Employment Standards TRIBUNAL

An appeal

- by -

Shane Williams
("Williams")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: David B. Stevenson

FILE No.: 2001/77

DATE OF HEARING: April 24, 2001

DATE OF DECISION: May 23, 2001

DECISION

APPEARANCES:

on behalf of Shane Williams	In person
on behalf of Blackstock Ventures Ltd.	Cameron Blackstock

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by Shane Williams ("Williams") of Determination ER # 103-659 issued January 4, 2001 by a delegate of the Director of Employment Standards (the "Director").

Williams had filed a complaint with the Director alleging he was entitled to length of service compensation under Section 63 of the *Act* because his employer, Blackstock Ventures Ltd. operating as Blackstock Vending ("Ventures") had not recalled him following a lay off due to a shortage of work. The Determination concluded that Williams had quit his employment, that Ventures was not liable to pay him length of service compensation under the *Act* and closed the file on the complaint.

Williams says the Determination is wrong.

ISSUE

The sole issue in this appeal is whether Williams has shown the conclusion of the Director, that he was not entitled to length of service compensation, was wrong.

THE FACTS

Ventures' primary business focus is restocking vending machines. Many vending machines are located in schools and the local college and do not require restocking from late June to early September. There is a temporary downturn in work during this period. Williams was working as a route driver for Ventures when he was laid off June 21, 2000 due to the temporary downturn in work. Cameron Blackstock ("Blackstock"), who is the principle of Ventures, testified that at the time of the lay-off it was his intention to recall Williams back to work in early September, coinciding with the reopening of the schools and the local college.

Williams said he was never told of this intention and that his Record of Employment indicated he was being laid of due to shortage of work, with the expected date of return being shown as "unknown". In July, Williams called Blackstock twice. He owed some money to him for a leather jacket purchased on his behalf and was trying to get the exact amount owed. Blackstock

didn't know the amount and Williams was referred to Blackstock's wife, who had that information. Williams said there was no discussion during those telephone calls about returning to work. In late July or early August, Williams went to the warehouse on a Thursday - as he knew Mrs. Blackstock would be there on that day - and paid the amount he owed for the jacket. He said there was no discussion at that time, either, about him returning to work.

During August, Williams met Blackstock on two occasions, once in front of a fast food outlet and once on the Aboriginal reserve lands. They had brief discussions on each of those occasions, but there was nothing mentioned about Williams returning to work. Blackstock testified that he did not raise it because there were other people present on both occasions and he did not feel it was appropriate to talk about Williams' return to work in front of those people. On the latter occasion, Blackstock was servicing a customer and was accompanied by Justin Froese, his nephew, who was working for Ventures. He did ask Williams to come see him at the warehouse.

In mid to late August, Williams received two telephone calls from Blackstock. In the first, Blackstock asked that Williams meet him at the warehouse one afternoon at approximately 2 o'clock. Williams went to the warehouse at the appointed time, but Blackstock was not there. He left. In the second, Blackstock again asked Williams to meet him at the warehouse sometime between 2 and 3 o'clock in the afternoon. On that occasion, Williams went to the warehouse at the appointed time, but Blackstock was not there. He left, returning two more times between then and 3 o'clock. Blackstock did not appear. Blackstock testified that he intended to talk with Williams at those meetings about returning to work, but Williams was not told that during any of the telephone discussions. There was no further communication or attempted communication between Williams and Blackstock until October 12.

In September, Williams said he heard that Blackstock had another driver on the truck. On October 12, Williams went to the warehouse to talk with Blackstock. He asked why he had not been called back to work and was told that he had been asked three times to come see him, but did not follow through. Williams expressed the view that he was entitled to a severance package. Blackstock disagreed.

ARGUMENT AND ANALYSIS

The facts submitted to me at the hearing did not differ significantly from those established during the investigation and which are set out in the Determination. In the Determination, the Director expressed her conclusion as follows:

> The Complainant had been temporarily laid off due to a shortage of work. There had been no intention on the part of the Employer to terminate the Complainant. The Employer intended to recall Williams back to work in late summer to coincide with schools and college reopening, which is when the work would increase again. Both the Complainant and the Employer made statements to the delegate confirming that the Employer had invited the Complainant to come to the

> office to see him, making an effort to "recall" Williams. These efforts were made within the 13 weeks of the temporary layoff. The Complainant said he had gone to the office, but the Employer was not there. He made no further attempt to contact Blackstock concerning his job and/or future employment. The employer has a cellular telephone that he carries with him, the office has an answering machine to allow messages to be left, the Complainant knew the Employer's home address and telephone number, bu no attempt was made to follow through on the several requests from the Employer to contact him. By not doing so, it would be reasonable to deduce that the Complainant did not want to go back to work for Blackstock, and had, in effect, quit his employment, thereby discharging the Employer's liability for CLOS as per Section 63(3)(c).

The relevant parts of Section 63 of the *Act* state:

> 63. (1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one weeks' wages as compensation for length of service.
>
> . . .
>
> (3) The liability is deemed to be discharged if the employee
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> . . .
>
> (c) terminates the employment, retires from employment, or is dismissed for just cause.

Williams was asked during his evidence whether, when Blackstock asked him to come in and see him, he thought it was about work. He replied that he wasn't prepared to assume it was about work. He was asked what else it could have been about and replied he didn't know. He was asked why he had not called Blackstock after Blackstock had failed on two occasions to be at the warehouse after calling Williams to arrange a meeting time. He said it was because he assumed that either the meeting was unnecessary or whatever Blackstock wished to talk about was unimportant. It is interesting that Williams was not prepared to make any assumption concerning why Blackstock wished to see him, but was prepared to assume, following the two failed meetings, that either the meetings were unnecessary or what Blackstock wanted to say to him was unimportant. He also said it was not in his nature to call Blackstock to complain about having been, in effect, "stood up" twice.

Blackstock was asked why, when he was unable to meet Williams at the times arranged by him, he did not make any further efforts to contact Williams to return to work. He replied that since he had asked Williams three times to meet him at the office, he felt there was some responsibility on Williams to follow up.

The burden on Williams in this appeal is to persuade me that the Director was wrong to conclude his conduct discharged Ventures from their liability for length of service compensation. The *Act* provides three circumstances where the conduct of an employee may operate to discharge an

employer from the liability to pay length of service compensation: where the employee terminates, or quits, the employment, where the employee retires from employment and where the employee gives just cause for dismissal. A decision about whether an employee has quit, retired or given just cause for dismissal is predominantly a question of fact.

The Determination correctly recognized that the objective of the factual analysis is to decide if the employee "clearly communicated, by word or deed, an intention to terminate their employment relationship" (see *Re RTO (Rentown) Inc.*, *supra*). On the facts, the Director was satisfied Williams' conduct was demonstrative of an intention on his part to end the employment relationship. I agree with that conclusion in the circumstances of this case.

The failure of Williams to make an effort to contact Blackstock, after he had been asked at least four times in the span of 3 or 4 weeks to do so, is significant. Even accepting that Blackstock did not show up when Williams went to the warehouse on two occasions after being called by Blackstock, his failure to follow up those failed meetings when Blackstock did not show is perplexing and quite inconsistent with the conduct of an individual intent on continuing his employment. Not only did he not follow up those failed meetings, but he made no attempt to contact Blackstock until October 12, 7 or 8 weeks later. Williams provided several reasons for not following up on Blackstock's requests to come and see him. First, he said he didn't assume Blackstock wanted to talk about a return to work. I simply do not accept that response. When asked what else Blackstock could have wanted to talk to him about, he said, "I don't know". Second, he said he assumed whatever Blackstock wanted to talk about was unimportant. There was no basis upon which he could have made that assumption. Third, he said he was never told the lay off was temporary, noting that his Record of Employment indicated the probable date of return as "unknown". While that might be technically correct, I do not accept, just as the investigating officer did not accept, that Williams was unaware of the probable duration of the lay off. He testified he was told by Blackstock when he was laid off that "he couldn't afford an employee for the summer on account of the schools and community colleges being shut down". That evidence lends greater significant to Williams' failure to contact Ventures at the end of the summer, when the schools and the college reopened, and supports the conclusion that Williams intended to end his employment with Ventures.

Williams said the reason he finally contacted Blackstock in October was because he found out that Blackstock's nephew, Justin Froese, was working with Blackstock. In his appeal submission, Williams stated:

> In September, people started to tell me that someone else was with Mr. Blackstock in the work truck. I found out that it was Cam's nephew, Justin Froese. I never ran into him and Cam while they were working so I don't know where he comes up with his Statement in the Determination. . .
>
> On October 12, 2000 I went to the warehouse to talk to Cam and ask why I had not been called back to work.

In the hearing Williams retracted the assertion that he had not seen Blackstock and Justin Froese while they were working. He acknowledged he had seen them in early August on the Aboriginal reserve lands, which begs the question - if it was the presence of Justin Froese working on the truck that caused him to ask why he hadn't been called back, why didn't he inquire right then why he had not been called back to work?

As a general comment, the Determination noted that some of Williams evidence did not harmonize "with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (*cf. Faryna v. Chorney*, (1952) 2 DLR 354 (BCCA)). I cannot say there was no basis for that conclusion.

Williams has not persuaded me that the Determination is wrong and the appeal is dismissed.

I wish to address one final matter. The following statement is found in the Determination:

> When there is a temporary layoff, there is some responsibility on behalf of the employee to contact the employer to find out when s/he may be called back to work.

As a general proposition the above statement is too broad. As I have noted elsewhere in this decision, an employee's conduct only relieves his or her employer of the statutory obligation to pay length of service compensation if it is determined the employee quit, retired or gave just cause for dismissal. An issue about whether an employee has quit the employment is predominantly a question of fact. Several factors might be relevant to a conclusion on that issue, but the particular weight to be given to any factor will vary from case to case depending on the circumstances. The fact an employee did or did not contact the employer to "find out when s/he may be called back to work" might be a relevant factor but it is neither presumptive nor determinative of the issue.

ORDER

Pursuant to Section 115 of the *Act*, I order Determination ER # 103-659 dated January 4, 2001 be confirmed.

David B. Stevenson
Adjudicator
Employment Standards Tribunal