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 -

Cost Less Express Ltd..
("Cost Less" or the "Employer")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE NO.: 98/438

HEARING DATE: September 18, 1998

DECISION DATE: October 16, 1998

DECISION

APPEARANCES

on behalf of Cost Less

Mr. Darren Norris on behalf of himself

OVERVIEW

This is an appeal by the Employer 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 19, 1998. In the Determination, the Director's Delegate found that Darren Norris ("Norris") did not resign from his employment and, therefore, was entitled to compensation pay for length of service. The Employer argues that Norris resigned. The Employer does not take the position that he was terminated for cause.

ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether Norris resigned.

FACTS AND ANALYSIS

The Employer provides warehousing and delivery services for Costco. Norris was employed as a delivery driver at $10.00 per hour. From the Determination I assume that he was employed at least 12 consecutive months. In any event, length of service is not an issue.

For the present purposes it is sufficient to refer to Section 63 of the Act, under which an employer may become liable for compensation for length of service which is discharged, among others, if the employee terminates the employment. The burden of proving the Determination wrong rests with the Employer, Cost Less.

In several earlier decisions, the Tribunal has adopted the following test to determine whether an employee resigned (here quoted from *Wayte*, BCEST #D207/98):

> "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. <See, for example, *Wilson Place Management Ltd.* (BCEST #D047/96) and *Burnaby Select Taxi Ltd.* (BCEST #D091/96)>"

Johnson, the president and CEO, was the Employer's main witness. He suggested that Norris was a good employee who, after having been turned down for a wage increase, became unhappy with his employment and resigned on or about November 12, 1997. While Norris received a $1.00 per hour wage increase in October, Johnson mentioned that he and other supervisors had warned Norris about his performance and attitude. For the most part, this is disputed by Norris.

The events that precipitated the termination of the employment relationship occurred on November 4, 1997 when, according to Norris, he called in sick for the following day, which was a Wednesday. He called the Employer around 11:00 p.m. The Employer is concerned about the timing of the call because it needs to know by 3:00 p.m. if they need to load the driver's truck or make other arrangements. The following day, November 5, Norris says he telephoned Ken Sakara, the Employer's operations manager, and said that he would not be in for two days, *i.e.*, until Friday. There is some dispute over the contents of this conversation. In its written appeal, the Employer says that Norris said that "maybe" he would be at work Friday. Sakara, who gave evidence for the Employer at the hearing, could not recall exactly what was said during this telephone conversation. Sakara, however, agreed in cross-examination that Norris told him that he would be back Friday--but that he expected a call the next day.

Subsequently, also on November 5 and 6, the Employer left two messages on Norris telephone answering machine. These messages asked Norris to contact the employer and to bring a doctor's note with respect to the reason for not being at work. Norris agrees that he did receive the two messages. However, he explains that he heard them too late to respond to them.

Norris came to for work on November 7, a Friday, at which time there was no work for him to do--his truck was not loaded. Norris went in to see Johnson who told him that Sakara was not sure if he would show up for work on the Friday. Norris understood that things would be back to normal on the following Monday. It was his understanding that Johnson "would take care of it". He also understood the lack of work on the Friday as being the result of mis-communications between himself and Johnson.

When Norris came to work the following Monday, the truck again was not loaded. According to Norris, he went in to see Johnson who said that he had not told Sakara that he would be coming in on Monday. He also explains that he telephoned Sakara and was told by him that he did not know Norris would be in. There was either one or two telephone conversations between Norris and Sakara that day. During these, Norris says, Sakara told him that "he'd had enough, to call it quits from here, and not to bother to show up for work anymore". Sakara says that he did not use the word "fire" in connection with Norris. He agreed that he could "see himself" saying that "I've had enough". He states that he would not have terminated Norris without speaking with Johnson.

It is common ground that Norris did not go to work the next day. As well, he did not contact the Employer. However, on that day, Johnson telephoned Norris and offered him two weeks of employment in the warehouse, *i.e.*, not as a driver. Norris agreed that Johnson called him and offered him work in the warehouse but not that he had quit. After the conversation with Johnson he contacted the Employment Standards Branch for advice and filed the complaint.

On the balance of probabilities, I am not satisfied that Norris resigned from his employment. At best, the Employer's evidence in support of the proposition that Norris resigned was equivocal. In my view, the Employer's conduct is more consistent with Sakara having told Norris that "he should not bother to come to work anymore" and that an reasonable person in the circumstances could well take it from that statement that he had been terminated. Sakara is a manager with the Employer. He may not have the actual authority to fire, as was Johnson's evidence. Norris assumed that he had the authority. In my view, the Employer terminated Norris' employment, perhaps without actually intending to do so. The subsequent offer to Norris came too late to be of any assistance to the Employer, having already terminated his employment.

In the result, the appeal fails.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated June 19, 1998 be confirmed in the amount of $891.37, together with such interest as may have accrued pursuant to Section 88 since the date of issuance..

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal