

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 -

Dr. Robert Yip Inc.
("Yip")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE NO.: 98/247

DATE OF HEARING: June 18, 1998

DATE OF DECISION: July 8, 1998

DECISION

APPEARANCES

Dr. Robert Yip

For the employer

OVERVIEW

Dr. Robert Yip Inc. (“Yip”), pursuant to section 112 of the *Employment Standards Act* (the “Act”), appeals a Determination of the Director of Employment Standards dated April 2, 1998. Leigh N. Whillans gave Yip notice that she was terminating her employment. The Determination orders that Whillans be paid for the last week of a termination agreement.

ISSUES TO BE DECIDED

Yip appeals the order to pay Whillans. Dr. Yip says that while Whillans gave notice of termination and he accepted that notice, she subsequently declared an intention to quit a week early and he agreed to that. The employer argues that, as there was notice to leave early, on the 2nd of May, and Whillans was paid to that point, no further wages are owed.

FACTS

Leigh N. Whillans began work as a Dental Receptionist for the employer in February, 1991. Her last day of work was May 2, 1997.

The parties disagree on many of the facts. What follows is what I find to be the important facts, on hearing from Yip, and Whillans, the latter through a written submission (for some reason she chose not to attend the hearing set in the appeal).

On Friday, April 18, 1997, Whillans gave Yip notice of termination effective Friday, May 9, 1997. Dr. Yip accepted the notice even though he felt betrayed by both Whillans and the oral surgeon who was to be her new employer. Whillans had, only weeks before, led him to believe that she was planning to stay working for him and his practice. And the hiring of Whillans was all done behind Dr. Yip’s back even though Yip had been referring patients to the oral surgeon for several years. He was sufficiently upset with the oral surgeon that he ordered that no further business be sent that man’s way.

Relations between Whillans and Yip took a turn for the worse after the notice. She says that Dr. Yip was abusive. He admits to falling quiet. As far as I can see, a sort of icy coldness fell over relations between the two but that was the extent of it, at least that is,

until the 28th of April. On that day, Dr. Yip told Whillans that he expected her to audit patient charts the next day. No one else was going to work that day as Dr. Yip was to be at a meeting. Whillans felt that she was being punished for quitting and complained of having to work. There was an argument, Whillans describes it as a “fight”. Dr. Yip, in an August 8, 1997 letter to Employment Standards Officer, Susanne de Diego, describes Whillans as being “extremely upset”. He went on to say in the letter that Whillans said, “In that case I will quit this Friday” (May 2, 1997) and “I expect you to pay me until Friday”.

Whillans went in to work on the 29th. She worked approximately two hours. She was gone by the time Dr. Yip reached his office at 3:00 p.m.. At that point, Yip decided to terminate Whillans. He left a message on her answering machine, stating that “(you are) officially terminated as of now, even though I will pay (you) until May 2, 1997” [The quote is again from the letter to Susanne de Diego].

Whillans subsequently wrote, and delivered to Yip, a letter dated April 28, 1997. It reminded Yip that notice of termination had been given on the 18th and gave her last day as the 9th. That letter might have been delivered to Yip on the 29th but Yip convinces me that it was likely written on the 29th, backdated, and not delivered until early on the 30th.

ANALYSIS

The *Act* does not require an employee to give notice of termination to an employer but where an employee does so, and that notice is accepted by the employer, a binding contract to terminate the underlying employment agreement is concluded [*Liana Elizabeth Gray et al*, BCEST No. D151/96]. Yip accepted Whillans’ notice of termination on the 18th of April. With that a ‘termination agreement’ replaced what had been the governing employment contract. The new agreement set the day of termination as May 9.

Yip says that Whillans then declared that she would quit on May 2nd. If she did exactly that, was that not also notice of termination? If Yip accepted an offer to terminate the employment on May 2nd, was not the termination agreement which had been reached on the 18th then replaced with a new termination agreement, or amended, such that May 2 became the date on which termination was to occur? It is clear to me that the answer to each question is in the negative.

Quitting is a right which is personal to the employee. The employer cannot deem the employee to have quit. Moreover, there must be clear and unequivocal evidence that the employee is voluntarily exercising the right to quit [*Burnaby Select Taxi Ltd.*, BCEST D091/96]. A valid resignation has both subjective and objective components. The employee must both form an intention to quit and then act in a way, or demonstrate conduct, which is plainly inconsistent with continuing ones employment [*Wilson Place Management Ltd.*, BCEST No D047/96]. It is simply not enough that the employee state “I quit” or something similar [*University of Guelph* (1973) 2 LAC92d) 348]. That may be nothing more than an expression of frustration or anger.

In this case a termination agreement existed and it is argued that there was a subsequent shortening of the notice period. But as I see it, there remains a need for plain, clear evidence that the decision to resign earlier than initially indicated is voluntary. The employer must show that there was both an intention to resign earlier, and that the employee then acted or conducted herself, or himself, in a way which is consistent with resignation earlier than first announced. That has not happened in this case. If Whillans did express an intention to leave on the 2nd of May, it was likely part of nothing more than an emotional outburst. Clearly she was extremely upset. And there is no act or conduct on Whillans part which confirms that she truly was about to quit on the 2nd, indeed the evidence is to the contrary. I refer to the letter dated April 28, 1997. That is not inconsistent with continuing employment beyond the 2nd but demonstrates a clear intention to stay until the 9th.

Yip may have thought that Whillans had given notice of termination with the date of termination being May 2nd but the date of termination remained as provided by the termination agreement of April 18, 1997. If Whillans did truly intend to quit, she chose not to carry out the quit but reaffirmed that her last day would be the 9th of May. The employer has paid only part of the notice period, to the 2nd of May, not the 9th. As such, she is entitled to be paid for the remainder of the notice period.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated April 2, 1998 be confirmed in the amount of \$800.31, together with whatever further interest has accrued pursuant to Section 88 of the *Act*, since the date of issuance.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal