Employment Standards TRIBUNAL

An appeal

- by -

Weber & Associate Architectural Consultant Inc.
(the "Employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Ib S. Petersen

FILE No.: 2001/879

DATE OF HEARING: April 2, 2002

DATE OF DECISION: April 4, 2002

DECISION

APPEARANCES:

Mr. Tom Ecker Ms. Pat Ecker	on behalf of the Employer
Ms. Ewa Szenowicz Mr. Stan Szenowicz	on behalf of herself

OVERVIEW

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") of a Determination of the Director's Delegate issued on November 29, 2001.

In the Determination, the Director's Delegate found that Ms. Szenowicz did not quit her employment with her Employer. In the circumstances, the Delegate concluded that the Employer terminated her employment because it failed to allow her to return to work after an extended period off from work due to serious illness.

The Employer takes issue with the Delegate's conclusions with respect to the termination.

FACTS AND ANALYSIS

The Employer, as the Appellant, has the burden to persuade me that the Determination is wrong. For the reasons set out below, I am of the view that the Employer has not met that burden.

Ms. Szenowicz performed work for the Employer from July 12, 1989 until June 15, 1999. She was employed as an architectural technician. In mid June, Ms. Szenowicz went on medical leave and, shortly thereafter, had surgery and treatment for a serious illness. At then end of June 1999, the Employer issued a Record of Employment under the *Employment Insurance Act* to allow Ms. Szenowicz to obtain medical benefits, showing absence due to illness with an "unknown" return date. There is no dispute that the Employer maintained her coverage under the Employer's extended health insurance plan, allowing Ms. Szenowicz to receive long term disability benefits until she was ready to return to work. On April 18, 2001, Ms. Szenowicz contacted her Employer and advised that she was ready to return to work on May 1, 2001, and was told that there was no work for her. At that point, the Employer was in the process of winding down its operations due to lack of business.

In my view, the onus is on the Employer to prove that the Employee "quit". The Adjudicator in *RTO (Rentown) Inc*., BCEST #D409/97, noted:

> "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 clearly have 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 and represented the employee's true intention at the time it was given."

Having considered all the circumstances, I am not persuaded that the appeal can succeed. Mr. Ecker, who testified on behalf of the Employer candidly stated that he "assumed" that Ms. Szenowicz had resigned because she went on medical leave and, subsequently, requested a ROE. Mr. Ecker explained that Ms. Szenowicz came into his office on June 15, 1999 and told him she was very ill and had to leave work on account of immediate surgery. He stated that she appeared to be shaken and he was "stunned." He candidly explained that he did not feel anything was resolved in that meeting. A few days later, Ms. Szenowicz contacted the Employer and requested a ROE and "it was at that point [he] assumed that she had quit." She explained that was to provide "bridging" for long term disability. There is no dispute that the Employer maintained insurance coverage for her.

During 1999 and 2000, there were occasional contacts between Mr. Ecker and Ms. Szenowicz. Mr. Ecker explained that during some of these contacts, he told her that the Employer would "re-hire" her if work load permitted it. Ms. Szenowicz denied that she was told that she would be "re-hired." Her understanding was that she was on leave due to her serious illness. She takes the position that she was terminated when she sought to return to work.

As mentioned, I am of the view that the Employer has failed to meet the burden on appeal. The Employer's case essentially is that it assumed that Ms. Szenowicz resigned when she requested the ROE. In my view, this does not meet the test for a quit. In particular, there is nothing in the circumstances to suggest that "the employee ... clearly ... communicated, by word or deed, an intention to terminate [her] employment relationship."

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated November 29, 2001 be confirmed.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal