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-

Karen Blaine
(the "Appellant")

-of a Determination issued by-

The Director of Employment Standards
(the "Director")

ADJUDICATOR:	E. Casey McCabe
FILE NO.:	2000/289
HEARING DATE:	July 28, 2000
DATE OF DECISION:	September 15, 2000

DECISION

APPEARANCES

No one	for the employer
Karen Blaine	for herself
No one	for the Director of Employment Standards

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") by Karen Blaine from a Determination dated April 4, 2000. That Determination found the employer, Super-Byte Computers Ltd, liable for one week of severance pay to Ms. Blaine. The Determination found that Ms. Blaine had given her notice of resignation to the employer effective December 31, 1999. The director's delegate determined that in closing his business on December 24, 1999, the employer had denied Ms. Blaine the opportunity to work out her notice period. The Determination found therefore that Ms. Blaine was only owed severance for the week preceding December 31, 1999.

ISSUE TO BE DECIDED

1. Did Ms. Blaine intend to resign on December 31, 1999?

FACTS

Ms. Blaine commenced full-time employment with the employer in September 1993. Previously Ms. Blaine had worked for the employer under a practicum program. The employer ran a retail computer store in Maple Ridge doing both sales and services. Ms. Blaine's duties included buying stock, accounts receivable, customer service and sales.

In October of 1997 Ms. Blaine became very ill. She was off work until April of 1998 at which time she returned on a graduated basis. According to her testimony Ms. Blaine started at around 12 hours per week and gradually worked up to her normal 40 hour work week.

In December of 1998 the employer moved to new premises in Maple Ridge. The new location was approximately three times the size of the old store. Ms. Blaine helped with the move, ordered new stock and assisted with the purchase of new fixtures. In April of 1999 she had a relapse of her illness and, additionally, was diagnosed with a brain tumor.

Ms. Blaine states that in September of 1999 she was ready to again return to work on a graduated basis. At that time Ms. Blaine states that Larry Caswell, the owner of Super-Byte, informed her that there was no work available. Ms. Blaine states that in early October Mr. Caswell started to phone her telling her he would not give her any hours unless she gave him a resignation letter to put on file. By mid October, when Ms. Blaine still had not received any hours, she relented and wrote the resignation letter.

Mr. Caswell, in a letter sent to the delegate on February 12, 2000, denies these allegations. He states that Ms. Blaine told him she was too sick to return to work. He states Ms. Blaine then wrote her resignation letter which was to be effective at the end of December in case she improved enough to help out around the store during the Christmas period.

The records indicate that Ms. Blaine worked a total of 34 hours between October 29, 1999 and December 18, 1999. Ms. Blaine, in her testimony, stated that she never worked more than one 4 hour shift in a week, except for her last week of employment, where she worked a total of 9 hours over two days.

On December 18, Mr. Caswell asked Ms. Blaine to make up a sign to place on the store window indicating that the store would be closed from December 24 till January 1, 2000. The store did in fact close on that day and has not re-opened.

ANALYIS

The Employment Standards Tribunal scheduled a hearing into this appeal for 9:00 a.m. July 28, 2000. The hearing notice was sent to the parties dated June 23, 2000. Ms. Blaine, was present.

I convened the hearing at approximately 9:10 am. I then adjourned the hearing until 9:30 am to allow additional time for a representative of the employer to show up. During that period I asked the Employment Standards Tribunal to attempt to contact the employer.

I was informed by a representative of the Employment Standards Tribunal that all mail sent to the employer, including the notice of hearing, had been sent back as undeliverable. The telephone number on file for the employer was no longer in service. The lawyer for the employer informed the Tribunal that he only acted for the employer for records and did not act for the employer on this case.

I reconvened the hearing at 9:30 am. As it was Ms. Blaine's appeal the hearing went ahead in the absence of a representative of the employer.

The question in this case is whether Ms. Blaine resigned her employment. In her testimony, Ms. Blaine stated that the employer demanded from her an undated letter of resignation, to be kept on file, or she would not receive any hours. Ms. Blaine subsequently provided such a letter, with an effective date of December 31, 1999. A copy of the letter was shown to her at the hearing and Ms. Blaine agreed that it was her letter.

The letter itself does not have a date indicating when it was written. Ms. Blaine stated at the hearing that the letter was written shortly after Thanksgiving, i.e. mid October 1999. There is nothing in the submissions by the employer that would contradict such a date and I have no reason for disbelieving Ms. Blaine on this aspect of her testimony. I find, therefore, that the letter was written in the middle of October 1999.

The question now arises whether Ms. Blaine's evidence is sufficient to make a finding that the resignation letter was not a true expression of an intention by her to resign. It is long established that a resignation has both an objective and subjective intent. (see *Burnaby Select Taxi Ltd v.*

British Columbia (Director of Employment Standards) BC EST #D091/96). The instant problem is that the employer, by not allowing the notice period to expire, has made it impossible for Ms. Blaine to actually leave her employment thus clearly showing objective evidence of a quit. It is clear that the only evidence to indicate that Ms. Blaine was going to resign was the letter of resignation written by her.

Ms. Blaine's argument is that the letter written by her was not written voluntarily. In *Re Miracle Mart Steinberg Inc. (Ontario) and United Food and Commercial Workers, Local 175*_19 L.A.C. (3d) 65, the arbitrator found that a resignation offered as an alternative to termination was voluntary, and the grievors could not subsequently argue unjust termination. In that case, however, the employees were also told that if they did not resign they could face criminal charges.

The British Columbia Court of Appeal has had an opportunity to look at the concept of involuntary resignations in a judicial review of an Industrial Relations Council decision. (*Office and Technical Employees' Union, Local 378 v. British Columbia (Industrial Relations Council)* 56 D.L.R (4th) 140. In that case, the Court of Appeal upheld a decision by the Council which found that where an employee is given a choice between being fired and resigning a resignation under such circumstances cannot be voluntary (*Fred deMoor (the "Grievor"), and Office and Technical Employees Union, Local 378 (the "Employer"), and Office and Professional Employees Union (the "Union")* No. C28/87 BCIRC.)

In this case, Ms. Blaine claims that Mr. Caswell told her that he would not schedule her any hours unless she provided a letter of resignation. Had Mr. Caswell not provided Ms. Blaine with any hours, it would have been a constructive dismissal. As such I find that if Ms. Blaine's story is believed her resignation was not truly voluntary and therefore does not meet the test of objective and subjective intent to resign.

Ms. Blaine is the appellant in this case and as such bears the burden of convincing the Tribunal that the Determination made by the delegate was in error. The mere fact that the employer did not show up for the hearing is not enough for Ms. Blaine to win by default.

Ms. Blaine's evidence is that Mr. Caswell repeatedly phoned her in October of 1999 seeking an undated letter of resignation to be put on file. Finally, in frustration that she was not getting any hours, and under the belief that once she could show Mr. Caswell that she could do the job he would schedule hours for her, Ms. Blaine agreed to write the letter with an effective date of December 31, 1999. In her testimony Ms. Blaine stated that Mr. Caswell was annoyed when he saw that she had written an effective date on the letter. Ms. Blaine refused to write a new, undated letter. In response to a question from the panel, Ms. Blaine stated that she really didn't know why she had put a date on the letter, and that she thought that without a date the letter would not be valid. She reckoned that the end of the year seemed to be a good date.

The employer states in his submission of February 12, 2000, that the letter was to be effective December 31, 1999 so as to allow Ms. Blaine to help out over Christmas if she was able. On the facts there is a conflict in the evidence. Applying the principles in *Faryna v. Chorny*_ [1952] 2 D.L.R. 354 (B.C.C.A.), I find on the balance of probabilities that Ms. Blaine's story is to be preferred. The submissions sent in by the employer indicate only that Ms. Blaine had advised the

employer that she would no longer be able to work full time. The employer states that Ms. Blaine then sent in her resignation. The employer does not dispute that on her return to work after the first illness Ms. Blaine worked part time until she was able to function on a full time basis. Ms. Blaine testified that she intended to do the same type of graduated return after her second illness. Such a return is consistent with an intention to remain an employee of the company and is consistent with Ms. Blaine's history of employment with the company.

The fact that the letter of resignation has an effective date of December 31, 1999 is troubling. I would have little hesitation finding that a letter of resignation that does not indicate when the resignation is to take effect is not good evidence of an intent to quit. Prima facie, a letter of resignation with an effective date on it is evidence of an intent to quit. In this case however, I am not prepared to find that the fact the letter has an effective date on it is enough to cause me to reject Ms. Blaine's sworn testimony over the reason she wrote the letter. I find Ms. Blaine's testimony simply more credible than the employer's position that the reason the letter was dated December 31 was in case Ms. Blaine was well enough to work over Christmas.

I accept Ms. Blaine's testimony that she started to receive hours at the end of October. It is difficult to believe that a person off sick since April would suddenly feel the need to write a letter of resignation in October for an effective date of the end of December. On the facts before me it is simply more credible to conclude that the resignation letter was written to satisfy a request from the employer. I find as a fact that the only reason Ms. Blaine wrote the letter of resignation was because the employer refused to schedule any hours for her unless she wrote such a letter. Therefore the letter cannot be considered voluntary and, consequently, there is no subjective intent to quit.

Ms. Blaine also seeks an order for the payment of 9 unpaid hours. The employer does not deny that Ms. Blaine worked those hours. From the file material it would appear that a cheque for these hours has been given to the delegate. I find then that Ms. Blaine is entitled to be paid for the 9 hours worked on December 14 and 18.

ORDER

The Determination dated April 4, 2000 is varied to include severance pay based on the termination of a 6-year employee without notice or notice in lieu. The matter is remitted back to the delegate for the calculation of damages.

E. Casey McCabe

Adjudicator

Employment Standards Tribunal