

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 -

T. M. Engineering Ltd.
("T.M.E.")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 97/859

DATE OF HEARING: January 23, 1998

DATE OF DECISION: February 3, 1998

DECISION

APPEARANCES

Tonino Mariutti on behalf of T. M. Engineering Ltd.
Lynda Whittle on her own behalf

OVERVIEW

This is an appeal by T. M. Engineering Ltd. (“T.M.E.”), under Section 112 of the *Employment Standards Act* (the “Act”), against a Determination which was issued on November 13, 1997 by a delegate of the Director of Employment Standards.

The Director’s delegate found that T.M.E. had terminated the employment of Lynda Whittle without notice and without just cause and, therefore, owed her compensation for length of service (under Section 63 of the *Act*) in the amount of \$3,928.15 plus interest (calculated pursuant to Section 88 of the *Act*). T.M.E.’s appeal is based on its submission that Mrs. Whittle resigned her employment and, therefore, is not owed compensation for length of service.

A hearing was held at the Tribunal’s offices on January 23, 1998 at which time evidence was given under oath. Witnesses were excluded from the hearing room until they were called to give their evidence.

ISSUE TO BE DECIDED

The sole issue to be decided in this appeal is whether Mrs. Whittle’s employment was terminated by T.M. Engineering Ltd. or by her resignation on June 28, 1996.

UNDISPUTED FACTS

The following facts are not in dispute:

- Mrs. Whittle was employed by T.M.E. as a bookkeeper/secretary from June 10, 1991 to June 28, 1996 during which time she was the sole full-time member of the administrative staff.
- Her salary in 1996 was \$3,000.00 per month plus a bonus of \$270.00 or \$285.00 per month.
- June 28, 1996 was a Friday. July 1, 1996 was a Monday and a statutory holiday. The next business day after June 28, 1996 was July 2, 1996.

- Mrs. Whittle had absented herself temporarily from the workplace on several occasions during her employment as a result of “disagreements” between her and the firm’s president, Mr. Tonino Mariutti.
- T.M.E. manufactures high-precision machinery for the mining industry around the world.
- Mr. Tonino Mariutti is the “operating mind” of the business and spends a considerable portion of his time in the manufacturing shop and some of his time in the office, which is in the same building.
- Mrs. R. Mariutti and Ms. L. Mariutti also provide administrative support to the business.
- Mrs. Whittle was paid her regular salary for the month of June, 1996 (\$3,000.00/month) plus vacation pay, statutory holiday pay and 3 additional days wages which she was owed.

TESTIMONY CONCERNING JUNE 28, 1996

Mr. T. Mariutti’s testimony

According to Mr. Mariutti’s evidence in chief, the incident giving rise to this appeal began when he asked Mrs. Whittle to enlarge a copy of certain technical drawings before faxing them to a customer and she did not do so. He testified that he told Mrs. Whittle: “I’m not asking you why you won’t do it, I’m asking you to do it. Please do it.” It was at this point, he testified, that Mrs. Whittle, “...was not sent away” and that “he...did not force (her) to walk off the job.”

After giving his evidence in chief and making certain submissions I asked Mr. Mariutti to recount, to the best of his recollection, the discussion which took place between him and Mrs. Whittle at approximately 9:30 a.m., June 28, 1996. He gave the following evidence:

I went into the office. Lynda showed me a fax of technical drawings to be sent to Barrack Gold Mines in Nevada (Attention: Doc Kellenberger). The business deals with precision parts and very specific tolerances; often small fractions or thousandths of an inch.. I told Lynda: “Let’s enlarge them before we send them.” She replied: “I don’t think that’s necessary.” I said: “I’m not here to discuss if it’s necessary.” Lynda said: “I don’t have to do that. I don’t need to do that.” Lynda then swore at me, picked up her purse and took off. Nothing further was said to each other.

Mr. Mariutti also testified that he received a telephone call from Mrs. Whittle’s husband, John Whittle, during the afternoon of June 28, 1996: “...probably mid-afternoon; I’m guessing between 2:00 p.m. and 3:00 p.m.” He testified, further, that Mr. Whittle told him that his wife was upset and that the message on his telephone answering machine was unclear. Mr. Whittle then asked Mr. Mariutti what had happened and “...I told him that Lynda left her job in the morning.” When Mr. Whittle asked him: “has she been

fired?”. Mr. Mariutti testified that he told Mr. Whittle: “She is free to do what she wants.”

Mrs. R. Mariutti’s testimony

Mrs. Mariutti testified that she was in the office when her husband came into the office and asked Mrs. Whittle to enlarge a specification or drawing and to send it to a customer. She testified, further, that she could not recall what Mrs. Whittle said in replying to Mr. Mariutti, but that he repeated the order forcefully and said: “please enlarge this and send it.” It was at this point that Mrs. Whittle swore, stood up and walked out. According to Mrs. Mariutti, her husband was very surprised by Mrs. Whittle’s words and actions, but there was no further exchange of words. After Mrs. Whittle left the office, Mrs. Mariutti sent the fax to the customer, but she could not recall in her testimony to whom or where she sent it.

Mrs. Mariutti also testified that her daughter, Laura, answered the telephone later that day and passed the caller, Mr. Whittle, to her. Mr. Whittle asked her what had happened and where his wife was. He also asked to speak to Mr. Mariutti. Mrs. Mariutti “...went to get (her) husband” at that point. He spoke to Mr. Whittle.

Ms. L. Mariutti’s testimony

Ms. Mariutti’s evidence was given very briefly. She testified that at approximately 9:30 a.m. Mr. Mariutti asked Mrs. Whittle to enlarge a “...diagram or line drawing of a machine in our brochure” prior to faxing it to a customer. He then repeated the request “...more firmly - in a louder tone.” According to Ms. Mariutti, Mrs. Whittle replied: “I don’t have to do this. I don’t have to take this.” Mrs. Whittle then swore and walked out of the office “...just like on other occasions.” Ms. Mariutti also recalled that she and her mother were upset because Mrs. Whittle was scheduled to receiving computer software training on that day, and it was a “very busy time” for the company.

Mr. Lawrence Wong’s testimony

Mr. Wong is employed as a CAD drafting technician by T.M.E. He testified that he was working at his computer on the morning of June 28, 1996 and became aware of “...a problem with a fax being sent out.” He also recalled that Mr. Mariutti was upset, that he “exchanged words” with Mrs. Whittle and that he (Mr. Mariutti) raised his voice. When I asked him to be more precise, Mr. Wong testified that he “...he could not recall the exact words”, nor could he recall “...who said what to whom”, nor could he recall “...anything said by Mrs. Whittle or Mr. Mariutti.”

Mr. Wong also testified that he could recall answering the telephone on one occasion when Mr. Whittle asked to speak to Mr. Mariutti. On that occasion, which he thought was possibly on July 2, 1996 “he went to the shop to ask Mr. Mariutti to come to the telephone.”

Mrs. Whittle's testimony

Mrs. Whittle testified that her conversation with Mr. Mariutti and her actions on June 28, 1996 arose out of and followed several earlier telephone calls from a particular customer in Arizona. The customer had called two or three times earlier that week concerning the dimensions of a particular machine which T.M.E. manufactured and sold. According to Mrs. Whittle, Mr. Mariutti had been reluctant to disclose that information in the past and she was checking with Mr. Mariutti to see if she could give this information to the customer. She had gone to the shop to ask Mr. Mariutti and their conversation began there. They returned to the office while their conversation was taking place. Mrs. Whittle testified that the brochure describing the machine contained a small diagram and, to make it more legible on the fax, she suggested drawing it on a larger scale because it was a simple line drawing.

Mrs. Whittle testified that she "...was intending to make helpful suggestions and was not refusing to follow orders." However, according to Mrs. Whittle, Mr. Mariutti had been "agitated" earlier that morning and had "yelled at his wife" concerning a foreign bank transfer which had not arrived. She also testified that he became increasingly agitated during their conversation about the information requested by their customer in Arizona.

It was at that juncture, according to Mrs. Whittle's evidence, that the following exchange of words occurred.

LW: "Don't yell at me, Tony!"

TM: "I can yell at you!"

LW: "Don't yell at me!"

TM "Get out!" (pointing at the door)

Mrs. Whittle stated that that was the first time that Mr. Mariutti had told her to "get out." On numerous previous occasions, she testified, she had left the office as a behaviour modification / anger management technique recommended by her physician. She also testified that the reason she swore was because "...he ordered me out." It was at that point that she "grabbed her purse, walked out and drove straight home" to call her husband and to tell him that "Tony ordered me out." She did not remove her personal belongings from her desk.

When Mrs. Whittle spoke with her husband, she testified, he asked her if she had been "fired" and she told him that she didn't know. Mr. Whittle agreed to call Mr. Mariutti to ask him if his wife had been "fired". Mrs. Whittle testified that she then went to visit her grandmother and her husband called her there after he had spoken to Mr. Mariutti by

telephone. Mr. Whittle told his wife that she was “fired” because Mr. Mariutti had told him that she “...can’t go back to work.”

When her husband gave her that information, Mrs. Whittle testified, she realized that T.M. would “...have to give me my final pay cheque” and that she was the only person who knew how to operate the computerized payroll system. For that reason, she testified, she sent a lengthy fax to Mr. Mariutti on July 2, 1996 to provide instructions and to set out her understanding of what wages she was owed.

Mr. Whittle’s testimony

Mr. Whittle testified that when he telephoned T.M. during the morning of June 28, 1996 Lawrence Wong answered it and he asked to speak to Mr. Mariutti. He then asked Mr. Mariutti if Mrs. Whittle had been “fired” and was told “Yes, she will not be returning to work.” According to Mr. Whittle, he tried to call his wife at home but she was not there so he called her at her grandmother’s home to tell her that “...Tony confirmed to you that you have been fired.” Mr. Whittle also testified that his telephone conversation with Mr. Mariutti on June 28th was the only time that they spoke on this topic and he has never spoken to Mr. Mariutti again since that conversation. He reiterated that testimony when questioned about it by Mr. Mariutti and stated emphatically that he did not speak to Mr. Mariutti at any time about a proposed settlement agreement.

ANALYSIS

Section 63 of the *Act* creates a liability for employers to pay an employee compensation for length of service. The amount of compensation to which an employee is entitled increases with each year of consecutive employment to a maximum of 8 weeks wages. An employer’s liability is deemed to be discharged (Section 63(3) of the *Act*) if the employee is given written notice, resigns, retires or is dismissed for just cause.

In this appeal, T.M.E. argues that Mrs. Whittle resigned her employment voluntarily. It, therefore, does not argue that it had just cause to dismiss her and states expressly that it did not terminate her employment. This is the same position that it submitted to the Director’s delegate during her investigation of Mrs. Whittle’s complaint.

It is trite law that the appellant (T.M. Engineering Ltd. in this appeal) bears the onus of establishing that the Determination is wrong or defective and, therefore, should be varied or cancelled.

The Director’s delegate decided in the Determination that, on the balance of probabilities, she preferred Mrs. Whittle’s account of how her employment came to be terminated. She also found that Mr. Mariutti had not provided her with any evidence to show that Mrs. Whittle had resigned her employment voluntarily. Those findings led her to determine that Mrs. Whittle was entitled to compensation for length of service under Section 63 of

the *Act* and she required T.M.E. to pay an amount equivalent to five weeks wages, plus interest. The Director's delegate described at length the results of her investigation and an analysis of her findings in the Determination.

I have reviewed in detail that analysis as well as the written submissions on behalf of T.M.E. and Mrs. Whittle. I have also given careful consideration to the evidence which was given at the hearing. As is often the case in appeals such as this, there are considerable differences in the witnesses' recollections. Where there is a conflict in evidence, the views of the late Mr. Justice O'Halloran of the British Columbia Court of Appeal in *Faryna V. Chorny*, (1952) 2 DLR 354 (BCCA) have been widely accepted. He made the following comments on how issue of credibility ought to be assessed by a decision - maker:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor 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. ...(pp.356-57)

As noted above, the issue which I must decide is whether Mrs. Whittle resigned or whether her employment was terminated by T.M.E. on June 28, 1996. The appropriate test for deciding such matters, which the Tribunal has adopted (see: *Burnaby Select Taxi Ltd.*, BCEST #D091/96) is as follows:

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 an 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 further employment

(at page 9)

I note that the Director's delegate adopted that test in making her determination.

Did Mrs. Whittle resign ("quit") her employment?

When I review the findings and the analysis made by the Director's delegate I cannot see any statement or action by Mrs. Whittle which supports a finding that she intended to resign her employment. Mr. Mariutti submits that Mrs. Whittle's fax of July 2, 1996 supports a finding that she resigned. I disagree. Her fax message requests (at page 1)

severance pay based on five years of employment. It also shows (at page 7) that she believed that she was “fired” at 9:30 a.m. on June 28, 1996.

When I review the parties’ written submissions and the oral evidence which I heard I am persuaded, on the balance of probabilities, that Mrs. Whittle’s recollection of what transpired on June 28, 1996 is “in harmony with the preponderance of the probabilities.” I note that several important points in Mrs. Whittle’s testimony were not refuted. Mr. Mariutti had yelled at her on many occasions in the past. Her strategy for dealing with such situations was to tell Mr. Mariutti not to yell at her and to remove herself from the office. Mr. Mariutti was “agitated” on the morning of June 28th and had yelled at his wife about a foreign bank draft. Mrs. Whittle went to the shop to seek Mr. Mariutti’s permission to release certain information to a customer - information which he had been reluctant to release in the past.

I find that several of Mrs. Whittle’s actions indicate clearly that she did not intend to resign employment. In addition, She did not say “I quit” nor any other words which would convey that meaning. Instead, Mrs. Whittle left the office and went directly home to telephone her husband. As a result of that conversation, Mr. Whittle called Mr. Mariutti to find out if his wife had been “fired”. Those actions, following as they did immediately after the heated exchange between Mrs. Whittle and Mr. Mariutti, do not support a finding that Mrs. Whittle intended to resign her employment. I note also that Mrs. Whittle did not remove her personal belongings from her desk before leaving the office.

In short I find that Mrs. Whittle did not intend to resign and did not act in a manner that would support a conclusion that she was exercising her right to terminate her employment.

On the contrary, I find that the facts support a conclusion that Mr. Mariutti terminated Mrs. Whittle’s employment on June 28, 1996. In particular, Mr. Whittle’s direct evidence concerning his telephone conversation with Mr. Mariutti taken together with Mrs. Whittle’s testimony that Mr. Mariutti told her to “Get out” support this finding. In addition, Mr. Mariutti’s statement in his fax of July 2, 1996 [“...this time, by swearing and insulting behaviour, there is no reconsideration at reaccepting you” (sic)] is consistent with a finding that the employment relationship was terminated by the Employer. Also, the Employer’s conditional offer on July 2, 1996 to pay severance pay only if Mrs. Whittle agreed to sign a waiver and release would not be consistent with a finding that she had resigned her employment on July 2nd and is not in harmony with Mr. Mariutti’s testimony that he told Mr. Whittle that Mrs. Whittle “...had left her job in the morning” and that she was “...free to do what she wants.” In my opinion, if Mr. Mariutti had expected Mrs. Whittle to return to work on the next business day, as she had done on several previous occasions, he would have said so to Mr. Whittle.

For all of the above reasons I find that Mrs. Whittle’s employment was terminated by T.M.E. on June 28, 1996 without notice and without compensation for length of service.

ORDER

I order, under Section 115 of the *Act*, that the Determination be confirmed and that T.M. Engineering Ltd. pay compensation to Mrs. Whittle in the amount of \$3,928.15 plus interest in accordance with Section 88 of the *Act*.

Geoffrey Crampton
Adjudicator
Employment Standards Tribunal

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