

An appeal

- by -

Dr. D. Ciarniello Inc.  
(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* (as amended)

**TRIBUNAL MEMBER:** Yuki Matsuno

**FILE No.:** 2007A/152

**DATE OF DECISION:** March 3, 2008

## DECISION

### SUBMISSIONS

Dr. D. Ciarniello

for the Employer

Chantel Martel

for the Director of Employment Standards

### OVERVIEW

1. The Employer appeals a Determination of the Director of Employment Standards (the “Director”) issued November 2, 2007 (the “Determination”), pursuant to section 112 of the *Employment Standards Act* (the “Act”).
2. In the Determination, a delegate of the Director (the “Delegate”) found that the Employer had contravened section 63 of the *Act* when it did not give Deanne Veltri compensation for length of service upon termination of employment. The Delegate ordered the Employer to pay Ms. Veltri \$770.78, including resulting vacation pay under section 58 and interest calculated under section 88 of the *Act*.
3. The Delegate also imposed a \$500.00 administrative penalty on the Employer for contravening section 63 of the *Act*, as prescribed by section 29 of the *Employment Standards Regulation*. The total amount of the Determination is \$1270.78.
4. The Delegate dismissed Ms. Veltri’s claim for overtime pay, vacation pay, and statutory holiday pay.
5. The Determination was made after an investigation and a hearing regarding Ms. Veltri’s complaint, filed on February 22, 2007. The hearing into the complaint was held on June 27, 2007. Ms. Veltri did not attend the hearing, despite receiving notice. After waiting for one-half hour for Ms. Veltri to attend, the Delegate properly proceeded with the hearing in her absence. Mrs. Marianna Ciarniello, an employee of the Employer whose responsibilities include managing the office and preparing payroll, represented the Employer at the hearing. Ms. Velitchca Baudin, who works for the Employer as a Certified Dental Assistant, provided information at the hearing.
6. The Employer now appeals. In its appeal submission, the Employer indicates that an oral hearing is necessary, especially since Ms. Veltri did not appear at the hearing into this matter. I have reviewed the file and considered the Employer’s request. Given that a finding of credibility is not essential to the disposition of this appeal and no viva voce evidence is otherwise required, I will decide this appeal on the basis of the parties’ submissions and the Record. I have reviewed and carefully considered these documents in coming to my decision.

### BACKGROUND AND THE DETERMINATION

7. Ms. Veltri was employed as an assistant at a dental clinic operated by the Employer from January 24 to August 24, 2006, at a salary of \$3,000.00 per month. On August 24, 2006, at approximately 11:00 a.m., Ms. Veltri was assisting Dr. Ciarniello with a patient at the dental clinic when she was asked by Dr. Ciarniello to leave. There is a difference in views regarding the circumstances surrounding Ms. Veltri’s

departure. Ms. Veltri says in her complaint submission to the Employment Standards Branch that she was told to leave the workplace. At the hearing, the Employer's witness, Ms. Baudin, stated that Ms. Veltri was repeatedly shouting "What do you want me to do next" at Dr. Ciarniello a number of times before Dr. Ciarniello asked her to leave his side because the patient was getting upset.

8. Ms. Baudin stated that Ms. Veltri then left Dr. Ciarniello and walked towards the lunchroom area. She left the dental clinic shortly afterwards, with her personal belongings from her desk, including her coffee cup. Ms. Veltri had been scheduled to work the rest of that day, but did not return to work, nor did she call to indicate when she would return. Ms. Baudin stated that no one had time to call Ms. Veltri to inquire if she was coming in, but she was expected to return after lunch and the following day, as scheduled. Ms. Veltri did not report to work the next day (August 25), but called the clinic at approximately 2:00 p.m., just around closing time. Ms. Baudin did not talk to Ms. Veltri, but stated that both Dr. Ciarniello and the receptionist talked to her. The receptionist later told Ms. Baudin that Ms. Veltri asked when she was next scheduled to work; stated that she did not quit her job; and asked about her paycheque.
9. Mrs. Ciarniello stated that neither she nor Dr. Ciarniello called Ms. Veltri to inquire about her intentions. Ms. Ciarniello assumed, based on Ms. Baudin's and Dr. Ciarniello's version of events, that Ms. Veltri had quit, and proceeded to issue her a paycheque and Record of Employment.
10. In the Determination, the Delegate outlined the obligation under section 63 of the Act for the employer to provide the employee with compensation for length of service upon termination of employment. She pointed out that one way to discharge that obligation is for the employer to show that the employee quit her employment, and noted that this was the Employer's argument in this case. The Delegate also pointed out that the burden of proof is on the employer to show that the employee quit.
11. The Delegate proceeded to find that there was evidence the cumulative effect of which led the employer to conclude that Ms. Veltri quit (she walked out of the clinic in the morning of August 24 and did not return to finish her shift; she took her personal belongings with her when she left; she did not report to work the next day, although she was scheduled to work; she did not phone the clinic until the afternoon of the next day). The Delegate found, however, that Ms. Veltri did not intend to quit her employment. The Delegate based her conclusion on the evidence provided by Ms. Baudin, namely that Ms. Veltri indicated to the receptionist that she did not quit and wanted to know when she was next scheduled for work. The Delegate also found that when Ms. Veltri left the clinic with her belongings on August 24, she was simply reacting to the situation in the heat of the moment.
12. The Employer appeals the Determination on the grounds that the Delegate failed to observe the principles of natural justice in making the Determination. I have reviewed the Employer's arguments and they also suggest that the Delegate erred in law in determining that Ms. Veltri did not quit and that the Employer failed to comply with section 63 of the Act. Although the Employer did not check off this ground of appeal in its appeal form, I will proceed to consider the merits of its appeal on this ground as well as the enumerated ground of failure to observe the principles of natural justice. The Tribunal should not take a mechanical approach to appeals relying solely on the grounds of appeal that are indicated by the appellant on the appeal form; rather, it should take a large and liberal view of the appellant's explanation as to why the determination should be cancelled, varied or referred back to the Director: *Triple S. Transmission Inc.*, BCEST #D141/03.

## ISSUE

13. Did the Delegate err in law or fail to observe the principles of natural justice in making the Determination?

## ARGUMENT AND ANALYSIS

14. As the party bringing the appeal, the Employer has the burden of showing that the Determination is wrong and should be varied or cancelled. I have considered all the arguments of both parties and refer only to those which are relevant to the outcome of the appeal.

### *Failure to Observe the Principles of Natural Justice*

15. The Employer's arguments with respect to the failure to observe the principles of natural justice are that the Delegate did not have "sufficient direct information to make a fair and unbiased determination" because Ms. Veltri did not choose to attend the hearing; that Ms. Veltri's non-attendance deprived it of the opportunity to cross-examine her or get an explanation for her behaviour at the clinic on August 24, 2006; and that the hearing should have been rescheduled and Ms. Veltri subjected to a penalty for not attending the hearing.
16. The principles of natural justice concern themselves with procedural fairness. The basic components of the principles of natural justice are: the right to know the case against oneself and respond; the right to an unbiased decision maker who both hears and decides the case; and the right to receive reasons for the decision. In my view, none of the Employer's arguments point to a failure to observe the principles of natural justice. The Employer was informed of the case against it and had an opportunity to respond during the investigation stage and at the hearing. The hearing was not meant as an opportunity for the Employer to cross-examine Ms. Veltri and receive explanations from Ms. Veltri about what happened; rather, it was an opportunity for the parties to present their evidence to the Delegate and state their case. The Employer, who was represented by Mrs. Ciarniello at the hearing, had that opportunity. Ms. Veltri's absence from the hearing did not detract from the Employer's opportunity to respond fully to the allegations against it. Parties who do not attend a hearing are not subject to a penalty under the *Act*; rather, the hearing usually proceeds without their having an opportunity to present evidence. Finally, there is no evidence that there was bias on the part of the Delegate, and the Delegate provided reasons for her decision in the Determination.

### *Error of Law*

17. The Tribunal uses the test outlined in *Britco Structures Ltd.*, BC EST #D260/03 to determine whether an error of law has been made. An error of law could result from:
1. a misinterpretation or misapplication of a section of the *Act*;
  2. a misapplication of an applicable principle of general law;
  3. acting without any evidence;
  4. acting on a view of the facts which could not reasonably be entertained; and

5. adopting a method of assessment which is wrong in principle (in the employment standards context, exercising discretion in a fashion that is wrong in principle: *Jane Welch operating as Windy Willows Farm*, BC EST #D161/05).
18. The Employer's argument is that the Delegate was wrong, or in other words, the Delegate erred in law, in concluding that Ms. Veltri did not quit her employment but was terminated, and consequently, to conclude that the Employer breached section 63 of the *Act*. The Employer submits that Ms. Veltri was not fired and was not asked to leave the workplace. From the Employer's viewpoint, it was Ms. Veltri who chose to leave work on August 24<sup>th</sup>, taking her personal belongings with her; it was Ms. Veltri's choice not to return to work that day or the next day, even though she was scheduled to work; and it was Ms. Veltri who asked for her cheque on August 25<sup>th</sup>, even though it was not a pay day. The Employer's view is that it was reasonable for the Employer to assume, from observing Ms. Veltri's actions, that she had quit her employment. The Employer denies terminating her employment.
19. On the other hand, the Delegate says in her submissions that the Employer is merely rearguing the case it had presented at the hearing, namely, that Ms. Veltri quit her position. The Delegate says the Employer's argument is contrary to the evidence presented at the hearing. The Delegate urges the Tribunal to dismiss the appeal based on the fact that the Employer merely expresses disagreement with the findings and conclusions of fact made by the Delegate in the Determination.
20. From the Employer's point of view, it appeared that Ms. Veltri was not returning to work after she left the clinic on August 24<sup>th</sup>. According to its submissions, the Employer assumed, when she asked for her cheque, that Ms. Veltri was quitting her position. However, it is not the Employer's assumptions, or what is reasonable from the Employer's perspective, that determines whether or not an employee resigned. Rather, the law demands a broader perspective. As the Delegate cites in the Determination:

The right to quit is personal to the employee and there must be clear and unequivocal facts to support a conclusion that this right has been voluntarily exercised by the employee involved. There is both a subjective and objective element to a quit; subjectively, the employee must form an intent to quit employment; objectively, the employee must carry out an act inconsistent with his or her employment (*Burnaby Select Taxi* and *Zoltan Kiss*, BCEST #D91/96, reconsidered and upheld BCEST #D122/96).
21. The employee's intention to quit must be clearly communicated:

To be a valid and subsisting resignation, the employee must have clearly communicated, by word or deed, an intention to terminate their employment relationship and, further, that intention must have been confirmed by some subsequent conduct. In short, an "outside observer" must be satisfied that the resignation was freely and voluntarily given and represented the employee's true intention at the time it was submitted. (*RTO (Rentown) Inc.*, BCEST #D409/97).
22. In this case, the facts are not clear and unequivocal to support a conclusion that Ms. Veltri quit. At best, they are ambiguous. For instance, it is undisputed that Ms. Veltri took her personal possessions with her when she left the workplace on August 24<sup>th</sup>. The Employer interpreted this act as conduct that objectively showed Ms. Veltri was quitting her employment. However, this act could just as easily be interpreted as an indication that Ms. Veltri thought she had been fired from employment when told by Dr. Ciarniello to leave. The same could be said for Ms. Veltri's failure to attend work later on August 24<sup>th</sup> and on August 25<sup>th</sup>.

23. With respect to the subjective element necessary to find that an employee has quit, there simply was no clear communication by Ms. Veltri of an intention to quit. On the contrary, according to the evidence of the Employer's witness, she stated to the receptionist that she did not quit, and asked for her work schedule. In my view, an "outside observer" viewing these actions would not be satisfied that Ms. Veltri intended to resign.
24. I find no error of law in the Delegate's conclusion that Ms. Veltri did not quit her employment and that as a result, the Employer is liable for compensation for length of service.
25. Since the Employer has not shown that the Delegate erred in law or failed to observe the principles of natural justice in making the Determination, I dismiss the Employer's appeal.

### **ORDER**

26. Pursuant to Section 115 of the *Act*, I order that the Determination dated November 2, 2007 be confirmed in the amount of \$1,270.78, together with any interest that has accrued under Section 88 of the *Act*.

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**Yuki Matsuno**  
**Member**  
**Employment Standards Tribunal**