

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 -

Gregory Tomyk
("Tomyk")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Norma Edelman

FILE NO.: 98/260

DATE OF HEARING: September 15, 1998

DATE OF DECISION: September 21, 1998

DECISION

APPEARANCES

Gregory Tomyk on his own behalf

OVERVIEW

This is an appeal by Gregory Tomyk (“Tomyk”) pursuant to Section 112 of the Employment Standards Act (the “Act”) against a Determination issued by a delegate of the Director of Employment Standards (the “Director’s delegate”) on April 6, 1998. The Director’s delegate found that Tomyk was not owed compensation for length of service by Don Lumley operating F 2 F Services Ltd. (“Lumley”) because he quit his employment. Tomyk argues that the Determination is wrong because his employment was terminated by Lumley.

The hearing into this appeal was originally set for June 22, 1998. At the hearing the parties reached a settlement and as a result the Tribunal’s file was closed. Subsequently, the Tribunal learned that Lumley failed to comply with the terms of the settlement agreement and another hearing was scheduled for September 15, 1998 to decide the appeal. Although duly notified of the time and place of the September 15, 1998 hearing, Lumley did not attend and offered no explanation for his failure to attend.

ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether Lumley owes Tomyk compensation for length of service.

FACTS

Tomyk testified that he commenced employment with Lumley as a Warehouse Manager on May 29, 1997. At that time, Lumley operated his business on Annacis Island under the name of Fulfillment to Freight. On August 15, 1997, Lumley moved his business to Burnaby and changed its name to F 2 F Services Ltd. Tomyk stated that his conditions of employment remained the same when the business changed its name and location. Lumley continued to own and operate the same business and there was no break in his employment. He stated that his rate of pay during his last 3 months of employment was \$15.00 per hour and that he worked 40 hours per week.

According to Tomyk, his employment was terminated by Lumley on November 10, 1997. On the morning of November 10, 1997, he was on the phone and Lumley came over and swore and screamed at him to get off the phone. When he did, Lumley continued to yell at him, and as a result he told Lumley that he did not think he knew how to speak to people constructively. At this point, Lumley told him he could not afford him anymore and he was

to “get the fuck out of here”. Tomyk said that he did not want to leave, but he did, because he feared for his safety. Ten days later, Lumley phoned him and asked if he wanted his final cheque and, if so, he could come in and make it up. Tomyk said that Lumley did not know how to operate the computer. Tomyk said he agreed, and he went in to work and made up a cheque for his final wages, vacation pay for the period August 15, 1997 to November 10, 1997, 4 hours minimum daily pay for November 10, 1997 and statutory holiday pay for November 11, 1997. He said when he asked if “severance pay” could also be included, Lumley “snapped”, made various threats, and then crumpled up the cheque and threw it at him.

Tomyk said the Director’s delegate erred when she decided that he quit his employment. In the Determination, the Director’s delegate stated that she preferred Lumley’s evidence concerning events on November 10, 1997. At page 3 of the Determination she said:

Mr. Lumley states that once you hung up the phone, he tried to speak to you regarding your attitude and that you replied that he should learn how to talk to people. He alleges that he responded that you should learn to put in a decent days work and if you did like it you could leave. You stated “maybe I will”, gather up your belongings and left.

Mr. Lumley further states that when he had not heard from you for a couple of days, he contacted you and suggested that you come in. You declined to come back to work, however as you completed the payroll you did agree to go into the office and calculate your final pay cheque. As Mr. Lumley contacted you and you declined to return to work, you are deemed to have quite work.

(Reproduced as written)

Tomyk stated that Lumley never made a statement to the effect that “if he didn’t like it he could leave”, nor did Lumley ever offer him his job back. Further, during his employment he never received any warnings that his employment was in jeopardy. Tomyk claims he is owed \$600.00 which represents one weeks compensation for length of service.

Tomyk also claims he is owed vacation pay for the period May 29, 1997 to August 14, 1997. Tomyk’s complaint form dated November 12, 1997 shows he made a claim for vacation pay for the period June 1 to November 10. In a submission to the Tribunal, the Director’s delegate states that Tomyk told her he had received his vacation pay. The Determination makes no mention of vacation pay. Tomyk states that the Director’s delegate was confused because he told her he had received some but not all of his vacation pay.

In a written submission to the Tribunal dated May 15, 1998 Lumley stated that after politely trying to get Tomyk to cease a personal call on November 10, 1997, he told him to “get off the fucking phone now”. When Tomyk got off the phone, he told him that he had “some kind of nerve with (his) attitude...while (he was) losing money”, and further that “he should be ashamed of himself for his lax attitude when the company was losing money”. Tomyk

replied that he should learn how to talk to people. Lumley said he then told Tomyk “You should learn how to put in a decent days work and if you don’t like it (referring to the way I talk) you can always leave.” Tomyk replied “Maybe I will” and then left the work site. Lumley denies he told Tomyk he could not afford him anymore and he was to “get the fuck out”. He said that he advertised for a replacement for Tomyk on that day. He further said that he assumed Tomyk would call him and ask if he could return because he had not asked for his keys nor did he change the alarm code. He said, however, that he would not have allowed Tomyk to return in the same capacity as a manager. He said he phoned Tomyk to determine whether he wanted his vacation pay or “what was up”. He agrees that he never asked Tomyk to work for him again. It is his position that Tomyk quit, although he also says that he had cause to fire him for his work habits. Lumley further said that Tomyk worked for two different companies. He managed the first one (presumably this is Fulfillment to Freight) and Tomyk is owed vacation pay from that company, and although it is not his responsibility, he has issued a cheque for this vacation pay.

ANALYSIS

A recent decision of the Tribunal, *Director of Employment Standards* BCEST #D051/98, described the risks associated with non-attendance at a hearing as follows:

The non-attendance of a party does not change the onus, which remains on the appellant to demonstrate error or a basis for the Tribunal to vary, cancel or confirm a Determination. As a matter of evidence, however, a non-attending party takes the risk that the attending party will tender sufficient and weighty evidence for the appellant to have met its tactical burden to persuade an Adjudicator to vary or cancel a Determination. A party who fails to appear at a hearing does take a risk that information or evidence helpful to Adjudicator may not be available to the Adjudicator. This proposition applies equally to an Employer, an Employee or the Director’s delegate. In the case of an appellant non-attendance is generally fatal to an appeal. In the case of any other party, the non-attendance may or may not be fatal, depending on the circumstances of the case, the issues on appeal and whether the appellant meets the persuasive or tactical burden.

The onus is on the Appellant, Tomyk, to show that the Determination should be cancelled or varied. Tomyk was the only party to this appeal who attended the hearing. After considering his evidence, and the written submissions filed by Lumley and the Director’s delegate (including her Determination), I am satisfied that Tomyk has met the burden of establishing that the Determination is incorrect.

I conclude that Tomyk did not quit his employment. The Tribunal has stated in a number of cases (see for example *Burnaby Select Taxi - and - Zolton Kiss* BCEST D#91/96) there

must be clear and unequivocal facts to support a conclusion that an employee has voluntarily quit his/her job.

In this case there are no clear and unequivocal facts to support a conclusion that Tomyk quit his job. First, in contrast to what the Director's delegate states in her Determination, it is agreed by both Lumley and Tomyk that Lumley never told Tomyk to return to work after November 10, 1997. Second, Tomyk's evidence, which went uncontradicted at the hearing, was that he did not voluntarily depart his employment. I found his testimony to be credible and persuasive. Third, even if I preferred Lumley's version of what took place on November 10, 1997, I would still conclude that Tomyk did not freely terminate his own employment. Lumley's use of the words "if you don't like it ...you can always leave" amounts, in my view, to a dismissal. For these reasons I conclude that Tomyk's employment was terminated. Moreover, there is no evidence that Tomyk was dismissed for just cause. It is not established that Tomyk was advised prior to his dismissal that there were any problems with his work habits and that his employment was in jeopardy. Finally, I am satisfied on the evidence before me (which includes the T4 slips and Records of Employment issued by Lumley) that Tomyk was continuously employed from May 29, 1997 to November 10, 1997 and that pursuant to Section 63 of the Act he is entitled to one weeks compensation for length of service. I calculate that amount to be \$600.00 based on the undisputed evidence concerning Tomyk's rate of pay and hours of work.

The Determination makes no reference to vacation pay and until such time as a Determination is issued by the Director on vacation pay, the Tribunal has no jurisdiction to decide the matter.

ORDER

Pursuant to Section 115 of the Act I order that the Determination dated April 6, 1998 be varied to show that Tomyk is owed compensation for length of service in the amount of \$600.00, plus 4% vacation pay on that amount, together with whatever interest may have accrued pursuant to Section 88 of the Act.

Norma Edelman
Registrar
Employment Standards Tribunal