

An appeal

- by -

Trusstem Industries Inc.

- 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: E. Casey McCabe

FILE No.: 2001/859

DATE OF HEARING: April 22, 2002

DATE OF DECISION: April 29, 2002

DECISION

APPEARANCES:

Kwan Chau	on behalf of the Employer
Kristie Chan	on behalf of the Employer
Barry Sully and Barb Woloshuk	on behalf of Barry Sully

OVERVIEW

This is an appeal by Trusstem Industries Inc. (the “Employer”) pursuant to Section 112 of the Employment Standards Act (the “Act”) from a Determination dated November 13, 2001 which found the employer liable for compensation for length of service pursuant to Section 63(2)(a) of the Act.

ISSUE

1. Did the complainant quit his employment?
2. If the complainant did not quit his employment is he entitled to compensation for length of service?

FACTS

The employer, Trusstem Industries Inc., is an engineering company that produces engineered roof truss systems for the residential and commercial market. The employer’s plant is located in Abbotsford, British Columbia. Mr. Bruce Sully, the complainant (“Complainant”), in his most recent period of employment for this employer worked from April 17, 1999 to October 6, 2000 as a sawyer/builder. The complainant’s last day of work was October 6, 2000. It is the circumstances surrounding the termination of his employment and conversations that the complainant had with Mr. Kwan Chau, in December of 2000 and Ms. Chan in October 2000 that form the basis of this appeal.

Ms. Kristie Chan and Mr. Kwan Chau testified for the employer. Ms. Chan is the office secretary. She testified that on September 28, 2000 she was contacted by a representative of the Worker’s Compensation Board (WCB) with regard to a claim the complainant had made for two days’ pay due to an injury suffered on September 7, 2000. Ms. Chan testified that the complainant did not report the injury directly to the office. However when his supervisor called on September 12 the complainant returned the call and informed the supervisor by a voice message that he had hurt his ankle. It was not until September 28, 2000 when the WCB representative called Ms. Chan that she learned the full particulars of the report.

Ms. Chan testified that she completed the necessary WCB forms and returned them to the WCB on or about October 3, 2000. It was about this time that Ms. Chan testified she had a conversation with the complainant. She was not able to identify the date of the conversation but she speculated that it was some time after she had submitted the forms to the WCB and may have been, but she is not sure, on October 6 which was the complainant’s last day of work.

Ms. Chan stated that the complainant came into her office and was very upset because the WCB representative had indicated to the complainant that the employer considered his employment status to be part-time or on-call rather than permanent full-time. She testified that the complainant yelled at her and hassled her because the employer had said that he was an on-call employee and that WCB had refused his claim. She stated that he started to pack up his stuff and said that he quit. However she was not able to verify what he packed up because she did not go into the shop with him. She relied on the information that the other workers in the shop conveyed to her that he had packed his stuff and left. She testified that she subsequently prepared a Record of Employment indicating that the complainant had quit his job. That Record of Employment was dated October 13, 2000.

On October 18, 2000 she prepared an Amended Record of Employment showing illness as the reason for termination. She testified that she was told by Mr. Chau, the owner, that the original Record of Employment showing quit should be voided and that a new Record of Employment showing illness as the reason for termination should be issued. She testified that the second Record of Employment was given to the complainant's wife when she attended at the employer's premises that day. She further testified that the reason that she had written "void" across the face of the first Record of Employment was because it had already been forwarded to Canada Customs and Revenue Agency (CCRA). She testified that she had no further conversations either with the complainant or the complainant's wife after this.

Mr. Chau testified that on the day that the complainant came into Ms. Chan's office he received a call from another office employee saying that he should come back to the office. By the time he returned the conversation was over but he saw the complainant apparently fixing his automobile which had broken down in the yard. Mr. Chau went into the office to speak to the other employees. Later he went to the complainant's house. He testified that he went there to ask the complainant if he needed help. The complainant said he didn't need any help. Mr. Chau left.

Mr. Chau then gave evidence with respect to the complainant's work attitude and work history. Mr. Chau wanted to rely on the work history and the opinions of fellow employees of the complainant's work place attitude to support the employer's position that the complainant had quit his employment. The evidence was largely hearsay evidence and does not go to the specific events of which Mr. Chau had personal knowledge which were the events of the conversation with the complainant held in mid December 2000. I am prepared to draw an inference that the complainant had a work history marked by blown shifts, unauthorized absences, missed call-ins and threats to quit. Nonetheless the evidence showed that the complainant after making such threats would report for duty and be assigned duties.

Mr. Chau testified that there was one time when the complainant indicated to him on a Wednesday that he intended to quit on Friday. He said that the complainant was upset and was using dirty language in this conversation. However, subsequent to that he said that the complainant telephoned him to ask if there was more work. Mr. Chau testified that there was and that the complainant could return to complete the work. He testified that the work relationship with the complainant was "on and off like that" over a long period of time. I take from this evidence that the work relationship was intermittent and may at times have been rocky but I cannot conclude from this particular evidence that it was an indication by the complainant on or about October 6 or during December 2000 that he intended to quit his employment.

Mr. Chau testified that he had a conversation with Mr. Sully's wife on or about October 18, 2000. He testified that during that conversation he and Mr. Sully's wife discussed Mr. Sully's work habits. He also acknowledged that Mr. Sully's wife was at the work place to inform him that Mr. Sully had been hospitalized and that his discharge date at the time was unknown. Mr. Sully's wife explained that Mr.

Sully wished to apply for E.I. Medical Benefits and that he required a Record of Employment indicating that his employment had been terminated due to illness.

Mr. Chau complied with that request. He instructed Ms. Chan to complete a second Record of Employment showing illness as the reason for termination. That second Record of Employment was given to the complainant's wife. It is clear from the evidence that neither the complainant nor his wife had ever received the first Record of Employment.

Mr. Chau further testified that the complainant came to his office one day in December, 2000. He stated that the complainant said that he wanted to return to work but that he also wanted a raise. Mr. Chau stated that he told the complainant that he would not give him a raise. Mr. Chau testified that he had already given the complainant a conditional raise in the sense that he had told the complainant that if the complainant would work all his assigned shifts and thereby complete a 40 hour week that he would pay him a bonus of \$0.50 per hour for the hours worked that week. Mr. Chau testified that in response to this the complainant said that if you don't give me a raise I quit. Mr. Chau testified that he replied that it was basically up to the complainant, that he was a part time worker, that there was no work for him and that he couldn't assign a position to him. However, Mr. Chau did state that if the complainant wanted to come in on a Saturday or Sunday when Mr. Chau was there and the other employees were not present in the shop that he may be able to provide some work for him. Mr. Chau testified that the complainant did not return to work.

Mr. Chau reiterated his position that the complainant was a part-time or on call employee. He repeated the fact that the complainant would sometimes call for work or that he would sometimes respond when the employer called him in. He also testified that he had heard from other workers that the complainant had gone to work for another employer in January or February, 2001.

Mr. Sully testified. He stated that he did file a WCB claim in September for an ankle injury suffered when he stepped in a pothole at the work place. He stated that he didn't receive WCB benefits for the two days that he was off work. He further stated that he did get irate in a conversation with Kristie Chan but that his anger was not directed at her. He testified that he didn't say that he quit but that he did use profanities in expressing his view of the WCB denial of his claim. The complainant is not sure of the date of the conversation but testified that although he had left the work place that day he did return on the following day and the day after that to work. The complainant states that on or about October 6, 2000 there was an incident in the work place which was a combination of comments and events which he viewed as harassment by fellow employees. He testified that he did leave work early on October 6, that he went to his sister's house who advised him to go to the hospital. He attended at the hospital, was admitted and was subsequently treated for stress. He was discharged in early December 2000.

The complainant further testified that after his hospital discharge he went to the work place to speak to Mr. Chau. He testified that he told Mr. Chau that he could not return to work at that time but that his doctors had indicated that he would be fit to return to work on January 22, 2001. He testified that he asked Mr. Chau if he would consider giving him a raise of \$0.50 when he returned. The complainant testified that Mr. Chau responded that he would consider giving him a raise when the complainant returned to work. The complainant testified that Mr. Chau looked at him and said that he thought that the complainant had quit his employment. The complainant replied, "what do you mean?" stating that he had been in the hospital and that his doctors had said that he could return to work on January 22. The complainant testified that Mr. Chau stated there was no work and that the conversation ended.

The complainant testified that he telephoned Mr. Chau on January 22 to tell him that he was ready to return to work and that Mr. Chau then said that there was no work for him. The complainant testified that he went to the employment office to switch his claim for benefits from medical benefits to regular E.I. benefits. The employment office took the position that he had quit his employment. Shortly thereafter the complainant testified that he found employment with another truss company and continued with that employment while filing his instant complaint with the Employment Standards Branch. He re-iterated his position that at no time either in the conversations with Ms. Chan or with Mr. Chau did he indicate that he had quit.

Barbara Woloshuk also testified. She testified that she attended at the work place on October 18 to pick up her husband's Record of Employment. She testified that neither she nor her husband had received the Record of Employment that stated quit. She testified that the only Record of Employment that they had received was the one that stated that illness was the reason for the termination of the employment. She testified that there was a lengthy conversation, up to one half hour, with Mr. Chau at the time regarding the complainant's work habits. She also testified that she had informed Mr. Chau that the complainant was hospitalized and that his length of treatment was unknown at the time.

Interestingly she testified that she also thought that she had received a vacation pay cheque for her husband at the October 18 meeting. However, under cross-examination she agreed that the vacation pay cheque was not forwarded until early February 2001 when it became apparent that her husband would not be returning to Trusstem and he had found alternate employment.

ANALYSIS

The issue in this case is narrow. The question is whether the complainant quit his employment. If he quit he is not entitled to termination pay. If he did not quit the Determination must be upheld.

In determining whether an employee has quit employment the Tribunal applies both a subjective and objective test. The subjective test requires an inquiry into the complainant's state of mind. The test asks whether the complainant intended to quit his employment. The objective portion requires a look at the facts surrounding the termination to ask or to determine whether there is any objective evidence to support the subjective intention to quit. (see *Burnaby Select Taxi Ltd.*, BCEST #D091/96, *Re. O'cana Enterprises Inc.* BCEST #D503/97). In this particular case I find that the complainant did not intend to quit his employment. I make this finding for the following reasons.

In October 2000 Mr. Chau instructed Ms. Chan to issue a second Record of Employment. I find it significant that the first Record of Employment was not issued to the complainant although Ms. Chan's evidence was that it had been forwarded to CCRA. I think that it is significant that the complainant's wife was given an Amended Record of Employment showing illness as the reason for termination at the same time that Ms. Chan "voided" the original Record of Employment.

Secondly, I find that Ms. Chan is not able to identify precisely the day in which the complainant came to her office and made the statement that he quit. Since it is the employer that is the appellant in this matter the onus rests on the employer to prove that the Determination is wrong. I find that Ms. Chan was truthful in her testimony and believes that the complainant had told her that he quit; however, she was not clear on the date that the statement was made and particularly could not confirm or deny that the statement was made on Friday, October 6 which was the complainant's last day of work. On the other hand the complainant testified that he did continue to work after the conversation with Ms. Chan. The

evidence indicated that Ms. Chan wrote to the WCB on October 3, 2000 and that the complainant was notified promptly of the employer's letter. The payroll records confirm that he did work Wednesday October 4 for 3 hours and Friday October 6, 2000 for 6.5 hours. Therefore there is no clear objective evidence to support that he intended to quit.

Thirdly, I turn to the conversation in December 2000. I accept that the employer was concerned about the complainant's attitude and work history. However, I take from this evidence that the employer was quite tolerant of the complainant's attendance record and continued to employ or re-employ the complainant over the course of the years. I am not prepared to find that in the December conversation the complainant unequivocally stated that he would quit his employment if the employer did not give him a 50 cent raise. There was no work available at the time. The employer testified that he left the matter of continued employment if work were to become available up to the complainant. The complainant testified that he contacted the employer on January 22, 2001 when he was fit to return to work and the employer told him no work was available. He subsequently found alternative employment. At this point in time he had been off work in excess of thirteen weeks.

Furthermore, the fact that the final holiday pay cheque was not issued until early February 2001 indicates that the employer had not accepted that the complainant had clearly quit his employment in October or December 2000.

ORDER

For the above reasons the Determination dated November 13, 2001 is confirmed.

E. Casey McCabe
Adjudicator
Employment Standards Tribunal