

**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-

RTO (Rentown) Inc. formerly known as Granada Canada Ltd.

(“RTO” or the “employer”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

**ADJUDICATOR:** Kenneth Wm. Thornicroft

**FILE No.:** 97/256

**DATE OF HEARING:** August 18th, 1997

**DATE OF DECISION:** October 6th, 1997

**DECISION**

**APPEARANCES**

James M. Bond                      for RTO (Rentown) Inc.  
Kelly Sheehan                    on her own behalf  
No appearance                    for the Director of Employment Standards

**OVERVIEW**

This is an appeal brought by RTO (Rentown) Inc., formerly known as Granada Canada Ltd. (“RTO” or the “employer”), pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by the Director of Employment Standards (the “Director”) on March 25th, 1997 under File No. 193160 (the “Determination”).

The Director determined that RTO owed its former employee, Kelly Sheehan (“Sheehan”), the sum of \$9,793.51 on account of five weeks’ wages as compensation for length of service and interest. The employer’s appeal is based on the assertion that Sheehan voluntarily quit her employment and thus, by reason of section 63(3)(c) of the *Act*, was not entitled to any termination pay. As an alternative or subordinate position, the employer says that the Director’s calculation of the amount owing by way of termination pay is incorrect. Specifically, the employer asserts that Ms. Sheehan’s wages in the weeks prior to her termination were “artificially inflated” due to a series of ongoing “liquidation sales” and that such “inflated weekly wages” ought not to be used as a base to calculate compensation for length of service. According to the employer, a proper calculation would lead to an award in favour of Sheehan in the neighbourhood of, before interest, \$4,125.

This appeal was heard at the Tribunal’s offices in Vancouver on August 18th, 1997 at which time I heard evidence from Marshall Hurst, the former chief operating officer of RTO (when it was known as Granada Canada Ltd.) and Natalie Donna Clayton (by telephone conference call) on behalf of RTO; Ms. Sheehan testified on her own behalf. No one appeared on behalf of the Director.

**FACTS**

Granada Canada Ltd. (the predecessor firm to RTO) was formerly in the business of leasing and selling home electronic equipment such as televisions and sound systems. In about July 1994 the employer’s board of directors decided to wind up Granada (which at that time had operations across Canada and employed some 400 employees).

By January 1995 only the Toronto and Vancouver operations of Granada remained open for business. By letter dated June 27th, 1995 Sheehan, who worked as a sales representative in the Vancouver operation, was advised that her employment would be terminated on December 29th, 1995 which was the proposed closing date of the Vancouver office.

Throughout most of 1995, Sheehan was one of only two sales representatives in the Vancouver office. Commencing in the early spring of 1995 and continuing throughout the year, Granada had a half-dozen or so "liquidation sales" in order to reduce its stock of inventory. These sales--which took place at the company's warehouse in Burnaby, were quite successful; during one such weekend sale Granada sold over \$250,000 worth of inventory. According to Ms. Sheehan, these sales were "quite lucrative" in terms of her commission earnings (Sheehan did receive an annual base salary but commission earnings represented the bulk of her total remuneration).

By the fall of 1995, the Vancouver operation had been reduced to about 12 employees, including Sheehan. According to Marshall Hurst, who was then managing the Vancouver operation, on Thursday, September 14th, 1995, Sheehan approached him and said she needed the afternoon off to attend to a "family matter" and was given the afternoon off. The next day, Hurst was told by some other staff members that Sheehan had taken the afternoon off to "get her hair done". The next day, a Friday, Hurst spoke to Sheehan around noon when she advised him that she wished to take the afternoon off in order to pack and take care of some personal errands before she left on her scheduled vacation. According to Hurst's testimony:

- Hurst told Sheehan that "I won't stop you from leaving but when you get back we will have to sit down and have a disciplinary interview".
- Sheehan was obviously surprised and offended and told him words to the effect of "I don't need to put up with this; I'm quitting".
- Hurst asked if she was sure and Sheehan replied that she was; that her current job was "going nowhere".
- Hurst then said that he'd make the "appropriate arrangements".
- A few days later, a letter was delivered to Sheehan's residence. The letter, under Hurst's signature and dated September 19th, stated, in part: "Further to our discussion on Friday, September 15th 1995, this letter will confirm that I accept your verbal resignation from the company effective 12:30 pm on that date."
- Hurst never requested a letter of resignation from Sheehan.
- On the next Tuesday, following her return from a one-week vacation, Sheehan telephoned Hurst and asked why she had been terminated; Hurst replied that she had quit. Sheehan then asked for some customer files (which were not given to her) and a letter of reference. Sheehan never asked for her job back and mentioned that she had some job interviews

lined up.

- On the Thursday of that week, Sheehan attended at the Burnaby office to pick up her personal effects that had been boxed up by Hurst.

Not surprisingly, Sheehan's recollection of the above-described events is somewhat different:

- Sheehan had previously booked a cruise vacation that was scheduled to run from Saturday, September 16th to the next Saturday.
- On Friday, September 15th, at about 2:00 P.M. (the usual quitting time was 4:00 P.M. but was 3:00 P.M. on that day), Sheehan told Hurst that she had to leave in order to run some errands prior to leaving on her scheduled vacation. Sheehan had apparently told Hurst the previous day that she would need to leave early; the problem on Friday was that the only other sales representative had phoned in sick and thus, if Sheehan left early, no one would be available to handle incoming telephone sales inquiries.
- On Friday, Hurst appeared to be upset by the request and said that "we'll have words about this when you get back from your trip".
- Sheehan adamantly denies that she told Hurst that she was "quitting".
- After she returned from her vacation she read the September 19th letter that had been delivered to her home and called a fellow employee who told her that he had been advised by Hurst that Sheehan had "quit". Apparently, this employee advised Sheehan not to report for work on Monday because she might be escorted off the premises.
- After telephoning another employee, she then spoke with Hurst, by telephone, at which time he said that she had quit.
- On the Thursday, she retrieved her personal belongings from the Burnaby warehouse.

## **ISSUES TO BE DECIDED**

1. Did Sheehan voluntarily quit her employment or was she terminated?
2. In the event that she was wrongfully terminated, should Sheehan's commission earnings from the "liquidation sales" be taken into account when calculating her termination pay?

## **ANALYSIS**

Both the common law courts and labour arbitrators have refused to rigidly hold an employee to their "resignation" when the resignation was given in the heat of argument. To be a valid and subsisting resignation, the employee must have clearly communicated, by word or deed, an intention to terminate their employment relationship and, further, that intention must have been confirmed by some subsequent conduct. In short, an "outside observer" must be satisfied that the

resignation was freely and voluntarily given and represented the employee's true intention at the time it was submitted.

In the present case, even if Sheehan actually indicated on the Friday afternoon that she was "quitting" (and I am not satisfied that she did), I am not satisfied that the employer was properly entitled to immediately act as if her statement demonstrated a clear and unequivocal intention to terminate her employment. The majority arbitration award in *Re Workers Compensation Board* (1987) 31 L.A.C. (3d) 129 is instructive (at pp. 134-35):

One cannot automatically conclude that a person whose judgment is merely impaired does not intend to effect his declared purposes merely because, for example, he may be angry. Notwithstanding the impairment, such a person may be quite capable of acting on sound motives and reason. On the other hand, one cannot be entirely certain that he is not acting more from emotion than from rationality. For these reasons arbitrators will sustain a resignation only where it is clear that it reflects his "true and continuing intention".

...where an employee purports to quit without an opportunity to think about what he is doing, his resignation will be taken to be effective only where it is supported by some subsequent objective conduct which is confirmatory of his expressed intention.

In the case at hand, I am not satisfied that Sheehan's alleged words "I am quitting", standing alone, clearly and unequivocally communicated an intention to terminate her employment. The words, if spoken at all, were spoken in anger. Hurst himself admits that he, too, was angry on the Friday afternoon (which is understandable in light of the fact that he believed himself to have been misled, to his embarrassment, by Sheehan the previous day). No written letter of resignation was submitted by Sheehan, nor apparently, was any effort undertaken to obtain such a letter from her. When Sheehan left, she did not gather up her personal effects from her work space. Sheehan's key to the office was not surrendered, nor was a request made on the Friday to deliver up her office keys. There was no further discussion between Hurst and Sheehan about the matter prior to the delivery of the September 19th letter--presumably, since Sheehan was away on vacation in any event, the matter could have awaited her return the following week so that Sheehan's true intentions vis-à-vis her employment could have been confirmed or clarified. By the time Sheehan returned to Vancouver and spoke with Hurst, the matter of her termination was then, at least insofar as Hurst was concerned (even though he then knew that Sheehan did not consider herself to have resigned), a *fait accompli*. In my opinion, when the evidence is viewed objectively, I am not satisfied that a reasonable person would consider that Sheehan irrevocably and voluntarily terminated her employment with RTO on the Friday afternoon. When the employer refused to allow Sheehan to continue in its employ it, in essence, constructively dismissed her.

Accordingly, I am satisfied that the employer is obliged to pay compensation for length of service and is not entitled to rely on the section 63(3)(c) "voluntary quit" defence.

*Calculation of Compensation for Length of Service*

Given Sheehan's tenure with the employer, it is common ground that she was entitled to 5 weeks wages as compensation for length of service--however, the employer says that her wages were artificially inflated in the last months of her employment due to her commission earnings from the "liquidation sales".

Section 63(4) of the *Act* establishes a formula for calculating compensation for length of service. In my view, Sheehan's commission earnings from the "liquidation sales" can be properly characterized as "regular wages" during 1995 especially in light of the fact that such sales occurred at regular intervals beginning in early spring of that year. It is undoubtedly true that Sheehan, as a result of her commission earnings from the liquidation sales, earned more money in 1995 than would have otherwise been the case if the employer was not closing down its Vancouver operations. Nevertheless the expectation of higher earnings stood as a form of *quid pro quo* or incentive for Sheehan to continue working throughout 1995 while knowing that, regardless of her performance, her employment would end as at December 29th. The "liquidation sales" were a necessary aspect of the winding-up of the Vancouver operations and, in my view, any commission earnings from such sales were properly characterized as "regular earnings" during 1995. Thus, I see no error in including any such commissions, earned in the 8 weeks prior to her termination, when calculating Sheehan's termination pay in accordance with the formula set out in section 63(4) of the *Act*.

## **ORDER**

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of \$9,793.51 together with whatever further interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

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**Kenneth Wm. Thornicroft, *Adjudicator***  
**Employment Standards Tribunal**