

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 -

Dennis Kearns
("Kearns")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Norma Edelman

FILE NO: 96/328

HEARING DATE: July 11, 1996

DATE OF DECISION: July 24, 1996

DECISION

APPEARANCES

Dennis Kearns Pam Chhokar	For Dennis Kearns and Associates Ltd.
Deana Kosolofski	On her own behalf
Victor Lee	For the Director of Employment Standards

OVERVIEW

This is an appeal by Dennis Kearns and Associates Ltd. (“Kearns”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) against Determination No. CDET 002154 issued by the Director of Employment Standards (the Director”) on May 2, 1996. In this appeal, Kearns claims that statutory holiday pay and compensation for length of service is not owed to Dean Kosolofski (Kosolofski”).

ISSUE TO BE DECIDED

Was Kosolofski’s employment terminated by Kearns or did she quit her job?

Is Kosolofski owed statutory holiday pay?

FACTS

Kosolofski was employed by Kearns as an Office Manager from November 30, 1994 to December 12, 1995.

On December 12, 1995, Kearns told Kosolofski that he wanted her to take some time off work. According to Kosolofski, Kearns said he wanted her to take off the rest of the month and the first week in January. This made her upset as she couldn’t afford to take this much time off work. After she left Kearns’ office, Kosolofski spoke to three co-workers: Vicki Lauckner (“Lauckner”), Pam Chhokar (“Chhokar”), and Lana Gogol (“Gogol”). Kosolofski said she told the three women about her conversation with Kearns and said that she was upset because she couldn’t afford to be off work for that period of time. She also made the following statement to them: “I am going to have to quit, if I’m not to be back to work until after the first week in January.” Kosolofski said she was mad at the time, and

this was just a statement made to women that she considered to be friends and it didn't mean anything. She had no real intent on quitting her job. Kosolofski said that after she made the statement she threw some files on her desk, removed her coffee cup and some personal papers from her desk and left the work site. She said she removed the items from her desk because she wasn't going to be at work for about three weeks, not because she planned on never returning to her job.

According to Kearns, he told Kosolofski that she needed to take some time off as his business was down, but there was no mention of when and for how long. He said he saw Kosolofski clean out her desk after their conversation, but he doesn't know what she actually took from her desk. Kearns said after Kosolofski left the worksite, he was told by Lauckner, Gogol and Chhokar that Kosolofski had quit her job.

On December 13, 1995 Kearns and Kosolofski had a telephone conversation. Neither can remember who initiated the call. Kosolofski said that Kearns told her not to come in to work anymore and he wanted her to sign a release letter in exchange for her final wages. Kosolofski stated that she assumed Lauckner, Gogol and Chhokar had told Kearns something about her comment to them on the 12th of December and this caused Kearns to terminate her employment.

Regarding the December 13, 1995 conversation, Kearns stated that insofar as Kosolofski quit on December 12, 1995, he advised her that he had prepared her final wages and release letter.

On December 14, 1995 Kosolofski attended at her former worksite and received her vacation pay and wages for 56.5 hours of work up to and including December 12, 1995. She signed a letter, which had been prepared by Kearns, which indicated she agreed that this was the total monies owing to her by Kearns. Kosolofski said she was forced to sign the letter in order to get her final wages. This is denied by Kearns. Subsequently, Kearns issued a ROE which indicated that Kosolofski had quit her job.

In support of his position, Kearns submitted a letter from his accountant which indicates his gross income decreased by 43% in 1995, and a letter from Chris DiSalle, who shares office space with Kearns, which reads that he overheard two of his staff say on December 12, 1995 that Kosolofski had just quit. Kearns also submitted a letter from Gogol dated May 6, 1996 which reads:

On December 12, 1995 at approximately 4:00 p.m. I witnessed Deana Kosalofski walk out of Dennis Kearns office and state that she had just quit her job.

Deana explained that Mr. Kearns had requested that she cut down her hours so instead of agreeing, she quit. She also stated that she threw some of Mr. Kearns client files in the garbage.

Kosolofski contends that Gogol was pressured into writing this letter. She denies that she threw files in the garbage.

At the hearing, Kearns called Chhokar as his witness. She stated that Kosolofski came out of Kearns' office on December 12, 1995 and said she was quitting her job because her hours were cut back. Chhokar did not see Kosolofski clean out her desk. She said Gogol told her that Kosolofski had cleaned out her desk on December 12, 1995.

Kearns stated that Gogol and Chhokar no longer work for him and have nothing to gain by their evidence.

Kearns also stated that Lauckner told him Kosolofski had quit but she didn't want to get involved as she is Kosolofski's cousin.

In summary, Kosolofski claims her employment was terminated by Kearns. She is of the view that the fact she told three women she was going to have to quit is irrelevant. What is relevant, according to Kosolofski, is that she never told Kearns that she was quitting. Kearns, however, contends that Kosolofski quit. She said she was quitting and she cleaned out her desk. Accordingly, he does not believe Kosolofski is entitled to compensation for length of service.

Kearns also contends that Kosolofski is not entitled to statutory holiday pay because, a) she signed the letter on December 14, 1995 stating she had been paid in full and b) she previously agreed not to be paid for statutory holidays. No payroll records were provided by Kearns.

Finally, Kearns takes exception with the investigation conducted by Victor Lee ("Lee"), the investigating officer. Kearns stated he provided Lee with the names of Chhokar and Gogol, who could directly confirm that Kosolofski had quit her job, and Ziana Gauci ("Gauci") who was told by Chhokar and Gogol that Kosolofski had quit her job. Lee wrote the following to Kearns on April 1, 1996: "None of the 3 ladies could confirm that Ms. Kosolofski quit her job. All they knew was that she was unhappy over the reduction of hours and contemplating quitting as she could not survive on those hours." Yet, Kearns states, Gogol in her letter of May 6, 1996 and Chhokar in direct evidence said otherwise, and Gauci says she was never contacted by Lee. Kearns submitted a letter dated July 11, 1996 from Gauci which confirms she was never contacted by Lee. Kearns believes Lee should be reprimanded for saying he contacted these three people when he did not.

ANALYSIS

In this appeal hearing, Kearns bears the burden of proving that the Determination was in error.

Statutory Holiday Pay

With respect to the issue of whether Kosolofski is owed statutory holiday pay, I am satisfied that Kearns has not shown that the Determination was in error. There was no

evidence before me to indicate that Kearns paid Kosolofski any statutory holiday pay. Further, any alleged agreement or concession on the part of Kosolofski to waive her rights to the minimum requirements under the *Act* is null and void. Section 4 of the *Act* does not allow employers and employees to make any agreement that violates the *Act*. Accordingly, I conclude that Kosolofski is owed the statutory holiday pay as set out in the Determination.

Compensation for Length of Service

Regarding the issue of compensation for length of service, I am not persuaded that Kosolofski's employment was terminated by Kearns. I conclude on the balance of probabilities that Kosolofski quit her job.

The act of quitting involves both a subjective intention to quit and some objective conduct which manifests an attempt to carry that intent into effect. I find that both these elements are present in this case. Based on Kosolofski's and Chhokar's evidence, I am satisfied Kosolofski verbally indicated she had quit or was going to quit her job. Regardless of whether Kosolofski actually told Kearns the foregoing, she did tell others and this information was conveyed to Kearns. Given that, is there any subsequent conduct on the part of Kosolofski which confirms or is consistent with her stated intention to quit? Kearns claims that the act of cleaning out her desk confirms that Kosolofski had quit her job. I would not place much weight on this fact if it had been established that Kosolofski was told to take days off work effective December 13, 1995. But, it was not. At best, there is Chhokar's evidence that Kosolofski stated she was quitting because her hours were cut. However, this does not necessarily mean that Kosolofski was told not to report to work on the following day or days. Therefore, in the absence of any supporting evidence to indicate that Kosolofski was told she would be off work effective December 13, 1995, the fact that she left the worksite with her cup and personal files is conduct which is consistent with her stated intention to quit her job.

There are two other factors which I have considered in reaching my conclusion that the evidence supports the position that Kosolofski quit and was not dismissed from her job. The first concerns the ROE issued by Kearns. It indicates that she quit her job. The second concerns the conversation between Kosolofski and Kearns on December 13, 1995. There was no evidence to support Kosolofski's claim that Kearns initiated a dismissal during this conversation. Moreover, had he done so, and if the reason was due to Kosolofski's comment the day before (and Kosolofski testified this is what she assumed had taken place) I would have expected that Kosolofski would have clarified her position with Kearns. However, there was no evidence before me that Kosolofski told Kearns that she was not quitting and did not really mean what she had said on December 12, 1995. Accordingly, I find that the lack of clarification on Kosolofski's part indicates a continuing intent to quit her job.

For the all the above reasons, I conclude that the Determination with respect to compensation for length of service is in error. I am satisfied that Kosolofski's employment was not terminated by Kearns and therefore she is not entitled to compensation.

I make no comment on Kern's desire to have Lee reprimanded as the matter which concerns Kerns has no bearing on my decision.

ORDER

Pursuant to Section 115 of the Act, I order that Determination No. CDET 001280 be varied to indicate that Kosolofski is owed statutory holiday pay in the amount of \$1131.52 together with interest to be calculated by the Director in accordance with Section 88 of the Act.

Norma Edelman
Registrar
Employment Standards Tribunal

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