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 -

Safety First Fire Control Ltd.
("SFFC")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	David Stevenson
FILE NO.:	97/19
DATE OF HEARING:	April 30, 1997
DATE OF DECISION:	May 9, 1997

DECISION

APPEARANCES

for the appellant: Frans Frake

for the complainant: in person

for the Director: no one appearing

OVERVIEW

This is an appeal filed by Safety First Fire Control Ltd. ("SFFC") pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") from a Determination of a delegate of the Director of Employment Standards (the "Director") dated December 19, 1996. In that Determination, the delegate concluded the complainant, Ed Cote ("Cote") was entitled to length of service compensation in an amount equal to five weeks' wages when his employment with SFFC was terminated. SFFC says the Determination is wrong and the delegate should have concluded, based on all the circumstances, that Cote either quit his employment or gave SFFC just cause for termination.

ISSUE TO BE DECIDED

Has SFFC been discharged from its statutory liability to pay Cote length of service compensation?

FACTS

Cote was employed by SFFC in April of 1990 as a service tech. It is alleged his employment ended October 31, 1995. The circumstances leading to his termination are relevant.

On October 7, 1995, Cote hurt his back. He did this at a friend's house in the afternoon of that day. Previous experience with back pain told him the pain would probably pass with a combination of rest and muscle relaxants. He spent the next two days resting. By October 10 the pain remained and he went to the shop that morning to tell his employer, SFFC, he would be unable to work for an undetermined period of time. He told Mr. Frake, the owner and manager of SFFC, he had hurt his back at work, lifting heavy cylinders in the shop on October 7. Mr. Frake did not believe him and told him so. Cote retracted the explanation and replaced it with an equally untrue story, claiming it was not caused by lifting a heavy cylinder, but by lifting an empty box.
Cote claims a combination of the pain and some anger he felt at the unsympathetic reception he received from Mr. Frake caused him to assert the back pain was work related.

Cote saw his doctor on the same day and was told to remain off work for two, and possibly three, weeks. He decided to file a Workers' Compensation Claim and asked SFFC for a claim report form on October 10. They had no forms. On October 13, Cote attended the

shop. While there he again asked for a claim form. They still had none. On October 16, Cote told SFFC he would be returning to work on October 23. On October 17, SFFC filed an Employer's Report of Injury, Form 7. At or around the same time SFFC prepared a Record of Employment for Cote, dated October 17, stating the reason for issuing the Record as "D", illness or injury, and stating the date of return as "unknown". They informed Cote of this on October 19. On October 20, Cote was again in the shop. He advised the bookkeeper he would return to work on the Monday, October 23, and obtained and filled out a WCB claim form. In the evening of October 22, Cote received a call from Mr. Frake telling him not to report for work until he had a could produce a certificate stating he was fit to return to work. Cote went to the shop on October 23 to clarify this request. Following the discussion he called his doctor, who prepared a certificate for him. He produced it to Mr. Frake on October 24. He was not returned to work. He was told to go home and wait further communication from SFFC. Cote was back again at the shop on October 25. A discussion took place during which Cote offered to be laid off. Mr. Frake declined the offer.

On October 31, Cote was told by a WCB official, the employer had supplied information in respect of the claim that indicated he was not in the shop on the day he claimed the injury occurred. Cote acknowledged he had falsified the location of the injury and conceded it was not work related. His claim was denied.

On the same day, Cote went to the shop. He and Mr. Frake met. The versions of what transpired vary significantly between Cote and Mr. Frake. For the most part, I do not need to decide which version accords more closely to the probabilities. That is because I find Mr. Frake had decided before the meeting commenced to terminate Cote. Cote had done nothing up to this meeting to give any indication of an intention to voluntarily leave his employment. To the contrary, what he had done indicated he intended to return to work. On the other hand, SFFC had demonstrated a real reluctance to return him to work. They had refused to accept Cote's own claim of fitness to return to work and later refused to accept his doctor's certificate of fitness to return to work. At the meeting of October 31 the Record of Employment was already placed in an envelope and was given to him. I find this decision was primarily motivated by a concern about protecting the interests of the company from what they perceived would be a continuing liability - Cote's physical condition.

ANALYSIS

The issue here is length of service compensation for Cote.

Section 63 of the *Act* places a statutory liability upon an employer to pay length of service compensation to each employee upon completion of three consecutive months of employment. In a sense length of service compensation is an earned statutory benefit conferred upon an employee. The amount of compensation increases as the employee's length of service increases to a maximum of 8 weeks' wages. An employer may effect a discharge from this statutory obligation by providing written notice to the employee equivalent to the length of service entitlement of the employee or by providing a combination of notice and compensation equivalent to the entitlement of the employee. An employee may cause an employer to be discharged from the statutory obligation by doing one of three things: first, self terminating employment; second, retiring from employment; and third, giving just cause for dismissal.

What I must decide in this case is whether Cote has discharged SFFC from its statutory liability by either terminating his employment or by giving just cause for dismissal.

While the *Act* uses the word "terminate" in paragraph 63(3)(c) to describe one of the ways by which an employee which would effect a discharge of the statutory obligation of an employer to give notice and/or compensation, the term is intended to capture any manner by which an employee chooses to end the employment relationship. Labour relations concepts such as abandonment, resignation and voluntary termination or severance of employment are all notions caught by the term. To the lay person, however, it is simply known as a "quit". The question I have to answer is whether, in all of the circumstances present in this case, I can find Cote quit.

The position the Tribunal takes on the issue of a quit is now well established. It is consistent with the approach taken by Labour Boards, arbitrators and the Ontario Employment Standards Tribunal. It was stated as follows in the Tribunal's decision *Burnaby Select Taxi Ltd. -and- Zoltan Kiss*, BC EST #91/96:

> The right to quit is personal to the employee and there must be clear and unequivocal facts to support a conclusion that this right has been exercised by the employee involved. There is both a subjective and an objective element to a quit: subjectively, the employee must form an intent to quit; objectively, the employee must carry out some act inconsistent with his or her further employment. The rationale for this approach has been stated as follows:

> ". . . the uttering of the words "I quit" may be part of an emotional outburst, something stated in anger, because of job frustration or other reasons, and as such it is not to be taken as really manifesting an intent by the employee to sever his employment relationship."
> **Re University of Guelph**, (1973) 2 L.A.C. (2d) 348

On the facts of this case, SFFC has not demonstrated the clear and unequivocal facts necessary to support a conclusion Cote quit his employment on October 31. There are two reasons for this conclusion: first, it is apparent from the evidence SFFC took the initiative in terminating Cote's employment; and, second, providing an employee with an "option", which in reality is no option at all, does not establish the necessary element of voluntariness to the actions of an employee to establish the subjective element of a quit.

The appeal of SFFC fails on this point.

On the question of just cause for dismissal, what I must decide is not whether there was some conduct on the part of Cote that warranted a disciplinary response - clearly there was - but whether, in all the circumstances, his conduct justified summary dismissal. Cote had been employed by SFFC for five years. No prior disciplinary record or problem is alleged.

This is a close call, but on balance, I find insufficient cause for summary dismissal in this case. I make this judgement primarily on the response SFFC took to the episode it now seeks to rely upon as just cause for dismissal, the false WCB claim.

On October 10, when Cote gave his first description of the disabling event to Mr. Frake, he was caught in a lie. SFFC did nothing. On the same day SFFC knew Cote intended to file a claim for workers' compensation. Cote's intention to file a claim was reinforced on October 13. By at least October 17, SFFC knew Cote had lied about being on the premises on October 7. They did nothing about bringing home to Cote their views on that matter from an employer/employee perspective. They filed their information with WCB and prepared a Record of Employment for Cote showing a lay-off. They refused to return him to work, but not for any reason relating to the false WCB claim. And, as I have already concluded, when SFFC forced Cote's resignation the primary reason was not related to the false WCB claim.

When the circumstances suggest the employer did not treat the episode as one justifying summary dismissal, or as in this case, even worthy of comment or discussion, should the Tribunal treat it more seriously? The simple answer is we should not. It is not our job to discipline for what the employer has failed to act upon when it is fully aware of the circumstances and has had ample opportunity to formulate and initiate a response to the allegedly improper conduct.

The appeal of SFFC fails on this point also.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination of the delegate of the Director, dated December 19, 1996, be confirmed.

David Stevenson
Adjudicator
Employment Standards Tribunal