

An appeal

- by -

Harry Simon
("Simon")

- 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: Mark Thompson

FILE No.: 2001/330

DATE OF HEARING: September 7, 2001

DATE OF DECISION: October 11, 2001

DECISION

APPEARANCES:

Ray Lallier	For Dominion Steel Ltd.
Harry R. Simon	For himself

OVERVIEW

This is an appeal by Harry R. Simon (“Simon”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) against a Determination issued by a delegate of the Director of Employment Standards on April 6, 2001. The Determination found that Simon was not entitled to compensation for length of service after his employment with Dominion Steel Ltd. (“Dominion”) ended on December 8, 2000 because Simon had quit his employment. Simon argued that he had been terminated without cause. Both parties agreed that, if Simon’s appeal were successful, he would be entitled to compensation for length of service of one week’s pay.

ISSUE TO BE DECIDED

The issue to be decided in this case is whether Simon was terminated from his employment without cause.

FACTS

Simon was employed by Dominion as a forklift operator from April 12, 2000 until December 8, 2000. Dominion has about 15 employees at the location in question. According to Simon, his instructions from senior management were to bring any problems to their attention. On December 7, he had a problem with another worker and informed Bryan Gardner (“Gardner”), his supervisor. The Determination stated that Simon alleged that another employee, evidently Blake Patterson (“Patterson”), threatened him. About 30 minutes later, Gardner returned and told him that Patterson said that Simon was not “holding up your end,” and Patterson had trouble getting along with him. Simon then said, “I guess I should go home,” and Gardner replied, “Yes, I think that would be a good idea.” Simon left the premises, taking his coat, his lunch and his keys to the building. His time sheets remained in his locker. He left his coveralls, which were Dominion’s property, in the locker. Apparently, he told a fellow employee to pick up his time sheets from his locker on December 8, but there was no direct evidence on that point.

Simon testified that he telephoned the Employment Standards Branch from home, and he was told to contact Dominion the next day. He left at least one telephone message for Gardner between 8:45 and 9:00 a.m. the following day, December 8. Gardner did not return the call. About 10:10 a.m. Ray Lallier (“Lallier”) called Simon and told him that his final pay cheque was ready. The separation slip and Report of Earnings listed the termination as a quit. Simon told

Lallier to send the cheque to him through another employee, with whom Simon normally drove to work. Simon called Gardner again and said that he had not quit his employment, and Gardner told him he would have to file a complaint (presumably under the *Act*). The other employee gave Simon his cheque and returned Simon's keys to Dominion's building to management. Simon testified that he never called senior management of the company because Gardner was his immediate supervisor.

Gardner stated that he meant that Simon should go home on the morning of December 7. Simon was in an emotional state and had had problems with Patterson before. When Simon did not come to work on December 8, he concluded that Simon had resigned.

Lallier testified that he learned of the events in question from Gardner and told him to make notes. He did not tell the other employee to take Simon's time sheets from his locker. He found the time sheets on his desk and made up the cheque at 8:40 a.m. and asked the other employee for Simon's keys. He was certain that he would have taken longer to process the matter if Simon were being fired because of the possible liabilities to the company arising from a dismissal. Lallier did not speak to Gardner (or Simon) before issuing the cheque.

Gardner testified that Simon had given cause for termination. The situation with Patterson was not going to change, as there was a lot of animosity between them. The event of December 7 was the first encounter between them that had come to his attention, but he believed there had been other incidents. Later he spoke to Patterson and did not have further problems with him.

ANALYSIS

The Tribunal has faced the question raised by this case, determining whether or not an employee quit his position on a number of occasions. The Tribunal's position is well stated in *Burnaby Select Taxi Ltd. and Zoltan Kiss*, BC EST #D91/96 as follows:

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 must form an intent to quit; objectively, the employee must carry out some act inconsistent with his or her further employment.

This general principle was explained further in *Lordco Parts Ltd.* BC EST #D005/97:

A quit has both a subjective and objective element. The subjective element requires an intention by an employee to terminate his employment. The objective element requires that the employee do some act, which may include a verbal statement, which confirms the intention to quit.

Many of the previous decisions of the Tribunal involved situations in which an employee stated that he or she was quitting his or her employment and then reconsidered that decision. See *Dunn's Automatic Transmission Ltd.* BC EST #D394/97 (decision upheld in BC EST

#D064/98); *Burnaby Select Taxi, supra*. In this case, Simon never told Dominion that he wanted to quit. He merely suggested that he should go home after his argument with Patterson. He denied in his complaint under the *Act* and in his testimony to the Tribunal that he had ever intended to quit. He left the building carrying the keys, not the action of an employee intending to quit. Nor did he turn in his time sheet. He telephoned the Employment Standards Branch to ask about his rights. On the other hand, he did not appear for work the following day, an action that might be a sign of his intention to quit, fact on which the Determination relied. He also asked a fellow employee to turn in his time sheet. However, he called his supervisor, Gardner, at least once, that day to ask about his status, again not the action of someone who wanted to quit his employment.

Gardner testified first that he intended just to send Simon home on December 7. He also stated that he believed that Simon had given cause for termination for cause, a statement that arose in the Tribunal hearing for the first time. This would explain the rapid action by Dominion to issue a Report of Earnings. Gardner saw Simon's willingness to go home on December 7 and failure to report for work on December 8 as an opportunity to sever the employment relationship. No one explained the circumstances to Lallier, who acknowledged that he would have taken more care if he had believed Simon was being discharged.

Overall, the facts of this case do not meet the tests of the Tribunal for establishing that Simon quit. Neither the subjective nor the objective elements were present. There was no "clear and unequivocal" evidence to support the conclusion that Simon had quit. The evidence was ambiguous at best. Subjectively, Simon was firm throughout the proceeding that he did not intend to quit. He left the building with his keys and called Gardner shortly after the commencement of the working day, both actions more consistent with his expectation that he would continue to work for Dominion than an intention to quit. Objectively, Simon's only act consistent with an intention to quit was his apparent instructions to another employee to turn in his time sheet. That action could also be construed as an acknowledgement that he has been discharged.

ORDER

For these reasons, I order that the Determination of April 6, 2001 be cancelled, pursuant to Section 115 of the *Act*. Simon is entitled to compensation for length of service, and the Director shall calculate the exact amount, including interest, pursuant to Section 88 of the *Act*.

Mark Thompson
Adjudicator
Employment Standards Tribunal