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 -

G.C. Auto Supplies Ltd.

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	John L. McConchie
FILE NO.:	1998/763
DATE OF HEARING:	March 29, 1999
DATE OF DECISION:	May 14, 1999

DECISION

APPEARANCES

Tage Pedersen	for G.C. Auto Supplies Ltd.
Samantha Badminton	on her own behalf.

OVERVIEW

This is an appeal brought by G.C. Auto Supplies Ltd. (the "Employer") pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") from a Determination issued by the Director of Employment Standards (the "Director") dated November 16, 1998 under file number ER No. 12276. The Director determined that the Employer owed a former employee, Samantha Badminton ("Badminton" or "the complainant"), the sum of $591.81 as compensation for length of service, vacation pay and interest.

The appeal was heard at the Tribunal's offices in Vancouver on March 29, 1999, at which time I heard evidence and submissions from Mr. Pedersen, a part-owner of the Employer, and from Ms. Badminton on her own behalf. The Director was not represented at the appeal hearing.

BACKGROUND

As its name suggests, the Company is in the auto supply business. Badminton was employed as a shipper-receiver by the Employer from July, 1994 to November 20, 1995.

On November 20, 1995, the complainant sought and received permission to leave work early due to a death in her family. As Pedersen recalled it in testimony, this was the extent of her request. As Badminton recalled it in her testimony, she told Pedersen she was not sure how long she would be away.

As it turned out, Badminton did not return to work during the week of November 20. She testified that she believed she had called Pedersen on Wednesday, November 22nd, but she was unclear about the details. Pedersen denied that he had received a call on November 22 and said the first contact that he had with the complainant after granting the leave on November 20 was on Friday November 24. Badminton agrees that she called Pedersen on November 24. At no time during the week did Pedersen attempt to contact Badminton to find out what she was doing. He explained in his evidence that "it is not uncommon for employees to stay away for a few more days" and that "to try to track them down is almost impossible."

In the November 24 conversation, little was said. Pedersen recalled in his testimony that the complainant began to relate to him a reason why she had not returned but that he was too busy at the time to pursue the matter. He did hear Badminton tell him that she would return on the following Monday.

In her testimony, Badminton said that she was planning to return on Monday but was involved in quite a serious car accident on the weekend. The accident was serious enough for her to have to attend at Lion's Gate Hospital for a time. It was not disputed that her injuries were sufficiently serious to prevent her from working for several months after the accident.

Badminton did not return to the workplace until sometime on Tuesday, November 25.

In his evidence, Pedersen testified that if Badminton had come in on Monday, he might have accepted her excuses for being absent the week before. However, she did not come in on Monday and did not phone. By the time she had arrived unannounced on the Tuesday, he had decided that she had resigned and had prepared her Record of Employment. When she arrived, he testified, she asked him whether he would be prepared to lay her off so that she could go back to school. He also recalls that she told him about the accident and showed him some papers from the Hospital. He does not dispute that she was in an accident on the weekend and that she sustained injuries which prevented her from working. In essence, this was water under the bridge. He provided her with her Record of Employment which indicated that she had resigned. He testified that, if she had not resigned, he would have terminated her for just cause due to her absenteeism. She had had a previous verbal warning for the same cause and had been told that she would be terminated on a reoccurrence.

Badminton remembers the discussion differently. She agrees that she did not call on the Monday and says that she just got caught up in the confusion caused by the accident and her Aunt's death the previous week. As it turned out, the funeral had been scheduled for the Monday. When she arrived at work on Tuesday, Pedersen almost immediately handed her some separation papers and told her that in his view she had quit. She told him about the accident and showed him some proof of her treatment at Lion's Gate Hospital but he was not moved to change his mind. She then asked him if he would be prepared to lay her off rather than treat her as resigned. However, he did not amend the Record of Employment, which provided that she had resigned from her employment.

The documentary evidence submitted by the complainant establishes, without dispute, that one of the complainant's Aunts passed away on November 19, 1995. She testified that she spend much of the week with her cousin, who was deeply affected by the loss of his mother. She travelled back and forth from Surrey during that period, which she said was something of a blur in her mind. The record also shows that that Aunt's funeral was on the Monday she was supposed to return to work, but she admits that she did not attend the funeral. She does not now remember why. As it turned out, a second Aunt of the complainant's passed away on the Monday. She remembers it as a very emotional time in which the dates are mixed up in her memory. She realizes that she did not keep in touch

with her employer as she should have and can point to nothing other than the emotional turmoil of the events as an excuse.

The Employer submits that, by her conduct, it was entitled to treat her as an employee who quit her employment. In the alternative, if she did not quit her employment, the Employer submits that it had reason to terminate her employment for just cause.

ISSUES TO BE DECIDED

The issues in this case are two-fold:

Did Badminton quit her employment?

If not, did the Employer have just cause to terminate Badminton's services without providing her with compensation in lieu of notice?

Since I conducted a full evidentiary hearing on this matter, I am able to make findings of fact on the basis of the evidence and it will not be necessary to refer to the specific findings of the Director. I have, however, reviewed all of the materials on file, including the submissions on appeal, in arriving at my decision.

ANALYSIS

Did Badminton resign?

The Tribunal has adopted the following test for determining whether an employee has resigned from his or her employment:

The act of resigning, or "quitting", employment is a right that is personal to the employee and there must be clear and unequivocal evidence supporting a conclusion that this right has been voluntarily exercised by the employee involved. There is both a subjective and objective element to the act of quitting: subjectively, an employee must form an intention to quit; objectively that employee must carry out an act that is inconsistent with further employment. [See, for example, *Wilson Place Management Ltd.* BC EST #D047/96) and *Burnaby Select Taxi Ltd.* (BC EST #D091/96)]

It is my conclusion on the evidence that Badminton did not quit her employment with the Employer. Far from there being clear and unequivocal evidence supporting a conclusion to this effect, the evidence supported the conclusion that Badminton had not formed any such intention. Badminton's absence during the week of November 20 was due to the death of her Aunt and the ensuing events. It is true that she made no satisfactory efforts during this period to maintain contact with her Employer about her situation. However, the issue of whether she met her employment obligations is different from the issue of whether she intended to resign and carried out her intention. Clearly, the events of the week of

November 20 do not support the conclusion that she was resigning her employment. Her failure to attend on Monday as she had promised to do was again not evidence of an intention to resign. She had suffered a serious car accident on the previous Sunday. I am satisfied that the combination of the previous emotional week involving the bereavement and the advent of a car accident on the Sunday caused her to fail to attend work on Monday. Her failure was not due to an intention to resign.

As for the discussion which she had with Pedersen on Tuesday, I am satisfied on the evidence, and assessing the probabilities which apply to those circumstances, that she did not begin her conversation with Pedersen by quitting her employment. The evidence did not suggest any reason that she would do so. I am satisfied instead that Pedersen, who already had her Record of Employment prepared, having concluded that she had quit, presented her with her separation papers as a fait accompli. She asked him if he would be prepared to change the reason for leaving to a layoff but this did not change Pedersen's mind. In no event does the evidence support the proposition that she intended to quit her employment, and neither does the evidence, given the context of a death and a car accident, support the conclusion that Badminton has taken actions which satisfy the objective element of the test for resignation.

In many cases where an employee is absent from work for a longer period than is covered by the Employer's grant of permission, and where the employee neglects to maintain contact with her office or to return when she had previously advised, this will present a strong prima facie case for a finding of resignation. Ms. Badminton's evidence has rebutted any such presumption in this case.

Did Badminton's conduct give the Employer just cause for termination?

In Kruger, BC EST #D003/9, the Tribunal said the following about just cause for dismissal under the *Act*:

> 1. The burden of proving the conduct of the employee justifies dismissal is on the employer.
>
> 2. Most employment offenses are minor instances of misconduct by the employee not sufficient on their own to justify dismissal. Where the employer seeks to rely on what are instances of minor misconduct, it must show:
>
>   1. A reasonable standard of performance was established and communicated to the employee;
>   2. The employee was given a sufficient period of time to meet the required standard of performance and demonstrated they were unwilling to do so;
>   3. The employee was adequately notified their employment was in jeopardy by a continuing failure to meet the standard; and

4. The employee continued to be unwilling to meet the standard.

3. Where the dismissal is related to the inability of the employee to meet the requirements of the job, and not to any misconduct, the tribunal will also look at the efforts made by the employer to train and instruct the employee and whether the employer has considered other options, such as transferring the employee to another available position within the capabilities of the employee.

4. In exceptional circumstances, a single act of misconduct by an employee may be sufficiently serious to justify summary dismissal without the requirement of a warning. The tribunal has been guided by the common law on the question of whether the established facts justify such a dismissal.

Badminton was granted a leave of absence for a short period and overstayed it by several days. I am satisfied that it was not until Friday, November 24, that she called her Employer to report in and seek permission to remain away. When she did speak to Pedersen on November 24, she told him that she would return Monday, November 26. She did not do so and did not call to advise that she was unable to do so. The Employer's argument that it had just cause for termination is not a trivial one.

However, the argument loses its strength when a number of factors are considered. First, with respect to the absences during the week of November 20, it is clear on the evidence that the Employer took no steps at all to locate Badminton. It did not write to her or phone her, or seek to contact her through a friend or colleague. Pedersen's explanation was that it was impossible to locate employees when they do not return, but this proposition is not self-evident and there was no evidence to support it. Instead, the evidence supports the conclusion that Pedersen, perhaps from compassion or resigned tolerance, had decided not to disturb Badminton on her bereavement leave. He certainly was not preoccupied with the subject matter of her absence when she called on the Friday. He cut the conversation short after receiving her promise to come to work on the following Monday. He was not sufficiently interested in her excuses to hear them out, choosing instead to terminate the call in order to deal with a customer concern. In his evidence, he said that he likely would have accepted her excuses if she had returned on Monday. I have no doubt on the evidence that this was so.

However, Badminton did not return to work on the Monday and did not call. The evidence supports the conclusion that when this occurred, Pedersen had had enough. His level of tolerance, which given Badminton's failure to contact him at all in the previous week until the Friday was not insignificant, was at an end.

The evidence shows that this caused him to make a fundamental error when Badminton arrived on the Tuesday. His error was that he did not provide Badminton with an opportunity to tell him why she had not attended at work on Monday and why she had not

called in to say she was going to be absent. Pedersen believed that he was at this point well within his rights to let her go, whether this be by way of construing her actions as a "quit" or terminating her for just cause. Had he asked her for an explanation, he would have learned that she had been involved in the weekend accident and that her injuries were sufficiently serious to prevent her from working for many months. He would then have had the opportunity and right to explore with her why she had not called to let him know about this, particularly given the events of the past week. He did not ask any of these questions because he had made up his mind.

It is my conclusion that had Pedersen permitted Badminton to explain her circumstances, he would have likely concluded that Badminton was deserving of written discipline for failing to notify him on Monday that she was going to be unable to attend work. I accept the evidence that the Employer had previously given Badminton a verbal warning about being absent without permission. In many cases, this might well be sufficient to ground a termination for a subsequent leave without permission. However, the circumstances of this case compel me to the conclusion that Badminton's actions do not constitute evidence of an unwillingness to respond positively to progressive discipline. The circumstances facing Badminton in the period from November 20 to November 27 were, to put it mildly, serious. During this seven-day period, she lost two family members and suffered a serious car accident. I cannot conclude that the Director erred in concluding that the complainant had not quit her employment, and I cannot conclude that her actions gave the Employer just cause for termination.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter be confirmed as issued in the amount of $591.81 together with whatever further interest may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

John L. McConchie
Adjudicator
Employment Standards Tribunal