

An appeal

- by -

Weeks Insurance Services Inc.
("Weeks")

- 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

ADJUDICATOR: Michelle Alman

FILE No.: 2000/534

DATE OF HEARING: November 17, 2000

DATE OF DECISION: February 2, 2001

DECISION

APPEARANCES:

Jack E. Zimmer and Dianna Johnsen Zimmer, for Weeks Insurance Services Inc.

Charmaine Stevenson, for herself

OVERVIEW

This decision addresses an appeal filed pursuant to Section 112 of the *Employment Standards Act* (the "Act") by Weeks Insurance Services Inc. ("Weeks") from a Determination issued July 11, 2000 by a delegate of the Director of Employment Standards ("the Director"). The Determination concluded that Weeks owed its former employee, Charmaine Stevenson ("Stevenson"), one week's pay as compensation for length of service, plus vacation pay on that amount.

PRELIMINARY ISSUE

A preliminary issue arises in this case as to the admissibility of evidence and written submissions delivered by Stevenson following the closing date for exchanges in this appeal. Because the additional evidence is not relevant to the main issue in the appeal, I decline to consider any evidence or submissions delivered to the Tribunal after November 3, 2000.

I further note that in her August 22, 2000 written reply to the Weeks appeal, Stevenson asks the Tribunal to review the amount of vacation pay the July 11, 2000 Determination stated she was owed by Weeks. The Determination concluded that Weeks was late in making payment for vacation pay owing to Stevenson, but that all vacation pay owed to Stevenson, other than vacation pay owed on her compensation in lieu of notice of termination, eventually had been paid. Stevenson states in her August 22, 2000 submissions that she believes this is incorrect and that she is owed further vacation pay. Stevenson did not file a timely appeal from the July 11, 2000 Determination and only raised the issue in her reply to the Weeks appeal. I therefore decline to address that additional issue.

ISSUE

The issue to be decided is whether Stevenson was fired from her employment with Weeks, such that she is owed one week's wages as compensation for length of service, or whether she resigned and is owed no compensation for length of service.

Weeks is an insurance sales business owned and operated by Jack E. Zimmer ("JZimmer") and his wife, Dianna Johnsen Zimmer ("DZimmer"), in White Rock. Stevenson began

employment with Weeks on May 10, 1999 as a customer service representative with a General Salesperson Level 1 license. This level of licensed insurance salesperson is covered by the provisions of the *Act*.

Weeks employs only a small number of agents. Stevenson was hired to work primarily on AutoPlan policies, though she also had shared responsibility with other employees for handling matters related to other forms of insurance. After a three-month probationary period, Stevenson was confirmed in late August, 1999 as a full-time employee with benefits, despite some on-going issues DZimmer had with Stevenson's demeanour. Stevenson was also given half of her promised raise in recognition of her efforts to improve her work performance. The second half of Stevenson's promised raise was withheld pending another review of her performance at a later date.

Following her confirmation as a permanent employee, Stevenson moved to the White Rock area in early October, 1999 in order to be closer to work. She had requested the second half of her raise in late September so as to be able to meet her increased living expenses from the relocation. DZimmer testified that from sympathy for Stevenson, she decided to give Stevenson that raise at the end of the first pay period in October, 1999.

In early October, 1999, Stevenson also sought to obtain from JZimmer a form to allow her to seek compensation from the company's medical insurance plan for some of her prescription medications. JZimmer and DZimmer both gave evidence to the effect that the medical plan Weeks had enrolled in required employers to review employees' receipts prior to their submission to the plan. This was, apparently, the plan's effort to save administrative expenses by having the employers rather than the plan verify that reimbursement requests were for covered items. When JZimmer discussed this with Stevenson in early October, 1999, she did not submit her receipts to him because she did not wish to disclose her prescription medication information to her employers. She persisted, however, in asking for a form so that she could submit her receipts directly to the plan.

On October 15, 1999 Stevenson's employment with Weeks ended. There is conflicting evidence as to precisely what occurred between Stevenson and the Zimmers on that date. The parties agree that DZimmer spoke with Stevenson at some point during that day to ask her to keep down her conversations with another employee, Diana Mills ("Mills"). The parties also agree that DZimmer asked Stevenson if she was going to turn in her prescription receipts to DZimmer to review and submit to the medical plan. The parties disagree as to the time or times when those comments were made, but that disagreement is irrelevant to the main issue. Stevenson's evidence is that she found DZimmer's comments upsetting. She left the office at least once during the afternoon to attend to some work-related banking, and testified that when she returned, JZimmer asked her to come into his office to speak with him and DZimmer. Stevenson stated that she presumed they wanted to press her about turning over her prescription receipts, and that she felt defensive. She testified that she also felt that the Zimmers had been giving her constant verbal reprimands, and that because she was aware

of the requirements of the *Act*, she wanted whatever further criticisms the Zimmers might have to be made in writing.

The parties agree that when called to JZimmer's office, Stevenson refused to be seated. The parties also agree that instead of having any discussion with the Zimmers, Stevenson told them repeatedly, "Put it in writing," and, "This is verbal harassment." The parties further agree that JZimmer asked Stevenson, "You aren't going to speak with us?" and that Stevenson confirmed that she would not. At that, the parties agree that JZimmer asked Stevenson for her key to the office. The parties also agree that this request occurred just outside the door to JZimmer's office, and that the door to the office was not closed during the conversation.

According to Stevenson, after JZimmer requested her key, she went to her desk, gave her office key to JZimmer, cleared out her few personal belongings, and left. Stevenson testified that only once, upon walking out the door, did she say to DZimmer, "You have 48 hours to pay me." Stevenson believes the entire conversation took about ten minutes, and that no one raised his or her voice. Stevenson provided as support for her version of the events a letter dated November 2, 2000 from Mills. Mills was not called to testify. Mills's letter states that it represents what she heard on October 15, 1999. The letter states that on October 15, 1999 Stevenson had a meeting with DZimmer in the morning, and that Stevenson subsequently told Mills what DZimmer had said to her. Mills also writes that she saw the Zimmers go into the office, and that they later came out and asked Stevenson to come into the office. Mills writes that Stevenson replied, "Anything you have to say you can put in writing. I am tired off by [sic] harassed." Mills later in the letter reports that JZimmer asked Stevenson for the key to the office, and that Stevenson "handed them the key and said she wanted her money." Mills's letter is clearly hearsay, and contains double-hearsay and opinions. I take no notice of the opinion evidence expressed in the letter, and because it is hearsay, accord its factual reports little weight. I note that in any event, the letter does not report that Mills heard any of the disputed parts of the conversation between Stevenson and the Zimmers.

DZimmer's and JZimmer's evidence is that when they wanted to speak with Stevenson on October 15, 1999, they were not concerned so much about her prescriptions as about what they perceived to be her increasingly erratic and prolonged absences from the office during the workday. JZimmer gave evidence that when he asked Stevenson to be seated, she refused and said, "No, I'm not going to take any more. This is verbal harassment." He testified that he then said, "What are you talking about, we just want to talk to you." JZimmer stated that Stevenson then repeated that she "was not going to take any more," and told him, "Put it in writing. I want my money within 48 hours." JZimmer again asked Stevenson what she was talking about, and he testified that Stevenson said, "I'm out of here," and repeated her demands that he put things in writing and pay her within 48 hours. At that, JZimmer says he told Stevenson something like, "Well, if it's come to this, give my your keys and clear your desk and we'll send you your papers and cheque within the required time." He stated that he did not understand what had happened, and that the entire conversation had

taken only two minutes or less. JZimmer testified that Stevenson did not say she quit, but that he understood her to have quit. He also gave evidence that the parties were not shouting though their voices may have been "higher than normal." This evidence was contrary to the submissions made on behalf of Weeks by DZimmer to the effect that Stevenson had become "hysterical" and had "yelled" and quit her job. JZimmer further said that the conversation had taken place with the door to his office open, and that after Stevenson cleared her desk and left, Mills asked him what had happened. He testified that he replied, "Your guess is as good as mine."

DZimmer in her evidence largely confirmed JZimmer's account of the events of October 15, 1999. DZimmer said that when JZimmer asked Stevenson to be seated, Stevenson refused and said, "I don't have to take this any more, this is verbal harassment." DZimmer said she asked Stevenson, "What are you talking about, Jack just asked you to have a seat; we just want to talk to you. DZimmer testified that she felt Stevenson was shouting when Stevenson replied, "This is verbal harassment, I don't have to take this, I'm out of here." DZimmer also testified that Stevenson said and repeated, "Put it in writing, and I want my money within 48 hours." After that, DZimmer testified that Stevenson left the office, and that JZimmer asked Stevenson for her key when Stevenson was just outside of his office. DZimmer thought that the conversation in the office took five minutes or less, and that the whole thing was done with in ten minutes or less. She also stated that after Stevenson left, Mills asked her what happened, and that she replied to the effect that Stevenson had quit and that it was really odd or bizarre.

DZimmer testified that she had to work on the following day, a Saturday, in Stevenson's place, because October is Weeks's busiest month for the AutoPlan work Stevenson had been doing. DZimmer stated that on coming in to work, she found that Stevenson had left a message on the office answering machine the previous evening to say that she wanted her final pay forthwith, and to call her if DZimmer wanted to speak with her. DZimmer stated that she called Stevenson's home and left a message in reply to the effect that she would mail Stevenson her Record of Employment ("ROE") and final pay cheque. Stevenson in her written reply submissions denied that she received any reply from DZimmer, and stated that she had called DZimmer a week later to discuss picking up her money and separation slip. DZimmer denied that she ever had any direct conversation with Stevenson after October 15, 1999 until the date of hearing. On cross-examination, Stevenson said she called to speak with DZimmer on the Monday after her employment ended. She agreed she was changing her assertion as to when she had called to speak with DZimmer, but insisted that she had spoken with DZimmer.

Decisions from the Courts and this Tribunal have held that an employee's right to quit his or her employment is personal. An employee has to make up his or her own mind that he or she is quitting a job, and the employee must somehow objectively demonstrate that decision, as for example, by offering a letter of resignation. The employee's objective act must be one that is inconsistent with the continuation of the employment. Stating the words, "I quit," or

their equivalent, such as, "I'm out of here," could also be an objective demonstration of the intention to resign, if coupled with a cessation of the employee's attendance at work or communication with the employer. See, e.g., *Wilson Place Management Ltd. (c.o.b. Wilson Place)*, BC EST #D047/96 and the discussion in *Maple Ridge Travel Agency Ltd.*, BC EST #D273/99. If, however, the words, "I quit," or "I'm out of here," take place in the course of a heated argument, Courts, labour arbitrators, and this Tribunal have declined to accept those words as an indication of a true intention on the employee's part to leave employment. As was said in the *Maple Ridge* decision, *supra*,

I agree with the adjudicator in RTO (Rentown) Inc., BCEST #D409/97:

“Both the common law courts and labour arbitrators have refused to rigidly hold an employee to their “resignation” when the resignation was given in the heat of argument. To be a valid and subsisting resignation, the employee must clearly have 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 and represented the employee’s true intention at the time it was given.”

The most significant fact in dispute in this case is whether in the course of the brief, rapid and tense exchange between the parties Stevenson said to the Zimmers, "I'm out of here." Stevenson denies ever saying that, while JZimmer asserts he clearly recalls her making that statement before he asked her for the office key. Another significant difference in the parties' evidence is the timing and frequency of Stevenson's demand to be paid within 48 hours. Stevenson asserts she made the demand only once just as she was leaving the office. The Zimmers assert that she made the demand repeatedly in the exchange before she was asked to turn over her office key and clear out her desk. JZimmer testified that it was Stevenson's refusal to engage in a discussion with her employers, coupled with her alleged statement, "I'm out of here," and her allegedly repeated demands to be paid her money within 48 hours which led him to conclude she had quit. After that, he stated that he asked her for the office key because he believed she had quit.

In assessing this conflicting evidence given at the hearing by Stevenson and the Zimmers, I apply the test set out by the B.C. Court of Appeal in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 356-357 (B.C.C.A.):

The credibility of interested witnesses, particularly in cases on conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing

conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

Here, JZimmer's assertion is that Stevenson quit **before** JZimmer asked her for her office key, in part because Stevenson repeatedly demanded to be paid within 48 hours. Only an employee who is fired, however, can assert for the right to be paid all monies owing within 48 hours of the employee's termination. Stevenson testified that she was familiar with the provisions of the *Act* relating to payment of monies following termination; this evidence was not contested or questioned. It would only make sense for Stevenson to demand payment of monies owed to her within 48 hours if she believed she was being fired. Stevenson also testified that she never intended to quit her job, and that although she was defensive about being called in to speak with the Zimmers, she did not yell when refusing to discuss any matters with her employers on October 15, 1999. This latter point was supported by JZimmer's evidence, though he believed voices may have been raised. Stevenson testified that she did not ask to be paid within 48 hours until she was leaving the office, which would make sense if events unfolded as she testified. On balance of probabilities, I therefore conclude that Stevenson did not intend to quit her employment with Weeks on October 15, 1999, and that she was fired.

I hasten to point out that both of the Zimmers and Stevenson gave their evidence in credible fashion. I believe, however, that the parties were in a tense state at the opening of the exchange between them, though for entirely different reasons. That tension combined with the brevity, rapidity, and shock of the events, as well as the passage of time, are more responsible in my opinion for the discrepancies in the parties' versions of events than is any dishonest intention on any of their parts. It is indeed unfortunate for the parties that the Weeks medical plan provisions caused Stevenson to feel such anxiety that she reacted as she did to the Zimmers' request to meet with them for a discussion on October 15, 1999.

Section 18 of the *Act* states:

If employment is terminated

18 (1) An employer must pay all wages owing to an employee within 48 hours after the employer terminates the employment.

(2) An employer must pay all wages owing to an employee within 6 days after the employee terminates the employment.

And section 63(1) of the *Act* states:

Liability resulting from length of service

63 (1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.

Because I have concluded that Stevenson did not quit her employment but was fired, and because she worked for Weeks for more than three consecutive months, I conclude that Stevenson is owed one week's wages as compensation for length of service in accordance with the provisions of section 63(1) of the *Act*.

ORDER

Pursuant to section 115 of the *Act*, I hereby confirm the Determination issued July 11, 2000, plus additional interest owed further to section 88 of the *Act*.

MICHELLE ALMAN

**Michelle Alman
Adjudicator
Employment Standards Tribunal**