

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 -

Frank Shuster operating as
Frank Shuster Dairy Farm
("Shuster")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: John L. McConchie

FILE NO.: 97/394

DATE OF DECISION: August 22, 1997

DECISION

OVERVIEW

This is an appeal by Frank Shuster operating as Frank Shuster Dairy Farm (“Shuster” or “the appellant”) pursuant to Section 112 of the *Employment Standards Act*, R.S.B.C. 1996, C. 113 (the “Act”) from a Determination issued by a Delegate of the Director on April 25, 1997. The Director’s Delegate concluded that Shuster owed Terry Jansen (“Jansen”) the sum of \$811.37 on account of severance pay resulting from Jansen’s termination without notice and without just cause. In this appeal, Shuster claims that no severance pay is owed Jansen for the reasons which are detailed below.

FACTS

In the Determination, the Director’s delegate noted the following background to the original complaint filed by Jansen:

“Jansen worked for Shuster as a milker on his dairy farm for over four years, from September 15, 1992 until November 1, 1996. She worked from Monday through Friday, and was off on weekends. She asked for a week off around the end of October to take her son to Calgary, Alberta to register for college. When she returned, she was told that she was no longer needed. She is requesting termination pay.”

In carrying out her investigation under the Act, the Delegate received information from both Shuster and Jansen. Shuster told her that he had expected Jansen to work on October 28th but she did not show up for work until November 4. He said that at that time he informed Jansen that he did not need her any longer and paid her for the last week of October. Shuster alleged that Jansen had told him she had shoulder problems from milking, couldn’t handle the job much longer and was getting treatment. Shuster told the Delegate that it was his belief that Jansen intended to quit.

Jansen told the Delegate that she had asked Shuster for the time off at the end of October; that she picked up a paycheque on October 28 and reminded Shuster she would be away for a week. When she returned to work on November 4, Shuster told her that he was laying her off as he did not need her any longer. In response to Jansen’s questions, he denied that she was being fired. Jansen denied informing Shuster of any intention to quit.

Based on the information provided by Shuster and Jansen, the Director’s Delegate determined that Jansen should have been given notice or termination pay by Shuster but was not. She noted that Shuster had admitted that he laid off Jansen permanently because he believed she was going to quit. The Director’s Delegate calculated that Jansen was owed three weeks severance pay.

ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether Jansen is owed severance pay as determined by the Director's Delegate

ARGUMENTS

In his appeal submission Shuster submits there are a number of reasons why Jansen was laid off and raises the following allegations to substantiate his claim that no severance pay is owed to Jansen:

Jansen was hired to work in September 1992 for six days per week for approximately four to five hours per day. After a "short time" she decided she no longer wanted to work on Saturdays and her hours were "substantially reduced", although she was paid the same salary;

Jansen "constantly had her daughter, as well as other family members and friends visiting and distracting her during working hours. This led to numerous costly errors in judgment and lack of observation of the animals", including Shuster not receiving an annual award for Quality Milk Production for the 1995/1996 year;

Jansen "walked off the job on several occasions, sometimes not returning to work for 4-5 days with neither telephone nor any other contact. Her work habits continued to decline over the past two years and there were many occasions where she would refuse to talk to me";

Jansen never asked for time off in the Fall of 1996 and, furthermore, had used all of her 1996 vacation entitlement prior to the end of Summer 1996;

In September 1996 Shuster advised Jansen that he would be taking his annual vacation for two weeks in mid-October. At that time, no mention was made of her plans for a trip to Calgary;

During Shuster's mid-October absence Jansen refused to work one of the weekends to make up for time she had taken over and above her vacation allowance.

During Shuster's mid-October absence two registered cows died and Shuster maintains that "this could have been avoided had she [Jansen] recognized the need for attention for these animals";

Jansen did not return to work on October 28 as per her regular schedule. When she returned to work on November 4 a "mutual decision" was made that she would be "laid off, effectively immediately" and would be paid until the end of October. Jansen stated at that time that she was intending to quit her job;

Jansen received approximately \$450.00 worth of hay for her horses from Shuster's farm, as well as a \$110.00 load of sawdust, for which she has never made arrangements for payment.

In response, Jansen denies Shuster's allegations, claiming:

She worked many weekends and statutory holidays "without extra pay";

She never brought anyone on to Shuster's property without checking with Shuster first and was never spoken to by him about visitors; she has no idea what "costly mistakes" she is alleged to have made; she has no control over milk quality and was never approached by Shuster about any unhappiness on Shuster's part with her work performance;

She has never walked away from her job;

It was common knowledge that her son had to be in Calgary by October 31;

She was informed on October 11 by Shuster that he was going on holidays;

She was not asked to work on the weekends Shuster was away;

She did everything she had been taught when the two cows became ill during Shuster's absence;

She went to the barn on October 28th to get her October 15th paycheque;

She disputes his estimates of the cost of the hay and sawdust and notes that she was never asked to pay for these items.

In support of her submission Jansen has provided several letters of reference regarding her work; photocopies of Christmas cards which she and her daughter received from Shuster; and a page outlining the days she took as holidays and days off for 1996.

ANALYSIS

The appellant has raised several new arguments in support of dismissal which were not discussed with the Director's delegate. These new allegations are set out in the items numbered 1, 2, 3, 6, 7 and 9 above. These allegations can be dealt with summarily. The Tribunal will not consider new arguments that could have been tendered by a party at the investigation stage: *Tri-West Tractor Ltd.* [1996] BCEST No. 268/96 and *Kaiser Sables Ltd.* [1997] BCESTD No. 58/97. No reasons have been provided in this appeal for a departure from this important procedural principle.

Shuster's remaining submissions provide no basis for overturning the decision of the Director's Delegate. Shuster has alleged that Jansen intended to quit her job and so agreed to the layoff. Even if Jansen had such an intention (which she denies) it would not be material unless she put it into effect through words or action. In order to decide that an employee has quit her job, this Tribunal has said that there must be "clear and unequivocal facts to support [such] a conclusion": *Burnaby Select Taxi Ltd. -and- Zoltan Kiss*, BC EST #D091/96. No such clear and unequivocal facts exist in this case. The preponderance of the evidence before the Director's Delegate was to the opposite effect. The appeal submissions leave this situation unchanged. The appellant cannot succeed on this allegation.

Did Jansen give just cause for termination due to an absence without leave for a period of about one week? It is not clear that this is even a proper question on this appeal because it does not appear from Shuster's arguments that the Employer ever purported to terminate Jansen's employment for just cause. Putting that concern aside, the evidence does not support the conclusion that Shuster treated the leave as an event justifying summary dismissal. Firstly, Shuster told the Director's Delegate that the reason for dismissal that he reported to Jansen was not the leave of absence but the fact that he did not need her anymore. Secondly, the appellant alleges that this was not an isolated instance (see item 2 above) stating that she had "walked off the job on several occasions, sometimes not returning to work for 4-5 days with neither telephone nor any other contact." Despite this, there is no allegation that Jansen was reprimanded on these other instances or in any way made aware that such absences were considered by Shuster to leave her susceptible to possible termination. In the face of this, it is hard to see how Shuster would be in a position to dismiss Jansen for the events of late October, without first having clearly warned her that her absences would no longer be condoned. Finally, there was no suggestion in the submissions that Shuster attempted to reach Jansen during the week she was away, either to find out why she was not working or to find out when she intended to return.

The appeal submissions suggest a growing dissatisfaction over time on Shuster's part with Jansen's attitude and work quality. In such circumstances, it can often be tempting for an employer to use the occasion of a misunderstanding or a deficiency in the employee's performance as a basis for bringing the unhappy situation to a conclusion. The submissions imply that this may have occurred here. There was nothing to prevent Shuster from terminating Jansen's employment at any time. However, in order to bring her employment to a conclusion without providing notice or payment in lieu of notice, Shuster was required to establish that she either quit or that he had just cause for her summary dismissal. This onus of proof has not been satisfied in this case.

ORDER

Pursuant to Section 115 of the Act, I order that the Determination of the Director's Delegate dated April 27, 1997 be confirmed.



John L. McConchie
Adjudicator
Employment Standards Tribunal