

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 -

Murphy Aircraft Mfg. Ltd.
("Murphy")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE No.: 2000/470

DATE OF HEARING: September 25, 2000

DATE OF DECISION: October 30, 2000

DECISION

OVERVIEW

The appeal is by Murphy Aircraft Mfg. Ltd. (“Murphy Aircraft”, also, “the appellant” or “the employer”) and pursuant to section 112 of the *Employment Standards Act* (the “Act”). Appealed is a Determination by a delegate of the Director of Employment Standards (the “Director”) dated June 13, 2000. The Determination orders Murphy Aircraft to pay Kerry Fleming compensation for length of service and it imposes a Nil penalty on the employer.

According to the Determination, Fleming was terminated by Murphy Aircraft without notice. The employer, on appeal, claims that the delegate is wrong on the facts and that Fleming quit in that he abandoned his employment.

The penalty is also appealed, for two reasons. One, as the Determination should not have been issued, no penalty should have been imposed. Two, according to the Determination, the penalty is imposed because “the facts are similar to those of a previous contravention” and “there is a pattern of non-compliance” but, according to the employer, it has not previously contravened the *Act*.

APPEARANCES:

Daryl Murphy

For Murphy Aircraft

ISSUES TO BE DECIDED

At issue is the matter of whether the liability to pay compensation for length of service has or has not been discharged. Underlying that issue is the question, Did the employee quit or was he terminated by the employer?

At issue is the matter of the Nil penalty.

What I must ultimately decide is whether the employer has or has not shown that the Determination ought to be varied or cancelled for reason of an error or errors in fact or law.

FACTS

Murphy Aircraft is a manufacturer of aircraft assembly kits. Fleming started working for the company in 1993. According to the delegate, the employment was terminated on May 13, 1999.

Fleming worked three days a week for Murphy Aircraft. He did not report for work on the 6th, 11th, 12th and 13th of May but went to work for another company as a consultant of some sort.

According to the Determination, Fleming did not quit or abandon his job when he went to work for another company. The delegate notes that Fleming indicated that he would be returning to

work for the employer and that he reported for work on the 14th of May. The delegate also found that Fleming was free to choose his days of work just so long as the employer was given prior notice of what he was doing. And, according to the delegate, Fleming, on the 7th, left a message on the employer's voice mail which indicated that he was taking the next couple of days off.

Murphy Aircraft, on appeal, claims that Fleming was neither allowed to choose what days he would work, nor given special permission to miss work as he did. Fleming was sent the appeal and he responded with a letter dated July 31, 2000. In that letter, he states "if there was to be a change in (the) arrangement [i.e. I needed a few more days at home to work on a project], (I was) to notify the company and make sure this was suitable to them". He goes on to claim that the employer, on the 10th, gave him permission to take further time off.

Fleming's written submission is contrary to the Determination. On the basis of what Fleming has to say, I find that he was not free to choose his days of work at all. Even he indicates that he could only change his work schedule if it suited the employer.

This case turns on the matter of whether Murphy Aircraft did or did not give Fleming permission to miss the four days of work that he did and, it not appearing that there was any way that the matter could be decided on the basis of written submissions, the Tribunal set a date for a hearing so that an Adjudicator could hear from the parties directly and assess credibility. The parties were duly notified. The Tribunal's notice of hearing states that the hearing would be at Library Square, 8th Floor, 360 West Georgia Street in Vancouver, and start at 9:00 a.m. on September 25, 2000. I was assigned the case. I went to the hearing at the appointed time and place and found that only the employer was present, represented by Daryl Murphy ("Murphy"), the owner of Murphy Aircraft. Fleming did not appear for the hearing, nor has he explained his absence.

I have heard the employer's appeal. It is the testimony of Murphy that Fleming announced in March of 1999 that he was going to go into business for himself. He is said to have declared at that point in time that it was his intention to quit Murphy Aircraft in two to three months, and to have demanded and received permission to go from a five day week to a three day week, Tuesday through Thursday. I accept all of that as fact, nothing to the contrary.

Murphy has produced his company's record of work for the last three months of Fleming's employment. It shows that Fleming's last day of actual work was the 5th of May. It is fully consistent with a three day week running Tuesday through Thursday and it shows no variation from that regular work schedule. He worked every Tuesday, Wednesday and Thursday from March until the 6th of May.

According to Murphy, it was made perfectly clear to Fleming, at a meeting on the 5th of May that customers were upset and demanding manuals and he was to make his work on the manuals a priority. To Murphy's chagrin, Fleming failed to show up for work the next day as he was supposed to, the 6th being a Thursday. I am told that it is on that day, not the 7th, that Fleming telephoned early in the morning, outside of business hours, and left word that he was not coming in that day. I am told that Fleming never met with anyone in a position of responsibility on the 10th and that no one at Murphy Aircraft gave Fleming permission to take the 11th, 12th, or 13th off, or the 6th off for that matter. I accept all of that as fact as it is plausible and there is no evidence to the contrary.

Even Fleming's submission appears to confirm that he was absent without permission on the 6th. He is not claiming that he had permission to take that day off. According to his submission, it is not until the 10th that the employer gives him permission to take a few days off.

ANALYSIS

Section 63 of the *Act* imposes a liability on employers to pay compensation for length of service. But as is set out in subsection (3) of 63, that liability is discharged if the employee quits.

63 (3) The liability is deemed to be discharged if the employee

- (a) is given written notice of termination as follows:*
 - (i) one week's notice after 3 consecutive months of employment;*
 - (ii) 2 weeks' notice after 12 consecutive months of employment;*
 - (iii) 3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice;*
- (b) is given a combination of notice and money equivalent to the amount the employer is liable to pay, or*
- (c) terminates the employment, retires from employment, or is dismissed for just cause. (my emphasis)*

Quitting is a right which is personal to the employee. The employer cannot just deem that an employee has quit. There must be clear and unequivocal evidence that the employee has voluntarily exercised his or her right to quit. [*Burnaby Select Taxi Ltd.*, BC EST #D091/96]. It must be shown that the employee acted or demonstrated conduct which confirms that there was an intention to resign or which is inconsistent with continuing the employment, the taking of another job for example.

In this case, the employee did not report for work on the 6th, 11th, 12th, and 13th, what for him were four consecutive days of work. On those days, the employee voluntarily went to work for another company as an independent contractor if not an employee. The delegate saw nothing wrong with that as he was led to believe that the employee was free to choose his days of work. But, on appeal, Fleming indicates that in fact he could only change his work schedule if the employer approved of the change. And the evidence before me is that Fleming was absent without permission when he took the above four days off and went to work for another company. I consider that plain, clear evidence that the employee voluntarily quit. In that the employee went to work for another company when he was to be working for the employer, he acted to sever his employment with the employer.

I attach no great importance to the fact that Fleming, on the 6th, stated that it was his plan to continue or, at least, resume working for Murphy Aircraft. In most cases, that would indicate that the employee did not intend to quit but in this case the statement is hollow and misleading. That may have been his long run intention but, on the 6th, his immediate and true intention was to cease working for Murphy Aircraft and perform work for another company. That he intended to quit is clearly inferred from that act.

I attach no importance to the fact that Fleming indicated on the 14th of May that he wished to resume working for Murphy Aircraft. By then, the employment had been severed. Murphy Aircraft is at that point Fleming's former employer and is no longer under any obligation to provide him with work or pay him compensation for length of service.

The Nil Penalty

In that I have found that Kerry Fleming resigned, it follows that Murphy Aircraft is not liable to pay compensation for length of service and that the employer has not contravened the *Act*. I therefore cancel the Nil penalty which is imposed through the Determination.

Had my decision been to the contrary, I would still have cancelled that penalty. According to the Determination, the facts are similar to those of a previous contravention and there is a pattern of non-compliance. But, on appeal, that has not been established by the Director. Indeed, it appears that the Director erred in imposing a penalty as she did because the employer has not, on some prior occasion, contravened the *Act*.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated June 13, 2000, be cancelled.

I also order, pursuant to section 115 of the *Act*, that determination which imposes a Nil penalty on the employer be cancelled.

Lorne D. Collingwood

Lorne D. Collingwood

Adjudicator

Employment Standards Tribunal