

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.:	97/96
DATE OF HEARING:	April 18, 1997
DATE OF DECISION:	May 13, 1997

DECISION

APPEARANCES

Allen Kruchowski on behalf of Cedar City Shake Ltd.
Kevin Nelson on his 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.

ISSUE TO BE DECIDED

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

FACTS

The employer operates a cedar mill at Maple Ridge, B.C. which manufactures ridge caps and builders' shims. The complainant, Mr. Kevin Nelson, was employed as a sawyer at that operation. He commenced his employment on July 4, 1992. In December 1995, just prior to Christmas, there was a general lay-off at the mill. Mr. Nelson, along with all other employees, was laid off and received a Record of Employment indicating lay-off. In January 1996 the mill re-opened and Mr. Nelson was recalled. He returned to work at his job as a sawyer. However, due to cold weather, the saw was shut down. It becomes very difficult and hence dangerous to work with the cedar when it is frozen.

The employer called Terry Clark. She testified that she was recalled to work in January 1996 and that the wood was too frozen to do ridge caps. She testified that she and the complainant were to work on builders' shims. She testified that the complainant didn't want to do shims and that he left his work. She testified that he said that he did not want to do that job and could make more money detailing cars. She testified that he got in his car and left. She was not sure what the date was but thought it was in mid-January, around January 19 or January 20, 1996. She testified that she stopped working on January 19, 1996 because Kevin had left but that she returned to work the next

day and worked with two other people. She testified that she didn't think that anyone else was working on shims and that it only required two employees for that job. She further testified that she didn't think it was snowing that day but even if it was snowing she stated that the employees would not have been called back to do ridge caps. The employer called two other witnesses who gave evidence that they had knowledge that the complainant besides working at Cedar City also detailed automobiles. Both witnesses testified that they had knowledge of the complainant performing car detailing while employed at Cedar City and after January 20, 1996.

The complainant testified that he was laid-off about the 15th of December, 1995. It was snowing at the time and he had volunteered to go home. He was told by the employer that he would get called back but he was not called back in December 1995. He was recalled in January of 1996 to work on ridge caps. He stated that in mid-January 1996 the wood was frozen and that the employer, Mr. Kruchowski, said to him that he could go home and that he would call him when he is needed. He denies working on the shims and states that he only worked on the ridge caps. He says he has a pay stub showing pay for only ridge caps but the stub was not offered in evidence. He denies that he had worked with Terry Clark and that he had walked off the job. He states that he did not return to work at Cedar City after that and that he was informed by other people that he didn't work there any longer. Sometime in March, 1996 he received a Record of Employment indicating that the reason for leaving was a lay-off. He states that he didn't ask for a Record of Employment on January 20, 1996 because he didn't need it. The complainant admits that he was doing some detailing of automobiles while working for the employer and also stated that he commenced a car dealing business with his uncle, Mr. Stewart Black, in May 1996. He states that he did do some car detailing between January 20, 1996 and the commencement of the new business and that any monies he made at detailing during this period were reported on his U.I.C. claim cards.

Mr. Stewart Black also testified. He testified that he and Kevin started an auto detailing business in May 1996 along with the complainant's girlfriend. He stated that the business was commenced after the complainant came up with the idea in April 1996. He testified that the business started off in his home and moved to an industrial park on October 1, 1996. He testified that the business did not exist prior to May 1996 and that any detailing that the complainant had done prior to that time had been for friends or family. He understood that the complainant was paid for that work but he wasn't sure of the amount.

ANALYSIS

This case is an appeal pursuant to Section 112 of the *Act*. The onus is on the employer to show that the Director's delegate erred in his determination that the complainant was owed compensation for length of service. The difficulty in this case is that the evidence from the employer's witness and the complainant is at odds. Mr. Kruchowski did not testify under oath at this hearing. However, correspondence from Cedar City Shake Ltd. dated July 15, 1996 indicates that the ridge saw was still not operating as of July 15, 1996. The employer's witness states that the complainant walked off the job on January 19, 1996. The complainant states that he was told by Mr. Kruchowski that he could go home. Mr. Kruchowski did not testify. The complainant's position is that when no work was available on the ridge saw he was sent home. The employer's position is

that work was available on the shims and the complainant didn't want to do it. A Record of Employment was subsequently issued indicating lay-off as the reason for termination. I find that the evidence of the employer's witness is as probable as the evidence of the complainant. I must therefore look to other factors to determine this case. This case turns on the onus on the employer to show that the determination is wrong. I find that the employer has not discharged that onus. The employer argues that the office person who issued the Record of Employment did not have the authority to issue it. He argues that he was not aware that the Record of Employment had been issued. However, I cannot accept that argument. The employer is responsible for the acts of its employees particularly where those employees are making declarations that are required by statute. On the evidence before me I cannot find that the complainant quit his employment.

ORDER

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

E. Casey McCabe
Adjudicator
Employment Standards Tribunal