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 -

Maple Ridge Travel Agency Ltd.
("Maple Ridge" or the "Employer")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE NO.: 1999/166

DATE OF HEARING: June 3, 1999

DATE OF DECISION: July 8, 1999

DECISION

APPEARANCES

Mr. Ernest Day	on behalf of Maple Ridge
Ms. Yvette Esposito	on behalf of herself

OVERVIEW

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director's delegate issued on March 3, 1999. In the Determination, the Director's delegate found that the Employer had terminated Ms. Esposito's ("Esposito") employment without "just cause". The delegate determined that she was entitled to compensation for length of service. The delegate determined that Esposito was entitled to $655.57. The Employee appeals the Determination and says that it did not terminate her employment, rather she quit.

FACTS AND ANALYSIS

Esposito was employed by Maple Ridge as a travel consultant between July 28, 1997 and September 26, 1998. She worked 40 hours per week at $9.50 per hour.

The events which gave rise to the termination of her employment occurred between September 24 and 26, 1998. In the evening of September 24, Mr. Ernest Day ("Day"), the owner of the Employer, received a call from a telephone call from a customer who wished to book a vacation. He could not do the booking that evening but, as I understood it, agreed to complete the matter the following day.

On September 25, in the morning he asked Esposito to book the vacation. At this point there is some disagreement as to what happened. Day says that he told Esposito to book the vacation and not to call the customer, a nurse, who had worked night shift. He says that the information needed to book the vacation was on file. She agrees that he asked her to complete the booking but that she could not do it because certain information was missing. She felt she had to call the customer to obtain the information and proceeded to do so. She said that the customer did not want to proceed with the booking. At that time, there was an argument between Esposito and Day who told her to do as she was told and book the vacation. Esposito left the office in tears. According to Day she left with the words "I'm not going to do it" and "I've had enough of this shit". The Employer sent another employee, Shirley, after her. According to Day, Shirley returned and told him that "she (Esposito) was not coming back". Esposito explains that Shirley suggested to her that she should

"go home for the day", *i.e.*, that she would be coming back the next day. She left and went to a friend's home. It is clear from the testimony that both Day and Esposito were upset. I accept that there was a heated argument between them which ended in Esposito leaving the office.

I understood that the customer actually booked the vacation in the afternoon through another employee.

Day says that he telephoned Esposito's home 2-3 times and, eventually, called her friend's home, leaving a message for her to call him as to whether or not she would be in the next day. Esposito says that she did not get the message until late in the evening and did not call Day. She did not think it important as she was of the view that she had indicated to Shirley that she would be in the next day. When the Day did not hear from Esposito, he cancelled a promotional trip to Hawaii that she was scheduled to go on the following week and, as well, prepared her final pay cheque with holiday pay. Day testified that he thought she had quit.

The following morning, September 26, Esposito came to work. When she came into the office (she brought her lunch), there was a further argument between her and Day concerning the booking. According to Esposito, Day told her: "when I say book (a vacation), you book (it)". She responded that "if the client didn't want to book, she wouldn't book it". After that Day gave her the pay cheque and said "you know where the door is, get out". According to Day, he told her that she "owed him an explanation" (when she came to work on September 26). He agrees that there was a conversation along the lines described by Esposito. He says he gave her the pay cheque with the words "go home and grow up". He did not tell her that she was "fired".

The Employer is not arguing that it had "just cause" for the termination of Esposito's employment. The central issue before me is whether, in the circumstances, she quit. When an employer terminates an employee, the employee is entitled to notice or pay in lieu to a maximum of 8 weeks (see Section 63 of the *Act*). However, an employee is not entitled to notice or pay in lieu if, among others, the employee "quits".

The delegate concluded that Esposito did not quit her employment. He based his Determination on an analysis of both the subjective and objective elements of the circumstances, *i.e.*, the employee's intention to quit and conducting herself in a manner inconsistent with the continuation of her employment. In my view, that analysis is consistent with the principles applied by the Tribunal in similar cases. I agree with his conclusion.

However, in my view, the onus is on the employee to establish that she was dismissed from her employment. The Tribunal's decision in *W.M. Schultz Trucking Ltd.*, BCEST #D127/97 may be read to support the proposition that there is an onus on the Employer to prove "the clear and unequivocal facts necessary to support a conclusion that <the employee> quit his employment". Insofar as there is any dispute with respect to the ultimate burden of proof, I prefer the approach of Mr. Justice Errico of the British Columbia Supreme Court in *Walker v. International Tele-Film Enterprises Ltd.*, <1994> B.C.J. No. 362 (February 18, 1994), at page 17-18:

> "The onus of proof is on Mr. Walker to prove that he was wrongfully dismissed. This is not a case where the defendant employer is raising justification. The issue is whether Mr. Walker left the company on his own volition or whether he was dismissed. Counsel for Mr. Walker cited a decision of the Nova Scotia Court of Appeal in *McInnes v. Ferguson*, (1900), N.S.R. p. 517. This decision holds that the onus lay on the employer where the issue was whether or not the employee left voluntarily, but there is no judicial discussion about it. I have considerable difficulty with this proposition which shifts the onus of proof to the defendant. This is a concern I share with Prowse J., as she then was, who in *Osachoff v. Interpac Packaging Systems Inc*., unreported, Vancouver Registry, April 21st 1992 C910344, discussed this decision and declined to follow it, as I do. In that case, as in this, the onus is on the plaintiff to establish on the balance that he was dismissed."

In England, Christie et al., *Employment Law in Canada* (Butterworth, 3rd ed.), the learned authors comment as follows, at page 13.7:

> "... Since, in a wrongful dismissal action, the burden of proving that he or she was dismissed is on the employee, the employee must prove that he or she has not resigned if the employer succeeds in raising a *prima facie* case of a quit."

There is no dispute that Esposito's employment came to an end. Even if I accept day's version of the events of September 26 (when Espositio returned to the Employer's office) Day sent her home with the words "go home and grow up" with her final pay cheque. It is not necessary, in my view, that the employer actually uses the words "fired" or "terminated" and, arguably, the dismissed her at that time. I refer to the comments of *England et al*., *above*, at page 15.1:

> "In whatever form, dismissal is a manifestation to the employee by the employer that it no longer intends to abide by the employment contract and that it will no longer accept performance on the part of the employee."

Excluding an employee from the work place with her final pay cheque could certainly, in the appropriate circumstances, constitute a dismissal. I accept that there was an argument and that both Day and Esposito were upset. However, there was no evidence that Day attempted to bring her back to work or to communicate to her that the employment relationship was not at an end. The reason for that, in my opinion, is that in Day's view Esposito had quit her employment either when she left the work place or when she failed to respond to his telephone messages. As I

understood his evidence, he had already cancelled Esposito's trip to Hawaii when she came to work on September 26 and he had prepared her final pay cheque.

As mentioned, the Employer says that Esposito quit her employment. For the reasons set out below, I do not agree. It is clear--and not in dispute--that Day and Esposito had an argument over the booking of the vacation for the customer and that, following that argument, Esposito left the Employer's office. When she left the office on September 25, there had been a heated argument between Esposito and Day, and she had left the office in tears. According to Day she left with the words "I'm not going to do it" and "I've had enough of this shit". I accept that there was a heated argument between Esposito and Day and that she left the office. Both Esposito and Day were upset. However, even if I accept that Esposito may have used words, which taken on their own, could indicate an intention to leave the Employer's employ, I do not accept that Esposito resigned at that time. I agree with the adjudicator in *RTO (Rentown) Inc*., BCEST #D409/97:

> "Both the common law courts and labour arbitrators have refused to rigidly hold an employee to their "resignation" when the resignation was given in the heat of argument. To be a valid and subsisting resignation, the employee must clearly have communicated, by word or deed, an intention to terminate their employment relationship and, further, that intention must have been confirmed by some subsequent conduct. In short, an "outside" observer must be satisfied that the resignation was freely and voluntarily and represented the employee's true intention at the time it was given."

In my view, she did not intend to resign when she left the office on September 25 after the argument with Day. Esposito's evidence is that she told another employee--in the parking lot--that she would be back the next day. That is in dispute. Day says that this other employee told him that "she <Esposito> was not coming back". I note that this employee did not testify at the hearing. In other words, I do not have direct evidence to support a finding that Esposito, in fact, stated that she was not coming back. Even if I accepted that Esposito told this other employee that she was not coming back, I would still be reluctant to find that she quit her employment because the next day, and that is not in dispute, Esposito came to work. She brought her lunch. That, in my view, is inconsistent with an intention to resign from her employment.

Similarly, I am not satisfied that she resigned when she did not return the Employer's telephone messages. Her evidence was that she received the messages late in the evening and that she, in any event, had indicated to Shirley that she would be returning the next day (*RTO (Rentown), above*).

Having considered all the circumstances, I am not persuaded that the appeal can succeed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated March 3, 1999 be confirmed.

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal