

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 -

Valerie Cook
("V. Cook")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Norma Edelman

FILE NO.: 96/451

DATE OF HEARING: October 25, 1996

DATE OF DECISION: November 13, 1996

DECISION

OVERVIEW

This is an appeal by Valerie Cook (“V. Cook”) under Section 112 of the *Employment Standards Act* (the “Act”) against Determination No. CDET 003514 which was issued by a delegate of the Director of Employment Standards on July 29, 1996. The delegate found that V. Cook owes Sylvia Schneider (“Schneider”) compensation for length of service. V. Cook claims that no compensation is owed because Schneider quit her job, or alternatively, because her employment was terminated for just cause.

A hearing was held on October 25, 1996 in Maple Ridge, B.C. In attendance were V. Cook and her husband Douglas Cook, Schneider, and on behalf of the Director of Employment Standards, Adrian Rees (“Rees”).

ISSUES TO BE DECIDED

The issues to be decided in this appeal are whether Schneider quit her job or whether her employment was terminated, and if the latter, whether V. Cook had just cause to terminate Schneider’s employment.

FACTS AND ARGUMENTS

Schneider was employed by V. Cook as a Special Needs Caregiver from November 14, 1994 to February 16, 1996. She was responsible for the care of the Cook’s two disabled young children, Trevor and Devin.

Schneider has been a member of AA since 1986. In September of 1995, she entered a detoxification facility for about one week. This was the first time the Cooks were aware of Schneider’s condition. The Cooks agreed to retain Schneider after she was released from the facility, on the condition, they say, that she agreed to “pull up her socks” because her work and attitude had been deteriorating.

V. Cook claims that she gave Schneider two verbal warnings between October and December of 1995 concerning her attitude and behavior. During the first warning, Schneider admitted that she had left the boys unattended in the van when she went into a beer and wine store. V. Cook said she told Schneider she was forgiven this one time, as the incident had taken place before she entered the detox facility, but she was never to leave the boys alone again. She also told Schneider that the previous caregiver had been fired for leaving the boys alone in the van. During the second warning, Schneider was admonished for going to a gas station where you have to go into the station to pay for the gas. V. Cook told Schneider she was to only go to a station where she could pay at the pump because then the boys would not be left unattended in the van. During these warnings, V. Cook said she mentioned to Schneider that she would smell of alcohol when she returned to work after being off work the previous day allegedly with the flu.

V. Cook said she told Schneider that she would be fired if her judgment was affected by alcohol and she was unable to care for the boys.

V. Cook said a third warning was given to Schneider on January 2, 1996 because she was still not improving and was still going to the wrong gas station, and she seemed not to care. At that time, she gave Schneider a list titled "Things to Remember!" which represented various duties not being done by Schneider. At the top of the list in bold print it states: "Never, ever leave the kids alone in the car under any circumstance or for however short of a time!!!!!!!!!!". According to V. Cook, matters did not improve after January 2, 1996.

V. Cook said Schneider called in sick on February 15, 1996. On that day, Trevor's physiotherapist came over and complained about Schneider. The physiotherapist said that Schneider was not getting into the water with Trevor; had told her she was useless and didn't know what she was doing; and was improvising with the therapy regime and not doing exercises that were necessary for Trevor. V. Cook said that she was very upset and decided that when Schneider returned to work she would discuss this issue with her, as well as concerns she had about Schneider's lackadaisical behavior, snide remarks and, failure to do certain things on the list of "Things to Remember!".

On Friday, February 16, 1996, Schneider returned to work and in the morning she and V. Cook had a heated and emotional confrontation.

According to V. Cook, she asked Schneider about Trevor's therapy and Schneider got defensive and started to undermine the therapist. Schneider said she didn't think that V. Cook trusted her and V. Cook agreed with her on this point. They discussed other aspects of the boys' care and then Schneider brought up the issue of not leaving the boys in the car anymore and that during two weeks in January she let Devin walk to school by himself out of her sight while she remained in the van with Trevor because she couldn't get Trevor's wheelchair through the ice. V. Cook said she was devastated to learn this and she told Schneider that it was unacceptable and asked her why she didn't mention it at the time. Schneider replied it was her decision and she didn't think V. Cook needed to know. V. Cook said she was upset, particularly since children are stolen all the time and Schneider knew her concerns about her boys. They talked further about Schneider's judgment. Then V. Cook told Schneider that she smelled of old alcohol. Schneider lost control, got loud and screamed "I quit, I can't work under these circumstances and how can I work if you don't believe me?". V. Cook stated that she then got worried about who would look after her boys on Monday and so she apologized and said they were angry and they should think about things. Schneider answered by reiterating that she was quitting and was going to get a test to prove she was not drinking. V. Cook told Schneider that she knew she wasn't drinking right then, and Schneider replied "You don't trust me, I quit". V. Cook said she then told Schneider to cool off over the weekend. Schneider then drove off. About 10 minutes later, she returned and threw the house and car keys at V. Cook. Later that night, Schneider returned and gave her a letter. V. Cook said she read the first paragraph and since it was self-serving she tore it up. The Cooks do not necessarily accept that the letter submitted by Schneider at the hearing is the same letter given to V. Cook on February 16, 1996.

V. Cook said Schneider phoned her on Sunday evening and asked for clarification and indicated she wanted her job back. Schneider also asked "What are you going to do?" and V. Cook replied "You quit". Schneider then asked for her severance and holiday pay and V. Cook said she was not entitled as she was a contract worker. V. Cook said it appeared by the kinds of leading questions that Schneider was asking, such as "You are telling me I don't have a job" and "So you don't need me", that she was trying to get her to admit to saying she had let her go, and V. Cook guesses she eventually did say she didn't want Schneider back to work.

The Cooks maintain that given the above, Schneider quit her job and is not entitled to compensation. Alternatively, if it is determined that her employment was terminated they argue they had cause for the following reasons: 1) Schneider admitted she stayed in the car while making Devin walk out of her sight. This shows a complete disregard for safety. She was perfectly aware this was unacceptable and knew the previous caregiver was fired for this reason. 2) The claims made by the physiotherapist on February 15, 1996 indicate willful misconduct on the part of Schneider. 3) She was given three warnings. The list of "Things to Remember!" is indicative of progressive discipline. The tone and exclamation marks on this list indicate she had received prior warnings and knew she was never to leave the boys unattended. She knew that she was not meeting their standards of performance. She was given a reasonable amount of time to improve and her own letter of February 16, 1996 indicates that she had been previously disciplined and knew her job was in jeopardy. 4) Her deceit and untruthfulness about her condition and leaving the boys unattended.

According to Schneider, when she returned to work on February 16, 1996, V. Cook brought up the issue of her leaving Trevor in the van while Devin walked to class alone. Schneider said she told V. Cook that she had asked another mother to help Devin get to class and she watched Devin be assisted to class and confirmed with the mother that he was safe. V. Cook asked her why she didn't tell her this before and Schneider replied that she didn't leave them alone or unsupervised. V. Cook replied that she paid Schneider and not some other mother to look after her boys. Then she said she could smell old alcohol on Schneider's breath. Schneider said she was upset regarding V. Cook's lack of trust and constant accusations of drinking since she had left the detox facility. Schneider said she told V. Cook she would get a blood test to prove she wasn't drinking and that she found it difficult to work for someone who didn't trust her. In reply V. Cook said "We aren't going to be able to work together and I'll have to replace you". Schneider said before she left she gave V. Cook her the keys, since she felt she was no longer employed. V. Cook then said she wanted her back in the house and Schneider said "No, I am going for a test". V. Cook then apologized and said she was sick and under pressure. She asked Schneider to take rest of the day off with pay and have a cooling off period and they would talk it over on the weekend.

Schneider said after she left the house, she did the blood test at 11:00 am. She also wrote a letter to V. Cook, which ends by asking about her status, and delivered it on February 17, 1996. She said V. Cook accepted the letter and Schneider told her that she

would talk to her later. Schneider said when she didn't hear from V. Cook, she called her late Sunday and asked what was happening and V. Cook said "What do you mean, I've found a replacement. I can't fault you for the boys. You have taken excellent care of them, but you and I can't get along." Schneider said she then asked for her severance pay and V. Cook said she would not get any because she was self-employed. Schneider replied she was not, and was going to look into her rights and then V. Cook said "You quit because you gave the keys back." Schneider replied "No, you terminated me then and now by saying we couldn't get along."

Schneider stated that she could not afford to quit her job. Further, she and V. Cook had no discussion about Trevor's therapy on the February 16, 1996. Although she does not dispute the incidents about going into the beer and wine store and being told not to use certain gas stations, she does not accept she received warnings on these or any occasions, and further the boys were in her view when she used these stations. She said she complied with V. Cook's demand not to leave the boys unattended and not to use certain gas stations, as well as all other items listed on the "Things to Remember!" list. She said she understood that if she started drinking again after detox she would be fired but she didn't drink and she went for the test which proved she was not drinking. According to the Cooks, the test means nothing since there is no proof to confirm the time when she took the test. If she had drank thirty hours before the test, for example, the test would show negligible signs of alcohol. Besides, they say, the point is, if she had been drinking at any time, this was reason enough for concern given her history as an alcoholic, and her responsibility for two young children.

ANALYSIS

The issue of whether an employee has quit his or her employment was framed in the following way by Adjudicator Stevenson in **Burnaby Select Taxi Ltd. and Zoltan Kiss (1996) BCEST #D091/96**:

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 employment.

The rationale for this approach has been stated as follows:

“...the uttering of the words “I quit” may be part of an emotional outburst, something stated in anger, because of job frustration or other reasons, and as such it is not to be taken as really manifesting an intent by the employee to sever his employment relationship.”(Re University of Guelph, (1973) 2 L.A.C. (2d) 348).

In this case, there are no clear and unequivocal facts to support a conclusion that Schneider freely and voluntarily quit her employment. There is no evidence to support the claim that Schneider told V. Cook that she quit her job. Further, I find that Schneider’s subsequent actions of going for a blood test, as well as phoning and writing a letter to V. Cook, are not actions consistent with an employee who truly intended to quit her job. This finding is further supported by V. Cook’s own evidence that Schneider called her on Sunday and asked for clarification and indicated she wanted her job back.

V. Cook has not discharged her onus of establishing that Schneider quit her employment. Accordingly, I conclude Schneider’s employment was terminated by V. Cook. The remaining issue concerns whether V. Cook had just cause to terminate Schneider’s employment.

The burden of proof for establishing that there is just cause to terminate Schneider’s employment rests with V. Cook. Just cause can include a single act of misconduct if the act is willful, deliberate and of such a consequence as to repudiate the employment relationship. It can also include minor infractions of workplace rules or unsatisfactory conduct that is repeated despite clear warnings to the contrary and progressive disciplinary measures by the employer. In the absence of a fundamental breach of the employment relationship, an employer must be able to demonstrate just cause by proving that:

1. Reasonable standards of performance have been set and communicated to the employee;
2. The employee was warned clearly that his or her continued employment was in jeopardy if such standards were not met;
3. A reasonable period of time was given to the employee to meet such standards; and
4. The employee did not meet those standards.

I am not satisfied that just cause has been established in this case. There is no evidence to support the view that Schneider engaged in an act that fundamentally breached the employment contract. It is not established that she was drinking on or off the job after she got out of the detox facility; that she left the boys unattended after the beer and wine store incident; or that she intentionally deceived her employer at anytime. Further, V. Cooks

evidence regarding the claims made by the physiotherapist does not establish that Schneider's conduct was deliberate and pre-meditated. In any event, I give little weight to this evidence, as the physiotherapist was not present at the hearing to give direct evidence and be cross-examined by the other parties. Finally, there is no evidence that Schneider received a clear and unequivocal warning that her job was in jeopardy for anything other than her drinking, and as indicated above, I find no proof of her drinking after getting out of the detox facility. For these reasons, I conclude that V. Cook did not have just cause to terminate Schneider's employment and Schneider is owed two weeks compensation. The parties agreed that the amount is \$796.12, before interest.

In the course of this appeal, the Cooks made various comments about the competency and conduct of Rees. I will comment on those aspects which have some pertinence to this appeal. First, although the timing of the service of the Determination by Rees was unfortunate, I find the service was effective and the Cooks were able to file their appeal. Second, Section 88 of the *Act* allows interest to accumulate from the earlier of either the date the employment of the employee terminates or the date a complaint is received by the Director, to the date that payment of wages are made by the employer. The interest calculated by Rees and included in the Determination is in accordance with the *Act*. Third, the Director or her delegate is not an agent of an employee named in a Determination. This was clearly expressed in an early Tribunal decision by Adjudicator Thornicroft: **BWI Business World Incorporated (1966) BCEST #D050/96**. Although it is claimed by the Cooks that Rees was acting as an agent for Schneider, I find no evidence to support that view.

ORDER

I order under Section 115 of the *Act* that Determination No. CDET 003514 be confirmed.

Norma Edelman
Registrar
Employment Standards Tribunal