**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 -

Geraldine McDougall.
("Mrs. McDougall")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

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| **ADJUDICATOR:** | David Stevenson |
| **FILE NO.:** | 1999/394 |
| **DATE OF HEARING:** | August 26, 1999 |
| **DATE OF DECISION:** | September 10, 1999 |

**DECISION**

**APPEARANCES**

| | |
|---|---|
| for the appellant | in person |
| for the individual | in person |

## OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) by Geraldine McDougall ("Mrs. McDougall") of a Determination which was issued on June 8, 1999 by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded Mrs. McDougall had contravened Section 63 of the *Act* when she failed to pay a former employee, Donna McDonald ("Mrs. McDonald"), length of service compensation, ordered Mrs. McDougall to cease contravening the *Act*, to comply with its requirements and to pay an amount of $1499.47.

Mrs. McDougall says the Determination is wrong because Mrs. McDonald abandoned her job and as a result has relieved Mrs. McDougall of the obligation to pay length of service compensation.

**ISSUES TO BE DECIDED**

The issue in this case is whether Mrs. McDougall has shown the Determination is wrong in fact, in law or in some combination of the two and, more specifically, whether Mrs. McDonald quit, or abandoned, her employment. The onus to demonstrate an error in the Determination is on Mrs. McDougall.

## FACTS

There are not many facts that are relevant to this appeal. After hearing the evidence, I have reached the following conclusions:

1. Mrs. McDonald had been employed by Mrs. McDougall as a home care support worker since January 1, 1996.

2. On December 22, 1998, Mrs. McDonald was told by Mrs. McDougall that she could take some time off through the holiday season as her daughter was coming to visit for the holidays and could take care of her needs. Mrs. McDougall said she would call when her daughter left.

3. Between December 25 and January 6, 1999, Mrs. McDougall called Mrs. McDonald's home phone on two occasions, leaving messages both times. The messages did not request Mrs. McDonald to come back to work, but requested her to return some bread that Mrs. McDougall was keeping in Mrs. McDonald's freezer.

4. Mrs. McDonald has a cellular phone and voice messaging and Mrs. McDougall has the number for that phone, but no calls were made to Mrs. McDonald on that phone between December 25 and January 6.

5. By January 6, Mrs. McDonald's husband was concerned that his wife had not been called back to work and he called Mrs. McDougall. Mrs. McDougall and Mr. McDonald gave conflicting evidence about the discussion, but I find the relevance of that discussion lies more in what was not said than what was said. There was no reference by Mrs. McDougall during the discussion that she had "called repeatedly" for Mrs. McDonald to return without receiving any response from her. Mr McDonald did ask Mrs. McDougall if his wife was still working for her and was told that she had been replaced.

There was considerable evidence about a sum of $400.00 that Mrs. McDougall had asked Mrs. McDonald to place in her bank account. Mrs. McDougall says the money was "stolen" from her and later says it was repayment of a loan she made to Mrs. McDonald. Mrs. McDonald says the money was a loan she was making to Mrs. McDougall. While the incident does provide some insight into why Mrs. McDougall did not call Mrs. McDonald to return to work, making specific findings of fact on whose version of events is correct is not necessary to this decision. If it were, I would tend to accept Mrs. McDonald's version of events as being more reasonable and probable in all of the circumstances. It should also be noted that in her initial response to the complaint, dated April 21, 1999, Mrs. McDougall makes no reference to Mrs. McDonald having "stolen" $400.00 from her.

**ANALYSIS**

Section 63 of the *Act* contains provisions relating to an employer's liability to pay an employee length of service compensation on termination of employment. Subsection 63(1) states:

> *63. (1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one weeks' wages as compensation for length of service.*

The amount of the employer's statutory liability for length of service increases as the employee's consecutive months and years of employment increases (subsection 63(2)). Length of service compensation is, from the employee's perspective, a statutory benefit earned with consecutive years of employment. From the employer's perspective, it is a statutory liability that accrues to each employee with more than 3 consecutive months of employment. While length of service compensation is often referred to as "termination" or "severance" pay, it is related to termination only to the extent that a termination of employment, actual or deemed, triggers the benefit or liability, depending on the perspective. Subsection 63(3) identifies three circumstances where the statutory liability of the employer to pay length of service compensation is deemed to be discharged: first, if the employee is given written notice of termination equivalent to the employer's statutory liability to the employee; second, if the employee is given a combination of notice and compensation equivalent to the employer's statutory liability to the employee; and third, if the employee terminates the employment, retires from employment or is dismissed for just cause.

In this case, Mrs. McDougall says, in effect, she is deemed to be discharged from her statutory liability to pay Mrs. McDonald compensation for length of service because Mrs. McDonald terminated the employment. In this case the term "abandoned" is used to describe Mrs. McDonald's conduct, but this term, as well as others such as "quit", "resigned", "voluntarily terminated" and "voluntarily severed", is included in the phrase "*terminating the employment*".

The act of terminating one's own employment is a right that is personal to the employee and there must be clear and unequivocal evidence that this right has been voluntarily exercised by the employee. There is an objective and a subjective element involved in this act: objectively, the employee must carry out an act that is inconsistent with further employment; subjectively, the facts must point to an intention on the part of the employee to terminate the employment. Mrs. McDougall has not shown from either perspective that Mrs. McDonald abandoned her employment. I do not accept that Mrs McDougall made numerous calls asking Mrs. McDonald to return to work that went unanswered. The only concern that I had with the conduct of Mrs. McDonald was why, when she had not been contacted by January 6, she did not call Mrs. McDougall to inquire about when she could expect to be called back to work. Her response to that question when I asked it was that she simply felt Mrs. McDougall's daughter had extended her stay and she would be called when she was needed. I accept that as a reasonable response to the question. She added that in any event she believed it was Mrs. McDougall's responsibility to call, not hers. I do not accept that. There is no absolute "responsibility" one way or the other. It is a matter of common sense and, ultimately, whether an employee's failure to communicate with the employer may demonstrate an intention to terminate the employment is a matter of fact that has to be considered in the circumstances of any particular case. However, that consideration does not arise in this case.

The appeal is denied.

## ORDER

Pursuant to Section 115 of the *Act*, the Determination dated June 8, 1999 is confirmed in the amount of $1499.47, plus interest on that amount pursuant to Section 88 of the *Act*.

**David B. Stevenson**
Adjudicator
**Employment Standards Tribunal**