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 -

Grootendorst's Flowerland Nursery Ltd.
("GFN")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE NOS.: 1999/112

DATE OF HEARING: May 20 1999

DATE OF DECISION: June 7, 1999

DECISION

APPEARANCES

For Grootendorst's Flowerland Nursery Ltd. Kase Grootendorst, President

Appearing on his own behalf Thomas Davidson

OVERVIEW

Grootendorst's Flowerland Nursery Ltd. ("GFN", also, "the employer") appeals a Determination by a delegate of the Director of Employment Standards dated February 8, 1999. The appeal is pursuant to section 112 of the *Employment Standards Act* (the "*Act*").

The Determination orders the payment of vacation pay at 6 percent, compensation for length of service and other moneys to Thomas Davidson. GFN appeals the order to pay compensation for length of service.

The delegate explains his decision to award compensation for length of service as follows: Termination was in the absence of written notice, 'just cause' was not claimed by the employer, and neither the subjective nor objective elements of a quit were apparent.

ISSUES TO BE DECIDED

The appeal, as originally filed, raised several issues. But Kase Grootendorst advises me that GFN has decided to accept that there are not two separate periods of employment but one stretching from 1993 to 1998, and also that Davidson is owed 6 percent vacation pay as set out in the Determination. That leaves only the matter of compensation for length of service to decide. In that regard, GFN claims that the Determination is wrong in that Davidson quit and also that the delegate is wrong in his calculation of compensation for length of service.

On the matter of whether or not Davidson quit, Grootendorst discards all of the employer's written submissions to the Tribunal and relies solely on a letter to the delegate dated October 19, 1998. As Grootendorst presents matters, the employer is now again claiming that the employee lied in that he said that he hurt his knee while walking a dog, that he then failed to see a doctor even though he was asked to do so, that he refused lighter duties which were assigned to him and, despite being told that he was really needed at work, that he was overly long in returning to work. According to GFN, Davidson demonstrated such a lack of interest in his job that it was concluded that the employee had no intention of returning and had quit.

Davidson denies any plan to quit. He says that he tore knee ligaments and was simply unable to work. Against the advice of his doctor, he decided to return to work after six weeks but, on indicating that he was ready to return to work, he was at first told that it was something that the owners would have to discuss and then told not to bother coming back to work and advised to find easier work.

On the matter of the delegate's calculation of compensation for length of service, GFN claims that the Determination is wrong in that pay was biweekly, not semi-monthly as set out in the Determination. The delegate, on appeal, agrees that pay was biweekly and he indicates that his calculation of average weekly wages for the last 8 weeks of Davidson's employment may not be precise.

FACTS

GFN is a wholesale nursery. It is family owed. It grows and sells Poinsettias and nursery stock but its main business is growing and selling bedding plants. As such, it is particularly busy each spring.

Davidson was employed as a labourer. He started working for GFN in March of 1993.

On Sunday, the 26th of April, 1998, Davidson hurt his knee while playing football. A record shows that his injury was treated that day as an emergency at a Richmond hospital.

On the 27th of April, Davidson advised his employer that he was injured and was unable to report for work. It was Rick Grootendorst that he spoke to. That same day, Davidson went to see his own doctor. That physician told him that he had a 2nd degree strain of his medial collateral ligament and would be off work for between 4 to 8 weeks.

It is alleged by GFN that Davidson lied about the circumstances of his injury. According to GFN, Davidson said that the injury was sustained while walking his neighbour's dog. Davidson denies saying that. But whether Davidson was truthful or not, it is not something that I need determine in that GFN is not claiming just cause but that the employee quit.

I fully accept that the Grootendorst brothers doubted that Davidson's injury was really all that serious at the outset and that both Rick and Kase believed that Davidson was capable of performing some sort of work for them, lighter duties at least. But on seeing Davidson on the 2nd of May, Rick realised that Davidson was not going to be of any assistance to GFN at least for a few weeks. He was wearing a special water cooled brace and was on crutches. Rick told Davidson to apply for EI as someone on medical leave.

Davidson's sister works at a school. In mid-May, that school held a bedding plant sale. GFN supplied plants for the sale. Davidson's sister and the school's principal went to pick up the plants accompanied by Davidson. Kase saw Davidson that day. Davidson was at that point still walking with the aid of crutches and it is likely that Kase would have noticed that. Neither he, nor anyone else associated with GFN, asked Davidson if he was capable of returning to work on that day.

There is no evidence to show that GFN contacted Davidson later in May, or in the first part of June, or that it asked him to return in any sort of capacity.

On the 11th of June, Davidson felt ready to return to work. He advised Kase Grootendorst that he was ready to come back to work. Kase tells me that he told Davidson that GFN had no need for him at that point as it had found that it could get along without him. Davidson tells me that Kase told him that his return was something that he (Kase) would have to discuss with brother Rick.

Despite further attempts to contact his employer, it was not until the 21st of June that Davidson heard further from his employer. On that day, a Sunday, Davidson managed to reach Kase Grootendorst by telephone. Davidson was not advised of when he could return to work. Kase expressed that a guy that can injure himself while walking a dog is probably not fit for nursery work. He tells me that he also suggested that Davidson consider looking for easier work.

Davidson was not called back to work after the 21st of June. Davidson filed his Complaint and that led to the delegate's investigation and, eventually, the Determination.

