

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 -

Ultra Care Cleaning Systems Ltd.
("Ultra Care")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Mark Thompson

FILE NO.: 98/634

DATE OF HEARING: November 27, 1998

DATE OF DECISION: February 4, 1999

DECISION

APPEARANCES:

Dean Woronuk: For Ultra Care
Karen Stevenson: For herself

OVERVIEW

This is an appeal by Ultra Care Cleaning Systems Ltd. (“Ultra Care”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) against a Determination on September 14, 1998 by a delegate of the Director of Employment Standards (the “Director”). The Determination found that Ultra Care had failed to pay a former employee, Karen Stevenson (“Stevenson”) compensation for length of service and the associated vacation pay. The Determination ordered that Ultra Care pay Stevenson \$1537.00, plus interest accrued since her termination.

Ultra Care appealed the Determination on the grounds that it had not terminated Stevenson’s employment. Rather she had abandoned her position. She had informed Ultra Care on July 29, 1997 that she was unable to work because of a sore hip. Ultra Care expected her to return to work on September 5, 1997. When she did not return, Ultra Care attempted to contact her unsuccessfully. It then hired another employee to replace Stevenson, who ultimately sought to reclaim her previous position on March 16, 1998. Ultra Care did not have work available to offer Stevenson a job on that date.

ISSUE TO BE DECIDED

The issue in this case is whether Ultra Care terminated Stevenson.

FACTS

Stevenson was employed as a janitor by Ultra Care, assigned to work at a college which had a maintenance contract with Ultra Care. Evidence before the Tribunal indicated that Stevenson was a good worker, and none of the events in question arose from any dissatisfaction with her work. Stevenson and Ultra Care differed with respect to the date when Stevenson began her employment. Ultra Care provided the Director's delegate with payroll records showing her first pay cheque as issued on February 15, 1994. Stevenson stated that she began work on a part-time basis in September 1992 and became a full time employee in July 1993. The Director’s delegate concluded in the Determination that Stevenson had commenced her employment in February 1994.

In June 1997, Stevenson complained of a sore hip. She continued to work until July 29, 1997, when she stopped working for medical reasons. According to Dean Woronuk (“Woronuk”), president of Ultra Care, Stevenson told him that she needed time off because

of a hip injury. Both Stevenson and Woronuk agreed that Stevenson told Woronuk that she needed the summer off work. Stevenson stated that, in addition to her sore hip, she was suffering from stress. Her physician had told her to take stress leave, and she told Woronuk about her treatment for stress. According to Stevenson, her physician also told her to file a claim with the Workers' Compensation Board (WCB) for an injury to her hip. Stevenson arranged for her niece, Lisa Mundy ("Mundy"), to take over her duties for Ultra Care. Woronuk testified that he and Stevenson agreed that she could take the summer off and return in September, a busy time for the college as students were returning to the residence. Stevenson said that she merely stated that she needed time off from work. Woronuk did not recall receiving any information about treatment for stress and continued to expect Stevenson to return to work in September.

Stevenson filed a claim with the WCB for an injury to her hip sustained in May 1997. Woronuk completed a report for the WCB on August 6. According to Woronuk, Stevenson told him a week later that she had not received any payment from the WCB and that her doctor had suggested that she take a leave of absence. On September 30, 1997, a WCB claims adjudicator wrote to Stevenson, denying her claim on the grounds that she had not demonstrated that an injury had occurred.

On August 19, 1997, Woronuk and Stevenson met outside of the college, and he provided a Record of Employment form and paid her for her annual vacation. Woronuk did not recall any discussion of a prolonged absence for Stevenson. She told him that her hip was better, but did not mention any problems with stress. Woronuk stated that he expected her to return to work on September 5, 1997. Stevenson recalled that she gave Woronuk a medical certificate she had received on August 18. A copy of the certificate was introduced in evidence in the hearing. It stated that Stevenson had "received medical approval to be off work due to stress" from August 18, 1997 through January 1, 1998. Stevenson produced a letter from Human Resources Development Canada dated October 16, 1997 approving her claim for sickness benefits from October 19, 1997 to November 1, 1997. Attached to the letter was a statement from Stevenson's physician that she was under treatment for stress and that she might be able to return to work at the end of January 1998. This letter was dated October 24, 1997. The discrepancy in the dates was not explained. Another medical certificate was produced in evidence stating that Stevenson had medical approval to be away from work due to stress from August 18, 1997 to March 15, 1998. Stevenson explained that one of the certificates contained an error, so the physician had issued a second one. Presumably the certificate with the August 18-January 1, 1998 date was superceded by the second certificate with the later date for Stevenson's return to work.

Stevenson moved out of her residence in North Vancouver to live with her sister in Chilliwack on September 1, according to a letter from her sister. Stevenson acknowledged that she did not inform Ultra Care of her new address or telephone number. Woronuk attempted to telephone Stevenson at her North Vancouver address without success. He then called the WCB to ask for Stevenson's current address but was not able to locate her. Woronuk also asked Mundy for Stevenson's address in Chilliwack, but Mundy could not assist him. Later in August, Woronuk was worried about the anticipated volume of work and stated that he could not locate Stevenson. He called the North Vancouver office of

Human Resources Development Canada asking for assistance in locating Stevenson. The office confirmed that Woronuk had called on August 27, 1997 asking for information to assist him in contacting Stevenson.

As the beginning of the September term approached, Mundy became available for full time work in the position Stevenson had held. She continued to work until February 1998, when she went on maternity leave. Ultra Care stated that other employees, including Mundy, had told management that Stevenson did not intend to return to work.

On March 15, 1998, Stevenson contacted Ultra Care, asking to return to her previous position. Woronuk told Stevenson that no work was available, as another employee had filled her position. Subsequently, Stevenson complained to an official of the college about Ultra Care's refusal to restore her employment. In May 1998, Woronuk offered her a position at another location, but Stevenson declined.

ANALYSIS

The crucial evidence for the outcome of this case is Stevenson's medical status during her absence from work. Evidence before the Tribunal confirms that she was unable to work for medical reasons. Ultra Care may have been unaware of her medical condition after August 19, but it appears to have relied on second or third hand information, much of it erroneous, about her condition and intentions.

The *Act* protects the right of employees to compensation for length of service. This right should not be removed without clear evidence that an employee intended to resign her position. The act of quitting employment is personal to the employee. Any conclusion that an employee has voluntarily resigned her position must be clear and unequivocal. As the Tribunal noted in *Canadian Chopstick Manufacturing Co.* BC EST #D369/98 (Martins), both subjective and objective elements exist in the act of resignation, that is the employee must form an intention to quit and must act in a way that is inconsistent with further employment. Neither condition existed in this case. Stevenson took a leave of absence from work for medical reasons. She continued to seek help from her physician and was granted benefits for sickness by Human Resources Development Canada. When her physician cleared her to resume employment, she sought her previous position from Ultra Care. Direct evidence before the Tribunal does not support the conclusion that she resigned.

Stevenson could have avoided misunderstanding about her intentions by keeping Ultra Care informed of her condition and her plans for employment. I do not agree with the conclusions in the Determination that Ultra Care made no effort to contact her. It appears that Woronuk must have tried to call Stevenson before she moved at the beginning of September. Her failure to notify Ultra Clean of her change of address does not nullify her rights under the *Act*.

ORDER

For these reasons, the Determination of September 14, 1998 is confirmed, pursuant to Section 115 of the *Act*. Stevenson shall receive \$1537.00, plus interest accruing from the date of the Determination pursuant to Section 88 of the *Act*.

Mark Thompson
Adjudicator
Employment Standards Tribunal