

Ministry of Labour

Ministère du Travail



REASONS FOR DECISION
Employment Standards Act, 2000

Claim Number: 70218665-5

Business Name: NUMERIS
1500 Don Mills Road, 3rd Floor, Toronto, ON M3B 3L7

Employer Rep: Mr. David Hager
Legal Counsel

Claimant: Ms. Sayanthini Santhira

Date Claim Filed: Jan 31, 2019.

Standard(s) At Issue:

Claimant claims for:

1. The pay for the legal entitlement for the first two days of the Personal Emergency Leave / Sick days she took.
2. Termination Pay legal entitlement.
3. Reprisal of being terminated by the employer for taking the Personal Emergency Leave / Sick days.

Claimant stated in her claim that she worked for NUMERIS as an Executive Assistant from June 6, 2018 to Oct 3, 2018. She was paid semi-monthly in the amount of \$2,500.00 which represents \$60,000.00 per annum. She never quit her job but was "unlawfully fired due to being medically ill".

Claimant provided more details about his claim as follows:

"On Oct 1st I started experiencing severe back pain especially in my lower back. It came to a point that I could barely walk and had to limp around work. Minus how severe the pain was, I still went to work until Oct 3rd when my pain got work to a point I couldn't walk. I went to my family doctor, and she had wrote me a note (on Oct 3) indicating that I am unfit for work due to my medical condition and that I needed to get X-rays done ASAP. I had provided the doctor's note to my manager and HR Agent Beejal Pandit. Beejal had transferred my file to another department who had asked me to have my family doctor fill out a form. My doctor filled out my form and I had returned it back to NUMERIS on Oct 24, 2018. I was informed that I was denied STD. I even followed up and provided them with another doctor note dated Oct 17 indicating that I should go to the Emergency at the hospital and still NUMERIS did not care. My Doctor's Note even indicated that I was unable to bend, sit for a long time, severe back and neck pain and had limited functional abilities. It was not sufficient for NUMERIS. I started taking higher doses of pain killers and was in bed rest. NUMERIS tried contacting me via email and mail which I did not receive (I wasn't checking emails and I can't walk down the stairs so I didn't receive the mails.) I finally checked my email and on Jan 9/19. Beejal sent an email saying my short term was denied Oct 30/18 and even though I was on sick leaves and provided all medical notes that because I didn't respond that I "resigned" which is unfair because I was ill."

Evidence, Decision and Reason(s) With Respect to Each Standard at Issue:

Claimant submitted the following records on April 1, 2019 as evidence in supporting of her claim position:

1. Record of Employment (ROE) issued to claimant on July 13, 2018 showing claimant's "First Day Worked" was on June 6, 2018. (This ROE was issued due to the change of payroll service provider by the employer.)
2. Letter issued to claimant on Feb 20, 2019 by the Employer's Legal Counsel requesting claimant to return all the Company keys and property in her possession.
3. Employment Offer Letter to claimant for the position of Executive Assistant.
4. STD (Short Term Disability) claim form submitted by claimant's Family Doctor to Acclaim (Insurance Provider of NUMERIS) after claimant's consultation on Oct 23, 2018.
5. Emails from Oct 2 to 9, 2018 which claimant communicated with her manager, Shawn Sheridan – VP, Information Technology, and Beejal Pandit, Manager – People & Culture, attached with the Dr's Notes dated Oct 3, 2018 for her absence from work from Oct 1 to Oct 5 of 2018.
6. Four emails exchanged between claimant and Beejal Pandit, Manager – People & Culture, from Dec 19, 2018 to Jan 9, 2019 concerning claimant's "resignation" and denial of claimant's STD application by Acclaim, the Company's insurance provider.
7. Note for Specialist Consultation Referral issued to claimant by the Family Doctor dated Feb 28, 2019.
8. Dr's Note dated April 1, 2019 stated claimant is "Unfit and Unable to work since Jan 1, 2019 until July 1, 2019.

On April 10, 2019, the Employer's Legal Counsel provided a submission with the following documents to dispute the claim:

1. The Restated Articles of Incorporation showing the legal name of the Company is NUMERIS and it is a Not-for-Profit organization.
2. Employment agreement between claimant and Numeris dated May 16, 2018.
3. Wage Statements for claimant from Pay Period Endings June 15 to Dec 31, 2018.
4. Two ROEs issued to claimant because of the change of Service Provider showing claimant's "First Day Worked" was on June 6, 2018 and was paid until Pay Period End Oct 15, 2018.
5. Emails from Oct 1 to 9 of 2018 exchanged between claimant with her manager, Shawn Sheridan – VP, Information Technology, and Beejal Pandit, Manager – People & Culture, concerning claimant's first week of absence from Oct 1 to 5 of 2018 with Dr's Notes provided by claimant on Oct 3, 2018.
6. Email from Numeris to Acclaim on Oct 9, 2018 to notify the Insurance Provider on claimant's absence from Oct 1, 2018 to initiate the STD claim for claimant. The same day Oct 9, 2018, the Company also emailed claimant with the Medical Form for her application of the STD benefits to Acclaim.
7. Email from Acclaim to claimant dated Oct 30, 2018 for her STD claim denial. Claimant replied the same day on Oct 30, 2018 stated she would appeal the denial decision.
8. Letter with copy of the "Consent" form sent to claimant on Oct 19, 2018 by both email and courier requesting her consent and co-operation for the employer to write to her doctor direct for getting her medical condition and functional limitations for providing consistent accommodations for her return to work.
9. Another letter sent to claimant on Nov 28, 2018 by both email and courier requesting her again to respond within 10 days to the "Consent" form which was sent to her on Oct 19, 2018.
10. Emails from Beejal Pandit of Numeris to claimant on Dec 7 & 8 of 2018 to follow up on the "Confidential" – "Consent" form since claimant did not respond to his voice mails and emails.
11. Letter sent to claimant on Dec 19, 2018 by both email and courier to inform that since she did not respond to all the Company's communications including voice mail, emails and letters sent by couriers since Nov 19, 2018, so had quit her employment with Numeris, and claimant was requested to return all the Company property and keys in her possession. Two ROEs were also provided to claimant.
12. Email reply from claimant to Beejal Pandit of Numeris on Jan 8, 2019 stated that she did not quit but was terminated by Numeris.
13. Email reply from Beejal Pandit to claimant on Jan 9, 2019.
14. Email reply from claimant to Beejal Pandit on Jan 10, 2019.
15. Letter sent to claimant by the Employer's Legal Counsel, David Hager, on Feb 20, 2019 requesting claimant again to return all the Company property and keys kept in her possession.

The employer denied all the allegations made by claimant and stated a position that:

1. Numeris had paid claimant more than the payment of two days personal leave days that was required by the Employment Standards Act, 2000;
2. Claimant's conduct was either a resignation of her employment or, in the alternative, constituted wilful misconduct or disobedience, so that she is not entitled to termination pay; and
3. There was no reprisal against claimant for taking Personal Emergency Leave / Sick Days.

The evidence and information received from both parties showed:

A. Claimant's employment period:

1. Claimant's first day of work was on June 6, 2018 as shown on claimant's Employment Letter submitted by both parties.
2. Claimant's last day of work at Numeris should be on Sep 28, 2018 (Friday) since claimant worked Monday to Friday 5 days a week, **NOT** on Oct 3, 2018 as stated by claimant in her claim and in her email to the Officer.

Reasons:

- a. Claimant submitted the emails chain of communication with the Company from Oct 2 to 9 of 2018 concerning her absence. While the employer provided the emails exchanged with claimant from Oct 1 to 9 of 2018 for the claim investigation.
- b. The emails submitted by both parties showed that claimant sent the first email to her manager, Shawn Sheridan – VP Information Technology on Oct 1, 2018, 9.11 a.m. for her absence on that day.
Claimant stated in this email:
"I have been shaking, feeling light headed and in pain all weekend. I am going to stay home today and go to my family doctors to see what they say. I will provide a doctor's note."
- c. The emails communicated between claimant and Beejal Pandit and Shawn Sheridan of the Company on Oct 2, 3, and 4 of 2018 showed that claimant was absent on all those days. Claimant went to see the doctor on Oct 3, 2018 and provided her Dr's Notes dated Oct 3, 2018 to the Company.

The above emails and the following information provided by claimant showed what claimant stated in her claim that her last day of work was on Oct 3, 2018 is **NOT** supported with facts.

"On Oct 1st I started experiencing severe back pain especially in my lower back. It came to a point that I could barely walk and had to limp around work. Minus how severe the pain was, I still went to work until Oct 3rd when my pain got work to a point I couldn't walk....."

Decision:

Claimant's first day of work was June 6, 2018 and last day of work was on Sep 28, 2018 (Friday).

B. Pay for Personal Emergency Leave Legal Entitlement (2 days sick pay):

1. The Wage Statements Payroll Records provided by the Employer on claimant's entire employment showed:
 - a. Claimant last day of work was on Sep 28, 2018 (Friday).
 - b. Claimant was paid up to Pay Period ending Oct 15, 2018.
2. The Company has a policy of paying the first 5 days of sick days under the Short-Term Disability benefits of the Company. After that the benefits claim will be referred to the Insurance Provider, Acclaim, for review for the employee to continue with further benefits.
3. The records provided by the employer showed that claimant enjoyed the better rights and benefits and was paid for more than the 2 days legal entitlement for her Personal Emergency Leave under S. 50(8) of the Act until Pay Period Ending Oct 15, 2018.

Decision:

Claimant has been paid for more than the legal entitlement for the first two days of the Personal Emergency Leave / Sick days she took. No violation of S. 50(8) is found.

C. Reprisal against claimant for taking Personal Emergency Leave:

1. Claimant's first sick day off was on Oct 1, 2018. She was paid by NUMERIS for the first 5 days sick days / Personal Emergency Leave until Oct 5, 2018.
2. People & Culture Department of NUMERIS then advised claimant on Oct 9, 2018 to submit her form to the Insurance Provider, Acclaim, to continue with her STD benefits. The People & Culture Department also submitted the Absence Notification form for claimant to Acclaim, the Insurance Provider, to notify on claimant's upcoming STD benefits application.
3. Claimant continued to get pay from NUMERIS until Pay Period End Oct 15, 2018.
4. Claimant's STD benefits application was denied by Acclaim, the Insurance Provider, on Oct 30, 2018. Claimant was advised to contact the People & Culture Department of NUMERIS. Claimant replied email to Acclaim and copied to Beejal Pandit, Manager of People & Culture, the same day on Oct 30, 2018 to appeal the denial decision of the Insurance Company.
5. Acclaim and NUMERIS are two independent companies. Acclaim as an Insurance Company made its own decision in denying claimant's application for STD benefits based on the information submitted by claimant direct to Acclaim.
6. The Manager of People & Culture Department wrote to claimant on Nov 19, 2018 by both email and courier to ask for claimant's consent to direct contact her Doctor to get information on her health condition to provide accommodation consistent with her functional limitations on her return to work under the Ontario Human Rights Code.
7. Claimant did not respond to the employer's letters dated Nov 19 and 28 of 2018 sent to her by both email and courier. In the letter dated Nov 28, 2018 sent to claimant by both email and courier, claimant was requested to respond within 10 days otherwise she would be considered to have resigned from the Company.
8. The Manager of People and Culture then followed up with phone calls to claimant and two voice messages were left with her on Dec 7 and 10 of 2018. Again, no response of phone call, email or letter reply received from claimant.
9. Claimant did not reply to any of the employer's communication since Oct 30, 2018.
10. NUMERIS finally sent letter again to claimant on Dec 19, 2018 by both email and courier to inform claimant that it is her decision to resign from the Company.
11. Claimant was paid for her vacation pay on the pay day of the following pay period ending date on Dec 28, 2018.

The above evidence and communications between the two parties showed:

- NUMERIS as the employer paid more than the legal minimum entitlements for the sick days / Personal Emergency Leave taken by claimant.
- The People & Culture Department of the Employer also exercised every effort to communicate with claimant to assist her to apply for the STD benefits to the Insurance Provider, Acclaim; and attempted the best effort to get in touch with claimant to work on the accommodation required to help claimant to return to work.
- No evidence of any kind can support that the employer has an intention to penalize claimant because of her taking the Sick Days / Personal Emergency Leave.
- The employer communicated with claimant by emails, mails by courier, and telephone by leaving phone messages for claimant, the Officer is not convinced that in today's communication technology claimant would not check her emails and her phone messages for more than two months from Oct 30, 2018 to Jan 8, 2019 when claimant eventually replied email to Beejal Pandit, Manager of People & Culture, concerning her "resignation". The Officer also cannot believe that if claimant is care and concerning her employment and the STD benefits she was applying, she would not even call Numeris or Acclaim to follow up and cooperate with the Company and the Insurance Provider in working on those issues.
- All of the above evidence showed that claimant chose not to respond to all the employer's communication after Oct 30, 2018 and abandoned her employment with NUMERIS.

