

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act

-by-

GFC Communications Inc.
Operating as Angel Answering Service

(“GFC”)

-of a Determination issued by-

The Director of Employment Standards

(the “Director”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 96/561

DATE OF DECISION: November 30th, 1996

DECISION

OVERVIEW

This is an appeal brought by GFC Communications Inc., operating as Angel Answering Service (“GFC”), pursuant to section 112 of the Employment Standards Act (the “Act”) from Determination No. CDET 003895 issued by the Director of Employment Standards (the “Director”) on September 5th, 1996. The Director determined that GFC owed its former employee, Josephine Degenhardt (“Degenhardt”), the sum of \$418.33 representing two weeks’ wages as compensation for length of service [section 63(2)(a) of the Act] and concomitant vacation pay and interest.

GFC’s appeal, so far as I can determine, is based on the ground that it had just cause to terminate Degenhardt on March 8th, 1996 and, therefore, in light of section 63(3)(c) of the Act, was not obliged to pay any termination pay whatsoever.

FACTS

Degenhardt commenced employment with GFC as a telephone operator on or about July 20th, 1994. By March 1996 she had become dissatisfied with her work situation and, in particular, with the number of hours that she was scheduled to work each week--in the eight weeks prior to March 8th, 1996 Degenhardt averaged about 26 hours per week at an hourly rate of \$7.50--and therefore intended to resign. Degenhardt did, in fact, purport to resign with one month’s working notice on March 8th, 1996.

GFC, for its part, admits that Degenhardt gave one month’s notice but maintains that it was not obliged to accept such notice. A handwritten letter dated March 10th, 1996 on Angel Answering Service letterhead and signed by Esther Fluevog reads, in part, as follows:

I am sorry that you decided that you had no choice but to resign...

...the last several months you have become increasingly unreliable, negative and less able to make responsible judgement calls. You have also resisted taking responsibility for your work attitude and behaviour. Due to these

things, we believe that it is not in the companys' [sic] best interest to take you up on your offer of giving one month's notice (though we appreciate the fact that you considered this!)

ISSUE TO BE DECIDED

Did Degenhardt quit, or was she dismissed without just cause or notice?

ANALYSIS

It is agreed between the parties that Degenhardt did not show up for her scheduled shift on March 8th, 1996. It is also agreed between the parties that there were at least two prior incidents when Degenhardt also failed to show up for a scheduled shift.

GFC says that Degenhardt telephoned in the morning of March 8th at about 10:00 A.M. to advise that she would be late and again at about 12:30 P.M. when she announced that she was quitting. According to the GFC supervisor who spoke with Degenhardt, the latter was intoxicated when she phoned the second time. According to this supervisor, Degenhardt has had an ongoing alcohol problem.

Degenhardt admits that she had previously been spoken to concerning her work-related problems but says that she never received a written warning (the employer does not contest this latter point).

It may well be that if the employer followed the principles of progressive discipline (for example, by issuing prior warnings and putting Degenhardt on clear notice that subsequent unexcused absences would result in dismissal), it might have had just cause to terminate Degenhardt on March 8th. However, GFC essentially condoned Degenhardt's behaviour when it refused or neglected to take disciplinary action with respect to Degenhardt's previous unexcused absences from work. In my view, three unexplained and unexcused absences during nearly 18 months of employment does not constitute just cause for dismissal, especially in the absence *any* prior substantive disciplinary action by the employer. In my opinion, on March 8th, when Degenhardt was absent for a third time without permission, GFC had just cause to discipline, but not just cause to terminate.

Indeed, it would appear that on March 8th the employer was not purporting to terminate Degenhardt for cause. I infer from the employer's letter (quoted, in part, above) that GFC was under the impression that Degenhardt's proposal to give one month's working notice was open for acceptance or rejection, but, in any event, Degenhardt had tendered an irrevocable resignation.

Under the Act (although not under the common law), an employee is not obliged to give his or her employer notice of resignation. If an employee offers to give the employer a particular amount of working notice and this offer *is accepted by the employer*, then a binding contract comes into force. If an employee's "working notice" offer is *not accepted by the employer*, then there is no binding agreement governing termination of employment.

When Degenhardt tendered one month's working notice, GFC was not obliged to accept that notice. In that event, under the Act, Degenhardt had two options open to her--she could either quit without notice (or offer some lesser amount of working notice acceptable to GFC) or continue in her employment. In this case, however, the choice was taken out of Degenhardt's hands because GFC, in effect, immediately terminated her employment.

GFC did not have just cause to terminate Degenhardt on March 8th, nor did GFC accept Degenhardt's one month notice proposal. Accordingly, on March 8th GFC could lawfully terminate Degenhardt's employment only by giving her two weeks' notice of termination or by paying her two weeks' wages--GFC did neither.

ORDER

Pursuant to section 115 of the *Act*, I order that Determination No. CDET 003895 be confirmed as issued in the amount of \$418.33 together with whatever further interest that may have accrued since the date of issuance pursuant to section 88 of the *Act*.

Kenneth Wm. Thornicroft, Adjudicator
Employment Standards Tribunal