

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act

-by-

P.A. Building Maintenance Ltd.

(“P.A. Building”)

-of a Determination issued by-

The Director Of Employment Standards

(the “Director”)

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 95/002

DATE OF HEARING: January 26, 1996

DATE OF DECISION: May 3, 2001

DECISION

APPEARANCES

Adam S. Albright **for** P.A. Building Maintenance Ltd.
Dave Ages **for** The Director of Employment Standards
Gurmail Singh Gill on his own behalf

OVERVIEW

This is an appeal by P.A. Building Maintenance Ltd. ("P.A. Building") pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") against Determination #CDET 000028 issued by the Director of Employment Standards (the "Director") on November 7, 1995. In this appeal P.A. Building claims that no compensation for length of service is owed to Mr. Gurmail S. Gill ("Gill").

A hearing was held at the Tribunal's offices on January 26, 1996.

Prior to the hearing Mr. Gill indicated his need for an interpreter to assist him during the hearing. The Tribunal provided an interpreter, Mr. Bupal Mann. At the hearing, Mr. Mann was sworn in as an interpreter from English to Punjabi and from Punjabi to English.

At the commencement of the hearing Mr. Ages, on behalf of the Director, noted that the Determination contained two errors:

- ◇ The amount of compensation owing should be \$780.00 not \$811.20; and
- ◇ The relevant section of the legislation giving rise to the Employer's liability is Section 42 of the former *Act*, not Section 63 of the current *Act*.

Mr. Albright did not object to these errors being corrected.

Mr. John Manuel was excluded from the hearing at Mr. Ages' request since it was possible that he could be called as a witness.

Mr. Ages referred to Section 128 of the *Act* which deals with transitional and consequential provisions.

Section 128(4) of the *Act* states, in part:

...“Section 63 applies to an employee whose employment began before Section 63 comes into force and is terminated after that Section comes into force.”

Gill’s employment ended before November 1, 1995 (the date on which the *Act* was proclaimed into force) and, therefore, the relevant statute for purposes of determining the employers’ liability is the *Employment Standards Act* (S.B.C. Chapter 10) (the “former *Act*”). The relevant parts of Section 42 and 43 of the former *Act* state:

Notice required

42. (1) An employer shall not terminate an employee without giving the employee, in writing, at least
- (a) 2 weeks’ notice where the employee has completed a period of employment of at least 6 consecutive months, and
 - (b) after the completion of a period of employment of 3 consecutive years, one additional week’s notice, and for each subsequent completed year of employment, an additional week’s notice up to a maximum of 8 weeks’ notice.

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Notice not required

43. Section 42 does not apply to
- (a) an employee discharged for just cause,

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FACTS

To assist in the efficient hearing of this appeal, Mr. Gill, Mr. Ages and Mr. Albright agreed that the following facts are not in dispute:

1. Mr Gill was employed by P.A. Building as a janitor on April 10, 1992. His last day of work was July 13, 1995.
2. A letter dated July 20, 1995 from Parkat Lehal (President of P.A. Building) to Gill notes Gill’s absence from work on July 13, 1995 and his possible replacement if he is unable to return to work by July 28, 1995.
3. The Record of Employment (‘ROE’) dated July 21, 1995 shows “K” as the reason for issuing it. Box #22 of the ROE contains the following statement:

“Employee failed to return to work after being offered a night shift.”

4. Mr. Gill filed a complaint with the Employment Standards Branch on July 25, 1995. Attached to the complaint was a medical certificate issued by Dr. A. V. Nurani on July 21, 1995 stating that Mr. Gill was incapable of working due to illness from July 16, 1995. Dr. Nurani stated that Mr. Gill was suffering from "severe headache, nausea and vomiting." The certificate did not state an expected recovery date.
5. Dave Ages (Industrial Relations Officer) wrote to P.A. Building on September 29, 1995 to notify it of Mr. Gill's complaint and to request evidence on the matter.
6. Determination #CDET 000028 was issued by Dave Ages, a delegate of the Director of Employment Standards, on November 7, 1995 in the amount of \$811.20. The Reason Schedule attached to the Determination states:

The employee was terminated without notice. The employer has provided no information that would support a claim that compensation for length of service was not owing.

The Calculation Schedule attached to the Determination showed that compensation for length of service under Section 63 of the *Act* was based on an entitlement of 3 weeks:

\$6.50/hour x 40 hours/week x 3 weeks =	\$780.00
plus 4% vacation pay =	\$31.20
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Total amount owed:	\$811.20

As noted above, the Determination was amended by consent to read \$780.00 owing pursuant to Section 42 of the former *Act*.

7. P.A. Building appealed the Determination on November 27, 1995. Stating that:

Mr. Gill did not report to work as scheduled, was advised that such continued behaviour would result in his dismissal and Mr. Gill continued to fail to report to work as scheduled. Accordingly, Mr. Gill's employment was terminated in that Mr. Gill was determined to have resigned or alternatively was terminated for cause.

In addition to these undisputed facts, P.A. Building and the Director each called one witness to give evidence under oath.

The evidence of Mr. Parkat Lehal (President, P.A. Building) was that Gill was told on July 13, 1995 that he was scheduled to work the night shift effective July 15, 1995. Gill did not report to work on July 15, nor did he contact his supervisor to explain his absence. Gill was scheduled to work the night shift for 5 consecutive shifts. On July 20, 1995 Lehal

personally delivered a letter to Gill advising him of his possible replacement if he did not return to work by July 28, 1995.

Lehal's evidence was that Gill said he worked night shifts at a Zellers store and, therefore, could not work night shifts at P.A. Building. Lehal told Gill that the night shift was the only work available.

Following that, Lehal instructed the accountant to prepare a ROE which was dated July 21, 1995 and was given to Gill on July 28, 1995. Lehal also testified that he did not see Gill for "a couple of weeks" at which time Gill presented a medical certificate dated July 21, 1995. By the time that Gill presented the medical certificate, Lehal had hired a new employee to replace Gill.

When offered the opportunity to cross examine Lehal, Ages and Gill put no questions to him.

Mr. Ages called Mr. Gill to give evidence under oath.

Gill's evidence was that he had worked day shift for two years prior to July, 1995. He had worked afternoon shift and night shift occasionally in the past. His evidence was that his medical problems began at the beginning of July, 1995 but he did not go to the doctor at that time. Gill stated that he told his supervisor (John Manuel) about his headaches in early July, 1995 but he did not recall the date when he visited Dr. Nurani about his condition.

When asked about the medical certificate dated July 21, 1995, Gill said that he visited Dr. Nurani on that date. On the same day he showed the certificate to John Manuel, who told him to bring it to the office. Gill testified that Manuel and Lehal told him "we don't have any work".

Mr. Manuel was not called as a witness by the Director nor by P.A. Building.

Gill's evidence was that he worked at Zellers from 06:00a.m. to 09:00a.m. and that July 16, 1995 was the last day he worked at Zellers. He also stated that he would have been able to work night shifts at P.A.. Building except for his headaches and nausea. However, he also stated that he could not work from 10:00p.m. to 6:00a.m. in mid-July, 1995 because his wife did not return home from work until midnight and he cared for their child until she arrived home. Gill's evidence was that three weeks later his wife's parents were available to care for the child and he was then available to again work from 10:00p.m. to 6:00a.m.

Gill's evidence was that he was not given any reason by his employer for being scheduled to work the night shift on July 15, 1995. He said he told his supervisor that he could only work day shifts due to his medical condition. He also said that he was willing to return to work on any shift after September 11, 1995 - the date that Dr. Nurani said he was fit to return to work.

Under cross-examination by Mr. Albright, Mr. Gill agreed that he had received a written warning about his work performance during August, 1994. However, when I asked if that letter would be put into evidence, Mr. Albright declined on the ground that Gill had agreed he had received the written warning.

Gill also agreed, in cross-examination, that he had received oral warnings about his work, although he said "...I was doing my work good." Gill conceded that his scheduled hours at Zellers (6:00a.m.to9:00a.m.) conflicted with the night shift at P.A. Building (10:00p.m.to 6:30a.m.). However, he stated that he did not work at Zellers after July 16, 1995. Gill's evidence was that he did not like and did not prefer to work night shift because of his medical condition, but he had worked that shift three times during the year prior to July, 1995.

When asked by Ages if he would have worked night shift once his medical condition improved, Gill said: "Yes, sure".

ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether Gill terminated his employment with P.A. Building by his failure to report for work or was his employment terminated by P.A. Building. If Gill's employment was terminated by P.A. Building, the issue then becomes whether there was just cause.

ARGUMENTS

The argument made by Mr. Albright on behalf of P.A. Building is that the evidence given by Mr. Gill and all the relevant facts support a conclusion that he resigned his employment rather than work night shifts effective July 15, 1995. Mr. Albright argued that the real reason for Mr. Gill being unwilling or unable to work night shifts was that it would conflict with his child care responsibilities and his scheduled hours of work at Zellers. To support this view, Mr. Albright also argued that Mr. Gill's credibility is at the centre of this matter. He pointed to an inconsistency in Mr. Gill's evidence concerning his illness beginning at the end of June, 1995 whereas Dr. Nurani's medical certificate shows July 16, 1995 as the date on which the illness began. Mr. Albright argued, in the alternative, that if Mr. Gill did not resign that P.A. Building terminated his employment for just cause - his failure to report for work on July 15, 1995 as scheduled and his failure to offer any explanation for his absence until July 20, 1995.

Mr. Ages, on behalf of the Director, argued that once P.A. Building was made aware of Mr. Gill's illness on July 20, 1995 he could have and should have been granted an unpaid medical leave. In Mr. Ages' view there was no reason for the employer to terminate Mr. Gill's employment, and nothing in the evidence suggests there was just cause for termination. Mr. Ages also argued that Mr. Gill would have worked night shifts if he had not been suffering from headaches and nausea at the time. In his view, Mr. Gill's

employment at Zellers is irrelevant because it would not be rational to retain part-time employment in preference to a full-time position at P.A. Building.

ANALYSIS

As noted in my overview, it is agreed that this appeal is to be decided under the provisions of Section 42 and 43 of the former *Act*.

Section 42 of the former *Act* requires that an employer shall not terminate an employee without giving notice in writing. However, Section 43(a) of the former *Act* states that Section 42 does not apply to "...an employee discharged for just cause".

In this case, the burden of proof for establishing that Mr. Gill was dismissed for just cause rests with P.A. Building.

A central issue in deciding this appeal is the credibility of the evidence given by Mr. Gill. In assessing credibility a number of factors are to be considered. These include: the demeanour of the witness; opportunities for knowledge; powers of observation, judgement and memory; ability to describe clearly what has been seen and heard; and the probability of the event happening in the manner suggested[Farnya v. Chorny (1952) 2 DLR 354 (BCCA)].

I have carefully reviewed and considered all of the agreed to facts and the evidence given by the two witness, Mr Lehal and Mr. Gill. I have concluded, on the balance of probabilities, that the reason for Mr. Gill's failure to report for work as scheduled on July 15, 1995 and thereafter was that his child care responsibilities and his employment at Zellers prevented him from working the night shift at P.A. Building. I am forced to this conclusion by Mr. Gill's own evidence, under oath, concerning his childcare responsibilities and his employment at Zellers. His evidence on those points is entirely consistent with the evidence given by Mr. Lehal. In addition, I found Mr. Gill's evidence to be evasive and contradictory regarding his visits to Dr. Nurani and, in particular, the dates of those visits.

On the basis of the analysis set out above and after a careful consideration of all the evidence and arguments, I conclude that Mr. Gill's employment with P.A. Building was terminated by his failure to report for work as scheduled on July 15, 1995. For that reason, P.A. Building is not required to give notice nor pay severance pay in lieu of notice. pursuant to Sections 42 and 43 of the former *Act*.

ORDER

I therefore order, pursuant to Section 115(1) of the *Act*, that Determination #CDET 000028 be cancelled.

Geoffrey Crampton
Chair
Employment Standards Tribunal

May 3, 2001

Date

GC:sd