Decision:

- Claimant abandoned her job and resigned from NUMERIS when she chose not to respond to all the employer's communication after Oct 30, 2018 and chose not to co-operate with the employer in working on her own return to work accommodation.
- Claimant resigned and quit her job thus no termination pay entitlement.
- No reprisal is found under S. 74(1)(a) of the Act. No evidence could support that claimant was penalized because of her taking Personal Emergency Leave. In turn all the evidence showed that claimant was paid more than the legal entitlement of 2 days' pay as required under S. 50(8) of the Act. The evidence also showed that the employer exercised the best effort in helping claimant to apply for the STD benefits to the Insurance Company and also trying to work with claimant to make all the required accommodations to help her to return to work.

Action(s) Taken by Officer:

No Order Issued. Claim denied. No violation is found.



Ben Cheung

Employment Standards Officer # 623

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Relevant Sections of the Employment Standards Act, 2000:

What constitutes termination

56. (1) An employer terminates the employment of an employee for purposes of section 54 if,

- (a) the employer dismisses the employee or otherwise refuses or is unable to continue employing him or her;**
- (b) the employer constructively dismisses the employee and the employee resigns from his or her employment in response to that within a reasonable period; or**
- (c) the employer lays the employee off for a period longer than the period of a temporary lay-off. 2000, c. 41, s. 56 (1).**

Employer notice period

57 The notice of termination under section 54 shall be given,

- (a) at least one week before the termination, if the employee's period of employment is less than one year;**

Pay instead of notice

61. (1) An employer may terminate the employment of an employee without notice or with less notice than is required under section 57 or 58 if the employer,

- (a) pays to the employee termination pay in a lump sum equal to the amount the employee would have been entitled to receive under section 60 had notice been given in accordance with that section**

Personal emergency leave

50 (1) An employee is entitled to a leave of absence because of any of the following:

- 1. A personal illness, injury or medical emergency.**
- 2. The death, illness, injury or medical emergency of an individual described in subsection (2).**
- 3. An urgent matter that concerns an individual described in subsection (2). 2017, c. 22, Sched. 1, s. 39 (2).**

Advising employer

50 (3) An employee who wishes to take leave under this section shall advise his or her employer that he or she will be doing so. 2000, c. 41, s. 50 (3).

Same

(4) If the employee must begin the leave before advising the employer, the employee shall advise the employer of the leave as soon as possible after beginning it. 2000, c. 41, s. 50 (4).

Limit

(5) Subject to subsection (6), an employee is entitled to take a total of two days of paid leave and eight days of unpaid leave under this section in each calendar year. 2017, c. 22, Sched. 1, s. 39 (3).

Same, entitlement to paid leave

(6) If an employee has been employed by an employer for less than one week, the following rules apply:

- 1. The employee is not entitled to paid days of leave under this section.**

2. Once the employee has been employed by the employer for one week or longer, the employee is entitled to paid days of leave under subsection (5), and any unpaid days of leave that the employee has already taken in the calendar year shall be counted against the employee's entitlement under that subsection.

3. Subsection (8) does not apply until the employee has been employed by the employer for one week or longer. 2017, c. 22, Sched. 1, s. 39 (3).

Leave deemed to be taken in entire days

(7) If an employee takes any part of a day as paid or unpaid leave under this section, the employer may deem the employee to have taken one day of paid or unpaid leave on that day, as applicable, for the purposes of subsection (5) or (6). 2017, c. 22, Sched. 1, s. 39 (3).

Paid days first

(8) The two paid days must be taken first in a calendar year before any of the unpaid days can be taken under this section. 2017, c. 22, Sched. 1, s. 39 (3).

PART XVIII

REPRISAL

Reprisal prohibited

74. (1) No employer or person acting on behalf of an employer shall intimidate, dismiss or otherwise penalize an employee or threaten to do so,

(a) because the employee,

(i) asks the employer to comply with this Act and the regulations,

(ii) makes inquiries about his or her rights under this Act,

(iii) files a complaint with the Ministry under this Act,

(iv) exercises or attempts to exercise a right under this Act,

(v) gives information to an employment standards officer,

(vi) testifies or is required to testify or otherwise participates or is going to participate in a proceeding under this Act,

(vii) participates in proceedings respecting a by-law or proposed by-law under section 4 of the Retail Business Holidays Act,

(viii) is or will become eligible to take a leave, intends to take a leave or takes a leave under Part XIV; or

(b) because the employer is or may be required, because of a court order or garnishment, to pay to a third party an amount owing by the employer to the employee. 2000, c. 41, s. 74 (1).

Onus of proof

(2) Subject to subsection 122 (4), in any proceeding under this Act, the burden of proof that an employer did not contravene a provision set out in this section lies upon the employer. 2000, c. 41, s. 74 (2).