BC EST # D196/97

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.:	97/95
DATE OF HEARING:	April 3, 1997
DATE OF DECISION	May 13, 1997

DECISION

APPEARANCES

Allen Kruchowski	on behalf of Cedar City Shake Ltd.
Corinne Selzler	on her own behalf
Joanne Kembel	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. Additionally, the original determination was varied to increase the amount of termination pay from one week to two weeks' on the basis that the complainant had completed six months of employment prior to November 1, 1995.

ISSUES 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*?

If the employer is obligated to pay compensation for length of service is the employer liable for two weeks' pay?

FACTS

The employer operates a cedar mill at Maple Ridge, B.C. where ridge caps and builders' shims are manufactured. The complainant, Ms. Corinne Selzler, was employed as a shim packer. She was hired on April 20, 1995 and was terminated on April 16, 1996.

On January 9, 1996 the complainant suffered a work related injury. She did not return to work on January 10, 1996. She reported to work on January 11, 1996 and worked one-half day. When she was injured on January 9, 1996 she did not report the accident to her employer. The injury was not reported to her employer until 11:30 a.m. on January 11, 1996. The complainant then went home. She returned to work the following week and worked from January 15, 1996 through January 19, 1996. She then went off work on a W.C.B. claim. She did not return to work thereafter.

On or about April 15, 1996 the complainant telephoned the employer to inform the employer that she was ready to return to work. She talked to Marie Liakopolous who was the payroll clerk for the employer at the time. The complainant testified that later that day she received a second phone call from Marie asking her to come in to pick up her Record of Employment. The complainant testified that she reported to the office to pick up her Record of Employment. She testified that she did not speak to any of the employees in the yard at the time. She went into the office, picked up her Record of Employment and returned to her truck where a friend was waiting to drive her to an appointment with the physiotherapist. The Record of Employment, which was signed by a Paulette Connors, shows lay-off/shortage of work as the reason for issuing the Record of Employment. It is the complainant's position that she did not quit but rather, upon informing her employer that she could return to work, was placed on lay-off.

The employer disputes that the complainant was laid off. The employer called evidence from two witnesses of a conversation that the complainant had with each witness in the yard in which it is alleged that the complainant told these other two employees that she would not be returning to work because her doctor had said she couldn't. The first employee during examination in chief placed the conversation with the complainant in the yard at the lunch table on April 16, 1996. However, under cross-examination by the complainant the witness stated that "it is possible that we had a conversation at an earlier date than April 16, 1996 and she did tell me that (i.e. her doctor said she couldn't work) at that time". The witness stated further under cross-examination that she "… didn't know if this conversation was on April 16 or some other date."

Likewise, the second witness who testified about a conversation with the complainant in which she said she couldn't return to work because of her back could not place the time of the conversation. He testified the conversation could have happened in January or February of 1996. The complainant did not receive her Record of Employment until April 16, 1996.

I do accept the complainant's evidence that she attended at the work place on two occasions being January 19, 1996 to fill out her W.C.B. claim form and April 16, 1996 to pick up her Record of Employment. I also accept that she had conversations with her fellow employees on January 19, 1996 when she attended at the work place. The independent witnesses were not able to precisely state that the conversations took place on April 16, 1996. The complainant states that she talked to the employees when she picked up her W.C.B. forms and it would be likely that she would have said at that time that she couldn't return to work due to her doctor's orders. However, it is not likely that she would have said that in April when she had been cleared medically to return to work. I think that the passing of time has eroded memories on this point. Furthermore, the Record of Employment issued on April 16, 1996 states that the reason for termination was lay-off/shortage of work.

The employer argued that the complainant did not want to return to his work place because she had another job. That job was working in a restaurant in which the complainant has an ownership interest. However, I am not prepared to accept that the complainant's work in the restaurant is indicative of an intention to quit her job at Cedar City Shake Ltd.

The evidence showed that when the complainant informed her physiotherapist that she would not be returning to Cedar City Shake Ltd. that she was continued under her W.C.B. claim on a graduated work program to prepare her for another line of work, namely, car detailing. Even though she had a continuing claim with the W.C.B. during the period after April 16, 1996 I am not prepared to accept that as an indication of an intention to quit her employment at Cedar City Shake Ltd. She had been laid off and it is only logical that she would have taken steps to prepare herself to enter the work force in another occupation.

ANALYSIS

This case is an appeal pursuant to Section 112 of the *Act*. The onus in this case is on the employer to show that the employee quit her employment. Any analysis of a quit requires an adjudicator to examine both the subjective and objective elements of the termination. Is there any evidence present to indicate that the subjective requirement of an intention to quit was present? I do not think that the complainant's actions indicate a subjective desire to terminate her employment. She called the employer on April 15, 1996 to inform the employer that she was ready to return to work. The employer's response later in the day was to inform her to come in to pick up her Record of Employment which states on its face that she has been laid off due to a shortage of work. The complainant believed that she had been laid off. Furthermore, I cannot accept the statement she made regarding her doctor not allowing her to return to work as being made on April 16, 1996. The independent witnesses simply were not able to conclusively place the conversation at that time. Therefore, the objective element is not met. Since the onus rests on the employer in this matter I find that the employer has failed to prove that the complainant quit her employment.

Secondly, the employer appeals the variation of the Determination dated January 30, 1997 which effectively doubled the amount of its liability from one weeks' pay to two weeks' pay. I find that the variation is correct. The complainant, who was hired on April 20, 1995 had completed six months of employment prior to November 1, 1995. Therefore, her rights under the predecessor to the current *Employment Standards Act* had vested. Those rights entitled her to two weeks' notice or pay in lieu of notice upon completion of six months employment. I find that the employer is liable for two weeks' pay. (See *Rescan Investments Ltd*. BC EST # D007/97).

ORDER

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

E. Casey McCabe
Adjudicator
Employment Standards Tribunal