

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 -

Beth Donald
("Donald")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE NO.: 98/276

DATE OF HEARING: July 27, 1998

DATE OF DECISION: August 18, 1998

DECISION

APPEARANCES

Beth Donald
Robert Nygren
Bradd K. Bradley

The Appellant
Counsel for Lordco
Witness

OVERVIEW

Beth Donald, pursuant to section 112 of the *Employment Standards Act* (the “Act”), appeals a Determination by a delegate of the Director of Employment Standards dated April 8, 1998. The Determination is that Donald terminated her employment and that she is not, for that reason, owed compensation for length of service by her former employer, Lordco Parts Ltd. (“Lordco”).

ISSUES TO BE DECIDED

At issue is the matter of whether or not Donald quit working for Lordco. The Director’s delegate found that Donald had agreed to terminate her employment on the 24th of January. On appeal, Donald claims that it was never her intention to stop working for Lordco, only switch from full-time employment to part-time work. Donald says that Lordco told her that it would provide her with work on Saturdays, and that she accepted regular full-time employment with another company on that basis, only to find that Lordco then refused to provide her with part-time work.

Lordco argues that Donald gave notice that she was terminating her employment and that notice was accepted by Lordco. It says that it never agreed to provide her with part-time employment.

FACTS

Beth Donald began work for Lordco on September 12, 1994. She began as a delivery driver. She was promoted to Shipper/Receiver and she worked as well as Counter-person for a period but returned to work as a delivery driver, at Lordco’s request, and was working in that capacity on January 24, 1998, her last day of work for the company.

Donald was unhappy working as a delivery driver. That led her to look for another job. She was offered a job by a company called “Servicemaster”. While that job was more

challenging, it paid less than her job at Lordco. Donald was about to get married and could not afford a cut in pay.

On January 15, 1998, Donald went to Bradd Bradley, Manager of the store at which she worked, for the purpose of determining whether Lordco would provide her with work on weekends so that she could earn extra income and take the job with Servicemaster. Bradley denies agreeing to the part-time employment and says that Donald gave notice that she was quitting anyway. According to Donald, it was only because she was told by Bradley and then Alena Prochazka, the person in charge of shift schedules at Lordco, that she could work Saturday, January 31, 1998 for Lordco and alternating Saturdays from that day on, that she took the lower paying job at Servicemaster.

Donald worked Saturday, January 24, 1998 for Lordco. On Monday, the 26th she started work for Servicemaster. According to Donald, she then found, on asking what time she was to start on the 31st, and on receiving her pay cheque, that there would be no part-time work and that as far as Lordco was concerned, she had quit. That led her to contact a number of people for an explanation. She telephoned Bradley on the 31st but did not speak to him until the 1st of February. Unsatisfied with Bradley's explanation of matters, Donald wrote a letter to Marlyn, Lordco's head of payroll. In that letter, incorrectly dated February 15, 1997, she complains "I was 'quit' without consent or notice" and she then goes on to outline events exactly as she does to me.

ANALYSIS

The right to resign one's employment, which is to say, quit one's job, is personal to the employee. There must be clear, unequivocal facts that the right to quit has been voluntarily exercised by the employee [*Burnaby Select Taxi Ltd. and Zoltan Kiss*, (1996), BCEST No. D091/96]. That has both subjective and objective elements: Subjectively, the employee must form the intention to quit; objectively, the employee must act, or demonstrate conduct, which is inconsistent with his or her continued employment.

The Determination is that Donald terminated her employment through giving notice of termination. There are no clear, unequivocal facts to support that conclusion. Donald denies giving notice of termination. Donald did express that she would be resigning as a regular full-time driver at Lordco. That is clear. But she claims that was only on Lordco's promise of part-time work, which is to say, she expected to remain an employee of Lordco, albeit, in a reduced capacity. And there are just no plain, clear facts to the contrary, nothing that clearly shows that she quit. Indeed, I find myself inclined to believe Donald: That she expected to keep on working for Lordco and that she took the job with Servicemaster only because she understood Lordco to say that it would provide her with work on alternating Saturdays. There was discussion of her working part-time for Lordco. Donald's actions are consistent with what she alleges. And I find it unlikely that, needing money as she did, that she would take the Servicemaster job, given that it paid less, without knowing how she was going to make up for the cut in pay. She could have simply remained driving full-time for Lordco and continued looking for a better job.

The delegate reports that he found no support for the conclusion that Lordco agreed to continue to employ Donald after the 24th of January. That is to apply an incorrect test in deciding whether or not the employee quit. The delegate is expected to consider whether or not there are plain, clear facts to support the conclusion that the employee voluntarily exercised her right to quit. He did not do that. I have now done that and find that there are not plain, clear facts to support the conclusion that Donald quit. It follows that Lordco has not discharged its liability to pay compensation for length of service to Donald.

Section 63 (2) of the *Act* provides for compensation for length of service as follows:

63. (2) *The employer's liability for compensation for length of service increases as follows:*

- (a) *after 12 consecutive months of employment, to an amount equal to 2 weeks' wages;*
- (b) *after 3 consecutive years of employment, to an amount equal to 3 weeks' wages plus one additional week's wages for each additional year of employment, to a maximum of 8 weeks' wages.*

Donald was employed for more than 3 years but less than 4. Lordco's liability for compensation for length of service is therefore equal to three weeks' pay. Donald is owed that, with vacation pay and interest over and above that. I leave calculation of amounts to the Director.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated April 8, 1998 be varied. Lordco owes Donald compensation for length of service equalling three weeks' pay, with vacation pay, and interest pursuant to Section 88 of the *Act*, being over and above that.

I order, pursuant to section 115 of the *Act*, that calculation of the amount of moneys that Lordco owes Donald, be referred back to the Director.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal