Employment Standards TRIBUNAL

An appeal

- by -

Preferred Service Customs Brokers Inc.

- 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: Ib S. Petersen

FILE No.: 2002/121

DATE OF DECISION: July 10, 2002

DECISION

SUBMISSIONS:

Mr. Jack Peterson	on behalf of the Employer
Ms. Louise Eckert	on behalf of herself
Ms. Ivy Hallam	on behalf of the Director

FACTS AND ANALYSIS

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") of a Determination of the Director's Delegate issued on February 18, 2002 in the amount of $560.78 (the Determination"). In the Determination, the Director's Delegate found that Ms. Eckert was terminated from her employment and did not resign, or quit, as alleged by the Employer.

On or about May 22, 2002, Ms. Eckert wrote to the Tribunal, purporting to withdraw her complaint. I have some doubt about her ability to do so, given the fact that there is a Determination which, presumably, while based on the initial complaint, was also based on the Delegate's subsequent investigation and decision on the merits of the issues in dispute, and I prefer to treat her letter as withdrawing from the appeal.

The issues before me are largely of a factual nature: did she resign or not. The appeal states that Ms. Eckert left her employment after the Employer expressed concern with respect to excessive absences from work. The Delegate found that she left after the Employer had required a "guarantee" from her that she would not take further sick time and, in the circumstances, therefore, was terminated. The Employer denies that it required a guarantee from her.

A hearing has been scheduled in this matter and the facts appear to be hotly contested. However, given Ms. Eckert's decision to withdraw from the appeal process, I am faced with only the Employer's version of the facts surrounding the material events. Boiled down to the bare minimum, the Employer's case is that Ms. Eckert ended a discussion about her absenteeism with the Employer's Mr. Peterson, on or about October 18 or 19, 2001, with the words that "she could not guarantee that she could come to work, and said 'it was fun working here' and walked out." It appears that she did not return or seek to return to work. I base my decision on those facts.

The onus is on the Employer to prove that the Employee "quit". The Adjudicator in *RTO (Rentown) Inc*., BCEST #D409/97, noted:

> "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, these are the applicable legal principles. I note that these were the principles applied by the Delegate.

While there is no dispute that Ms. Eckert's employment came to an end while she was off on a *bona fide* medical leave on October 18 and 19, 2001, as noted by the Delegate, the material facts are that she stated her intention to quit and conducted herself accordingly. Had she sought to return, my decision may well have been different. Having considered all the circumstances, I am persuaded that the appeal succeeds.

There is, as well, in my opinion, little practical merit in going ahead with a hearing, essentially to determine facts, if the Respondent has decided not to contest the facts asserted by the Appellant.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated February 18, 2002 be cancelled.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal