

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-

Cedar City Shake Ltd.
(the "Employer")

-of a Determination issued by-

The Director of Employment Standards
(the "Director")

ADJUDICATOR:	E. Casey McCabe
FILE No.:	7/94
DATE OF HEARING:	April 18, 1997
DATE OF DECISION:	May 13, 1997

DECISION

APPEARANCES

Allen Kruchowski on behalf of Cedar City Shake Ltd.
Shelley L. Eely on her own behalf
James Dunne on behalf of the Director of Employment Standards

OVERVIEW

This is an appeal by Cedar City Shake Ltd. (the "Employer") pursuant to Section 112 of the *Employment Standards Act* (the "Act") against Determination dated January 30, 1997. Under the Determination dated January 30, 1997 the Director's delegate determined that the Employer contravened Section 63(2) of the *Act* by failing to pay compensation for length of service in the amount of three weeks' pay.

ISSUE TO BE DECIDED

Is the employer liable to pay compensation for length of service or did the complainant quit her employment thereby relieving the employer of any liability under Section 63(2) of the *Act* ?

FACTS

The employer operates a cedar mill which manufactures ridge caps and builders' shims. The complainant commenced employment as a shim packer on February 8, 1993. At the time of her termination she was making and bundling ridge caps. It was agreed by the complainant and the employer that her rate of pay was the equivalent of \$15.00 per hour. On January 11, 1996 the complainant suffered a work related injury. She returned to work the following week but found that she was unable to continue her job. She filed a claim on January 15, 1996 with the W.C.B. which was accepted. She was informed by her doctor on approximately March 5, 1996 that she could return to work on March 11, 1996. She telephoned the office of Cedar City Shake Ltd. and asked to speak to Mr. Kruchowski, her employer. She did not speak to Mr. Kruchowski but instead spoke to Ms. Liakopoulos who is the payroll person for the employer. The discussions with Ms. Liakopoulos are crucial to the determination of the issue of whether the complainant quit her employment.

The complainant testified that she phoned the employer to inform the employer that she would be ready to return to work on March 11, 1996. She testified that she spoke to Ms. Liakopoulos and

that she asked to speak to Mr. Kruchowski. Ms. Liakopoulos went to find Mr. Kruchowski but returned to the conversation with the complainant and informed her that Mr. Kruchowski had said that he did not want to talk to her and that Mr. Kruchowski had said to give her her "walking papers". The complainant then testified that she asked why and was told by Ms. Liakopoulos that she didn't know. The complainant testified that she had no further conversations with Ms. Liakopoulos until she went to the employer's office on March 11, 1996 to pick up her termination papers. At that time very little was said. She further testified that she submitted her Record of Employment to the Unemployment Insurance Commission and that they did not question the document. It should be noted that the Record of Employment under Box 19 (Reason for issuing this ROE) had the code letter "A" for layoff entered. Under Box 20 (Expected date of recall) the box for "not returning" was marked with an "X". It is also notable that the document was not signed. The document was issued on March 11, 1996.

The complainant also testified that she had applied for other jobs during the course of her employment with Cedar City Shake Ltd. In particular she had applied for employment at another cedar mill located in Port Kells, B.C.; she had applied for work as a flag person; and, she had applied for work with a landscaping company that was operated by a Mr. Rick Springer. Apparently Mr. Springer did contact Mr. Kruchowski for a reference and I will return to this point later. The complainant candidly admitted that she was seeking employment elsewhere during the term of her employment at Cedar City Shake Ltd.

Marie Liakopoulos also testified. She testified that she had two telephone conversations with the complainant that day. In the first conversation she testified that the complainant phoned and asked to speak to Mr. Kruchowski. She went to find Mr. Kruchowski who told her that he didn't have time to talk to the complainant. She testified that she returned to the telephone conversation with the complainant and informed her that Mr. Kruchowski could not speak to her at that time. The conversation ended. Later in the day Ms. Liakopoulos did speak to Mr. Kruchowski. She said that she asked Mr. Kruchowski what he wanted to do regarding the complainant's return to work and Mr. Kruchowski stated that Ms. Liakopoulos should give her her "walking papers". She testified that she then phoned the complainant and informed the complainant that she had been instructed to give her her "walking papers". Ms. Liakopoulos agrees that she made out the Record of Employment, that she filled the entries in Box 19 and Box 20 and that she was surprised that it was unsigned. She thought that she had signed it. Ms. Liakopoulos also admitted to having filled out the W.C.B. claim form and stated that she had mistakenly checked the box which said that the employer would object to the claim. However, no particulars were provided and W.C.B. accepted the claim. Ms. Liakopoulos also admitted to writing a letter dated March 11, 1996 on Cedar City Shake Ltd. letterhead addressed to "To Whom It May Concern" and signed by her for Mr. Kruchowski. In cross-examination Mr. Kruchowski challenged both the contents of the letter and Ms. Liakopoulos' authority to issue it on his behalf.

Mr. Kruchowski testified on behalf of the employer. He testified that the complainant had been employed at Cedar City from February 1993 to March 1996. He testified that she injured herself in January of 1996 and that he felt that she no longer could do the same type of work that she was doing at the time of her injury i.e. work on the ridge caps. He testified that other employees had reported to him that after the injury the complainant only wanted to return to work if she could return to another job with lighter duties. He testified that he was aware that while she was on the W.C.B. claim which commenced January 15, 1996 that she was looking for other employment. He testified that Mr. Rick Springer had called him for a reference. He also testified that the complainant had made no effort to speak to him directly about a job with lighter duties.

Mr. Kruchowski testified that he had never seen the W.C.B. claim application form and that if he had seen it he would have filled out an objection to the claim. However, no objection to the claim was made by the employer.

Mr. Kruchowski called three witnesses to support his evidence that he had heard from the employees that the complainant was looking for other work during the term of her employment at Cedar City Shake Ltd. Although the complainant took some exception in cross-examination to the particulars of the evidence that was given by these witnesses she did admit that she was seeking other employment at the relevant times. I accept the evidence of the witnesses. I further accept Mr. Kruchowski's evidence that he relied on these statements to form the opinion that the complainant no longer wished to work at Cedar City Shake Ltd. and that he relied on the telephone call from Mr. Springer seeking a reference for the complainant as further evidence, during the time of her W.C.B. claim, that she no longer wished to work at Cedar City Shake Ltd. I will deal with the inference I draw from this evidence later in the award.

Mr. Kruchowski further testified that he drew the conclusion that the complainant no longer wished to work at Cedar City Shake Ltd. from the fact that she made no effort to contact him personally on March 11, 1996 or later to inform him of her desire to continue employment. He testified that although he is not at the plant all day every day he is there each morning at starting time and that he has a regular presence during the day. I accept Mr. Kruchowski's evidence on that point. It is notable that Mr. Kruchowski testified that Ms. Liakopoulos did inform him on March 5, 1996 that the complainant was ready to return to work. However, he denies having made the statement referring to giving her her "walking papers". He does admit that he had formed the impression in his mind due to the conversation with Mr. Springer and the conversations with the employees that the complainant was looking for work elsewhere and therefore did not want to return to Cedar City.

ANALYSIS

The issue in this case is whether the complainant quit her employment. The complainant admits that during the course of her employment she was looking for other work but was unsuccessful. She states that on March 5, 1996 when she phoned and spoke to Ms. Liakopoulos that the purpose of her call was to inform the employer of her intent to return to work. She accepted that she was laid off as a result of the conversation with Ms. Liakopoulos and the fact that her Record of

Employment showed that she was laid off. She argues that she had no intention of quitting, that in fact she did not quit and that the reason she did not return to work was because she was laid off.

Mr. Kruchowski argues that his information was that the complainant was seeking other employment and from that he drew the conclusion that she did not want to return to work. This conclusion was bolstered by the fact that he felt that the complainant did not make any effort to personally contact him. He argued that he was readily available for the complainant to reach him if she really wanted to. He argues that her search for other work while employed at Cedar City is evidence of a subjective desire to quit her employment. He further argues that objectively she did not return to work despite the fact that he felt work was available for her. Mr. Kruchowski further argues that Ms. Liakopoulos did not have the authority to fill out the Record of Employment and the W.C.B. forms in the manner in which she did. He also argues that she did not have the authority to sign, on his behalf, the letter of March 11, 1996.

In determining whether an employee has quit employment one must search for both a subjective and objective element. Further, as this matter is an appeal, the onus rests on the employer to show that the employee did, in fact, quit her employment. Mr. Kruchowski has ably argued that the subjective element involved in the analysis of a quit is fulfilled by the fact that the complainant was actively searching for other work during her employment at Cedar City. I do not accept that argument. An employee is entitled to seek other work during the course of employment with her present employer and the fact that there is an active job search under way does not, particularly in these circumstances, fulfill the subjective requirement of indicating an intention to quit the present employment. A successful job search might fulfill the subjective requirement depending on circumstances but that is not the case here. Furthermore, I find that the objective element is not met because the complainant relied on a conversation with Ms. Liakopoulos and the Record of Employment to form her opinion that she had been laid off. The employer is ultimately responsible for the official documents that are issued on its behalf. I do not accept that Ms. Liakopoulos did not have the authority to issue the R.O.E. as she did on March 11, 1996. For the above reasons I find that the complainant did not have the subjective intention to quit her job nor is there sufficient objective evidence to support a conclusion that she quit.

ORDER

I order pursuant to Section 115 of the *Act* that the Determination dated January 30, 1997 be confirmed.

E. Casey McCabe
Adjudicator
Employment Standards Tribunal