

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 -

Dunn's Automatic Transmission Ltd.
("DAT")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE NO.: 97/233 and 97/244

DATE OF HEARING: August 11, 1997

DATE OF DECISION: September 5, 1997

DECISION

APPEARANCES

for the appellant: Robert Dunn
Kathleen Dunn

for the individuals: Harry Dunn, in person
Danny Spencer, in person

for the Director: Ken Copeland

OVERVIEW

This decision involves two appeals that have been made pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by Dunn’s Automatic Transmission Ltd. (DAT) from Determinations made by a delegate of the Director of Employment Standards (the “Director”). The first is an appeal of a Determination dated March 17, 1997 in which the Director concluded DAT had contravened Section 63 of the *Act* by failing to pay length of service compensation for Danny Spencer (“Spencer”). The Director ordered DAT to pay an amount of \$1673.67 in respect of the contravention. DAT says this Determination is in error as Spencer had verbal notice his employment would be terminated.

The second appeal is from a Determination dated March 24, 1997 in which the Director concluded DAT had contravened Sections 17, 57, 58 and 63 of the *Act* by failing to pay wages for days worked, failing to allow or pay annual vacation entitlement and failing to pay length of service compensation upon termination of employment for Harry Dunn (“Dunn”). The Director ordered DAT to pay an amount of \$5296.12 in respect of the contraventions. DAT says this amount is not owed.

ISSUES TO BE DECIDED

The only issue relating to Spencer is whether he received the notice required by the *Act* when his employment with Dunn’s was terminated.

There are three issues relating to Dunn: the first is whether he quit his employment with DAT on or about April 4, 1996; the second is whether he performed work for DAT during a period from June 24 to June 26, 1996; the third issue is whether he has received all annual vacation pay entitlement. The third issue will be substantially decided by my conclusions about whether

Dunn received time off with pay during the period to which vacation pay entitlement has been allocated.

FACTS

For the purposes of the *Act*, Spencer was employed by DAT for a period from September, 1992 to December, 1996.

For approximately two years prior to December, 1996 Robert and Kathleen Dunn, the owners, officers and directors of DAT had been attempting to dispose of the business of DAT. In November, 1996 a purchaser was found and the sale was completed. Spencer was told the business was sold and his employment with DAT would end late December, 1996. No written notice of termination was given.

Dunn is the younger brother of Robert Dunn, one of the former owners, officers and directors of DAT. He began his employment with DAT in September, 1989. He worked as a mechanic, taking his apprenticeship while employed at DAT.

On April 4, 1996 Dunn's employment was terminated. There is an issue about whether he quit or was laid off. I heard a number of witnesses on this point. May Grieve ("Grieve") was in the DAT office visiting Kathleen Dunn on what I conclude was Thursday, April 4 when Dunn entered. She said he appeared visibly upset and never said "hello" to her. He asked Kathleen Dunn for his separation papers.

Agnes Smith ("Smith") testified she was in the DAT office on a Friday morning in early April, 1996. While there, Dunn came into the office. He talked briefly with Kathleen Dunn. Smith did not hear the discussion the two were having, but when Dunn turned from the discussion he spoke to Smith, saying: "I wasn't fired, you know, I quit. I'd be better off on welfare or U.I.C. for all I earn here."

Kathleen Dunn testified that in late March Dunn was having some personal problems involving family and finances. He had taken "a couple of days" off during the week previous to April 4. Just after lunch on April 4 he appeared in the office. He said he wanted his separation papers, as he was quitting. He said he would talk about it later with her. About 3:00-3:30 that afternoon he returned to the office. He talked about how much of his cheque was being deducted [there was an Family Maintenance Attachment Order on his earnings at that time] and about some of the problems he was having with the Justice Department concerning enforcement of the Order and a custody issue. He asked the ROE to show laid off, shortage of work, and she agreed.

In fact, because business was slow and Dunn and Spencer had been "work sharing" starting about two weeks previous. Both had spent part of the time working and part on layoff. After

Dunn left, DAT cut back on the mechanical side of the business, performing primarily transmission work.

Dunn testified that business was slow. He had not worked the week previous to the week of April 1-5. He talked to Kathleen Dunn about getting a separation slip so he could collect unemployment insurance for the weeks he was not working. She agreed. He says he maintained contact from time to time, checking if they had sufficient work to rehire him, but was told it was still too slow. He says later he found out, in May sometime, DAT had cut back the mechanical end of the business and Robert Dunn was doing what little work there was. He did not speak to either Kathleen or Robert Dunn about that.

On the other two issues, Dunn says he worked June 24-26 repairing a transmission on a Volkswagen. DAT says he did not. Dunn says he was not paid vacation pay while employed at DAT. DAT says he was.

ANALYSIS

Section 63 of the *Act* places a statutory liability upon an employer to pay length of service compensation to each employee upon completion of three consecutive months of employment. In a sense length of service compensation is an earned statutory benefit conferred upon an employee. The amount of compensation increases as the employee's length of service increases to a maximum of 8 weeks' wages. An employer may effect a discharge from this statutory obligation by providing written notice to the employee equivalent to the length of service entitlement of the employee or by providing a combination of notice and compensation equivalent to the entitlement of the employee. An employee may cause an employer to be discharged from the statutory obligation by doing one of three things: first, self terminating employment; second, retiring from employment; and third, giving just cause for dismissal.

What I must decide in this case is first, whether Spencer was given notice, and second, whether Dunn has discharged DAT from its statutory liability by terminating his employment.

The answer to the first is easy. The *Act* requires notice of termination to be in written form. It is agreed that no notice in writing was given to Spencer. The statutory obligation of DAT to pay length of service compensation to Spencer has not been discharged. The appeal of DAT from the Determination ordering them to pay Spencer length of service compensation is dismissed.

The issue of length of service compensation relating to Dunn is more difficult. While the *Act* uses the word "terminate" in paragraph 63(3)(c) to describe one of the ways by which an employee which could effect a discharge of the statutory obligation of an employer to give notice and/or compensation, the term is intended to capture any manner by which an employee chooses to end the employment relationship. Labour relations concepts such as abandonment, resignation and voluntary termination or severance of employment are all notions caught by the term. To the lay person, however, it is simply known as a "quit". The question I have to answer is whether, in all of the circumstances present in this case, I can find Dunn quit.

The position the Tribunal takes on the issue of a quit is now well established. It is consistent with the approach taken by Labour Boards, arbitrators and the Ontario Employment Standards Tribunal. It was stated as follows in the Tribunal's decision *Burnaby Select Taxi Ltd. -and- Zoltan Kiss*, BC EST #D91/96:

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 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; objectively, the employee must carry out some act inconsistent with his or her further 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.”

In the circumstances presented to me in this case, I conclude Dunn did quit his employment with DAT on April 4, 1996. There are a number of facts that lead me to this conclusion. First, there is the evidence of Smith. Dunn told her he had quit. Second, and I accept the evidence of Kathleen Dunn on this point, she would not have issued a Record of Employment unless Dunn asked for it. Third, while Dunn's initial intention to quit may have been part of an emotional response to his personal and financial problems, his objective conduct following his request for separation is inconsistent with any intention to continue his employment. There are several aspects of his evidence that support this conclusion.

First, in his reply to the appeal, he said he had asked for a layoff so he could collect U.I.C. for those weeks where there would be no work for him. In his evidence, he elaborated on that point. He said in March work had gotten slow and, as they did the year before, he and Spencer began to share the available work. The Payroll Records confirm that in the week ending March 23, Dunn worked three days while Spencer worked two. For the week ending March 30, that split would have been reversed, except Dunn took two days off that week to attend to some personal matters so Spencer worked the whole week. If, as he says, he only intended to apply the ROE to a supplemental unemployment claim, the work sharing arrangement should have continued. It did not. Second, he continued to frequent the shop to see Spencer and maintained his close personal friendship with him, yet there is no indication he made any inquiries about returning to work. Third, he said that in May he first found out that DAT had cut back the mechanical side of the business and effectively eliminated his job, but he did nothing to confirm his situation or status with DAT or raise the matter personally with either Kathleen or Robert Dunn. The suggestion it took him until May to reach that realization is surprising in itself. It is even more surprising he did nothing to raise the matter in light of the

relatively close family relationship that existed at the time. Finally, when he testified about the three days in June where he returned to do work on a Volkswagen transmission, he said that work was preceded by a phone call in early June from Kathleen Dunn. Again, there was no inquiry by Dunn about whether or when he might return to work, either generally, or specifically in the context of this work and no reference to his job being eliminated. In fact, in his evidence, Dunn gave the impression the call was in the nature of a casual consultation, with Kathleen Dunn saying she really didn't want the job, but wanting his views about what kind of problems they might expect if the customer pressed them to take it on.

The appeal succeeds on the issue of length of service compensation.

It does not succeed in either of the other areas.

I am satisfied from the evidence Dunn worked for the three days in June repairing the Volkswagen transmission. The evidence of Susan Harrison, that she was at the shop on one of those three days and saw Dunn in coveralls working on the transmission. She was surprised to see him working there and asked him what he was doing. He told her he was at the shop because First Class Transmission, another transmission repair shop in Salmon Arm, could not do the job. That evidence was not challenged in any meaningful way. Instead, DAT simply says it has no knowledge of any work done on a Volkswagen transmission on those days and no knowledge of Dunn working.

That reply is simply unacceptable. At a minimum, their work orders for the days in question could have established conclusively whether there was work performed on a Volkswagen transmission during that time period. They may even have identified who performed that work. In light of the evidence presented and in the absence of some reason for questioning its validity, DAT has not been able to persuade me the delegate's conclusion is wrong.

Also, with one exception, I do not accept that Dunn has received annual vacation pay or time off as required by the *Act*. It was the evidence of Kathleen Dunn that all vacation entitlement had been given to Dunn in the form of paid time off. She showed, from payroll records commencing in 1991, that Dunn had continued to receive full wages during times when the record showed he was absent, on one occasion, in 1991 the records showed he was at school doing a part of his apprenticeship and on two occasions, 1992 and 1993, the records show he had holiday time off around Christmas. She contended first, that Dunn also had holiday time off around Christmas in 1994, and second, that in 1995 she and Dunn had reached an agreement to allow him to take time off without loss of pay to compensate him for his vacation entitlement, although the days he supposedly took off were never recorded.

I accept, based on the records, that Dunn continued to receive his regular wages during a period from December 19, 1993 to January 1, 1994 when he was on "holiday". The pay received during this period should be considered as annual vacation pay. However, two statutory holidays occurred in that period for which DAT was required to pay Dunn the

equivalent of a normal day’s wages, which was \$96.00. The amount he received for the two weeks, \$960.00, will be adjusted by the two day’s statutory holiday pay and the balance, \$768.00, will be considered as the amount of annual vacation pay received for 1993. Based on the calculations made by the delegate for the year 1993, Dunn would have an unpaid annual vacation entitlement of \$157.60 for that year.

The payroll records do not support the contention that Dunn received any further “holidays with pay”, either as a period of time off around Christmas or as individual days off during 1994 or 1995. The records are, in fact, inconsistent with the assertion that Dunn took days off (which were not recorded) but continued to receive his normal bi-weekly wage as if he had worked 80 hours in the pay period. What the records show through 1995 and 1996 are many weeks recording days not worked where Dunn received less than his normal bi-weekly wage. The response of Kathleen Dunn to this inconsistency was to state DAT didn’t pay on those occasions either because Dunn was laid off and they couldn’t afford it or because the time taken off was for personal reasons. Neither of those responses explains the inconsistency in the position of DAT. Also, Kathleen Dunn was unable to give any assistance in identifying when these days off may have occurred, even though, based on Dunn’s entitlement, there should have been three weeks of such absences in 1995. Instead the record for 1995 shows 12 days of recorded absence for which wages were not paid.

The holiday pay calculations for the years 1994, 1995 and 1996 stand as made by the delegate, except the amount of \$312.00, which was incorrectly credited as annual vacation entitlement paid in 1996 shall be adjusted from the resulting amount.

In result, Dunn is entitled to the following amounts:

Vacation Pay:

1.	1993	4%	\$157.60
2.	1994	4%	\$1,046.40
3.	1995	6%	\$1,217.24
4.	1996	6%	\$563.82

Wages June 24, 25 and 26, 1996: \$312.00

Total Outstanding: \$3,297.06

Interest will be calculated and added to this amount. I refer the interest calculations back to the Director.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination respecting Spencer, dated March 14, 1997 be confirmed and I order the Determination respecting Dunn, dated March 24, 1997 be varied to show the amount owing as \$3,297.06 plus interest, the calculation of which is referred back to Director.

David Stevenson
Adjudicator
Employment Standards Tribunal