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 -

Wayne Blackburn
("Blackburn")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	Lorne D. Collingwood
FILE NO.:	98/571
DATE OF HEARING:	November 20, 1998
DATE OF DECISION:	December 16, 1998

DECISION

APPEARANCES

Ron Willson	Representing Northwest Drywall
Wayne Blackburn	The Appellant
Susan Blackburn	Assisting W. Blackburn
Robert Cove	Witness

OVERVIEW

Wayne Blackburn ("Blackburn") appeals, pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), a Determination by a delegate of the Director of Employment Standards dated July 16, 1998. The delegate found no evidence of constructive dismissal but rather that Blackburn simply quit his job at Northwest Drywall and Building Supplies Ltd. ("Northwest" or "the employer") and that, as such, he is not entitled to compensation for length of service.

ISSUES TO BE DECIDED

Blackburn refused to deliver a load of drywall materials despite being ordered to do so. Northwest suspended him for two weeks for insubordination. On appeal, Blackburn complains that the suspension was arbitrarily imposed and unfair given his sore back.

The employment relationship was then severed. The delegate's stated reason for concluding that Blackburn had quit, is (grammar and spelling corrected) that "asking an employer for a Record of Employment ("ROE") will mean that an employee no longer wishes to work for the employer". According to Blackburn, he never said that he was going to quit. He says that he only requested an ROE because he needed money and planned to apply for Employment Insurance for the period of the suspension. Northwest, on the other hand, says that all it did was suspend Blackburn and that, on suspending him, Blackburn asked for his ROE and, with that, nothing more was heard from the employee, that is, until the Complaint.

FACTS

Blackburn was hired by Northwest as a swamper. He proved to be a good worker. Indeed, he was, in 1995, the most productive of Northwest's employees and for that he was given a bonus of $150 in Safeway vouchers. He was later promoted to the position of driver.

Northwest is a supplier of drywall, related hardware, pointing and taping supplies, and wall finishing products. Its customers are construction contractors. They expect Northwest to deliver supplies as and when they are needed for work. There is, as a result, the occasional need for employees to work overtime at Northwest. Blackburn knew that.

At or near the end of his shift on Wednesday, the 26th of March, 1997, Blackburn returned to Northwest and he was met by Ron Willson, General Manager of Northwest. Willson told Blackburn that he had an order of joint filler for him to deliver to Ben's Drywall and that it had to go that afternoon. It would have meant that Blackburn would have worked about an hour's overtime but he never made the delivery. Blackburn complained of a sore back. (Joint filler comes in boxes that weigh about 20 kilograms.) Willson had no other driver available for the job and he insisted that the employee make the delivery. Blackburn refused to do that and left. Willson, an older man with bad knees and a bad back, made the delivery himself that day, outside of his regular office hours.

Blackburn tells me that he was ready and able to work the next day, Thursday, the 27th of March, but was told not to report for work. Friday, the 28th, was a statutory holiday and Northwest was closed for the day. Northwest was closed for the weekend. On Monday, the 31st of March, Blackburn reported for work and he was taken aside by Willson. Willson told him that he was suspended for two weeks. That angered Blackburn. He, without explanation, demanded an ROE. Northwest understood that to mean that he was quitting.

An ROE was prepared. At Box 19 of the document, where the employer is asked to indicate why the ROE is being issued, Northwest put "E", which is to indicate that Blackburn quit. It could have put, but did not, an "M", which indicates discharge, or "K" which stands for "other". A "K" would cover suspension. Blackburn noticed that he was listed on the ROE as having quit. He did nothing about that. There was no further communication between the employer and the employee and the employment relationship was terminated.

Blackburn complains that his suspension was arbitrarily imposed. I am not provided with evidence which confirms that.

Blackburn also complains that his suspension is unfair in that he injured his back. Willson indicates that he never believed that Blackburn had a sore back, only a second job to go to. The evidence does not confirm that the employee had a sore back, or show that his health was at risk. Indeed, the evidence is to the contrary. He did not see a doctor, even though he knew that company policy required that of him in the case of an injury. And the evidence is that if Blackburn did have a sore back it quickly improved. Blackburn himself tells me that he was ready and able for work the next day. Beyond that it is established that Blackburn did have a second job and that it had him delivering pizza on Mondays, Wednesdays and Fridays. There was no conflict between Blackburn's second job and making the delivery for Northwest to Ben's Drywall.

ANALYSIS

It is an employer's right to determine how its business will be conducted. Where an employee disobeys an order to perform work, the employer may terminate the employee for insubordination, so long as the work which the employee is directed to perform is not contrary to the law, dishonest, dangerous to the health of employees and within the ambit of the job for which the employee was hired [Stein v. British Columbia (Housing Management Commission), BCCA (1992), 65 BCLR (2d) 181]. An employer may not, moreover, require excessive hours of work or work which is detrimental to an employee's health (section 39 of the Act).

> *39 Despite any provision of this Part, an employer must not require or directly or indirectly allow an employee to work excessive hours or hours detrimental to the employee's health or safety.*

Blackburn complains that his suspension was arbitrarily imposed and unfair in that he had a sore back. The first of his allegations is not supported by evidence and neither is the second.

There are four questions to ask in considering whether an employee could rightfully refuse work for reason that his or her health was at risk [Steel Co. of Canada Ltd. (1973), 4 L.A.C. (2d) 315 (Johnston)]. They are:

1. Did the employee honestly believe that his health or well being was endangered?
2. Did he communicate this belief to his supervisor in a reasonable and adequate manner?
3. Was his belief reasonable in the circumstances?
4. Was the danger sufficiently serious to justify the particular action he took?

With nothing to confirm a sore back, or risk to health, the fact that the employee did not seek medical attention, combined with the fact that he was ready and able for work the next day, leads me to conclude that Blackburn's health was very likely never endangered. Nothing establishes that he faced a danger which was so serious as to justify his refusal to make the delivery to Ben's Drywall. From what I am told, I find that Blackburn was simply insubordinate and Northwest had just cause to terminate his employment.

The liability to pay compensation for length of service stems from sections 63 (1) and (2) of the Act.

> *63 (1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.*
>
> *(2) The employer's liability for compensation for length of service increases as follows:*

> *(a) after 12 consecutive months of employment, to an amount equal to 2 weeks' wages;*
> *(b) after 3 consecutive years of employment, to an amount equal to 3 weeks' wages plus one additional week's wages for each additional year of employment, to a maximum of 8 weeks' wages.*

The liability to pay compensation for length of service is discharged if the employee is given written notice of termination, given a combination of written notice and money, or terminates the employment, retires, or is dismissed for just cause [section 63 (3)].

Northwest decided that it would merely suspend Blackburn. Termination occurred, according to the delegate, when Blackburn quit and she found that he was not constructively dismissed. Blackburn does not appeal the latter conclusion, he just says that he did not quit. Did he quit, or did he not? If he did not, then compensation for length of service is owed unless Northwest can establish that it had just cause to terminate his employment.

The right to resign is personal to the employee. An employer may not deem that an employee has quit. There must be clear, unequivocal facts which show the employee voluntarily exercised his or her right to quit. Moreover, that is considered to have both a subjective and an objective element. Subjectively, the employee must form the intention to quit and, objectively, he or she must act in a way, or demonstrate conduct, which is inconsistent with the continuation of the employment *[Burnaby Select Taxi Ltd. and Zoltan Kiss*, (1996), BC EST #D091/96].

It is very often the case, where it is alleged that an employee quit, that the employee actually announces that he or she is quitting. The matter then becomes one of deciding whether or not the employee then carried out the quit. Where, as here, there is no statement which clearly informs of the intention to quit, it may be inferred where there is an act or conduct from which it may be implied that the employee fully intended to resign.

The delegate has, as I understand her Determination, decided that, just through asking for an ROE, there was expression of the intention to quit. Yet it is apparent to me that an employee can ask for an ROE and not have a plan to resign. Blackburn's stated reason for asking for an ROE is one of a number of reasons why an employee might request an ROE. One may not, on the basis of a request for an ROE alone, conclude that the employee has formed the intention to quit. The delegate is wrong in that regard. However, that is not the end of this matter.

All facts considered, I reach the same ultimate conclusion as the delegate, that Blackburn quit. It was Blackburn's conduct alone that led to his termination. Northwest could have terminated him but it decided to suspend him instead. On being suspended, Blackburn asked for an ROE, angry and without explanation. Because of that, Northwest was led to understand that he was quitting. The ROE reflects that. And the ROE indicates that it is

not for reason of discharge. Yet on seeing the ROE, Blackburn chose to do nothing. That conduct leads me to find that it was his intention to resign. Had he not planned to quit, then it is likely in my view that he would have been moved to tell Northwest that it was in fact his intention to resume work. And it is unlikely, given his stated need for money, that he would just accept an ROE that had him listed as a quit, given that an employee who just decides to quit is not entitled to Employment Insurance benefits, at least immediately. All considered, I am satisfied that there are clear and unequivocal facts in this case which show that Blackburn formed the intention to quit. The quit was then carried out, if not when he failed to act on the ROE, then certainly when he failed to report for work at the end of the suspension.

I find in this case that the liability to pay compensation for length of service has in this case been discharged.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated July 16, 1998 be confirmed.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunals