

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 -

Denis Montagnon operating Brentwood Brake & Muffler
("Montagnon")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	Lorne D. Collingwood
FILE NOS.:	1999/59
DATE OF HEARING:	April 23 1999
DATE OF DECISION:	May 14, 1999

DECISION

APPEARANCES

Dennis Montagnon	On his own behalf \
Elizabeth Milne	On her own behalf

OVERVIEW

Dennis Montagnon operating Brentwood Brake & Muffler ("Montagnon" or, "the employer") appeals a Determination by a delegate of the Director of Employment Standards dated January 15, 1999. The appeal is pursuant to section 112 of the *Employment Standards Act* (the "Act").

The Determination orders Montagnon to pay Elizabeth Milne compensation for length of service. The employer appeals that order and claims Milne terminated her employment.

The delegate considered whether Milne might have quit her employment. Relying on Burnaby Select Taxi Ltd. and Zoltan Kiss, (1996), BCEST No. D091/96, the delegate decided that there were not clear, unequivocal facts to show that Milne had resigned.

Montagnon, on appeal, questions whether the delegate knew and understood what he was saying. He claims that Milne very clearly indicated, in January of 1998, that she was tired of working two jobs and was going to quit. That forced him to consider what he was going to do for a bookkeeper. Milne was asked to stay to the end of July and do the year-end statements for the fiscal year 1997-98. Montagnon's wife began training with a view to taking over as bookkeeper. July arrived and Milne indicated distress at the prospect of her leaving . That led Montagnon to keep her on for another month.

Milne claims that it was never her intention to quit her employment.

ISSUES TO BE DECIDED

The facts are in dispute.

The matter of whether or not the employee resigned her employment is at issue.

FACTS

Dennis Montagnon is in the brake and muffler business. He operates under the name of Brentwood Brake & Muffler.

Elizabeth Milne worked part-time for Montagnon as his bookkeeper. She worked for Montagnon for more than ten years.

Montagnon for some reason got the idea that Milne wanted to leave his employ. It was decided that, rather than bringing in another bookkeeper, his wife would learn "Simply Accounting" and take over the bookkeeping. And Montagnon asked Milne to stay until his year-end statements were complete. His fiscal year is to the end of June. It takes about a month to do the year end. Montagnon made it clear to Milne that her last day was going to be the end of July even though nothing was put in writing.

As the end of July loomed, Montagnon could see that Milne was upset at the prospect of leaving her employment. Montagnon did not want part ways on bad terms that led him tell Milne that he would employ her to the end of August. Again, while that was not put in writing, there is no doubt that Montagnon, on or about the end of July, advised Milne that her last day was going to be the 30th of August.

On or about mid-August, Milne expressed that it would be better for her if she left on the 27th of August, instead of the 30th, and that she would use up some of her vacation days. Milne went on vacation on the 27th and her employment was terminated on the 30th.

ANALYSIS

What I must decide is whether or not the appellant has met the burden for persuading the Tribunal that the Determination ought to be varied or cancelled for reason of an error in fact or in law.

I find no error by the delegate in respect to the facts. As I find the important facts, they are as set out in the Determination.

The delegate has correctly applied the Act. Section 63 of the Act provides for and governs the liability to pay compensation for length of service. Sub-sections 1, 2, and 3 are of particular importance in this case. They are as follows:

- (1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service. The employer's liability for compensation for length of service increases as follows:

- (a) after 12 consecutive months of employment, to an amount equal to 2 weeks' wages;
 - (b) after 3 consecutive years of employment, to an amount equal to 3 weeks' wages plus one additional week's wages for each additional year of employment, to a maximum of 8 weeks' wages.
- (3) The liability is deemed to be discharged if the employee is given written notice of termination as follows: one week's notice after 3 consecutive months of employment; 2 weeks' notice after 12 consecutive months of employment; 3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice;
- (b) is given a combination of notice and money equivalent to the amount the employer is liable to pay, or
 - (c) terminates the employment, retires from employment, or is dismissed for just cause.

(my emphasis)

The employer alleges that the employee terminated her employment and that his liability to pay compensation for length of service is therefore discharged. But did Milne quit? I find that the evidence is clearly to the contrary.

The delegate relies on the decision, *Burnaby Select Taxi Ltd. and Zoltan Kiss*. I agree with that and the decision. It is the right of the employee to resign and that right is personal to the employee. An employer may not deem that an employee has quit. It is not enough that an employee simply says that they are going to quit or retire at some point. There must be clear, unequivocal facts which show that the employee voluntarily exercised his or her right to quit. And, in that regard, the act of quitting has been found to have both a subjective and an objective element. Subjectively, the employee must form the intention to quit. Objectively, he or she must then act in a way, or demonstrate conduct, which is inconsistent with the continuation of the employment.

The rationale for the Tribunal's 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

In the case of Milne, there are not plain, clear facts which show that the employee voluntarily exercised her right to quit. Milne may well have indicated that it was her intention to retire or, at least, terminate her employment, but she never put a date on her leaving. It is not at all clear that she completely formed the intention to quit.

Beyond the above, I find that even if it can be said that the employee announced a plan to quit, it is clear that she later changed her mind. At no point did Milne act or conduct herself in a way which is somehow inconsistent with being further employed. The decision that she would leave on the 30th of August was entirely Montagnon's decision.

I find that it was Montagnon that terminated Milne's employment. Even though Milne had plenty of advance warning of her impending termination, it is only through written notice of termination, in Milne's particular case, 8 weeks' written notice of termination, that Montagnon's liability to pay compensation for length of service could be discharged. Milne received nothing in writing. The Act requires written notice of termination.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated January 15, 1999 be confirmed. Elizabeth Milne is owed \$2,934.52 plus whatever further interest has accrued pursuant to Section 88 of the *Act*.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal