

**EMPLOYMENT STANDARDS TRIBUNAL**  
In the Matter of an Appeal Pursuant to Section 112 of the  
*Employment Standards Act*, S.B.C., 1995, C. 38

-by-

Pierina Iurman  
("Iurman")

-of a Determination issued by-

The Director of Employment Standards  
(the "director")

**Adjudicator:** David Stevenson

**File Number:** 96/208

**Date of Hearing:** July 8, 1996

**Date of Decision:** July 11, 1996

**APPEARANCES:**

Wilhemus Nieuwenhuizen Pierina Iurman	For the appellant
Bonnie Barnes Armenia Boyd	For the employer
Michael Fu	For the director

**DECISION**

**OVERVIEW**

This appeal is brought by Pierina Iurman (“Iurman”) under Section 112 of the *Employment Standards Act* (the “Act”) of Determination number CDET #001431, made by a delegate of the Director of Employment Standards (the “director”) on March 1, 1996. That Determination found no contravention of the *Act* by Ichiban Fine Cleaning Ltd (“Ichiban”) in respect of the termination of the employment of Iurman at Ichiban, concluding that Iurman had abandoned and quit her employment. Iurman says she did not quit.

The parties called evidence from six witnesses. I also received two affidavits from Iurman’s representative addressing minor points of fact. I have found the affidavits to be unimportant to the main issue in the appeal and have not been required to refer to them.

**FACTS**

After a full review of the evidence, I have reached the following conclusions of facts concerning the events which are relevant to the issue I have to decide:

1. On October 10, 1995, Iurman could not attend work because of pain in and about her neck and shoulders and accompanying dizziness. She contacted Mrs. Boyd, the owner of Ichiban, to advise her of her absence. She returned to work the next day.
2. On October 17, 1995, Iurman experienced a relapse of the same symptoms and again contacted Mrs. Boyd to advise of her inability to attend work. She saw her doctor on that day, who gave her some medication and instructed her to return if there was no improvement.

3. On October 20, 1995 Iurman returned to her doctor who instructed her to rest from her job at Ichiban for two weeks. She contacted Mrs. Boyd the same day and told her of her unavailability for the next two weeks. There was some discussion about whether Iurman was looking for another job or planning to quit and Iurman assured Mrs. Boyd this was not the case.

4. Shortly after the above discussion, Iurman decided to apply for UIC sick benefits. Upon application she was advised she would need a Record of Employment from Ichiban. She called Mrs. Boyd sometime between October 29 and November 2, 1995. Upon receipt of this request, Mrs. Boyd contacted her accountants and asked the Record of Employment be prepared. The resulting document is dated November 3, 1995 and in box 22, "Comments" stated:

Employee requested ROE. Says she has a sore neck and does not know when she is returning. Doctor's letter requested but not provided.

The accountant also prepared Iurman's holiday pay entitlement to the issuance date as she was approaching her anniversary date in any event.

5. Iurman saw her doctor again on November 7, 1995 and he instructed her to take another two weeks off work. Iurman called Mrs. Boyd, either on that day or within a few days of that day, and told her of her continuing unavailability. Mrs. Boyd told her in that discussion they were so busy at work they had to get a replacement and that Mrs. Boyd had two cheques for Iurman; she still had her paycheck for the period ending October 16 and she had her holiday pay to date. She did not intend to convey any impression Iurman's employment had been terminated. Iurman said she would pick up the checks on November 12, but she never did.
6. Mrs. Boyd attempted to contact Iurman one or two more times after November 12 but was unable to do so. After these attempts Mrs. Boyd began to feel that Iurman would not return to Ichiban.
7. As of November 28, 1995, the problems that had caused the absences of Iurman from her employment were not resolved. UI officials were continuing to process Iurman's sick benefit claim and contacted Mrs. Boyd concerning the status of Iurman's employment with Ichiban. She left the impression with them that Iurman had quit her employment as she had not had contact with her since November 11. The UI officials then called Iurman. She said she had not quit. It was suggested to her by the UI officials that she provide the doctors notes to Mrs. Boyd. Iurman called Mrs. Boyd and offered to get the notes to her. She was told by Mrs Boyd that she did not need the notes anymore. Neither Iurman nor Mrs. Boyd made any attempt after November 28, 1995 to communicate with one another.
8. Iurman finally picked up her checks on December 5, 1995. Iurman continued to receive physiotherapy treatments for her neck problems until December 8, 1995.

**ISSUE**

The issue is whether Iurman is entitled to length of service compensation.

**ANALYSIS**

Section 63(1) of the *Act* establishes a statutory liability on an employer to pay an employee length of service compensation upon completion of three consecutive months of employment. It is not only a statutory liability on an employer, but in a sense it is also an “earned” benefit to the employee that accumulates as the length of service of the employee increases. The employer may discharge its statutory liability by giving the appropriate written notice, a combination of notice and money or by the payment of an amount of money equivalent to the appropriate notice. In three circumstances, the actions of an employee may discharge the liability of the employer: if the employee quits, if the employee retires or if the employee engages in conduct that provides just cause for termination. In this case Ichiban has done nothing as an employer to discharge its statutory liability.

The question is whether the actions of Iurman have discharged the statutory liability of Ichiban. I find there is neither retirement nor just cause present in the circumstances of this case. I also find Iurman did not quit. The act of abandoning, or “quitting”, employment is a right that is personal to the employee and there must be clear and unequivocal evidence supporting a conclusion that this right has been voluntarily exercised by the employee involved. It has both a subjective and an objective element: subjectively, an employee must form an intention to quit; objectively, the employee must demonstrate some conduct or carry out some act inconsistent with further employment.

While the conduct of Iurman was improper and quite inconsistent with her duty to inform Ichiban of her medical status and projected return date during her absence from work, I cannot conclude she ever formed an intention to quit her employment. It is clear from the evidence that her absence was a result of a continuing disability which was not resolved when her employment was terminated. The evidence I have suggests Iurman’s employment was ended by the employer. Mrs. Boyd testified that by mid-November the continuing frustration of not hearing from Iurman and her disappointment about an apparent lack of empathy demonstrated by Iurman to her predicament led her to feel Iurman would not be coming back to work for Ichiban. It was Mrs. Boyd who made the decision on November 28 to not accept or consider the doctor’s notes and to express to UI officials on November 30 a reluctance to return to Iurman to a full time position with Ichiban.

**ORDER**

Exercising my jurisdiction under Section 115 of the *Act*, I order Determination CDET 001431 be cancelled and the matter be referred back to the director to issue a Determination in accordance with the conclusions reached in this decision. During the course of the hearing I advised the

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parties if I found Iurman to be entitled to length of service compensation Section 97 would apply in the circumstances and her employment would be deemed to be continuous and uninterrupted from March 15, 1992 when she was first employed by Ichiban Fine Cleaning. Mrs. Boyd acquired the business in November, 1993 and continued to employ Iurman. Accordingly, for the purpose of calculating length of service compensation, Iurman has three years service with Ichiban.

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**David Stevenson**

**Adjudicator**

**Employment Standards Tribunal**