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 -

Thompson Foundry Ltd.
("Thompson")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	Lorne D. Collingwood
FILE NO.:	98/654
DATE OF HEARING:	December 15 1998
DATE OF DECISION:	January 13, 1999

DECISION

APPEARANCES

Mike Thompson	For Thompson Foundry Ltd.
Bob Milward	Assisting Thompson
Dorothy Thompson	President, Thompson Foundry

OVERVIEW

Thompson Foundry Ltd. ("Thompson", also "TF") appeals, pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), a Determination by a delegate of the Director of Employment Standards dated October 1, 1998. The Determination is that Thompson must pay Joffre Banbury compensation for length of service as provided by section 63 of the *Act*.

ISSUES TO BE DECIDED

The issue is the matter of whether or not the employer's liability to pay compensation for length of service is discharged. Banbury was absent from work for a period of months. The delegate awarded compensation for length of service on finding that the employee was absent for reason of illness and that he never resigned. On that latter point, the delegate found, Banbury "indicated in his submission that he never quit (his) employment, therefore there can be no 'intent to quit'", and also, no action by Banbury that is inconsistent with continuing his employment. The delegate noted,

> "… TF gave Banbury an ultimatum – respond to our letter or "you have severed relations with Thompson Foundry". In fact this ultimatum was given to Banbury on April 24, 1997, then again in September 18, 1997. During this time period TF was well aware that Banbury was off on a medical claim. This is evidenced by the notes and records kept by them. It is not until the disability claim expires on October 19, 1997 that TF sends the final letter to Banbury indicating "We … are hereby terminating your employment with Thompson Foundry" (the delegate's emphasis). Such a letter would be unnecessary if in fact Banbury had quit. Why terminate an employee who had previously quit? …"

In making its case to the delegate, the employer went so far as to say that, if it is the case that Banbury did not quit, "a job is available for Mr. Banbury if he will work, and if he will not work …, then (that) confirms that Mr. Banbury voluntarily quit …". On that the delegate concluded,

> "This offer to employ Banbury comes 13 months after his last day of work. Also, it comes after three letters to Banbury indicating to him that he is no

> longer employed. Certainly, if there was any doubt in the mind of Banbury prior to the October 20, 1997 letter, that letter made the position of the company clear with the words "are hereby terminating you employment". The employer has offered no evidence to show (that) it continued to try and contact Banbury after this letter. This is contrary to their actions after the first two letters. This created a subjective and objective element to the termination. Subjectively they created an intent to terminate Banbury as indicated by the two previous letters. Objectively, they sent the letter of termination, October 20, 1997, and had no contact with Banbury thereafter."

Thompson on appeal argues that it had just cause to terminate the employee but that it did not terminate him: The employee quit. It argues that, as the employee had been absent for almost 6 months and had never properly explained his absence, it was entitled to demand that Banbury say whether it was his intention to return to work or quit. And, it claims, the fact that Banbury did not respond to its letter of October 20, 1997, even though it said that no response would be taken to mean that he had decided to resign, shows that in fact he had decided to resign. Thompson says that it did not want to lose Banbury as an employee: It valued him. According to the company, that is why it advised the delegate, on learning that Banbury was in fact seriously ill, that he could resume work as a moulder if that is what he wanted to do. On appeal, the employer advises me that it is to this day quite willing to employ Banbury.

Nothing has been heard from the employee on the appeal. For the purpose of deciding the appeal, I have relied on two submissions that he made to the delegate.

FACTS

Thompson Foundry is a manufacturer of industrial castings. Joffre Banbury began work for the company on the 29th of June, 1988. He proved to be a good worker and while in the employ of Thompson he completed an apprenticeship as a moulder. His work as a moulder was satisfactory and, as he was one of four moulders employed by Thompson, he was a key part of its labour force. Thompson tells me that moulders are in short supply as few people pursue the trade. Thompson to this day is still short a moulder.

Banbury worked Friday, the 4th of April, 1997. He was to be at work on Monday, the 7th of April but he failed to show up for work. And he did not call in, even though he knew that Thompson expected that of its employees. Thompson telephoned Banbury that day. It got his answering machine and left the message that he should call in to work. Nothing was heard from Banbury.

Banbury's unexplained absence from work continued. And Thompson made several attempts to contact the employee. Finally, on attempting to call him on the 14th of April, it reached Leslie, a person Thompson describes as Banbury's girlfriend. She said Banbury was ill and that she would have Banbury call them back.

Nothing had been heard from Banbury by the 24th of April. Short one of its moulders, and frustrated at the lack of an explanation for that, Mike Thompson sent Banbury a letter dated that day. It said,

> "If we do not receive any contact with you by April 30, we well take this as an indication that you have severed relations with Thompson Foundry, and that you have voluntarily quit your employment with Thompson Foundry".

Banbury telephoned Thompson the very next day. He explained that he was ill and that he would send along a note from his doctor which would confirm his illness. That note was never sent to Thompson. Acting on Banbury's word, Thompson did arrange a start to wage indemnity payments due under the company's MSA/BC LIFE extended benefits plan.

On the 14th of May, John Strini, a Thompson employee, paid a visit to Banbury. He told Banbury that he should call Thompson as it had indemnity cheques for him and a doctor's form for him to fill out for the purpose of the wage indemnity. Banbury made no attempt to contact Thompson. Thompson decided to mail the form and the cheques to him.

On the 21st of August, Thompson placed a telephone call to Banbury and it succeeded in speaking with him. Thompson asked him to explain his absence. Banbury said that he was under psychiatrist's care and receiving medication.

Thompson again did not receive any confirmation of Banbury's illnesses. It made three more attempts to talk to Banbury in September, all without success. Then, on the 18th of September, 1997, Thompson sent Banbury another letter, what the delegate calls "an ultimatum". It is in part as follows:

> "Since it will soon be 6 months since you worked here, we need to review your continued employment here at Thompson Foundry. We request that you contact us as soon as possible with a note from you doctor as to the specific date we can expect you to return to work.
>
> If we do not receive any contact with you by September 23, we will take this as an indication that you have severed relations with Thompson Foundry, and that you have voluntarily quit your employment with Thompson Foundry."

The letter was sent by courier and accepted by Banbury. Unlike the letter sent in April, there was no response to this one.

On the 14th of October, BC LIFE wrote Banbury with a copy going to Thompson. The letter warns that as yet it did not have a completed "Attending Physician's Statement" and that one was required for consideration of any further benefits. BC LIFE stated that unless the form was received by November 12, 1997, his claim would be closed.

Another letter was sent by Thompson to Banbury on the 20th of October. That letter is as follows:

> "On September 18, 1997, we sent you a letter by courier, with the following: "If we do not receive any contact with you by September 23, we will take this as an indication that you have severed relations with Thompson Foundry, and that you have voluntarily quit your employment with Thompson Foundry.
>
> We have not received any contact with you as of October 20, 1997, and are hereby terminating your employment with Thompson Foundry."

The letter ends with the statement, "If you have any information that may cause us to reconsider this decision, contact us as soon as possible."

On the 21st of October, Thompson sent Banbury a letter which advised him that his medical, dental and extended care benefits would cancelled as of the end of October and that his group insurance coverage would end on the 30th of November. And along with the letter was sent an ROE, with the stated reason for it being that the employee quit, and a cheque for all of the vacation pay due Banbury. There was no further contact and the cheque was cashed.

Months later, the delegate showed Thompson documents that made it clear that Banbury was suffering from severe depression and that it was only on the 22nd of January, 1998 that his doctor said that he could resume gainful employment. On seeing that, Thompson immediately wrote the delegate and said that Banbury was welcome to resume his work at its foundry if that is what he wanted to do. On appeal, Thompson again states that it still has a job for Banbury if only he will take it.

ANALYSIS

Section 63 of the *Act* sets out that employers are liable for compensation for length of service where employment is beyond 3 consecutive months. That section of the *Act*, at subsection (3) goes on to set out the circumstances under which that liability can be discharged.

(3) The liability is deemed to be discharged if the employee;
- (a) is given written notice of termination as follows:
  - (i) one week's notice after 3 consecutive months of employment;
  - (ii) 2 weeks' notice after 12 consecutive months of employment;
  - (iii) 3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice;
- (b) is given a combination of notice and money equivalent to the amount the employer is liable to pay, or

(c) terminates the employment, retires from employment, or is dismissed for just cause.

I am satisfied that in this case, the liability to pay compensation for length of service was discharged. When I consider what is probable in this case, or least possible, I find that it is either that the employee quit or it is that the employer terminated the employment with just cause.

It is acknowledged that the right to quit is a personal right of employees. An employer may not deem that an employee has resigned. 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), BCEST #D091/96].

The employee denies that he quit, but that does not preclude formation of the intent to quit. An employee may not actually state that it is his or her intention to quit but nonetheless demonstrate conduct or act in a way which, by implication, plainly and clearly shows that they decided to resign. In such cases, formation of the intent to quit must be inferred.

There are facts in this case which, in normal circumstances, would plainly and clearly imply that the employee decided to quit. Thompson's letter of the 24th of April led to an immediate response from Banbury, yet there was no reply to the letter of the 18th of September even though that letter, like the first, made it perfectly clear that Thompson would take no response to mean that Banbury had quit. The employee also accepted his ROE. And he cashed his final cheque. On the other hand, the evidence points to an employer that patiently waits for the employee's return even though it never receives confirmation of an illness, as an employer can in most cases expect.

Yet it is conceivable that, for reason of illness and the treatment for it, the employee simply could not collect himself to the extent that allowed him to inform Thompson of his absence, to respond to its letter of September 18 and, even, to form the intent to quit. There is, in other words, the possibility that he did not quit prior to Thompson's letter of the 20th of October.

In the October letter, Thompson stated that it was terminating the employment. I am convinced that Thompson had by that time concluded that Banbury had quit and that, while it speaks of termination, all that the employer really meant was that it was proceeding to wind things up, cancelling benefit plans, preparing the employee's final pay cheque, sending out his ROE, that sort of thing. Certainly, the employer had good reason to think that the employee had quit. Yet the delegate's conclusion is that termination occurred not through Banbury's unexplained failure to respond to Thompson's letter of September 18, but with Thompson's letter of October 20, and that remains a possibility. If it was Thompson that ended the employment, What then?

Banbury had never properly explained his absence. Thompson had no way to determine and had not been told when the employee would return. And by October, Thompson had been without a key part of its labour force for more than 6 months. Even where the employee is not at fault in such circumstances, the employer has just cause to terminate the employment. The underlying reason for discharge in cases of innocent or blameless absenteeism was set out long ago in Seiberling Rubber, 20 L.A.C. 267, at 275 (Weiler, 1969). It is as follows:

> "… An equally lengthy series of cases has held that blameless illness or other physical condition which prevents an employee maintaining an adequate attendance record can be ground(s) for discharge, in the sense of termination of the contract of employment. ... The theory behind these cases is that an employer who is in a contractual relationship with an employee is entitled to the benefit of his bargain. Regular absenteeism of an employee involves significant costs to an employer – eventually far outweigh the benefits he gets from paying the employee. Although an employee may be perfectly innocent of his absences, there is no reason why his employer should be forced to bear such unusual costs for an extended period of time. Hence, discharge may be appropriate, not as a form of discipline or punishment, but rather as a simple severance of the employment relationship."

In summary, it is either that the employee quit on not responding to the employer's letter of September 18, 1997 or that termination was later, in October, and by the employer. But if it is the latter, it is clear to me that, for reason of excessive although blameless absenteeism, there was a serious breach of the employment contract such that the employer had just cause.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated October 1, 1998 be cancelled.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal