Employment Standards TRIBUNAL

An appeal

- by -

N.M.V. Lumber Ltd.
("N.M.V.")

- 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: David B. Stevenson

FILE No.: 2001/493

DATE OF HEARING: October 26, 2001

DATE OF DECISION: October 31, 2001

DECISION

APPEARANCES:

on behalf of N.M.V. Lumber Ltd.	Sukhdev Sandur
on behalf of the individual	In person

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by N.M.V. Lumber Ltd. ("N.M.V.") of a Determination that was issued on June 8, 2001 by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded that N.M.V. had contravened Part 5, Section 45 and 46 and Part 8, Section 63 of the *Act* in respect of the employment of Dennis James Meeker ("Meeker") and ordered N.M.V. to cease contravening and to comply with the *Act* and to pay an amount of $1,574.04

N.M.V. says the Determination is wrong because Meeker quit his employment.

ISSUE

The issue raised in this appeal is whether N.M.V. has shown Meeker quit his employment and consequently lost entitlement to length of service compensation.

THE FACTS

Neither party presented any evidence at the hearing. Both were content to rely on the findings of fact made in the Determination. The thrust of the appeal was whether the facts were properly interpreted.

By way of background, the Determination noted that Meeker was employed by N.M.V. as a truck driver from July, 1999 to November 21, 2000 at a rate of $138.00 a trip. The Determination set out the following findings of fact:

1.) There were discussions held between Meeker and the employer on November 20, 2000 in regard to changing the oil on the truck.

2.) Meeker had been instructed to change the oil by the employer to do an oil change on the truck before it was driven out of the yard.

3.) Meeker did not drive the truck on the regular trip the evening of November 20, 2000.

4.) Meeker appeared for work on November 21, 2000 prepared to do the oil change and was advised by the employer that the employer considered that he had quit the night before when he had not taken the loaded truck out of the yard and do the deliveries.

The Determination concluded the employer had not shown Meeker had quit and consequently had not discharged its liability under Section 63 of the *Act*.

It is also common ground that the November 20, 2000 discussion was interrupted by a customer. Mr. Sandur told Meeker to go get a cup of coffee and come back when the customer had left. Instead, Meeker went home. The following morning, Meeker returned work. During the investigation there appears to have been some dispute about what had transpired on the morning of November 21, 2000. Initially, N.M.V. said Meeker came into the office that morning and asked for his final pay, holiday pay and Record of Employment. Meeker disputed this assertion, and provided the version of events that was accepted and included in the Determination. The appeal submission includes the following paragraph in its statement of facts:

> At approximately 9:00 am on November 21, 2000 Mr. Meeker arrived at work ready to do the oil change. I asked Mr. Meeker what happened to you yesterday. He replied, I went home and called the Labour Relations office and told them of my situation regarding oil change and servicing. Mr. Meeker told me that the Labour Relations Board advised him that the oil change and servicing was part of his job description. Then Mr. Meeker said he is there now to do the oil change. I advised him that by not following my directives or returning to see me the previous day, not changing the oil and not delivering the load of lumber that he had resigned. After this discussion, Mr. Meeker asked the office staff person for his final pay, holiday pay and record of employment.

During the investigation, an Employment Insurance Board of Referees dismissed an appeal by Meeker from a denial of unemployment insurance benefits. The Board of Referees found that Meeker had quit his employment. In a letter dated April 30, 2001, N.M.V. was told by the Director that decision was not determinative of a claim for length of service compensation under the *Act*.

ARGUMENT AND ANALYSIS

The Determination accurately set out the applicable principles for deciding whether an employee had quit employment and, as a result, had lost entitlement length of service compensation under Section 63 of the *Act*. The Director was correct to advise the employer that the conclusion reached by the Board of Referees, while interesting, was not determinative of Meeker's complaint under the *Act*. The Board of Referees administers an entirely different statutory scheme than what is administered by the Director. As noted by the director, the provisions of the *Act* govern the complaint, not federal employment insurance legislation or decisions made under such legislation.

The default position in the *Act* is that employers are liable to pay length of service compensation on termination of employment to every employee who qualifies under subsection 63(1). That liability is deemed to be discharged in the circumstances outlined in subsection 63(3). The relevant part of that provision for the purpose of this appeal is subsection 63(3)(c), which states:

63 (3) The liability is deemed to be discharged if the employee
(c) terminates the employment, retires from employment, or is dismissed for just cause.

In *Re Emond and Kirrmaier (c.o.b. as BJ's Restaurant and Rentals)*, BC EST #D182/00, the Tribunal said the following about length of service compensation provided in Section 63 of the *Act*:

> Length of service compensation is, from the employee's perspective, a statutory benefit earned with continuous employment. It is a minimum statutory benefit. From the employer's perspective, it is a statutory liability that accrues to each employee with more than 3 consecutive months of employment. While length of service compensation is often referred to as "termination" or "severance" pay, it is related to termination only to the extent that a termination of employment, actual or deemed, triggers the benefit or liability, depending on the perspective. Subsection 63(3) identifies three circumstances where the statutory liability of the employer to pay length of service compensation is deemed to be discharged: first, if the employee is given written notice of termination equivalent to the employer's statutory liability to the employee; second, if the employee is given a combination of notice and compensation equivalent to the employer's statutory liability to the employee; and third, if the employee terminates the employment, retires from employment or is dismissed for just cause. It should be pointed out that while the Act uses the phrase "terminates the employment" in paragraph 63(3)(c), that phrase captures circumstances that are more commonly described as quitting or abandoning employment.

There is no dispute that Meeker's employment was terminated. No notice was given. Meeker is entitled to the length of service compensation and N.M.V. is liable to pay length of service compensation unless they are discharged from the statutory liability for the reasons set out in subsection 63(3)(c) of the *Act*.

The question in that regard is whether Meeker quit his employment. There is no issue about whether he retired form employment or was dismissed for just cause. In order to succeed in this appeal, N.M.V. must demonstrate that the Director was wrong to conclude Meeker did not quit his employment.

In deciding whether an employee has terminated, or quit, the employment, the Tribunal has applied the following approach, which was formulated in *Re Burnaby Select Taxi Ltd.*, BC EST #D091/96:

> 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 voluntarily exercised by the employee involved. There is both a subjective and an objective element to a quit: subjectively, the employee must form an intent to quit employment; objectively, the employee must carry out an act inconsistent with his or her further employment. The rationale for this approach has been stated as follows:
>
> > . . . the uttering of the words "I quit" may be part of an emotional outburst, something stated in anger, because of job frustration or other reasons, and as such it is not to be taken as really manifesting an intent by the employee to sever his employment relationship.
> >
> > *Re University of Guelph*, (1973) 2 L.A.C. (2d) 348

The Determination referred to *RTO (Rentown) Inc.*, BC EST#D409/97, which adopted and applied the same principles as are found in the above excerpt.

There is no reason to disturb the Determination. N.M.V. has the burden of showing the Determination was wrong because the Director should have concluded Meeker quit his employment on November 20 or 21, 2000. The facts do not support such a conclusion and N.M.V. has not met its burden. At one level, the act of leaving the workplace on November 20 could be taken as indicating Meeker had quit. That arises from the fact Meeker left the workplace without performing work he had been instructed to complete. The objective element for a quit was satisfied. The circumstances, however, do not support a conclusion that he intended to quit his employment when he left work on November 20. Meeker did not, either on that day or at any other time, state that he was intending to quit. The conclusion reached by his employer was based exclusively on the events of November 20. There was no justification for that conclusion once Meeker came to work on November 21 and indicated he was ready to do the oil change. The Determination also noted the possibility that Meeker's leaving work on November 20 was borne out of a frustration with being denied additional pay for doing what he felt was extra work and, as such, did not support a conclusion his conduct manifested the required intention to quit his employment. There is nothing in the evidence to suggest anything happened on November 21 that would indicate Meeker confirmed an intention to quit his employment. What occurred on November 21 was preceded by Mr. Sandur telling Meeker he viewed his conduct of the previous day as a resignation, or a quit.

It is accepted that Meeker told Mr. Sandur on November 21 that he was ready to do the oil change. The Determination was not wrong in concluding no quit had occurred at the time Mr. Sandur refused to allow Meeker to go to work as he indicated he was prepared to do. While it is

technically correct that Mr. Sandur did not "fire" Meeker, it was, in the final analysis, the position taken by Mr. Sandur on the morning of November 21 that brought the employment to an end, not the conduct of Meeker.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination, dated June 8, 2001, in the amount of $1,574.04, be confirmed, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal