

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-

Canadian Chopstick Manufacturing Co. Ltd.

-of a Determination issued by-

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Fernanda Martins

FILE NO.: 97/819

DATE OF DECISION: August 25, 1998

DECISION

APPEARANCES

Tom Gilgan	on behalf of Canadian Chopstick Manufacturing Co. Ltd.
Denise Carter	on her own behalf

OVERVIEW

This is an appeal by Canadian Chopstick Manufacturing Co. Ltd. (“CCMC”) pursuant to Section 112 of the *Act*. The appeal is from the Determination issued by the Director on October 20, 1997. The Director found Denise Carter to be an employee of CCMC and entitled to compensation for length of service.

Ms. Carter started working for CCMC on November 13, 1990. In August 1996, she went on short term disability leave and was on long term disability leave when CCMC closed and ceased operations on April 1, 1997.

CCMC gave the following as reasons for making this appeal:

It is the company’s position that Ms. Carter voluntarily severed her employment with Canadian Chopstick Manufacturing Company Ltd. prior to April 1, 1997.

As a result of her voluntary termination of her employment, Ms. Carter is not entitled to severance pay as set out in the Employment Standards Act.

A hearing was held on February 17, 1998 in Nelson, BC at which time evidence was given under oath by Denise Carter , Garry Verignan, Tom Gilgan, Edward Shoji and Jirina Senko.

ISSUES TO BE DECIDED

This appeal requires me to decide whether the Director erred in finding :

1. Ms. Carter to be an employee of CCMC on April 1, 1997 when CCMC closed and ceased operations and
2. that she was entitled to compensation for length of service.

FACTS

The undisputed facts are:

CCMC was located in Fort Nelson and manufactured chopsticks. It ceased operation effective April 1, 1997 due to a failing demand for its product in the Pacific Rim resulting from the downturn in the Japanese economy. Two hundred employees were terminated as a result. CCMC's head office was located in Vancouver where accounting and payroll were administered. Mike Sato was President of CCMC with his office located in Fort Nelson. Edward Shoji was Senior Vice President of CCMC and responsible for overall management of the company. His office was located in Vancouver but he would travel to Fort Nelson on a monthly basis and maintain regular communication with CCMC from the Vancouver office. Tom Gilgan was employed by CCMC as Manager of Human Resources in Fort Nelson.

Denise Carter was employed by CCMC in its warehouse/stores operation as a purchasing clerk. In August, 1996 she went on short term disability until November 30, 1996 and then commenced long term disability leave. In January, 1997 she attempted a graduated return to her duties but was not able to continue. Her doctor in Fort Nelson had recommended that she attend the Victoria Pain Clinic located in Victoria, BC . Her supervisor throughout this time was Howard Bamford, department manager. Aetna Canada discontinued Ms. Carter's disability coverage after April 30, 1997 having determined that their independent medical examination supported her return to her own type of work.

Garry Verignan, Ms. Carter's spouse, was a contractor who operated a log processor that he leased from CCMC.

CCMC's Position

In an attachment to its appeal form, CCMC stated the following as "facts which are in dispute":

It is the company's position that Ms. Carter voluntarily terminated her employment by:

- a) Her statements during a farewell dinner held for her and her spouse on March 21, 1997 and her statements at P&T's Restaurant on the evening of March 18, 1997 .
- b) Her and her spouse's action of moving from the area in which Canadian Chopstick Manufacturing Company Ltd. conducts its operations. The reasons she gave the Ministry was she was pursuing medical assistance for her disability. She knew at the time she left Fort Nelson that an Independent Medical Examination had been scheduled with Dr. Hrudehy

and that her LTD benefit would be determined based on the outcome of the examination. Her LTD benefit was terminated effective April 30, 1997 as a result of the IME of April 7, 1997.

c) Ms. Carter, at the time of her attempted graduated return to work in January 1997, advised CCMC that she would never be able to return to her pre-injury duties. At that time she was told that there was a probability that her skills set would not allow her to move to other duties within the company and she would likely have to seek employment elsewhere when her LTD benefits had expired. The extent and degree of Ms. Carter's disability were the subject of contention between a number of physicians.

d) An interim ROE issued to Ms. Carter on May 27, 1997 stated she had applied for long term disability. This document was issued via our Vancouver office and was in error due to the large number of ROE's being processed as a result of the plant closure.

At the hearing **Mr. Gilgan testified** on behalf of CCMC that :

- he had encouraged Ms. Carter to take disability leave.
- Ms. Carter had attempted a graduated return to work.
- after not succeeding she voiced her concern to him about not being able to continue with her duties.
- he encouraged her to get her medical problem fixed.
- he told her not to worry about her job throughout January, February and March.
- he advised her that she would be covered by Long Term Disability for twenty four months while disabled from current work so she would have an income.
- in the first couple of weeks of March, 1997, he was contacted by the insurance company which advised him that they would be conducting an independent medical examination of Ms. Carter.
- while he was at a restaurant on March 18, 1997 with Paul Tanaka, a contractor to CCMC, he was addressed by Ms. Carter and Mr. Verignan from a nearby table. At this time asked Ms. Carter if she was moving and she replied "certainly". He asked if that meant she was not returning to CCMC and she replied "not likely" in a very sarcastic tone. He asked her to call him on the Thursday but never heard from her.
- he was given a note by his assistant with a contact address and phone number for Ms. Carter .
- he agreed that Ms. Carter made efforts to contact him on April 1 and that she contacted Cheryl Mays the receptionist on occasion.
- Ms. Carter called him on April 27, 1997 to inquire regarding severance pay.
- he didn't think she could receive both severance and LTD at same time but was going to check with Mr. Sato and Mr. Shoji.
- he obtained a lawyer's opinion she could not get both.
- Ms. Carter phoned again after April to say she had been cut off from her LTD .
- he told her "as far as I'm concerned you should get severance".

- he called the CCMC office in Vancouver and spoke to Pam Ulmer and requested that Ms. Carter be started on severance pay commencing May 1, 1997.
- he heard rumours in April regarding Ms. Carter and Mr. Verignan that they had no intent to return but did not pay attention to these rumours until the third week in April.
- he spoke to Frank Senko and was told that they were not coming back.
- he spoke to Jirina Senko who also said they were not coming back.
- he wrote a memo to Mr. Shoji saying that Ms. Carter was entitled to severance pay. (He stated that he could not present the memo to the Tribunal because he could not find it).
- Mr. Shoji replied that Mr. and Mrs Senko said that she was leaving permanently.
- he told Ms. Carter on May 5 or 6 that she was not an employee and followed up with a letter May 23, 1997.
- in the case of Ms. Carter's ROE, there had been some confusion with the paperwork because normally it would have passed through his office if there had been a termination. It should have been done in seven working days but he was not aware until latter April that there had been any truth to the rumours.

A letter dated May 23, 1997 from Tom Gilgan to Denise Carter was submitted into evidence. It informed Ms. Carter that she was not an employee at the time of the plant closure because:

You and your spouse had relocated from Fort Nelson. You and your spouse made it clear that you did not intend to return to Fort Nelson and in fact your spouse told a number of CCMC management representatives that he had accepted employment in another community.

Secondly, due to your extended absence from your job, another employee had filled the position and had you advised us of your availability, there would have been no work available to you. You had advised us that you were not capable of performing the duties of your job in stores and no other vacancies were available to you.

In reply to my question if Mr. Bamford was Ms. Carter's supervisor on March 20, 1997, Mr. Gilgan stated that he was.

On cross examination Ms. Carter asked Mr. Gilgan if he had spoken to Mr. Bamford. He replied that he asked Mr. Bamford in April, 1997 about the rumours. Mr. Bamford told him that he had no discussions with Denise regarding termination. Mr. Bamford said there had been a meeting with Mr. Sato, Mr. Senko, Mr. Verignan, Ms. Carter and himself about the final details regarding Mr. Verignan leaving but there had been no discussion regarding Ms. Carter. Mr. Gilgan further replied that he did not pursue the matter any further because would have expected the termination to come through Mr. Bamford.

Mr. Gilgan submitted a letter dated February 3, 1998 signed by **Frank Senko**. Mr. Senko was employed as Woodland Manager and was responsible for contractors working in CCMC's logging operations. Mr. Senko stated that he was not able to attend the hearing because of other commitments. The letter stated in part:

On March 13, 1997, in the presence of Gary Althouse, Logging Foreman, Rob Hall, Woodlands Superintendent and myself, Gary Verigan [sic] verbally advised us of his intent to return the processor to the company and to vacate his lease, effective immediately. He stated that he would be moving back to Cranbrook and seeking help for his girlfriend, Denise Carter, in Victoria. He stated he had a job offer in Nanimo [sic] and had been able to find work in Cranbrook as well.

Gary [sic] followed his verbal termination of the lease with a letter to the company, attention Frank Senko, Woodlands Manager, dated March 14, 1997. In this letter he states personal reasons as his reason for terminating the lease.

At a meeting with Mike Sato and myself on March 20, 1997, Gary [sic] said to Mike that he intend [sic] to take employment in either Nanimo [sic] or Cranbrook because they were closer to treatment for Denise's back pain.

In his letter, **Mr. Senko also claimed** to have hosted a going away dinner for Garry Verignan and Denise Carter with his wife Jirina Senko at the Coachouse Restaurant. He claimed that both Ms. Carter and Mr. Verignan clearly stated they were leaving Ft. Nelson for good and had no intention of returning.

Mr. Shoji testified that he was contacted by Mr. Senko regarding Mr. Verignan's cancellation of his agreement with CCMC. He also testified that Mr. Senko mentioned that while he was having dinner with Mr. Verignan and Ms. Carter he learned that they would not be returning to Ft. Nelson. Mr. Shoji testified that he advised the payroll department the same day that he spoke with Mr. Senko, he believed March 24, 1997, that Ms. Carter was no longer an employee.

A copy of a Record of Employment was submitted by Ms. Carter . It was dated May 27, 1997 and signed by Elizabeth Prentice. Her expected date of return is noted as "unknown" and the reason for issuing the ROE is noted as code K which directs one to the comments section . The comments box has the notation "applied for long term disability".

Mr. Shoji testified that Ms. Prentice had been employed for four or five years as a junior clerk and came back to work from a maternity leave in April and May of 1997 to assist with the work overload due to the termination of almost 200 people. He claimed that she was not aware of all the discussions regarding Ms. Carter that took place in her absence and she thought Denise was on disability leave. He claimed that this was a clerical error and the ROE should have shown that she was terminated.

On **cross examination** Ms. Carter asked Mr. Shoji if he did not require a resignation to be in writing. He replied that many employees had come and gone and he supposed some resigned verbally.

Mr. Shoji agreed with Mr. Gilgan's statements in his direct examination, that all managers reported to the vice president. Jirina Senko reported to the Operations Manager and that operations encompassed the storage facility. He testified that he did not know what Mrs. Senko's title was but recommended in January that she be made supervisor of stores.

Jirina Senko testified that she was the Project Co-ordinator for CCMC and reported to Larry Isotan the Operations Manager. She testified that in January of 1997, CCMC decided that she would be placed in the position of stores manager starting April 1, 1997. She testified that she learned that Garry Verignan and Denise Carter were leaving Ft. Nelson in mid March of 1997. She attended the Coachhouse Restaurant with them on March 20, 1997 and claims that in reply to her question of whether they would be returning they said "no". They also discussed Ms. Carter's attendance at the Victoria Pain Clinic and Mr. Verignan working in Nanaimo or Parksville. She testified that she spoke with Ms. Carter again in late April when Ms. Carter phoned and asked what she could do to get severance. Mrs. Senko said that her response to Ms. Carter was "you said you were not coming back"; to which Ms. Carter stated she had not signed anything. Mrs. Senko confirmed that she had not been at the meeting earlier regarding Mr. Verignan's contract.

Ms. Carter's position:

Ms. Carter denied that she was at a restaurant on March 18, 1997 and submitted that there had been no conversation between her and Mr. Gilgan where she said she would not return to CCMC.

Denise Carter in her submissions stated that the dinner at the Coachhouse Restaurant on March 20, 1997 had been a result of a meeting between Garry Verignan, herself, Frank Senko, Mike Sato and Howard Bamford at CCMC. Neither Tom Gilgan nor Jirina Senko were in attendance. At this meeting there was discussion regarding Mr. Verignan's lease on the processor. Mr. Verignan had a spare part for the processor which he offered to sell to CCMC for a steak and lobster supper. She submitted that Mike Sato told Frank Senko to take care of paying for the supper. Ms. Carter argues that this was not a "going away supper". She also submitted that at no time during the dinner did either she or Mr. Verignan mention that they would not return nor that she quit. Mr. Verignan confirmed all of this in his testimony. She submitted:

I was happy they were letting me take a medical leave to finding [sic] some answers elsewhere.

Ms. Carter denies she ever said during her attempted return to work that she would never be able to do her job. She says that she was confused why the pain continued to return

and “couldn’t give 100%” to her job. She also submitted that her job security was always something she had discussed with Mr. Gilgan and she had always felt assured that they were only interested in her getting well.

Ms. Carter submitted that Mr. Verignan needed to find other employment near a pain clinic since the cost would not be covered under her medical plan. Mr. Verignan also testified that this was the case. Before making the decision to attend the pain clinic she talked to Mr. Gilgan and Mr. Bamford (who she considered her “boss”). She had given Tom Gilgan and his secretary, Shelley Bolton all the information for the pain clinic that she received from her doctor. She understood from Mr. Gilgan that her job was secure and that she was being supported in her decision. She told Mr. Gilgan and Mr. Bamford she would keep in contact and did so. She also advised the insurance company of her plans. Ms. Carter submitted a copy of a “fax” from Louise Armstrong of Aetna Life Insurance to Denise Carter dated February 12, 1998 which stated in part:

Our records indicate that prior to that date, we were contacted by you from Fort Nelson on March 18, 1997 when you informed us that you would be in Fort Nelson until Friday, March 21, 1997. After this date, you would be attending a Pain Clinic on Vancouver Island but you did not have details as of that date.

Ms. Carter submitted that on April 1, 1997, she learned from a friend that the plant had closed down and attempted to contact Mr. Gilgan to discuss how this would affect her while on medical leave. She submitted a phone bill indicating the same and many subsequent calls to CCMC. She contacted Mr. Bamford regarding her employment status but he was unable to advise her. She then called Pam Ulmer in Vancouver who did staff payroll. She submitted that Ms. Ulmer said CCMC had her on medical leave and that she was an employee.

Ms. Carter submitted that some time before the end of April, 1997 she spoke with Mr. Gilgan regarding receiving severance pay and he advised her that her situation was being discussed at a meeting at CCMC’s Vancouver office; he told her that she could not get both long term disability benefits and severance.

Ms. Carter submitted that after the disability benefits were discontinued, she spoke to Mr. Gilgan who told her she would receive severance on May 15, 1997 on which day she went to the bank but no deposit had been made. She called Mr. Gilgan to find out why she had not received the funds and it was then that he advised her that she was not entitled to severance pay because she was not an employee at the time of the shut down. She submits that prior to him telling her this he had not once raised the issue of her having “quit”.

Ms. Carter submitted that taking a medical leave was the only thing that made sense. She would not be able to attend the pain clinic without Mr. Verignan working as there would be up to a three month waiting period after the assessment for the clinic was done. She would not be able to fly back and forth to the clinic and there was no way she would leave her nine year old daughter in Fort Nelson. Mr. Verignan’s parents offered to care for her

daughter at their home in Wasa, BC where Ms. Carter was enrolling her for the last three months of the school year. Mr. Verignan's parents also offered their trailer to assist their son and Ms. Carter in cutting living costs while in Victoria.

Mr. Verignan also testified that he had known Mr. and Mrs. Senko socially outside of work and had lived with them at one point.

Ms. Carter submitted a letter written by Wendy Dieno on July 18, 1997 which stated:

I began working down in Stores around the middle of September on a temporary basis. During that time it was made clear to me that I was temporary, and when Denise Carter returned to work that I would no longer be working in Stores....At no time up to and including the plant closure was I given permanent status as an employee at CCMC.

Ms. Carter testified that all she wanted to do was find out why she was in pain. She testified that she never terminated her job. She testified that she would have terminated her job properly if she intended to do so out of respect for the company.

ANALYSIS

The onus is on the Appellant, CCMC, to demonstrate error or a basis for the Tribunal to vary the Director's Determination that Denise Carter was an employee.

The obligations of an employer who terminates the employment of fifty or more employees is found in Section 64 of the Act. The relevant portion of Section 64 are:

64 (1) If the employment of 50 or more employees at a single location is to be terminated within any 2 month period, the employer must give written notice of group termination to all of the following:

(a) each employee who will be affected;...

(4) If an employee is not given notice as required by this section, the employer must give the employee termination pay instead of the required notice or a combination of notice and termination pay.

The obligation on an employer to pay compensation for length of service is found in Section 63 of the Act. The relevant portions of Section 63 state:

63 (1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.

- (2) The employer's liability for compensation for length of service increases as follows: ...
 - (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
- (3) The liability is deemed to be discharged if the employee...
 - (c) terminates the employment, retires from employment, or is dismissed for just cause.

To determine whether an employee has "terminated" her employment I refer to **Wilson Place Management Ltd.** (BCEST #D047/96) where it was held that:

The act of resigning, 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. There is both a subjective and objective element to the act of quitting: subjectively, an employee must form an intention to quit; objectively, that employee must carry out an act that is inconsistent with further employment.

I find that the Appellant has not advanced "clear and unequivocal" evidence to support the conclusion that Ms. Carter voluntarily exercised her right to terminate her employment at CCMC.

I find that Ms. Carter's actions were entirely consistent with her genuine pursuit of medical assistance for her disability. Ms. Carter was in regular contact with her supervisor and the Manager of Human Resources regarding her medical difficulties and her plans. While she was in Fort Nelson she attended their offices in person, she left a forwarding address and phone number, she continued to contact them by telephone. She was acting on her doctor's advice to attend the pain clinic despite the great expense and upheaval to herself, her spouse and her daughter. She contacted her insurance company to inform them of her plan. Everyone giving evidence agreed that both Ms. Carter and Mr. Verignan stated they were leaving to be near medical assistance.

CCMC's Vice President felt it was sufficient to conclude that Ms. Carter had terminated her employment based on information from a manager of an entirely separate and unrelated department; information which was acquired outside the work place at a social gathering. Neither Ms. Carter's supervisor nor the Manager of Human Resources were apprised of this information. Mr. Gilgan himself testified that he had to chase down a "rumour" to arrive at the conclusion that Ms. Carter had resigned. I find from this testimony that whatever he claimed he was told by Ms. Carter at P&J's restaurant on March 18, 1997, he clearly did not consider it to have constituted termination. He also testified that normally the termination would have come through his office and through Mr. Bamford, her

supervisor. Mr. Shoji testified that he “assumed” Mr. Gilgan knew of the termination. Mr. Shoji did not confirm with the manager of human resources, Ms. Carter’s supervisor or Ms. Carter herself that she had resigned. Given the structure of the Appellant’s organisation and given the knowledge on the part of everyone concerned that Ms. Carter was acting on her medical condition, it would not have been unreasonable for the Appellant to obtain confirmation from the appropriate individuals that she had terminated her employment. I find on balance that the Appellant’s argument that any manager could accept any employee’s resignation is not sufficient to substantiate a termination in this particular case where the employee has consistently kept her recognised superiors informed of her actions and has been available for contact.

The Subjective Element:

I find that the Appellant has not shown that Ms. Carter intended to quit. Ms. Carter testified that she did not intend to quit. Even if Ms. Carter did make statements that she was not returning to Fort Nelson I find that these were made outside the workplace, to people with whom she had socialised before, who had no authority over her at work and in circumstances where she could legitimately exercise the option to return or not if she desired at a later time. I find that these statements in and of themselves would not be sufficient to constitute the termination of her employment. There was no evidence that Ms. Carter stated that she quit or that she did not want her job any longer.

The Objective Element:

I find that Ms. Carter’s actions were not inconsistent with further employment. She was acting on the then current circumstances in her life. If the Appellant had not ceased operations it would have been open to Ms. Carter to seek a continuation of her employment if her circumstances allowed. That would have been an option for her to exercise later. She clearly could not predict what her circumstances would be at the time she made arrangements to leave town in order to attend a pain clinic after having seen numerous physicians and attempting to return to work. The Appellant does not dispute that it assisted in arranging for Ms. Carter to be on long term disability leave nor that her being on this leave meant that she ceased to be an employee. The Appellant argued that Ms. Carter’s job had been filled. I find that if there was no job to offer Ms. Carter when and if she returned to work, then that termination would be at the employer’s initiative, not the employee’s.

I find on balance that the Appellant has not satisfied its burden of proving that the Director erred in the decision that Ms. Carter was an employee of CCMC on April 1, 1997 when CCMC closed and ceased operations and that she was entitled to compensation for length of service.

After careful consideration of the testimony and lengthy submissions, I find that the Director’s Determination is correct and the appeal should be dismissed.

ORDER

Pursuant to s. 115 of the Act, I order that the Determination of the Director, CDET dated October 20, 1997 is confirmed as issued in the amount of **\$10,176.84** together with whatever further interest that may have accrued, pursuant to section 88 of the Act, since the date of issuance.

Fernanda M. R. Martins
Adjudicator
Employment Standards Tribunal