Employment Standards TRIBUNAL

An appeal

- by -

Penney Auto Body Ltd.
(the"Employee")

- 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.: 2001/216

DATE OF DECISION: June 14, 2001

DECISION

SUBMISSIONS/APPEARANCES:

Mr. Pinney King	on behalf of the Employer
Mr. Francesco Marascio	on behalf of himself
Ms. Jennifer Ip	on behalf of the Director

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 of Employment Standards (the "Director") issued on February 21, 2001. The Determination against the Employer concluded that concluded that the Employer terminated Marascio (the "Employee") and that he, in the result, was owed $5,956.47 on account of compensation for length of service.

FACTS AND ANALYSIS

The facts are largely not in dispute and may be gleaned from the Determination and the submissions:

1. Marascio worked for the Employer, an auto repair business, as an auto mechanic from October 1, 1991 to September 8, 2000. He was paid $24.00 per hour.

2. On September 8, 2000, the Employer gave Marascio notice based on shortage of work. The Record of Employment indicated termination due to shortage of work. The written notice stated that the "business is within its lowest profits this year. We are therefore terminating your position as mechanic..."

3. The employer paid Marascio two weeks severance in lieu of notice. Based on the length of service the delegate determined that Marascio was entitled to 8 weeks' pay and ordered the Employer to pay an additional 6 weeks' pay.

In its appeal, the employer says that, while Marascio was, in fact, given notice on September 8 and "offered to him an extra 2 weeks of compensation pay as a severance pay," it was not the Employer's intention that he leave his employment on that date. The employer says that it was its intention to terminate his position "in a short while" or "soon" but that Marascio became upset and left with the words "I quit."

Marascio takes issue with the Employer's version of the events. He says that, in fact, the employer told him that he "was going to be terminated that very day." He also says that the

employer had cheques, dated September 8, 2000, prepared for severance, regular wages and vacation pay for the meeting when he was told of the termination. The Employer acknowledges that the cheques were prepared on September 8, but says that they were not printed out until after Marascio has quit.

The delegate says that the Employer never raised the issue of Marascio having quit until the appeal and explains the Employer, in conversations with her, indicated to her that it was of the view that the liability for length of service was only two weeks' wages, regardless of length of service. The delegate also explained the requirements of Section 63 (notice) to the Employer verbally and in writing. The employer did not respond to this. The employer does not take issue with the delegate's assertions in this regard.

The Tribunal will generally not allow an appellant who refuses to participate in the Director's investigation, to file an appeal on the merits of the Determination (*Kaiser Stables*, BCEST #D058/97). The claim that Marascio "quit" his employment could have been raised with the delegate in his investigation. It was not. I am not prepared to allow the Employer to raise the issue at this stage. Based on the facts available to the delegate, including the written notice, the ROE and the two weeks' severance pay, I am of the view that she did not err in her conclusions. In the result, the appeal must fail.

ORDER

Pursuant to Section 115 of the Act, I order that Determination in this matter, dated February 21, 2001 be confirmed.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal