

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 -

Total Copierland Ltd. operating as
Pacific West Office World
("Company")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Richard S. Longpre

FILE NO.: 98/116

DATE OF HEARING: May 20, 1998

DATE OF DECISION: May 28, 1998

DECISION

APPEARANCES

Ms. Barbara Fisher	for the Company
Mr. Rick Fisher	for the Company
Mr. John Morris	for the Company
Mr. Ron Sabey	for himself
Mr. Rob Strutynski	for Ron Sabey

OVERVIEW

This is an appeal by Total Copierland Ltd. (the “Company”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”). The Company appeals a Determination by a delegate of the Director of Employment Standards dated January 29, 1998: File No. 086478. The Determination concluded that Ron Sabey was terminated from his employment with the Company. He had worked with the Company since 1991: compensation for length of service, vacation pay and interest totaled \$2264.59.

The Company called three witnesses: Barb Fraser, office manager, John Morris, sales manager and Rick Fraser, president of the Company. Sabey and Rob Strutynski, Sabey’s friend, also testified.

ISSUE TO BE DECIDED

At the outset of the hearing, the Company raised three issues in its appeal: findings of fact made by the delegate, whether there was just cause for discharge and whether Sabey quit. During the course of the hearing, we addressed the evidence the Company argued was mishandled by the delegate. The Company agreed that just cause for termination was not raised when Sabey’s employment ceased. The hearing, therefore, focused on the events of Thursday, September 4, 1997 and whether Sabey quit his employment with the Company? If so, severance for length of service was not owed to Sabey.

FACTS

The Company had accommodated Sabey’s medical needs over the past couple of years; Sabey is HIV positive. On Thursday morning, September 4, 1997, Sabey approached Barb Fraser about whether he would be paid for two days that he had earlier been off work. He also asked for some vacation pay without taking any vacation time. Barb Fraser told Rick Fraser to discuss his requests with Rick Fraser.

When Sabey met with Rick Fraser, Barb Fraser was present. As had occurred in the past, their discussion resulted in an argument. Barb Fraser testified that it was a heated

argument. Both men were angry. Rick Fraser remained relatively calm but Sabey showed that he was very upset. He was close to yelling. At the end of the discussion Sabey left the office and went outside the building to the area employees went to smoke a cigarette. As he left, Sabey told Rick Fraser that he was the “worst f--ing manager” and that he was “getting out of there”. Barb Fraser and Rick Fraser testified that Sabey also said “I quit”. They testified that they asked Sabey to put it in writing. Sabey denied making that statement and denied that he had been asked to put the statement in writing.

Barb Fraser and Rick Fraser waited in the office area to see what Sabey was going to do. Finally, Rick Fraser went out to the “smoke area” to talk to Sabey. He asked Sabey what he was going to do. Sabey said that he wanted to think about it. Rick Fraser told Sabey that he had quit and asked him to leave. Sabey apparently asked if he could work until Friday. Rick Fraser left Sabey and went back to discuss the matter with Barb Fraser. They decided not to permit Sabey to work for the remainder of Thursday and Friday but to pay him for those days. Barb Fraser prepared a final pay cheque, another cheque for outstanding vacation pay and a Record of Employment with the code “E” for quit.

Morris testified that he had been in the office when Sabey and Rick Fraser began to argue. He left during the argument. He next saw Sabey sitting outside in the smoke area. He testified that Sabey told him that he had just quit. Morris told him to calm down, to relax and to let the whole thing blow over. Sabey agreed with most of Morris’ evidence. He disagreed with Morris on one point. Sabey testified that he told Morris that he had just been fired.

Sabey was given his final cheques and the ROE but he did not leave the work premises. He waited outside the front door of the office for Rick Fraser to return from lunch. Morris again walked by him. Sabey told Morris that he wanted to apologize to Rick Fraser for the argument and his comment. Morris, who Sabey respected, told him to go home and let things calm down. Sabey followed his suggestion. When Sabey arrived at home, he told Strutynski that he had just been fired: Sabey was very upset.

The parties were not sure if Sabey telephoned Rick Fraser on Thursday afternoon or Friday. Sabey telephoned Rick Fraser and apologized for his conduct on Thursday morning. He asked Rick Fraser if he they could arrange his return to work. Rick Fraser accepted the apology but said that Sabey had terminated his employment with the Company. It was too late to now seek to return to work. Sabey told Rick Fraser that he wanted the severance pay owed to terminated employees. Rick Fraser told him that he had terminated and it was not owed severance pay. Sabey told Rick Fraser that there was an organization that assisted persons with Aids and that he could use their assistance to go to small claims court: Sabey was not familiar with the *Act*. Rick Fraser testified that Sabey also threatened that the organization would come down on the Company. Sabey testified that he did no more than tell Rick Fraser that he could be assisted by the organization.

Over the weekend, Sabey talked to two members of management. He told both managers that he intended to return to work on Monday morning. Neither manager informed the Frasers. When Barb Fraser and Rick Fraser arrived for work they found Sabey working.

They asked him to leave the site. They told Sabey to take the issue up with Employment Standards.

One other issue. Barb Fraser testified that Sabey cashed the cheques given to him on Thursday. Sabey said that he told her that he was cashing the cheques without prejudice to his claim for severance pay.

The delegate reached the following conclusion. Her Determination reads:

The decision to quit is a personal to the employee. The employee must voluntarily intend to quit and carry out an act that follows through with this. It is clear that a heated argument occurred between Sabey and the employer. Nevertheless, Sabey did not follow through with actions that would indicate he was in fact quitting his employment. On September 4, 1997, he clearly asked for severance pay and he clearly advised his employer that he did not quit and that he did not wish to leave the premises. Sabey also returned to the office on September 8, 1997, intending to work and insisting that he had not quit. On the balance of probabilities, Sabey did not quit, rather his employment was terminated by Copierland.

ANALYSIS

I accept the evidence of Barb Fraser, Rick Fraser and Morris that Sabey said he was quitting. Nothing in their evidence suggested that Barb Fraser and Rick Fraser were exaggerating their evidence. Further, Morris also said that Sabey told him that he quit. Sabey acknowledged that he respected Morris's advice and friendship. It is not likely Morris would exaggerate. Sabey was very upset at the end of his conversation on Thursday. It is quite likely that he would not recall his exact words at the end of an emotional argument.

The Company's case rests solely on the fact that Sabey used the words "I quit". Several decisions by the Tribunal have recognized that employees may be emotionally upset and make statements of quitting that they do not intend. Following the Tribunal's jurisprudence, it is not sufficient that Sabey made the statement, "I quit". There must be clear and unequivocal evidence to support a conclusion that the employee intended to quit his employment. There must also be evidence that the employee formed a subjective intention to quit as well as evidence that he carried out some act inconsistent with future employment: see *Burnaby Select Taxi Ltd.* BC EST D091/96; and *Safety First Fire Control Ltd.* BC EST D193/97.

As noted earlier, I accept the Company's evidence that Sabey said he quit. However, when Rick Fraser met with Sabey outside, he said he wanted to think about it. When Morris met Sabey outside, he said that he quit; however, Morris knew Sabey was very upset. He told Sabey to take some time to relax and settle down. When Morris saw Sabey again after lunch, Sabey said that he wanted to apologize to Rick Fraser. At that point, he wanted to return to work. Sabey took Morris's advice and he went home. Later, Sabey telephoned

Rick Fraser and apologized. He wanted to return to work. Over the weekend, Sabey told two managers that he intended to return to work on Monday: which he did.

Sabey said the words "I quit" in an emotional state. The statement was made in conjunction with some very anger words following a heated argument: Sabey did not show a subjective intent. It was not an unequivocal statement of quitting. Sabey genuinely did not believe that he even made the statement. Most importantly, within a few minutes of making the statement he began to back track. Morris saw this in their discussion in the smoke area. When Sabey received his cheques from Barb Fisher he believed that he was being terminated. Once he settled down, his conduct demonstrated that he had no intention to quit. He wanted to apologize and to return to work. Sabey leaving the site was an attempt to settle the matter down and have the Company allow him to return to work. On Monday, he returned to work.

I understand the Company's view that Sabey should be held to his words, regardless when the statement was made. The Tribunal has not applied the *Act* so narrowly.

The Company's appeal is denied.

ORDER

Pursuant to Section 115 of the *Employment Standards Act*, the Determination, dated January 29, 1998 is confirmed. The Company is directed to pay Sabey \$2,264.59 plus interest owing on that amount from January 29, 1998.

Richard S. Longpre
Adjudicator
Employment Standards Tribunal