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 -

Fraser Bakery & Konditorei (1964) Ltd.
operating as Fraser Bakery
("Fraser Bakery")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	David Stevenson
FILE NO.:	1999/450
DATE OF HEARING:	August 26, 1999
DATE OF DECISION:	September 9, 1999

DECISION

APPEARANCES

for the appellant:	Mike Kubbosek Fred Kubbosek
for the individual:	in person

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") by Fraser Bakery & Konditorei (1964) Ltd. operating as Fraser Bakery ("Fraser Bakery") of a Determination which was issued on June 30, 1999 by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded Fraser Bakery had contravened Section 63 of the *Act* when it failed to pay a former employee, Paul Johnson ("Johnson"), length of service compensation, ordered Fraser Bakery to cease contravening the *Act*, to comply with its requirements and to pay an amount of $1339.83.

Fraser Bakery says the Determination is wrong because in the circumstances Johnson has relieved Fraser Bakery of the obligation to pay length of service compensation.

ISSUES TO BE DECIDED

The only issue to be decided in this appeal is whether Fraser Bakery has shown that the Determination is wrong in its conclusion that Johnson was entitled to length of service compensation.

FACTS

Most of the facts are not in dispute and where the evidence conflicts, I have accepted the evidence given by the witnesses for Fraser Bakery.

Johnson was employed as a baker at Fraser Bakery from November 20, 1995 to December 30, 1997. His employment was terminated as a result of events occurring between December 30, 1997 and January 1, 1998.

On December 29, 1997, Johnson called Fred Kubbosek ("Fred"), one of the owners of Fraser Bakery, to inquire what his next shift would be. Fred said he was not sure and would let him know the next day. The next day, Fred talked to Johnson and told him that he was required to work the 5:00 pm to 1:30 am shift. Johnson told Fred he would not work on January 1 because he would be celebrating New Year's. Fred told Johnson he didn't think that was a good reason to miss his shift, but he would get back to him.

Fred talked to his brother, Mike Kubbosek ("Mike"), the other owner of Fraser Bakery, to discuss Johnson's position and they agreed that it was not appropriate for Johnson to simply say he would not work because he would be celebrating. They agreed to tell Johnson that they would leave it up to him to show up for work and, if he did not, they would take it that he didn't want his job anymore and would no longer consider him an employee. This was communicated to Johnson on December 30.

Johnson worked on December 30, ending his shift early in the morning of December 31. He did not show up for his shift on January 1.

On January 2, Johnson appeared at the office with a doctor's note saying he could not work January 1 because of a shoulder injury. He gave the note to one of the office staff and left. Fred saw the note, but there was no attempt to discuss the note with Johnson as Fraser Bakery considered Johnson was no longer an employee, having already quit by failing to show for work on January 1.

During the investigation, Johnson said he called Fraser Bakery on December 30 to tell them he was unable to work on January 1 because of a shoulder injury. That assertion was, of course, improbable because he in fact worked his shift on December 30/31 and I do not accept that Johnson has the necessary psychic ability that would have enabled him to predict a debilitating shoulder injury a day in advance of its occurrence.

He altered his story in his evidence before me, saying it wasn't until December 31 that his shoulder began to hurt. He said he called Fred at his home on January 1, told him he wouldn't be at work that afternoon and would bring a note. He said he saw the doctor as soon as he possibly could, January 2, obtained a note and delivered it to Fraser Bakery. In reply, Fred testified that he was away from his home all day January 1 and that there was no message from Johnson on his answering machine indicating Johnson had called that day to say he couldn't work.

I do not believe Johnson's evidence and I conclude there was no communication to his employer before January 2 of any problem with his shoulder. I cannot help but wonder, if Fraser Bakery had not taken the high road, whether the legitimacy of his excuse for not working on January 1 would have withstood closer scrutiny.

ANALYSIS

Section 63 of the *Act* contains provisions relating to an employer's liability to pay an employee length of service compensation on termination of employment. Subsection 63(1) states:

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

The amount of the employer's statutory liability increases as the employee's consecutive months and years of employment increases (subsection 63(2)). Length of service compensation is, from the employee's perspective, a statutory benefit earned with consecutive years of employment. It is a minimum statutory benefit. From the employer's perspective, it is a statutory liability that accrues to each employee with more than 3 consecutive months of employment. While length of service compensation is often referred to as "termination" or "severance" pay, it is related to termination only to the extent that a termination of employment, actual or deemed, triggers the benefit or liability, depending on the perspective. Subsection 63(3) identifies three circumstances where the statutory liability of the employer to pay length of service compensation is deemed to be discharged: first, if the employee is given written notice of termination equivalent to the employer's statutory liability to the employee; second, if the employee is given a combination of notice and compensation equivalent to the employer's statutory liability to the employee; and third, if the employee terminates the employment, retires from employment or is dismissed for just cause.

In this case, Fraser Bakery says the conduct of Johnson amounted to a quit or, alternatively, constituted just cause for dismissal. In either case, they say they should be discharged from the statutory liability to pay length of service compensation to Johnson.

On the matter of just cause, the burden is on Fraser Bakery to establish just cause for dismissal. As I stated above, my sense is that the alleged shoulder injury as a reason for his failure to show for work on January 1 might not have withstood the scrutiny of investigation. If that was borne out, Johnson's failure to show up for work would amount to gross insubordination and just cause for dismissal would have been established. However, no such investigation was done and, regardless of what my senses tell me, I am left with an unchallenged finding of fact made by the Director that on January 2 Johnson had a doctor's note supporting a valid medical reason for his absence on January 1. His failure to communicate the injury and its effect on his ability to attend work might be a matter which, in another context, would be worthy of discipline, but it does not constitute just cause for dismissal.

In respect of the argument that Johnson quit, the act of quitting is a right that is personal to the employee. There must be clear and unequivocal evidence that this right has been voluntarily exercised by the employee. There is an objective and a subjective element involved in the act of quitting: objectively, the employee must carry out an act that is inconsistent with further employment; subjectively, the facts must point to an intention on the part of the employee to terminate the employment.

The objective element is satisfied in the circumstances of this case by Johnson failing to show up for his shift on January 1 after having been alerted to the position of the employer that they would view his failure to show up as indicating he did not want his job anymore. With considerable reluctance, however, I cannot conclude that an intention to quit has been established. There is no doubt Johnson intended to have his own way about not working January 1 and showed considerable arrogance by telling his employer he would not work that day, but his appearance on January 2 with a doctor's note excusing him from working January 1 is a strong indication that he had not formed any intention of terminating his employment by not showing up on that day.

Fraser Bakery has not shown just cause or that Johnson terminated the employment. The appeal is reluctantly denied.

ORDER

Pursuant to Section 115 of the *Act*, the Determination dated June 30, 1999 is confirmed in the amount of $1339.83, plus interest on that amount pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal