

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act S.B.C. 1995, C.38

- by -

Andrew C. Barry and Corinna Barry
Operating Barry Marine
("Barry Marine")

- and -

Randy Rozon
("Rozon")

- of a Determination issued by -

The Director of Employment Standards
(The "Director")

ADJUDICATOR: Ralph Sollis
DATE OF HEARING: June 6, 1996
DATE OF DECISION: June 21, 1996

DECISION

APPEARANCES

For Barry Marine	Ronald MacIsaac, MacIsaac & Morino Andrew C. Barry & Corinna Barry
For Randy Rozon	In Person
For the Director	Gerry Omstead

OVERVIEW

This is an appeal by Andrew C. Barry and Corinna Barry operating Barry Marine pursuant to Section 112 of the Employment Standards Act ("the Act") against Determination #CDET 001579 issued by the Director on March 14, 1996. In this appeal, Barry Marine seeks cancellation of the Director's Determination in which a former employee, Randy Rozon ("Rozon") was found to be entitled to severance pay in lieu of notice under Section 42(3) of the former Act.

Consideration of this appeal falls under the transitional provisions of the Act.

Section 128 (4) and (5) of the Act states:

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- (4) Subject to subsections (5) and (6), section 63 applies to an employee whose employment began before section 63 comes into force and is terminated after that section comes into force.
- (5) An employer is liable to pay to an employee referred to in subsection (4) as compensation for length of service, an amount equal to the greater of the following:
 - (a) the number of week's wage the employee would have been entitled to under section 42 (3) of the former Act if the employment had been terminated without compliance with section 42 (1) of that Act.

The parties agreed that the following facts were not in dispute:

1. Rozon was employed by Barry Marine from March 29, 1995 to November 1, 1995
2. During this period Rozon was employed as a metal fabricator at the rate of \$20.00 per hour.
3. If Rozon was entitled to severance pay in lieu of notice, the amount set out in the Determination of \$1691.25 is correct.

ISSUE TO BE DECIDED

The issue to be decided in the appeal is whether Rozon terminated his own employment and consequently is not entitled to two week's notice or the equivalent severance pay.

ANALYSIS

The evidence of Andrew Barry was that the information contained in the undated letter to the Workers Compensation Board, set out the position of Barry Marine concerning the claim of Mr. Rozon. Substantially, the letter outlines Rozon's physical condition and his inability to continue his employment with Barry Marine due to his deteriorating back condition.

Mr. Barry testified that in early November, Rozon was absent from work and that after several unsuccessful attempts he was able to contact Rozon on the third day. When asked, Rozon responded that he would not be returning to work and would require his Record of Employment ("ROE") and wages.

The ROE indicates that Rozon will not be returning and under comments/observations the following:

"Due to Mr. Rozon's physical health and condition being poor, he is an unsuitable candidate for the fabricating position."

Mr. Barry stated the ROE was completed in this manner to facilitate Rozon's claim for Unemployment Insurance benefits.

Mr. Barry further testified that he had inquired of the Workers Compensation Board ("WCB") as to whether Rozon could be trained for other employment. Barry Marine could not offer Rozon lighter duties or less physically demanding employment. In an earlier conversation, Rozon had told Mr. Barry that he wished to continue working as long as he was physically capable.

Corinna Barry's evidence collaborated her husband's testimony concerning their attempts to contact Rozon during his absence in November, 1995. She stated that she overheard the telephone conversation between her husband and Rozon and emphasized that it was Rozon's decision not to return to work at Barry Marine as he was medically unfit.

Mrs. Barry further stated that the comments on the ROE were recommended as not to impede Rozon's opportunity to obtain Unemployment benefits. She maintained that Rozon did not request separation pay until Mr. Omstead was in contact with Barry Marine.

Randy Rozon gave evidence on his own behalf. He testified that he worked up until November 1, 1995 after having suffered a back injury at work on September 24, 1995. At the time of this injury, Mr. Barry informed Rozon that if he filed a Workers Compensation claim it would be better if he was laid off. Rozon responded that no one quits a \$20.00 per hour job.

By early November, Rozon's ability to continue was seriously affected by his deteriorating back condition and as a result he consulted with his family doctor on November 2, 1995. Rozon emphasized that he left a message on his employer's answering machine that he had an appointment to see his doctor that day and would advise the Barrys of the outcome.

When Rozon returned home at 3:45 p.m. that day, he received a call from Mr. Barry and informed him that his doctor advised Rozon not to return to work due to his back condition. The doctor also suggested that he file a claim for WCB benefits. Mr. Rozon testified that Mr. Barry asked him what he wanted to do and that Rozon replied "that if he wanted to let me go, I would require my final cheque and ROE". The Barrys offered to mail both to Rozon but he picked them up at the company's office on the following afternoon, (November 3, 1995).

ARGUMENTS

Mr. MacIsaac stated that his clients sympathize with Rozon and that the WCB avenue provides the best opportunity for Rozon's retraining and re-education. Barry Marine is unaware of the September 24, 1995 injury and believe Rozon suffers from a pre-existing condition. Lastly, it was Rozon's decision to terminate his employment knowing that he could not continue working at Barry Marine.

Mr. Rozon argued that after returning from one week's holiday in August, 1995, that Joe McGrath, the foreman, told him that Mr. Barry was very satisfied with his work and that he was a reliable employee. It was after his injury on September 24, 1995 that he was informed not to file a WCB claim. He stated that he enjoyed working for Barry Marine and continued to work as long as possible. When he could not function, he saw his doctor and filed a claim for WCB.

The issue is whether or not Rozon quit. The right to quit is personal to the employee and there must be clear and unequivocal facts to support a conclusion that the right has been voluntarily exercised by the employee involved.

It is my conclusion that Rozon did not quit. While on November 2, 1995 he did ask for his final cheque and ROE, it was within the context of the earlier conversation with Mr. Barry following his back injury on September 24, 1995. It is my belief that Rozon expected that his employment would be terminated as a result of filing a WCB claim. I do not believe that the request for his cheque and ROE was voluntarily exercised by Rozon.

ORDER

Pursuant to Section 115 of the Act, I order that Determination #CDET 001579 be confirmed.

Ralph Sollis
Adjudicator
Employment Standards Tribunal
