

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 -

Arcus Community Resources Ltd.
("Arcus")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 96/783

DATE OF HEARING: May 12, 1997

DATE OF DECISION: May 22, 1997

DECISION

APPEARANCES

Christopher R. Mellalieu on behalf of Arcus Community Resources Ltd.
Margie G. Friedrich on her own behalf

OVERVIEW

This is an appeal by Arcus Community Resources Ltd. (“Arcus”), under Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination which was issued by a delegate of the Director of Employment Standards (the “Director”) on December 16, 1996. The Determination found that Arcus contravened Section 63 of the *Act* for failing to pay compensation for length of service to Margie Friedrich. Arcus argues that it did not terminate Ms. Friedrich’s employment and seeks to have the Determination cancelled.

A hearing was held on May 12, 1997 at which time sworn testimony was given by Christopher R. Mellalieu and Margie G. Friedrich. The Director was not represented at the hearing.

ISSUES TO BE DECIDED

Was Ms. Friedrich’s employment terminated in contravention of Section 63 of the *Act*?

FACTS

Most of the salient facts in this appeal are set out in the Determination, and are not in dispute. Those facts which are in dispute are set out below, after the summary of the findings contained in the Determination.

Arcus operates a number of group homes for people with physical and emotional challenges.

The investigation which was conducted by the Director’s delegate resulted in the following findings of fact being set out in the Determination:

- The complainant was employed as a health care worker at a rate of \$12.00 per hour commencing her employment on February 1, 1995. The employment involved shift work.
- The employer requested that she provide a note from her doctor stating that she was in good health. The complainant provided such a note which said that she was in “good physical and emotional health”.

- On July 21, 1995 the complainant became ill with headaches and dizziness and called in sick.
- On August 4, 1995 the complainant provided her employer with a doctor's note saying the symptoms were not completely resolved and she would attempt to return to work on August 8, 1995, however her health continued to decline.
- On September 11, 1995 a further doctor's note states that Ms. Friedrich is "suffering from vertigo...she is not fit to work until further notice". The complainant was unable to work until January 16, 1996.
- On January 16, 1996 her doctor gave her a note enabling her to return to work. The note stated "Margie Friedrich is fit to work except shift work".
- The complainant remained available for work, providing it was not shift work (nights), until she was terminated without notice or compensation.

In addition to these facts, the Director's delegate considered that Ms. Friedrich was trained to work at several different group homes which were operated by Arcus. He also considered that "it is a condition of employment that all employees are expected to work shifts" and that, according to Arcus, "...none of them are fettered with the restriction of no shift work."

A further fact which the Director's delegate considered was that in December, 1995 Ms. Friedrich applied for three vacant positions but was unsuccessful.

On March 1, 1996 Arcus issued a Record of Employment (ROE) to Ms. Friedrich at her request. The ROE shows code "K" ("other") as the reason for issuing it. Under comments (Box # 22), the ROE states:

"Margie did not return to work - P.P. # 2 above was for time owing to Margie she was paid out! Margie is not available for shift work as per her doctor. We only have shift work available."

Based on that set of facts the Director's delegate concluded that Ms. Friedrich was entitled to two weeks compensation for length of service because:

- she was employed by the employer for a period in excess of 12 consecutive months (February 1995 until terminated on March 1, 1996); and
- Section 65(d) of the *Employment Standards Act* does not apply.

That conclusion was supported by the following reasons:

In my opinion, the complainant's medical condition is not "an unforeseeable event or circumstance". All employees become sick at sometime or another. In Ms. Friedrich's case she was unable to work nights. The employer had the option of either accommodating her i.e. with a day job or terminating her employment. He chose the latter course, and could either provide her with two weeks written notice or compensation for length of service. He did neither. Therefore, in my opinion he owes two weeks compensation.

According to Christopher Mellalieu, one of Arcus' principals, he took seriously the opinion contained in the medical note dated September 11, 1995 that Ms. Friedrich was "...not fit to work until further notice." Thus, when the vacant positions were posted in November, 1995 he testified that Ms. Friedrich's application was "...overridden by her doctor's order" that she was unfit for work. Mr. Mellalieu submitted that when Ms. Friedrich was ready to return to work on January 16, 1996 her doctor's opinion was that she was "...fit to work except shift work." Mr. Mellalieu's written submission states:

At that time, Ms. Friedrich's position had been kept available to her for four months. The rotation of the position included all shifts. Eight full-time and four part-time employees' hours rotated around the line in question.

We chose not to custom design a line that was days only. It was felt that such an action would be grossly unfair to twelve people at that location and would be unprincipled to the rest of the 100 employees who are available for all shifts.

Arcus, therefore, informed Ms. Friedrich that if such a position existed, (i.e. day shift only), she would be considered. From the time of Ms. Friedrich being available to the time of parting, no such job existed.

Mr. Mellalieu testified that all employees are required to be available for shift work although "some employees (Residential Team Leader) work steady day shifts." He also testified that while certain of the vacant positions which were posted in November, 1995 entailed day shifts primarily, licensing requirements imposed by the Ministry of Health meant that the incumbents of those positions must be available to work shifts if necessary.

Ms. Friedrich testified that when she applied for the vacant positions in December, 1995, she was optimistic that she would be successful because Ruth Leyland observed that Arcus was attempting to fill the vacancies with employees who were not registered nurses. Ms. Friedrich is not a registered nurse. An additional source of optimism was that her supervisor, Denise Stone, informed her about the vacant "day positions" and suggested that she should apply for one of them. However, Ms. Friedrich testified that she received no response to her application and telephoned Mrs. Cathy Mellalieu (Director of Programs and Residential Services) several times before being told by Mrs. Mellalieu that "...she would have to think about it."

When Ms. Friedrich received no response by early February, 1996, she again attempted to contact Mrs. Mellalieu several times by telephone. When she spoke to Mrs. Mellalieu in mid-February, Ms. Friedrich testified that Mrs. Mellalieu informed her that the vacancies had been filled and that she thought that Ms. Friedrich had resigned. Ms. Friedrich replied "I did not quit." Ms. Friedrich testified that in the conversation which ensued, Mrs. Mellalieu told her: "we don't want you back", prompting Ms. Friedrich to request her separation papers (i.e. Record of Employment).

Mr. Mellalieu also testified about the conversation between the two women as it was described to him by Mrs. Mellalieu. He testified that when Ms. Friedrich asked: "Why don't you admit that you don't want me back?" Mrs. Mellalieu replied with words such as: "Maybe that's the best route to go."

Ms. Friedrich did not receive the ROE by mail and went to Arcus' offices on Friday, March 1, 1996 to obtain it from Marie Scott (book-keeper). Ms. Friedrich testified that when she reviewed the ROE she told Mrs. Scott that she did not agree with the comments in Box # 22.

ANALYSIS

The Director's delegate determined that Arcus contravened Section 63 of the *Act*.

In its appeal, Arcus argues that it did not terminate Ms. Friedrich's employment. Rather, it argues, Ms. Friedrich was unable to work "shift work" due to her health condition. Arcus acknowledges that when several vacancies existed, that Ms. Friedrich was an applicant for three of them, but she was not selected because "her doctor's advice prevailed."

Section 63 of the *Act* establishes a statutory liability on an employer to pay length of service compensation to an employee upon termination of employment. That statutory liability may be discharged by the employer giving appropriate notice to the employee, by providing a combination of notice and compensation in lieu of notice to the employee or by paying compensation equivalent to the period of notice to which the employee is entitled under the *Act*.

The employer may be discharged from this statutory liability if the employee resigns, retires or is dismissed for just cause.

Section 65 of the *Act* sets out various circumstances under which Section 63 does not apply. One ground for Arcus' appeal was that Section 65(1)(f) should apply to the facts of this appeal because "...Ms. Friedrich's job was available. Many other positions were available. Ms. Friedrich could not accept any of them."

I reject this ground of appeal as it is illogical and inconsistent with Arcus' primary ground of appeal, namely, that it did not terminate Ms. Friedrich's employment. Section 65(1)(f) would be available to Arcus as a defense only if it had offered her reasonable alternative employment and she had rejected that offer.

In determining that Arcus had contravened Section 63 of the *Act*, the Director's delegate stated "...the employer had the option of either accommodating (Ms. Friedrich) with a day job or terminating her employment."

There is nothing in the evidence to suggest either that Arcus terminated Ms. Friedrich's employment for just cause or that she retired. Thus, the issue which I must decide is whether Arcus terminated Ms. Friedrich's employment without cause or whether she resigned.

In *Burnaby Select Taxi Ltd.* (BC EST #D091/96) the Tribunal adopted the following test to determine whether an employee has resigned his or her employment:

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.

When I apply that test to the facts of this appeal, I conclude from the evidence that Ms. Friedrich did not resign from her employment. On the contrary, she actively applied for several vacant positions in December, 1995 which, if she had been a successful applicant, would have allowed her to return from an unpaid leave to full time paid employment. This finding is supported by the fact that Arcus did not indicate code "E" (quit) as the reason for issuing the ROE on March 1, 1996. Rather it selected code "K" (other) and explained its reason for issuing the ROE by noting that Ms. Friedrich was "...not available for shift work as per her doctor. We only have shift work available."

I find that Mrs. Mellalieu terminated Ms. Friedrich's employment during their telephone conversation in mid-February, 1996. Ms. Friedrich's oral testimony on that point is consistent with her written complaint (March 1, 1996) and her written statement to the Tribunal (January 20, 1997) copies of which were provided to Arcus prior to the hearing. Mrs. Mellalieu did not attend the hearing to give evidence and Mr. Mellalieu did not refute Ms. Friedrich's evidence or written statements. In addition, I prefer Ms. Friedrich's direct evidence over Mr. Mellalieu's hearsay evidence.

For all of these reasons, I conclude that the Determination should be confirmed.

ORDER

I order, under Section 115 of the *Act*, that the Determination be confirmed.

**Geoffrey Crampton
Chair,
Employment Standards Tribunal**

GC/da