

**EMPLOYMENT STANDARDS TRIBUNAL**  
In the matter of an appeal pursuant to Section 112 of the  
*Employment Standards Act R.S.B.C. 1996, C. 113*

- by -

Dean Nekleva  
("Nekleva")

- of a Determination issued by -

The Director Of Employment Standards  
(The "Director")

**ADJUDICATOR:** Richard S. Longpre

**FILE NO.:** 97/690

**DATE OF HEARING:** December 19, 1997

**DATE OF DECISION:** January 7, 1998



**FACTS**

The Determination reviewed the facts of the case as follows:

- \* You [Nekleva] were away from your work station talking to another employee.
- \* The foreman shouted something to you
- \* You could not hear him and made a gesture by turning up the palms of your hands
- \* The foreman came closer and said, “f--- off”.
- \* you returned to your work station feeling humiliated.
- \* the foreman came by and hung around near your work station.
- \* You felt that he was trying to agitate you.
- \* You decided to leave and punched out and went home.
- \* Once home, you began faxing resumes for other employment.
- \* You decided to go in the next day and were advised by the employer that you were considered to have quit.

(p. 1-2)

In giving his evidence, Nekleva disputed some findings of fact made in the Determination. He says he had been away from his work area for only a very short period of time. Nekleva says the foreman screamed at him. Nekleva also gave evidence about how he felt. While he initially testified that he had feelings of humiliation and anger, he ultimately agreed he was primarily angry with the foreman’s comment and conduct.

After the incident Nekleva went to the time clock and punched out before he went home. He testified that he left his tool box, his work boots and jacket at his work area. Further, Nekleva said that he left the site at approximately 8:00 a.m. He said that the “boss” did not usually arrive until after 9:00 a.m. He went home with the intention of returning the next day to talk to her about the incident.

I turn now to the Determination itself. The Determination says that when Nekleva arrived at work the following day he met the foreman. The foreman told him that the Company considered him to have quit. The Determination reads: “the employer state[ed] that he did not wish to fire you and that you left without prompting by him.” The Delegate set out the basis on which he examined the events:

It is settled that the right to quit is one that is personal to the employee. This right must be voluntarily exercised by the employee. The employee must both form the intention to quit and carry out some action inconsistent with the exception of continued employment.

The Delegate concluded that the foreman's comment and his standing near Nekleva's work area did not cause Nekleva to quit:

The issue of whether the foreman was trying to agitate you and cause you to quit is one that would require us to impute some intention on behalf of the foreman that was not expressed. There is no evidence to support that conclusion.

The Delegate found that on the balance of probabilities, the events indicated Nekleva intended to quit. This conclusion was supported by Nekleva's conduct that afternoon. When Nekleva arrived at home he went to Employment Standards to see whether suitable job opportunities were available. He sent applications by fax to several prospective employers.

## **ANALYSIS**

The Tribunal has consistently required both subjective and objective elements to the finding that employees have quit their employment. On the facts before me, I do not find either element indicates that Nekleva quit.

The issue was whether there was clear or unequivocal evidence that Nekleva intended to quit. When Nekleva left the worksite, he did not tell the foreman that he quit. Can it be inferred from what happened next that he quit? Nekleva left his tool box and his work clothes at the work area. He punched his time card as any employee would do. He returned to work the next day. This conduct is not consistent with quitting. It does not suggest that he had any intention to quit.

Equally possible, Nekleva was angry and decided to leave the worksite. Prior decisions of the Tribunal have recognized "emotional outbursts" by an employee. The Determination does not address the possibility that Nekleva leaving the worksite was no more than his anger with the foreman.

The Determination considered Nekleva's return to work on the following day from the foreman's perspective. The Determination reads:

The fact that you presented yourself for work the following day did provide an opportunity for your employer to condone your actions and continue the employment relationship; however, the employer declined to do so, rather the employer confirmed that he had construed your actions as a "quit".

How the Company construed Nekleva's actions does not determine Nekleva's intention to quit. The issue is an objective and subjective evaluation of Nekleva's return to work in the context of the entire incident. As noted above, leaving his tools and clothes at the work site and returning the next day on time to work do not suggest that he quit.

The Determination finds that "the act of faxing resumes to prospective employers that afternoon [after he left the worksite] is an action that is inconsistent with the expectation of continued employment." Nekleva testified that he had no idea of the possibilities of other employment. He says that he would not have quit the Company until he had other employment. He makes a valid point. More importantly, the Determination seems to acknowledge that the sending of resumes does not prove that he quit - it is only inconsistent with continued employment.

The Determination should be cancelled. Nekleva had been employed by the Company for over 12 months when this incident occurred. Section 63(2) of the *Act* provides Nekleva with two weeks wages for termination after this length of service. The matter is returned to the Delegate to meet with the parties and determine the amount owed to Nekleva.

**ORDER**

Pursuant to Section 115 of the *Act*, I order that the Determination dated August 18, 1997 be cancelled. Pursuant to Section 63 of the *Employment Standards Act*, Nekleva is entitled to two weeks wages with interest from the date on which his employment was terminated.

**Richard S. Longpre**  
**Adjudicator**  
**Employment Standards Tribunal**