In the Determination, the delegate indicates that he believed that pay was semi-monthly. In fact, it was biweekly. On appeal, GFN claims that it can produce time cards which show hours worked but it does not show, indeed, it makes no attempt to show, that Davidson's average pay in the last 8 weeks of his employment is not as calculated by the delegate.

ANALYSIS

What I must decide is whether or not the appellant has met the burden for persuading the Tribunal that the Determination ought to be varied or cancelled for reason of an error in fact or in law.

I find that the facts, in all important respects, are just as found by the delegate. I also find that the delegate is correct in his application of the law.

The *Act* establishes the liability of an employer to pay compensation for length of service. Sub-sections 1, 2, and 3 of section 63 are of particular importance and are as follows:

> **63** (1) *After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.*
>
> (2) *The employer's liability for compensation for length of service increases as follows:*
>
> *(a) after 12 consecutive months of employment, to an amount equal to 2 weeks' wages;*
>
> *(b) after 3 consecutive years of employment, to an amount equal to 3 weeks' wages plus one additional week's wages for each additional year of employment, to a maximum of 8 weeks' wages.*
>
> (3) ***The liability is deemed to be discharged if the employee***
>
> *(a) is given written notice of termination as follows:*
>
> *(i) one week's notice after 3 consecutive months of employment;*
>
> *(ii) 2 weeks' notice after 12 consecutive months of employment;*
>
> *(iii) 3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice;*
>
> *(b) is given a combination of notice and money equivalent to the amount the employer is liable to pay, or*
>
> *(c)* ***terminates the employment****, retires from employment, or is dismissed for just cause.* (my emphasis)

The employer is not claiming termination for cause but that Davidson quit. Did he quit?

It is the right of each employee to resign his or her employment and that right is personal to the employee. An employer may not deem that an employee has quit. It is accepted that there must be clear, unequivocal facts which show that the employee voluntarily exercised his or her right to quit. And there is both a subjective and an objective element to that. Subjectively, the employee must form the intention to quit. Objectively, he or she must act in a way, or demonstrate conduct, which is quite inconsistent with the continuation of the employment. [*Burnaby Select Taxi Ltd. and Zoltan Kiss*, (1996), BCEST No. D091/96]

In this case, I find that there are not clear, unequivocal facts which show that Davidson voluntarily quit. Davidson never said that he was going to quit. He did not act or conduct himself in a way that implies an intent to quit. And there is no evidence that Davidson acted or demonstrated conduct that is in any way inconsistent with his remaining as an employee of GFN.

GFN alleges that Davidson acted in ways that showed a lack of interest in remaining in his job but, as the facts are presented to me, I find that all of its allegations are unfounded. Davidson did not fail to see a doctor. Davidson did not refuse to accept lighter duties: He was told to apply for EI. And there is no evidence that Davidson was able to report for work before the 11th of June.

The facts of this case clearly point to termination of the employment by the employer. Davidson had a painful knee injury which left him unable to work. His physician expected that his injury might take eight weeks to heal but Davidson was ready for work after only six weeks. He telephoned his employer and indicated that he was ready to resume working for GFN. But GFN failed to offer him work. In that it never gave him further work to do, GFN very clearly acted to sever the employment relationship. It follows that the employer remains liable for the payment of compensation for length of service under the *Act*.

GFN identifies an error in the Determination: That pay was semi-monthly when in fact it was biweekly. The delegate admits that, for reason of the error, his calculation of what is owed in the way of compensation for length of service may not be precise. But it not shown that his calculation is clearly wrong and that the Determination must be varied. As such, this case is similar to *Heinz Benecken*, BCEST No. D101/99 and *Mykonos Taverna operating as the Achillion Restaurant*, BCEST No. D576/98. In the latter of the two decisions, the Adjudicator makes the following observation:

> After the Director has determined that a person has lost wages because of a contravention of the *Act*, the task of establishing what amount of wages are payable can be a difficult one. That task can be made more difficult where the information necessary to determine the amount owed by reason of the contravention is unavailable or incomplete. Consistent with the statutory objective of achieving "efficient" resolution of disputes, the Director has considerable latitude in deciding what information will be received and relied upon when reaching a conclusion about the amount of wages that may be owing. If that decision is sought to be challenged *on its facts*, the burden on the appellant is to show either that the decision was manifestly unfair or that there was no rational basis upon which the conclusions of fact relevant to the decision could be made. This is consistent with the statutory and legal obligation of the Director to adhere to the principles of fairness and reasonableness when exercising her authority under the *Act* (see *Shelley*

> *Fitzpatrick operating as Dockers's Pub and Grill*, BCEST No. D511/980. (pages 6-7)

I am not prepared to order the production of documents, or refer the matter of compensation back to the Director, so that the amount of compensation for length of service can be recalculated in this case. It does not follow that because pay was biweekly, rather than semi-monthly, that the Determination is quite wrong. As I understand the delegate, his calculation of the average weekly wage for the last eight weeks of Davidson's normal employment was made in the face of less than perfect information. That may have led to small errors but they may well be offsetting. And to believe that pay was semi-monthly should actually have led to understatement of the amount of compensation owed. In the final analysis, it is not clear that the Determination is manifestly unfair to the employer or that there is no rational basis for it.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated February 8, 1999 be confirmed in the amount of $3,557.86, plus whatever further interest has accrued pursuant to Section 88 of the *Act* since the date of issuance.

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Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal