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 -

Evergreen Manufacturing Ltd. and
John W. Mitchell
(The "Company")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	Richard S. Longpre
FILE NO:	97/092
DATE OF HEARING:	May 29, 1997
DATE OF DECISION:	August 4, 1997

DECISION

APPEARANCES

Mr. John Mitchell	for the Company
Mr. Bill Jaklin	for the Company
Mr. Tades Mulugeta	for himself

OVERVIEW

The Company and Mr. John Mitchell, director/officer of the Company filed an appeal, pursuant to Section 112 of the *Employment Standards Act*, of a Determination dated February 3, 1997. The Delegate of the Director issued the Determination and concluded that the Company terminated Mr. Tades Mulugeta. The Delegate concluded that pursuant to Section 63 of the *Act,* Mulugeta was owed $1,779.13 in severance pay.

The Company raised three issues in its appeal. First, the Company says Mulugeta terminated his employment with the Company and he was not owed severance pay. Second, it argued that even if the Company terminated Mulugeta's employment $1,779.13 was an incorrect calculation of severance pay. Third, Mulugeta did not pursue his complaint under the "working agreement" in place at the Company. His complaint should, therefore, be dismissed.

ISSUE TO BE DECIDED

At the outset of the hearing Mulugeta agreed that $ 1,779.13 was an incorrect calculation of his severance pay claim. He agreed that his complaint was for approximately $900. Further, the Company agreed that the working agreement was not a collective agreement. Mulugeta could not be faulted for not pursuing his rights under that agreement. The only issue before me was whether Mulugeta was terminated and therefore was owed severance or whether he voluntarily quit his employment.

FACTS

Mr. Mitchell, Mr. Bill Jaklin, the Company's plant manager and Mr. Mulugeta attended the Tribunal's hearing. Their evidence at their hearing was virtually identical to the evidence before the Delegate.

The Determination reviewed Jaklin's evidence concerning his decision to terminate Mulugeta. Jaklin's says that the Company's conflict with Mulugeta arose when, on July 25, 1995, Mulugeta requested a 25 cent raise to his hourly wage rate. The Determination sets out the reasons Jaklin gave for refusing to give Mulugeta the raise and the results of that conversation with Mulugeta. It reads:

> On July 25,1995, [Jaklin] met with the complainant. The complainant was looking for a raise. He told the complainant that if he promised to go to school, he would give him a raise right now . The Complainant stated that his life was too busy; he did not have time to go to school. Mr. Jaklin said that there would be no raise if he did not go to school. The complainant gave two weeks' verbal notice and Mr. Jaklin replied "That's your choice." There was no mention of his injury and no mention of his taking an earlier vacation. There has been a discussion about taking a vacation, but this had been at an earlier meeting.
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> The complainant went to the change room. He was irate. Bill Jaklin talked to Paul Dixon [a supervisor] and told him the complainant was mad because he did not get a raise and that he had given two week's notice. Bill Jaklin was concerned about safety when the employee was operating machinery while in a bad mood. He asked the complainant why he had given two weeks' notice and the complainant said this is what the law required. Bill Jaklin told him that the employer has to give notice but that an employee can, leave at any time. The complainant said "I can leave now?" and Bill said "Sure, it's your call." At that point the complainant left. He heard from the complainant later that week. He was looking for his last pay check. He did not say anything about his injuries. There wasn't any meeting with the complainant, Bill Dixon and Bill Jaklin, and mentioned by the complainant below.

The Determination then reviewed Mulugeta's evidence. It set out the serious medical history of Mulugeta's hand injury. It went on to review the events leading to July 25, 1995. Further, it reviewed the July 25 conversation. Mulugeta said the conversation about the 25 cent wage increase had occurred a few weeks earlier. Mulugeta says the July 25 conversation was about whether he could leave early that day to attend a medical appointment. He also spoke to Jaklin about his vacation schedule. The Determination reads:

> After returning from his leave on February 6, 1995, his hand was still hurting, but he was able to work. He did not tell his employer about it. On July 25, 1995, his hand was really bothering him and he made an appointment with the doctor for that afternoon. He had scheduled his holiday for August, but decided to ask his employer if he could start his holiday early. He met with Bill Jaklin, the plant manager, prior to starting his shift in the afternoon. Mr. Jaklin said someone else was taking holidays at that time, and that the Complainant could not take holidays at the same time. In regard to the shift on July 25, 1995, Mr. Jaklin said there was no one to cover his shift, so he had to work it.

In his evidence before me, Mulugeta testified that he left for his medical appointment. The next day he attended at the office of his medical specialist. When he went to the Company site to pick up his regular pay cheque he was told that he was fired.

The Delegate examined the evidence, and applied Section 63 of the *Act*:

> Section 63 of the Employment Standards Act states that an employer is required to provide compensation for length of service or notice of termination of employment. In this case, the complainant would be entitled to two week's wages as compensation for length of service.
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> Section 63 (3) (b) states that
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> > "The Liability is deemed to be discharged of the employee....terminates the employment, retires from employment or is dismissed for just cause."
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> Just as the onus is on the employer to prove just cause for dismissal, the onus is on the employer to establish that an employee has terminated his employment. As stated in Burnaby Select Taxi Ltd. And Zoltan kiss (1996) B.C Employment Standards Tribunal Decision #D091/96:
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> > "The right to quit is personal to the employee and there must be clear and unequivocal fact to support a conclusion that this right has been voluntarily exercised by the employee involved. There is both a subjective and objective element to a quit: subjectively, the employee must form an intent to quit employment; objectively, the employee must carry out an act inconsistent with his of her employment."

The Delegate went on to conclude that there were "no clear and unequivocal facts to support the [Company's] argument that the [Complainant] voluntarily quit his employment."

ANALYSIS

The Tribunal's hearing was on May 29,1997. The events at issue in this case occurred in July 1995. I appreciate that Jaklin's and Mulugeta's memories of events were "stretched" because of this lengthy period of time.

I start with my conclusion that Mulugeta's anger after his meeting with Jaklin can not be based solely on the 25 cent per hour wage rate issue. The increase in the hourly wage rate was discussed by Jaklin and Mulugeta on July 25, 1995. However, Jaklin acknowledged before me that this issue may also have been discussed prior to this date. Equally important, Mulugeta's hand problems continued throughout this period. There is no doubt his medical condition was part of the July 25 conversation. He had a doctor's appointment shortly after the shift began which he asked permission to attend. Further, there is no dispute that Mulugeta wanted to commence his vacation a few days earlier than scheduled. He was going to be off work because of his hand and he wanted to take the time off as vacation time.

In their evidence Jaklin and Mulugeta disagreed as to how many times Mulugeta attended the Company's property after July 25. Mulugeta evidence seems more accurate. Mulugeta attended the site on the regular pay day and picked up his cheque from his supervisor. It was then that he was told to pick up his final cheque and separation papers. When he returned a few days later, Mulugeta found that the Record of Employment form indicated that he had quit. He took instant disagreement with that designation.

With this as the background, I turn to the tests the Company must address. As noted in the above cite, on appeal, the Company must establish "clear and unequivocal facts" that demonstrate Mulugeta quit his employment. Jaklin and Mulugeta disagreed with most aspects of the discussion(s) they held on July 25. In applying the subjective test, I would have to decide whose evidence to accept based primarily on their respective credibility. That examination, however, is not necessary. Even if I accept Jaklin's evidence, the Company did not establish that, viewed objectively, the evidence establishes that Mulugeta terminated his employment.

There is evidence that supports the Company's position; particularly Jaklin's evidence that Mulugeta apparently gave two weeks notice. However, the Company based its argument that Mulugeta voluntarily terminated his employment in reaction to its refusal to give him

the 25 cent wage increase. That was not the only nor the main issue that was discussed on July 25. Mulugeta wanted the day off to go to his doctor. He wanted to take his vacation time earlier than scheduled so as to address his medical problems; neither was permitted. While the Company had valid reasons, its refusal to accommodate Mulugeta led him to get angry. The reason he left work on July 25 was medical not the 25 cent rate of pay.

Jaklin took Mulugeta's conduct to mean that he had quit. I accept there is some logic to his conclusion. However, Jaklin agrees Mulugeta never said that he "quit." When Mulugeta received his Record of Employment form he immediately questioned the designation on the form that he had quit. Further, I see no basis for Mulugeta to actually terminate his employment to go to a doctor's appointment. I see no reason why he would give up the Company's medical and benefit programs while he would be off work for medical reasons.

There was real confusion as to whether Mulugeta's anger on July 25 was caused by the 25 cent per hour wage increase or by the Company's refusal to allow Mulugeta to take the day off and to take his vacation earlier than scheduled. In this context I do not find that objectively, there is clear and unequivocal evidence to support the Company's argument that Mulugeta quit on July 25.

As found in Determination dated February 3, 1997, Mulugeta is entitled to two weeks of severance pay. The parties agreed that the payment needs to be recalculated. The documents before me indicate that two weeks gross wages would be close to $845.00 plus four per cent vacation pay. If the parties can not agree on the severance pay owing to Mulugeta an Industrial Relations Officer will meet with the parties and determine the exact amount owing.

ORDER

Pursuant to Section 115 of the *Employment Standards Act*, the Determination dated February 3, 1997 is varied as indicated above.

Richard S. Longpre
Adjudicator
Employment Standards Tribunal