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 -

Monika Marlowe
("Marlowe" or the "Employee")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	Ib S. Petersen
FILE NO.:	1999/388
DATE OF HEARING:	October 4, 1999
DATE OF DECISION:	October 21, 1999

DECISION

APPEARANCES

Ms. Monika Marlowe — on behalf of herself

Ms. Patty Degelder — on behalf of Degelder Construction Co. Ltd. (the "Employer" or the "Degelder Construction")

OVERVIEW

This is an appeal by Ms. Marlowe ("Marlowe") pursuant to Section 112 of the Employment Standards Act (the "Act"), against a Determination of the Director of Employment Standards (the "Director") issued on June 1, 1999. The Determination concluded that Marlowe, who was employed by the Degelder Construction as a receptionist/administrative assistant from September 8, 1998 to December 15, 1998, quit her employment and, in the result, was not entitled to compensation for length of service.

In a lengthy Determination, the delegate reviewed the conflicting versions of the facts.

Marlowe's version of the events may be summarized as follows. On December 11, 1998, at 5:00 p.m., Marlowe approached Ms. Degelder ("Degelder") and requested a review of her employment to ascertain if she had passed the probationary period and would be kept on by the Employer. Degelder refused to attend to the review. On December 14, also at 5:00 p.m., Degelder told Marlowe to go to the boardroom. Marlowe said she could not, as she had made other arrangements. To avoid a confrontation, she left the office. When she came to work the next day, there was someone working at her desk. She had a conversation with Degelder and a vice-president of the Employer, during which Degelder told her to "get out". She then asked for her record of employment and pay cheque and left.

Degelder Construction's version of the events was different, particularly with respect to the timing of the material events. Degelder told the delegate that she was initially unable to do the employment review on December 11 as her husband, the president of the Employer, was not available. Some time was freed up, and she asked Marlowe to meet with them. Marlowe said "on my time? not on my time you don't". Marlowe said "that's it, I quit" and left. On Monday, December 14, Marlowe returned to the office, saw someone working at her desk and demanded her ROE.

It is clear from the Determination that there was dispute over the facts and the timing of the relevant events. The delegate concluded:

> "In reviewing the versions of events from the various parties, including witnesses, I prefer the evidence given by Patti Degelder. The version provided by her is consistent with that of Irene Croden and Vaquar Ahmad. ...

> While Monika Marlowe is adamant that she did not quit her job, I find it difficult to accept her position when it is contrary to that of the witnesses. I am also troubled by the discrepancy in dates, and Ms. Marlowe's confusion in that regard. While the parties agree that Ms. Marlowe presented herself at the office again, after the confrontation, there was no apology extended but rather she requested her ROE.
>
> In summary, I am satisfied that it appears, on the balance of probabilities, that Monika Marlowe behaved in a manner that had the effect of quitting her employment. I find that the subjective and objective elements of a 'quit' are established in that Ms. Marlowe formed the intent to quit and acted in a manner inconsistent with her employment."

FACTS AND ANALYSIS

A hearing was held at the Tribunal's offices in Vancouver on October 4, 1999.

At the hearing, Marlowe testified as to the events that culminated with the termination of her employment relationship with the Employer. In particular, she argued that the delegate erred when she concluded that there was "confusion" with respect to the dates on her--Marlowe's--part. She stated--and it was not disputed--that, in fact, it was Degelder who had erred with respect to the dates.

Marlowe explained that she was placed with Degelder Construction by Croden Personnel. There was some confusion as to the start date of her employment. The Employer issued three ROEs to Marlowe, each with a different start date, the first, issued on December 15, 1998, indicated that the first day of employment was September 11, 1998, the next two, issued some months later, indicated September 8 and 14. Degelder explained the reasons for the different dates on the ROEs. When Marlowe was first placed with the Employer, she was on a "trial period" for the first three days, paid as a "casual" employee. She was then off for some days with pay and did not "actually" start in the office until September 16. In the circumstances, I conclude that the start date is September 8. I accept that there was no deliberate attempt on the part of the Employer to mislead. Degelder testified that the Employer may have put the wrong start date on the ROE due to the haste at the time it was prepared. It was not in dispute that Marlowe would be entitled to one week's compensation for length of service, should I find that she did not quit her employment.

It is not in dispute that Marlowe's employment was subject to a three month probationary period. Marlowe explained that she towards the end of that period sought to "find out if she was going to be kept on". She testified that she had approached Degelder to find out during the last two weeks of her employment and, in her view, Degelder was "avoiding" her and "was not going to talk to" her. I understand that the reason she was concerned about continuing her employment with the Employer was that she needed to have dental work done and was concerned about coverage under the employee benefits plan. Finally, on Friday, December 11, 1998, around 5:00 p.m. she approached Degelder to discuss her employment situation. According to Marlowe, Degelder stated that she was being "demanding" and refused to address the matter. The following Monday, Degelder approached her around 5:00 p.m. Marlowe agrees that she told Degelder that she "couldn't stay" as she had made other arrangements, apparently to meet with a friend. Degelder then said "get in there kiddo" with reference to the boardroom. She was going to leave but

decided to respond to Degelder. She told her that she was "tired of her rude behaviour". She also stated that Degelder told her to get "out". Marlowe testified that she was very upset and went back to Croden Personnel. She had no intention of quitting and explained that was not in a position to do so.

The next day, December 15, she went to back work. There, she discovered another person sitting at her desk. She was called into the boardroom by Carl Steward, a vice-president with the Employer, who told her that "you understand that you're finished here". According to Marlowe, Degelder than "barged in" and told her to "get out" and "you don't run things here anymore". Marlowe then asked for her pay cheque and ROE. She received the cheque the following day. Marlowe emphatically denies saying that she "quit".

At the hearing, Degelder did not dispute the dates and agreed that the information supplied to the delegate in that regard was incorrect and that, as a result, others, who discussed the matter with the delegate, may have given incorrect information (in fact, it is clear that they did so). She maintained, however, that Marlowe told her that she "quit".

Essentially, the Employer's evidence at the hearing was that it had no intention of "letting Marlowe go" and that it wanted to do the review. Degelder explained that she was not in a position to do the review when Marlowe requested it on Friday December 11. She agreed that Marlowe requested the review. She explained that this conversation took place outside the boardroom. She explained that Marlowe was quite insistent on having the review "then and there". Degelder was not in a position to do that--among others she wanted her husband, the president of the Employer, to be part of the process, and he was not available at that time, and told Marlowe that the review would have to wait until Monday. Marlowe then said that she "did not think she (Degelder) would want to be thinking about it all weekend". Degelder responded that she "wouldn't be" as she had a very busy weekend. Marlow then walked out in a "huff".

At the hearing, Degelder testified that the conversation where Marlowe said that she "quit" occurred on Monday December 14. Around 5:00 p.m., she approached Marlowe to do the review. She was ready and had her husband "organized" and on the premises. Degelder explained that she got "quite a reaction" from Marlowe. Marlowe looked at her watch and told her "not on my time". Degelder was surprised because she felt she had been "cornered" on the Friday to do the review and, therefore, did not expect Marlowe to react the way she did. She said "OK" and walked away. Marlowe followed her and yelled "don't walk away from me". Marlowe also said that she (Degelder) was "rude" to her and that she "had a good mind not to come in tomorrow". Degelder responded that she should do what she "thought right". At that point, Marlowe said "that's it, I quit".

Degelder agreed that Marlowe came to work the following morning and that there was someone working at her desk. She did not, however, agree that Marlowe's position had been taken, i.e., that she had been replaced. Marlowe then started yelling for her ROE and became disruptive. Carl Steward then took her to the boardroom to calm her down. Marlowe left. Degelder stated that she had no intention of "firing" Marlowe. She explained that Marlowe would have been kept on with the Employer. She tought Marlowe performed her job "quite well" and that she "got her work done". She explained that she was going to address certain issues with Marlowe in the job review: she thought Marlowe was "unapproachable" and that her telephone manners could be improved (the latter, apparently, was a concern of Mr. Degelder). There was no dispute that Marlowe, on December 11, was invited to the Employer's Christmas party on December 20.

Vaquar Ahmad ("Ahmad"), a former employee of the Employer, testified at the hearing. He was employed at the material time. He agreed that he did not have specific recall regarding the dates on which the events described above occurred. He testified that he was in a position--being 5-6 feet away, at the photocopier--to hear the conversation between Marlowe and Degelder. From the content, it appears that the conversation he overheard--in part, anyway--was the one that occurred on December 14. Ahmad testified that he saw Degelder approach Marlowe with a piece of paper in her hand. He did not hear what she said but he observed that Marlowe "flared up" and yelled at Degelder. Degelder "backed up" and called for her husband three times. He explained that he did not--in part due to the passage of time--recall if the heard the words "I quit" but said that Marlowe said something "like that" and from his observations concluded that "it was obvious that she was not coming back". Marlowe left the Employer's premises. Ahmad did not agree with the suggestion, put to him in cross examination, that he could not hear the conversation because of noise from the photocopier. He said that he could hear the content of the conversation because Marlowe was yelling. He also testified that she was quite upset and "shivering".

I agree with Marlowe that the delegate erred when she accepted the Employer's version of the facts with respect to the chronology of the events. On my reading of the Determination, this was a material aspect of the delegate's reasons for accepting the Employer's version of the events. It is not now in dispute that the Employer, in fact, was confused about the dates. The Employer concedes that other witnesses spoken to by the delegate may have been similarly confused. In my view, this raises serious doubts as to whether the Determination can stand.

The question then becomes whether Marlowe quit. If she did not, she is entitled to compensation for length of service, cause not being an issue. I refer to my decision in Maple Ridge Travel, BC EST #D273/99, at pages 2-5:

> "The Employer is not arguing that it had "just cause" for the termination of Esposito's employment. The central issue before me is whether, in the circumstances, she quit. When an employer terminates an employee, the employee is entitled to notice or pay in lieu to a maximum of 8 weeks (see Section 63 of the Act). However, an employee is not entitled to notice or pay in lieu if, among others, the employee "quits".
> ....
>
> .... 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. Ferguson, (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 Inc., unreported, Vancouver Registry, April 21st 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."

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." "

Applying those principles to the case at hand, based on the evidence before me, I am not satisfied that Marlowe did not quit her employment. Marlowe testified that she was looking for other employment and that she had sought to enlist the assistance of Croden Personnel to secure other employment. It is -as well--clear from the her testimony at the hearing that she did not have much regard for Degelder's abilities as vice-president responsible for administration. Even if I accept that Marlowe did actually say the words "I quit" on December 14, as argued by the Employer, in the circumstances, that would not in itself be sufficient to constitute a "quit". It is clear on the evidence that Marlowe was upset when she left the work place on that day. However, even if I accept that Marlowe used words, which taken on their own, could indicate an intention to leave the Employer's employ, I do not accept that Marlowe resigned at that time. I accept that the Employer believed that she had quit. The Tribunal and the courts have recognized that a resignation given in the heat of an argument may not be valid. I agree with the adjudicator in RTO (Rentown) Inc., BC EST #D409/97:

> "Both the common law courts and labour arbitrators have refused to rigidly hold an employee to their "resignation" when the resignation was given in the heat of argument. To be a valid and subsisting resignation, the employee must clearly have communicated, by word or deed, an intention to terminate their employment relationship and, further, that intention must have been confirmed by some subsequent conduct. In short, an "outside" observer must be satisfied that the resignation was freely and voluntarily and represented the employee's true intention at the time it was given."

In retrospect, Marlowe may not have intended to resign when she left the office on December 14 after the argument with Degelder. She points to her financial situation and says that she was not in

a position to quit until she had other employment. On the other hand, it was clear that she was not satisfied with her employment and, in particular, with Degelder. She was looking for other employment. Her conduct on December 14 was such that the Employer believed that Marlowe had resigned. Viewed in the context of her conduct the following day when she again came to work-and her evidence at the hearing was that she came to work on December 15--, requesting her ROE and pay cheque, she did not seek an explanation from the Employer as to the person apparently working at her desk. Rather, she left the place of employment. I do not accept that Degelder told her to "get out" or that Marlowe perceived such words, if they were said, to mean that she had been dismissed. Had Degelder told her to "get out", she could potentially have caused the termination of Marlowe's employment. Had she perceived that her employment had been terminated, there was little reason to return to work on December 15. In my view, Marlowe's conduct on December 14 and 15 satisfies both the subjective and the objective element of the test. In the result, I am not satisfied that the delegate reached the wrong conclusions.

In short, I dismiss the appeal.

ORDER

Pursuant to Section 115 of the *Act*, I order that Determination in this matter, dated June 1, 1999 be confirmed.

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal