

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 -

A – Ztech Electronic Services Ltd. operating as A-Ztech/RAC Electronics
(" A-Ztech ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Carol Roberts

FILE No: 2000/8

DATE OF HEARING: March 8, 2000

DATE OF DECISION: March 9, 2000

DECISION

APPEARANCES:

For A-Ztech: J. M. Dowse, B. Dowse

For Janice McCondach: Representing herself

No one appeared for the Director

OVERVIEW

This is an appeal by A-Ztech Electronic Services Inc. operating as A-Ztech/RAC Electronics ("A-Ztech"), pursuant to Section 112 of the Employment Standards Act ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued December 15, 1999. The Director found that A-Ztech contravened Section 63 of the Act in failing to pay Janice McCondach ("McCondach") compensation for length of service in lieu of notice, and Ordered A-Ztech to pay \$423.45 to the Director on her behalf.

ISSUES TO BE DECIDED

At issue on appeal is whether the Director erred in determining that McCondach is entitled to compensation for length of service.

FACTS

McCondach was employed by A-Ztech as a receptionist from July 26, 1997 to July 12, 1999.

On Friday July 9, following the end of her shift, McCondach gave A-Ztech two weeks written notice of her intention to quit her employment. When she arrived at work on Monday, July 12, Mick Dowse ("Dowse"), the owner of the business and her supervisor, approached her, and asked her for an explanation as to why she was quitting just before he and his wife were going to take holidays.

The evidence of the parties on what happened next differs.

Dowse says that McCondach is a volatile person who becomes upset very easily, and that she "blew up" at him. He acknowledged that he was angry with her because she quit just before he was scheduled to take holidays, and because she quit he could no longer do so, but he denied that he had shouted at her. He says that because she was upset and angry, he sent her home to calm down. He says that he fully expected her back the following day. When she did not return, he assumed she had quit. He says that he did not call her at home to ask her whether she was returning or not because he had no obligation to do so, and furthermore, there was no point because of her volatile personality.

McCondach did not dispute the delegate's recitation of her evidence, which was that Dowse was verbally abusive to her that morning, complaining that he was unable to go on holidays because she was leaving. McCondach asked Dimitry Bogachek, a technician, to witness what Dowse was saying. Bogachek did, and Dowse repeated what he had said earlier. McCondach says that Dowse pointed to the door and told her to "go - go now."

McCondach also did not dispute the delegate's finding that Dowse did not use the words "you're fired" or "you're terminated." However, McCondach concluded that she was fired, based on Dowse's words and conduct, and went home.

A-Ztech completed McCondach's Record of Employment (ROE) indicating that McCondach had quit. The delegate found that the ROE had been completed on July 12. Accompanying the ROE was McCondach's final pay cheque, also dated July 12.

After reviewing the evidence of McCondach and Dowse, and after hearing the evidence of Bogachek, the delegate determined that McCondach was terminated. He arrived at this decision based on McCondach's return to work on Monday, after having given 2 weeks notice of quitting, as evidence of her desire to continue to work through the notice period.

The delegate further determined that A-Ztech issued McCondach her ROE on July 12, the same day as the incident described above.

The delegate found that because McCondach had asked Bogachek to witness the conversation between her and Dowse, McCondach had found the discussion threatening or offensive. The delegate found Bogachek to be a credible, non interested party, and relied on his corroboration of the events that morning to determine that McCondach had been fired without just cause and without written notice.

The delegate found that McCondach was entitled to two weeks compensation for length of service, vacation pay and interest.

ARGUMENT

Dowse contended that the Director's delegate was biased, and that he had prejudged the issue. He alleges that the delegate came into the offices of A-Ztech appearing to have his mind made up.

Dowse further alleges, as I understand the argument, that the delegate's decision is perverse, in that the conclusions are not supported by the evidence. Dowse further argues that the delegate made several factual errors which led to an incorrect conclusion.

Dowse says that McCondach had already notified A-Ztech that she intended to take July 21 and 22 off, and that the delegate's conclusion that she intended to continue to work through her notice period was in error. He also says that the delegate erred in finding that the ROE was completed on July 17, not July 12.

In his written letter of appeal, Dowse alleged that McCondach was terminated due to breach of contract and insubordination. However, at the hearing, he contended that McCondach quit, since she did not return to work.

Dowse argues that while he did not attempt to contact McCondach when she did not come back to work the following day, McCondach did not attempt to contact him either.

A-Ztech also submitted a letter from Bogachek in support of the appeal. Bogachek states that he did not hear the outset of the conversation, but when asked by McCondach to be a witness to the events, he observed McCondach to be quite upset and agitated. He also stated that Dowse, when asked by McCondach to repeat what he told her said, said "Janis (sic), you better go home now." His evidence was that Dowse, while reserved, was also upset.

DECISION

An appellant has the burden of establishing that a determination is in error. Based on the evidence and submissions before me, I am not persuaded that the appellant has discharged that burden.

A-Ztech alleges, firstly, that the delegate was biased, and, as I understand it, the entire decision ought to be set aside on that ground. No evidence but the determination itself was put forward in support of that position.

The rule against bias is one of the principles of natural justice. The standard test of bias is that of a "reasonable apprehension", as outlined by the Supreme Court of Canada in *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369 . The form of bias alleged in this instance is that of attitudinal bias, which is based on the personal characteristics of the decision maker. Behaviour which might constitute bias include hostile questioning of a party, or public comments on a case prior to or during the course of an investigation. (see also *Milan Holdings Inc. v. British Columbia (Director of Employment Standards)* B.C.E.S.T. D559/97)

The determination shows that the delegate spoke to McCondach, Dowse, and to Bogachek, who Dowse acknowledges is a credible witness. He considered their evidence, and arrived at his determination based on that evidence.

The determination rests on the credibility of the parties, since the evidence of Dowse differs from McCondach on the central issue of whether McCondach quit or was fired. The delegate preferred the evidence of McCondach. Not only did he find it to be logical, he found it to be corroborated by Bogachek's evidence. Arriving at a conclusion unfavourable to the appellant is not evidence of bias, nor is preferring the evidence of one party over another. I find no support for this allegation.

A-Ztech also argues that the delegate's conclusion is wrong on the facts. The grounds of appeal attached to the appeal documentation allege that McCondach "was terminated due to breach of

contract and insubordination." The position A-Ztech took at the hearing, and apparently during the investigation, is that McCondach quit. The employer cannot have it both ways. Either McCondach quit, or she was fired.

I have analyzed the determination in light of both of these positions.

Pursuant to Section 63 of the Act, an employer is liable for length of service compensation to an employee upon termination of employment, unless the employee quits, retires, or is dismissed for cause.

In Burnaby Select Taxi Ltd., the Tribunal stated 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 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; objectively, the employee must carry out some act inconsistent with his or her further employment..."

There is no evidence McCondach quit. The delegate found that McCondach returned to work after she handed in her notice, showing an intention to work through the notice period. The fact that McCondach had previously booked off July 21 and 22 does not change that intention. I am unable to agree that conclusion is perverse, or insupportable, on the facts. Dowse contends he was owed an explanation as to why McCondach was quitting. As the delegate notes, employees are free to leave their employment at any time. They are under no obligation to give reasons, they are only required to work the required notice period.

A-Ztech did not dispute the finding that it made no attempt to contact McCondach when she failed to show up for work on July 13. Dowse says he was under no obligation to do so, and that he was too busy in any event. The delegate found that it would be logical and reasonable for an employer to contact an employee if they did not show up for work, had they expected them to do so. The delegate found A-Ztech's failure to contact McCondach to be consistent with a firing. McCondach worked for A-Ztech for three years. Mrs. Dowse also claimed she and McCondach were good friends. I would agree that, had A-Ztech been concerned about McCondach's failure to show up for work, particularly in light of his concerns about his holiday plans, it would be logical for Dowse to telephone her to confirm her position. I find the delegate's conclusion to be neither irrational nor perverse.

The delegate, who saw the original ROE, found it was dated July 12. The documents provided on appeal were photocopies. The ROE appears to be dated July 17. While the original was not before me, McCondach's evidence was that it had been provided to the delegate. She contended that it had been altered. While the photocopy I was provided suggests the date was indeed changed, I am unable to conclude that it was, and have made no determination on whether the delegate erred on this point. Had the delegate made a conclusion that the date had been altered to conform to A-Ztech's position that McCondach quit, I would have sought to have the original introduced into evidence. In any event, I find nothing turns on this point, in and of itself.

I turn now to the second argument, that McCondach was fired for insubordination or breach of contract. The fact that McCondach quit at a time when Dowse was going on vacation is not a basis for firing on either of these grounds.

The evidence before me suggests that there was an incident involving raised voices over McCondach's termination notice. Insubordination is disobedience, or a refusal to perform work. Not only is there a complete absence of evidence on this point, it is inconsistent with the appellant's position that McCondach quit.

A-Ztech also argues that McCondach breached her contract of employment in quitting when she did. Dowse argues that it was a term of that employment contract that McCondach was to work full time when he took vacation. He says that because McCondach quit when she did, he was unable to take his scheduled vacation. McCondach not only denied any knowledge of when Dowse was going on vacation, she also denied this was a term of her employment contract.

Not only is there no evidence that McCondach had an employment contract requiring that she work when Dowse took his vacation, as the delegate points out, this position "ignores the fundamental principle that employees are free to leave their employment at any time." I concur with the delegate that this argument has no merit as grounds for a just cause termination.

The appeal is denied.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination, dated December 15, 1999 be confirmed, together with any interest accruing since the date of the Determination.

Carol Roberts
Adjudicator
Employment Standards Tribunal