

**BC EST # D290/96**

**EMPLOYMENT STANDARDS TRIBUNAL**

In the matter of an appeal pursuant to Section 112 of the  
*Employment Standards Act* S.B.C. 1995, C. 38

- by -

Unique Creations Ltd.  
("UCL")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** David Stevenson

**FILE NO.:** 96/461

**DATE OF HEARING:** October 7, 1996

**DATE OF DECISION:** October 9, 1996

**DECISION**

**APPEARENCES**

for the Appellant:	Lanie Smith Doug Smith
for the Complainant/Respondent:	Linda Davies
for the Director:	Betsy Arnott Jennifer Hagen

**OVERVIEW**

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by Unique Creations Ltd. (“UCL”) from a Determination, No. CDET 003408 dated July 19, 1996, issued by a delegate of the Director of the Employment Standards Branch (the “director”). The Determination concluded UCL had contravened parts of Section 40, Section 36 and Section 63 of the *Act* and ordered UCL to pay the amount of \$336.21 to a former employee, Linda Davies (“Davies”). UCL has appealed that part of the Determination ordering payment of one week length of service compensation to Davies. UCL says Davies asked not to be scheduled for work in the second week of her two week notice period and as a result had discharged the employer from its statutory liability to compensate Davies for that week. The amount at issue is \$177.14 plus interest.

**ISSUE TO BE DECIDED**

The sole issue to be decided is whether the statutory liability of UCL to pay length of service compensation to Davies has been discharged by the conduct of Davies. This issue will be decided on the facts of this case. The factual question is whether Davies voluntarily brought her employment to an end.

**FACTS**

UCL is a retail jewellery business operating a number of stores in the City of Kamloops. Davies had been employed by UCL since September 1, 1994. On February 1, 1996, UCL closed one of its stores, a casualty of the general slowdown in consumer spending.

**BC EST # D290/96**

It was the store to which Davies was most often assigned to work. Following the closure, Davies was scheduled for work at another store. After three weeks of scheduling Davies at the other location, it became clear to Lanie Smith ("Smith"), the owner of UCL, that she could not continue to provide hours of work to Davies. In a telephone conversation between Davies and Smith on February 19, 1996, Smith raised the concern she may not be able to give Davies any hours of work and she had to make some decisions. On February 20, 1996, Davies went to see Smith to pursue the discussion about her future with UCL. Davies met Smith at the front desk and in the presence of Mielle Gordon, a witness in the proceedings, Davies asked Smith if any decision had been made and Smith replied, "Yes, I can't give you any hours". Smith then invited Davies to join her in her office. In the office Smith showed Davies the work schedule for the following week, that is the week commencing February 26 and ending March 3. There is a dispute between Smith and Davies about whether the schedule showed Davies working any hours in that week. Smith says Davies was on the schedule for 22 hours of work in that week, but asked to be removed following the discussion in the office. Davies says she was never on the schedule for any hours of work in that week.

Smith also says she gave Davies written notice of termination of employment on that day. Davies says she never received the notice until Thursday, February 22, 1996, her first day of work in that week. The notice is dated February 19, 1996. Davies says she did not receive the notice until February 22 and was backdated to the date shown. She suggests UCL was motivated to do so in order to give the impression of compliance with the statutory requirement to provide a full two weeks written notice of termination. The letter states:

*To Linda Davies:*

*Feb. 19/96*

*As per our conversation of today, we regret that in two weeks we will not be able to give you the hours of work you require. Due to economic times, the closing of one of our stores etc., it has created shortage of work.*

*In the next two weeks we will try and give you as many hours as possible. We thank you for all your work and efforts, and regret that sales had dropped so drastically in the last year; that we were not in a position to give you the hours you needed.*

*Should you require a letter of recommendation, we would be pleased to comply.*

*Yours truly,  
"Lanie Smith"*

Upon receipt of this letter, Davies asked for a letter of recommendation. She testified she never raised any question about the first sentence of the second paragraph, even though it was directly contradictory to what she says she was told on February 20. Her failure to follow up on what I find to be an assurance or promise of hours of work lends support to the position of UCL that it was not a matter of concern to her because on February 20 she had asked not to be scheduled for any hours in the second week of her notice period.

The letter of recommendation is dated February 21, 1996. Even if Davies is right about UCL having some motive for backdating the notice of termination, I find no reason for UCL backdating the letter of recommendation and conclude the request for the letter of recommendation was made before February 21. This conclusion supports the evidence of UCL that Davies had been given the notice of termination on February 20 during the discussion with Smith and I make that finding of fact.

Davies worked February 22, 23 and 25. Smith testified that on or about February 22 she sought some advice on how she should handle the situation of Davies asking to not be scheduled for the second week of her notice period. Apparently, she was advised to have Davies confirm this to UCL in writing. On February 25, Davies' last day of work, Smith had a discussion with her at the end of the day about Davies giving a letter indicating it was her choice not to be scheduled for work in the second week of her notice period. Mielle Gordon, a witness called by Davies, gave evidence about this discussion. She testified Smith asked Davies, "Do you have that letter for me?".

Davies indicated she had not written a letter and was not going to write a letter. Smith became visibly agitated and said to Davies: "I don't understand why you won't write it, UI will not see it." Davies replied: "It's not to my advantage to write it." On Friday, February 29, 1996, Davies went to the Sahali store to pick up her final cheque. She talked to Terena Halcrow. Terena told her she was instructed by Smith not to give Davies her cheque unless Davies had the desired letter. Davies would not provide the letter and she did not get her final cheque at that time. On the same day Smith wrote another letter to Davies, which was given to her March 1, 1996. The substance of the letter reads:

*Linda Davies:*

*Feb. 29/96*

*On Feb. 19/96 I had given you a letter giving you two full weeks notice, that after March 4/96 you would be laid off due to a shortage of work.*

*It was your choice to only work one of the weeks, ending your employment Feb. 25/96. The minimum hours given to you Feb 26 - March 3/96 were:*

*Thursday*      5-9  
*Friday*        5-9  
*Saturday*     9:15-5:30

*With the possibility there could be more added by the end of the week. As per my conversation with Pat Cullinane, Employment Standards Branch, Prince George and Connie McNellie, Unemployment Insurance Kamloops, I am giving you this letter to verify you left your employment early by your own choice.*

Davies testified her response to the letter was to state it was “garbage”.

## **ANALYSIS**

Section 63(1) establishes a statutory liability on an employer to compensate an employee for length of service. That obligation may be discharged in the circumstances identified in paragraph 63(3)(c). The question is whether the actions of Davies have discharged the statutory liability of UCL. Since there is neither a retirement nor just cause alleged in this case, the statutory liability of UCL to pay length of service compensation to Davies will only be discharged if Davies self terminated, or “quit”, her employment. The act of self terminating, or “quitting”, employment is a right that is personal to the employee and there must be clear and unequivocal evidence supporting a conclusion that this right has been voluntarily exercised by the employee involved.

It has both a subjective and an objective element: subjectively, an employee must form an intention to quit; objectively, the employee must demonstrate some conduct or carry out some act inconsistent with further employment. In this case I must be convinced by the evidence that Davies asked Smith not to schedule her for work in the second week of her notice period and that her conduct or actions following that request is inconsistent with continued employment, or in this case, consistent with her stated intention to leave her employment as of February 25.

The objective element is indisputable. Davies did not work for UCL after February 25. Davies says that is because she was not scheduled for any work by UCL after that date. Smith says it is because Davies chose not to continue working for UCL after that date. What I must determine is whether there is clear and unequivocal evidence Davies did express an intention to self terminate after the first week of the notice period.

I find such evidence to exist in this case and conclude, on balance, Davies asked not to be scheduled for any work in the second week of her notice period, thereby expressing an intention to self terminate her employment at the end of the first week of her notice period.

**BC EST # D290/96**

The evidence is found in the notice of termination, dated February 19, 1996, in the discussion which took place between Davies and Smith on February 25, 1996 and in the letter given to Davies dated February 29, 1996.

The failure of Davies to inquire about the assurance of two weeks work in the letter of February 19 and my conclusion she received the notice of termination on February 20 indicate Davies had made her wishes known to UCL before the posting of the February 21 work schedule, from which Davies' name had been erased. In addition, I find the evidence of the discussion on February 25 and Davies' response to the agitated demand of Smith to provide a letter indicating it was her choice not to be scheduled for the second week of her notice period most compelling. Her response, publicly stated before other employees of UCL, was, "It's not to my advantage to write it." That response only makes sense in the context of the discussion taking place if Davies did ask Smith to leave her off the schedule in the second week of her notice period. Davies is refusing to confirm that fact in writing; she is not denying its existence.

In a similar way, the failure of Davies to denounce the letter of February 29, 1996 as a total fabrication speaks to the legitimacy of its content, even if Davies felt the content to be "garbage". That comment by Davies, made to her husband, not to Smith or any other person present during the meeting, must also take into account she had found another job, a full time position, by March 1, the date she was given the letter. The evidence points to no other conclusion than Davies had expressed an intention to self terminate her employment at the end of the first week of her notice period.

The employer was discharged of its statutory liability to Davies by reason of her decision to self terminate her employment effective February 25, 1996.

**ORDER**

Pursuant to Section 115, I order the Determination, No. CDET 003408, dated July 19, 1996 be varied to exclude length of service compensation, comprising the amount of \$177.14 plus interest.

---

**David Stevenson**  
**Adjudicator**  
**Employment Standards Tribunal**