Employment Standards TRIBUNAL

An appeal

- by -

Northland Plymouth Chrysler Ltd.

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Wayne R. Carkner

FILE No.: 2001/184

DATE OF HEARING: July 12, 2001

DATE OF DECISION: July 30, 2001

DECISION

APPEARANCES:

For the Appellant	Robert Bissonette (the "Appellant") Glen Wickland William Cheung Sherry Prideaux Brian Musgrave
For the Respondent	Bruce Graham (the "Respondent") by telephone.
For the Director	No Appearance

OVERVIEW

This is an appeal by Northland Plymouth Chrysler Ltd. pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) of a Determination issued by the Director of Employment Standards (the "Director") dated February 9, 2001. The Determination concluded that Bruce Graham (the "Respondent") was terminated without notice on July 10, 2000 and was entitled to compensation for length of service in the amount of $2,216.32, including interest, pursuant to Sections 63 and 88 of the *Act.* Northland Plymouth Chrysler Ltd. (Northland), represented by Robert Bissonette (the Appellant), takes the position that the Respondent quit of his own volition and was not entitled to compensation for length of service and that the Delegate erred when concluding that the facts established that the Respondent was not allowed to work the two week notice period provided in the Respondent's letter of resignation that was presented to the Appellant on July 10, 2001. The Appellant further submits that the Delegate erred in law by placing the burden of proof upon Northland to establish that the Respondent quit.

ISSUES

The issues in this case are:

1. Did the Respondent quit his employment with Northland or was his employment terminated by Northland without proper notice thus entitling him to compensation for length of service.

2. Was there an error in law by placing the burden of proof on Northland to prove that the Respondent quit.

FACTS

The Respondent was employed by Northland, a car dealership, as a sales representative from February 27, 1997 until July 10, 2000. The Respondent had a desire to live and work in the Okanagan Valley and had obtained employment at a car dealership in that region. On July 10, 2000, the Respondent met with the Appellant to tender a letter of resignation, which included two weeks notice. The parties then had a divergence of the content of the discussion that followed. The Appellant's recollection as outlined in the Determination was:

> "Further, it is the Employer's position that when Graham came to hand over his letter of resignation the two of them discussed the issue of his leaving. The Employer asked during this conversation how soon Graham would be able to start at his new job and was advised that Graham could start right away. It is the Employer's position that at the end of the conversation they had reached an amicable resolution that Graham would leave right away rather than continue to work the next two weeks."

This was consistent with the evidence given by the Appellant at the hearing. The Respondent's recollection of the discussion was outlined in the Determination:

> "When he [the Respondent] went to hand his letter containing his two-week notice of resignation to Bob Bissonette, the President of Northland, he was told that "we don't do things that way in [this business]" and he was told he might as well go right away."

This evidence was consistent with the Respondent's evidence at the hearing. The respondent then placed the letter of resignation on the Appellant's desk and left the premises. There was no discussion of severance pay during the discussion. The Respondent then commenced work with his new Employer on July 12, 2000. The complaint was filed with Employment Standards at a much later date.

In establishing the credibility of the evidence I am satisfied that the Appellant's evidence was credible. I am also satisfied that the Respondent's evidence was credible, albeit, this evidence was provided over the telephone and all the tests of credibility were not available.

ANALYSIS

One preliminary issue that arose was the issue of "just cause" due to a conflict of interest that was raised in the Appellant's written submission and responded to by the Director. At the onset of the hearing the Appellant withdrew this avenue of appeal.

The Delegate, on page 7 of the Determination places the onus for the burden of proof on the Appellant to prove that an employee has quit:

> "The burden of proving that the Employer did not have a liability to pay CLOS rests with the Employer. He has not satisfied this burden of proof. Sometimes there is a dispute as to whether the employee quit or was fired. The employer must show that the employee quit. There was evidence to show the *Complainant's intention to quit in two weeks.* There is no evidence to show that he that he quit effective July 10, 2001. To the contrary. It is the Complainant's position that he was not permitted to stay. If there is insufficient evidence to support the employer's argument that the employee voluntarily quit, then it would be found that the employee was fired."

On this issue of onus, I have reviewed the Tribunal's past decisions and found two lines of thought. The first one supports the Delegate's application of the law in **BC EST # D127/97, *W.M. Schulz Trucking Ltd.:***

> "The question I have to answer is whether, in all of the circumstances present in this case, I can find Mr. Lewis quit his employment with Schulz Trucking. The position the Tribunal takes on the issue of a quit is now well established. It is consistent with the approach taken by Labour Boards, arbitrators and the Ontario Employment Standards Tribunal. It was stated as follows in the Tribunal's decision *Burnaby Select Taxi Ltd. -and- Zoltan Kiss,* BC EST #91/96:
>
> > The right to quit is personal to the employee and there must be clear and unequivocal facts to support a conclusion that this right has been exercised by the employee involved. There is both a subjective and an objective element to a quit: subjectively, the employee must form an intent to quit; objectively, the employee must carry out some act inconsistent with his or her further employment. The rationale for this approach has been stated as follows:
> >
> > > ". . . the uttering of the words "I quit" may be part of an emotional outburst, something stated in anger, because of job frustration or other reasons, and as such it is not to be taken as really manifesting an intent by the employee to sever his employment relationship." Re *University of Guelph,* (1973) 2 L.A.C. (2d) 348
>
> On the facts of this case, Schulz Trucking has not demonstrated the clear and unequivocal facts necessary to support a conclusion Mr. Lewis quit his employment on December 6."

Adjudicators have taken the intention of the last paragraph to place the onus on the Employer to prove that an employee quit and this is the Jurisprudence relied upon by the Delegate in the Determination.

The second line of thought was outlined in BC EST #D273/99, *Maple Ridge Travel Agency Ltd.:*

> "However, in my view, the onus is on the employee to establish that she was dismissed from her employment. The Tribunal's decision in *W.M. Schultz Trucking Ltd*., BCEST #D127/97 may be read to support the proposition that there is an onus on the Employer to prove "the clear and unequivocal facts necessary to support a conclusion that <the employee> quit his employment". Insofar as there is any dispute with respect to the ultimate burden of proof, I prefer the approach of Mr. Justice Errico of the British Columbia Supreme Court in *Walker v. International Tele-Film Enterprises Ltd*., <1994> B.C.J. No. 362 (February 18, 1994), at page 17-18:
>
> > "The onus of proof is on Mr. Walker to prove that he was wrongfully dismissed. This is not a case where the defendant employer is raising justification. The issue is whether Mr. Walker left the company on his own volition or whether he was dismissed. Counsel for Mr. Walker cited a decision of the Nova Scotia Court of Appeal in *McInnes v. Ferguso*n, (1900), N.S.R. p. 517. This decision holds that the onus lay on the employer where the issue was whether or not the employee left voluntarily, but there is no judicial discussion about it. I have considerable difficulty with this proposition which shifts the onus of proof to the defendant. This is a concern I share with Prowse J., as she then was, who in *Osachoff v. Interpac Packaging Systems In*c., unreported, Vancouver Registry, April 21 st 1992 C910344, discussed this decision and declined to follow it, as I do. In that case, as in this, the onus is on the plaintiff to establish on the balance that he was dismissed."
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> In England, Christie et al., *Employment Law in Canada* (Butterworth, 3rd ed.), the learned authors comment as follows, at page 13.7:
>
> > "... Since, in a wrongful dismissal action, the burden of proving that he or she was dismissed is on the employee, the employee must prove that he or she has not resigned if the employer succeeds in raising a *prima facie* case of a quit."

I prefer this view in establishing "onus" and find that the Delegate has erred in placing the onus for the burden of proof on the Appellant in the context of the investigation and the Determination.

The Appellant argues that the Director has reached an improbable conclusion based on the facts. He points to the Respondent's intention to quit based on the letter of resignation that was submitted on July 10, 2000. In the written submission the Appellant states:

> "Other than Graham's own assertion, there is no independent evidence that Northland "fired' Graham. But there is objective evidence which shows Northland did not dismiss Graham but that Graham did quit:
>
> - Graham started his new employment on the 2nd day after quitting;
> - Graham did not initially demand severance pay, either from Employment Standards Branch or from Northland. The delay suggests that Graham did resign and was not entitled to severance pay;
> - Graham had always maintained that Bissonette and Northland had always been good to him and continues to make that claim after resigning.
>
> Each of these facts by themselves may not be conclusive, however taken together, they appear persuasively conclusive."

In the Determination the Delegate refers to the tests to establish that an employee quit as outlined in **BC EST #D091/96, *Burnaby Select Taxi Ltd. –and- Zoltan Kiss;***

> "The issue on the severance pay claim is whether Kiss quit. The right to quit is personal to the employee and there must be clear and unequivocal facts to support a conclusion that this right has been voluntarily exercised by the employee involved. There is both a subjective and an 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 or her further employment."

At page 7 of the Determination the Delegate states;

> "There are no "clear and unequivocal facts to support a conclusion" that it was Graham's intention to quit as of July 10, 2000. There is, however, a written notice of resignation indicating his [Graham's] intention to quit two weeks later."

With respect to the delegate I disagree. The fact that the Respondent tended a letter of resignation meets the "subjective test" outlined above. The letter clearly shows that the Respondent intended to resign from Northland in spite of the date outlined in the letter. To allow the difference of two weeks to negate the test is improper.

I now turn to the "objective test". The Determination did not deal with the "objective test" once it was concluded that the "subjective test" wasn't met. On reviewing the facts; no request for

severance pay at the time of the "Discussion", Graham commencing employment with his new Employer in the Okanagan two days later and the timing of the filing of the complaint, I must conclude that on a balance the Respondent "quit" his employment with the Appellant.

I find that the Appellant has met the onus to show errors in the Determination that are fatal to the conclusions reached in the Determination.

ORDER

Pursuant to Section 115 of the *Act,* I order that the Determination dated February 9, 2001 be cancelled.

Wayne R. Carkner
Adjudicator
Employment Standards Tribunal