* R.S.B.C. 1996, C.113

- by -

Dr. C.S. Vinnels Inc.
("Vinnels" or the "Employer")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No: 2000/126

DATE OF DECISION: May 19, 2000

DECISION

OVERVIEW

This is an application filed by legal counsel for Dr. C.S. Vinnels Inc. ("Vinnels" or the "employer") pursuant to section 116 of the *Employment Standards Act* (the "*Act*") for reconsideration of an adjudicator's decision awarding Christine Keryluk ("Keryluk"), a former employee of Vinnels, the sum of $6,444.36 plus interest (see section 88 of the *Act*) on account of unpaid wages including compensation for length of service, overtime pay, regular wages and vacation pay).

BACKGROUND FACTS

On August 13th, 1998, Christine Keryluk ("Keryluk") filed a complaint with the Victoria office of the Employment Standards Branch. In her complaint, dated August 7th, 1998, Keryluk alleged that she had been employed by Vinnels from June 17th, 1996 to November 20th, 1997 as a part-time (3 days/week) dental hygienist. She claimed in excess of $16,000 on account of, *inter alia*, unpaid overtime, regular wages and severance pay.

In a determination issued on January 25th, 1999 under file number 091485 (the "Determination"), a delegate of the Director of Employment Standards (the "delegate") dismissed Keryluk's complaint as untimely in light of section 74(3) of the *Act* which states that a written complaint "relating to an employee whose employment has terminated" must be delivered to an Employment Standards Branch office "within 6 months after the last day of employment". The delegate never addressed (and I do not suggest that he ought to have) the merits of Keryluk's complaint but simply dismissed the complaint pursuant to section 76(2)(a) of the *Act* ["The director may refuse to investigate a complaint...if [it] is not made within the time limit in section 74(3)..."].

Keryluk appealed the Determination to the Tribunal and a hearing was held on May 10th, 1999 following which an adjudicator issued written reasons for decision (on May 31st, 1999) cancelling the Determination (B.C.E.S.T. Decision No. D182/99). The adjudicator, having found that Keryluk's employment actually ended "at or near spring break in April 1998", concluded that her complaint was filed within the statutory 6-month time limit set out in section 74(3) of the *Act.* Accordingly, the adjudicator referred Keryluk's complaint back to the Employment Standards Branch for further investigation "and calculation of the proper amount to be paid plus the calculation of interest pursuant to section 88 of the *Act.*"

A new delegate was assigned to investigate Keryluk's complaint and a report, dated November 8th, 1999, was subsequently prepared and submitted to the Tribunal. It should be recalled that the November 8th report represents the first occasion when the merits of Keryluk's unpaid wage complaint were actually adjudicated. The delegate concluded that Keryluk was entitled to the following:

• Compensation for length of service (2 weeks' wages):	$1,836.00
• Unpaid sick days (as per employment contract):	$3,456.00
• Unpaid overtime pay:	$355.00
• Unpaid regular wages:	$414.00
• Vacation pay (4%):	$242.44
• Interest pursuant to section 88 of the *Act:*	$794.88
TOTAL	$7,098.32

The final paragraph of the delegate's November 8th submission states: "I recommend to the Employment Standards Tribunal that Dr. C.S. Vinnels Inc. pay Christine Keryluk the amount of $7,098.32 as payment for outstanding wages as outlined in my submission."

The adjudicator reviewed the delegate's calculations and in a written decision issued on February 7th, 2000 (B.C.E.S.T. Decision No. D015/00) confirmed the delegate's calculations except for three items: the adjudicator varied the above-noted calculations by increasing the overtime pay award by $36.50, the "regular wage" award by $99 and the "vacation pay" award by $5.42--a total increase of $140.92 plus a concomitant adjustment for interest. In a letter dated and submitted to the Tribunal on February 18th, 2000, the delegate indicated that the total award in Keryluk's favour, including interest calculated to February 18th, was **$7,223.03.**

THE REQUEST FOR RECONSIDERATION

By way of a letter dated and filed with the Tribunal on February 28th, 2000, legal counsel for Vinnels requested a reconsideration of the adjudicator's decision awarding unpaid wages to Ms. Keryluk. The reconsideration request is based on the sole ground that Keryluk's complaint ought to have been dismissed as it was not filed within the statutory 6-month complaint period.

ANALYSIS

As previously noted, Keryluk' complaint was filed on August 13th, 1998. In the Branch's complaint form, a complainant is requested to set out various information including the "Last day you worked for this employer" (*i.e.*, the employee's termination date). Keryluk, in response to this question, indicated that her last working day was *November 20th, 1997.* Thus, *on its face*, Keryluk's complaint was filed nearly three months after the expiration of the 6-month statutory time limit set out in section 74(3) of the *Act.* The first delegate, in the January 25th, 1999 Determination, reviewed the employer's payroll records and noted that although Keryluk's last working day was November 20th, 1997, she was paid for three further "sick days", the last of

which was November 27th, 1997 and thus the delegate found that this latter date, November 27th, was her "termination date" for purposes of calculating the 6-month "complaint period". In the result, Keryluk's complaint was dismissed as untimely.

The timeliness of Keryluk's complaint was, of course, the principal issue in Keryluk's appeal of the January 25th, 1999 Determination; that appeal was heard by the adjudicator on May 10th, 1999 and his reasons were issued on May 31st, 1999.

Certain facts are not in dispute between the parties. As recorded in the adjudicator's May 31st decision, Keryluk's employment with Vinnels commenced in mid-June 1996; during her employment Keryluk regularly worked three days per week.Keryluk's last "working day" was November 20th, 1997; she did not work on November 25th, 26th or 27th but did received paid "sick leave" as per her employment contract for these latter three days. In late November Keryluk notified her employer that she was under a great deal of stress and, on her doctor's advice, would not be returning to work in the near term.

On December 2nd, 1997 Vinnels issued Keryluk a "Record of Employment" ("ROE"). The ROE indicates that the "last day for which paid" was November 20th, 1997 and that the "final pay period" ended on November 30th, 1997. The ROE was issued due to "stress leave" and code "K" ("Other") was recorded on the form; it should be noted that there is a specific code for "dismissal" ("M") and for "quit" ("E") but neither of those two codes was indicated on the ROE as being the reason for its issuance. Keryluk's "expected date of recall" was indicated as "unknown" rather than "not returning" or a specific date. It is clear, *based on the employer's own records,* that Keryluk's employment did not end in late November 1997. A person remains an "employee" while on leave (see section 1 definition of "employee") and while Vinnels may have chosen to terminate Keryluk's employment in late November 1997 (although such action might have amounted to a "wrongful discharge"), Vinnels did not pursue that avenue. I am fortified in my conclusion that Keryluk's employment did not end in late November 1997 by Ms. Sinal's letter of May 6th, 1999 which indicates that she was specifically hired as a "relief hygienist in late 1997" and that "Dr. Vinnels and Ms. Johnston made it clear that I was only in the position until Ms. Keryluk returned."

However, it is clear that, at some point, Keryluk's employment with Vinnels did come to an end. It is not entirely clear how and when her employment ended. Keryluk never submitted a letter of resignation nor did she ever expressly "quit" her employment; Vinnels, for its part, never issued a formal termination letter to Keryluk. The material before me shows that Keryluk considered herself to have been terminated by no later than July 28th, 1998 on which date she wrote to Vinnels claiming damages for wrongful dismissal--her settlement proposal was rejected by Vinnels in a reply letter to Keryluk dated August 5th, 1998. Of course, if Keryluk's employment ended in late July 1998, her complaint was timely. The adjudicator, in his May 31st decision, concluded that Keryluk's employment ended "at or near spring break in April 1998"; at or around this time Keryluk's spouse attended at Vinnels' office in order to remove certain of Keryluk's personal effects although the adjudicator also noted that this latter action was not conclusive evidence of a quit.

Legal counsel for Vinnels maintains that Keryluk's "stress leave" was not *bona fide.* In my view, that assertion is entirely beside the point--Keryluk sought and was granted "stress leave" and accordingly, her employment relationship with Vinnels subsisted. It was open to Vinnels to terminate the employment relationship in late November or even early December but it did not do so as evidenced by the ROE issued by Vinnels to Keryluk.

Counsel for Vinnels also asserts that Keryluk's employment by Vinnels ended when Keryluk sought and accepted alternative employment with another dental office in January 1998--Keryluk's employment with this other office, on a part-time basis, actually commenced in mid-February 1998. Counsel for Vinnels asserts that this latter action on Keryluk's part "constituted a breach of her duty of fidelity and a repudiation of her employment relationship." Given Keryluk's part-time status with Vinnels, I agree with the adjudicator that seeking and accepting other part-time work did not, of itself, amount to a repudiation of her employment relationship with Vinnels. *Further, and in any event, it must be remembered that Vinnels never terminated Keryluk--in January or February 1998, or at any other time--for breach of her duty of fidelity.* An employer may have just cause to terminate an employment relationship but that employment relationship is not terminated until the employer chooses to assert cause and terminate the employee (thus, our law recognizes the principle of condonation whereby, despite a repudiatory breach, the employment contract continues). Similarly, an employee may assert that the employment relationship has been terminated by reason of some unilateral repudiatory action by the employer (*i.e.,* a "constructive dismissal"), however, if the employee accepts the unilateral changes, the employee may well lose his or her right to claim "constructive dismissal" on the basis that a novation has occurred.

In my view, and in the circumstances of this case, neither Keryluk's *search* for other employment, nor her *acceptance* of other *part-time* employment, amounted to a repudiation of her employment relationship with Vinnels. Had she accepted *full-time* employment, perhaps Vinnels could have argued that its contract with Keyluk was frustrated, but that is not what transpired. Even if it could be said that upon the commencement of her part-time employment by the other dental office on February 16th, 1998, her employment relationship with Vinnels was deemed to have terminated (a position I find to be legally untenable), taking February 16th as the termination date still leaves us with a *timely* complaint.

There is, in my view, simply no evidence in all of the material before me which suggests that Keryluk voluntarily quit (taking into account both the objective and subjective elements of a lawful "quit") her employment with Vinnels at any time, let alone evidence that suggests she quit more than 6 months prior to the date she filed her complaint with the Employment Standards Branch. The evidence suggests that, if anything, Keryluk took the position that she was "constructively dismissed" (although she did not use that term) sometime in April 1998 when the "temporary" replacement hygienist was hired on a "permanent" basis; Keryluk, for her part, advised Vinnels by way of a letter dated July 28th, 1998 that she had been "wrongfully dismissed". Whether one fixes Keryluk's termination date in April or in late July 1998, her complaint was nevertheless well within the 6-month limitation period.

In light of the above, I see absolutely no reason to set aside the adjudicator's decision regarding the timeliness of Keryluk's complaint.

ORDER

The application to vary or cancel the decision of the adjudicator in this matter is refused.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal