Employment Standards TRIBUNAL

An appeal

- by -

Fretter Design Inc.
(the "Employer")

- 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: Ib S. Petersen

FILE No.: 2001/567

DATE OF HEARING: November 29, 2001

DATE OF DECISION: December 6, 2001

DECISION

APPEARANCES

Mr. Gordon Fretter	on behalf of the Employer
Mr. Doug Carano	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's delegate issued on July 23, 2001. In the Determination, the Director's Delegate found that Mr. Carano did not quit his employment with Fretter Design Ltd., the Employer. The delegate determined that he was entitled to compensation for length of service, $512.05.

The Employer maintains that Mr. Carano quit and that the Delegate erred in her conclusion. That is, in a nutshell, the issue before me.

FACTS AND ANALYSIS

Mr. Carano was employed as a landscape labourer between October 3, 2000 and March 6, 2001.

It is clear to me that events leading up to the termination of Mr. Carano's employment were in dispute. Mr. Fretter testified that he had concerns about Mr. Carano's attitude. Similarly, Mr. Carano had concerns about the way in which Mr. Fretter was conducting his business. I do not need to make any finding because, in my view, the resolution if this case turns on the events which occurred on the last day of Mr. Carano's employment. On my review of the evidence, the material facts were largely not in dispute.

As mentioned, Mr. Fretter had concerns about Mr. Carano's attitude. He agreed that Mr. Carano was at all times a hard working employee. He arranged for the two of them to meet in a coffee shop and prepared a document for his discussion with Mr. Carano. Mr. Fretter spoke with Mr. Carano about his concerns with respect to Mr. Carano's attitude. He said that Mr. Carano then told him: "If that's the way you feel, I'm out of here" and handed him the company keys (for the truck, lock-up etc.). He then left. Mr. Fretter felt that he and Mr. Carano "parted ways." Some weeks later, he received telephone calls from the Delegate with respect to a complaint filed by Mr. Carano.

Mr. Carano agreed that the two of them met in the coffee shop. He said that he told Mr. Fretter that he had concerns about the way "things were going with [him] and the company." However, based on what Mr. Fretter told him, Mr. Carano felt that "[Mr. Fretter] wasn't interested in [his]

services." He said that Mr. Fretter told him that "it was his way or the highway." Mr. Carano then gave Mr. Fretter the company keys and walked out. Mr. Carano explained that he never went back to the workplace, and that he received his final pay cheque some days later. Mr. Carano did not take issue with Mr. Fretter's statement attributed to him "If that's the way you feel, I'm out of here."

First, while the Determination--correctly, in my view--refers to the elements of the test applied in resignation cases, namely the subjective element (the intention to quit) and the objective element (conduct consistent with that intention), she erred in the application of this test. The Delegate stated:

> "[s]ince there were no witnesses to the incident leading up to the ending of the employment relationship and the greater onus is that of the employer to determine (sic.) that the employee 'quit', I have determined that the employer terminated the relationship and that Carano was entitled to compensation for length of service."

In my view, the onus is on the employee to establish that she was dismissed from her employment. The Tribunal's decision in *W.M. Schultz Trucking Ltd.*, BCEST #D127/97 may be read to support an argument that there is an onus on the Employer to prove the clear and unequivocal facts necessary to support a conclusion that the employee quit his employment. However, I agree with the comments of Errico J. of the British Columbia Supreme Court in *Walker v. International Tele-Film Enterprises Ltd.*, <1994> B.C.J. No. 362 (February 18, 1994), at page 17-18:

> "The onus of proof is on Mr. Walker to prove that he was wrongfully dismissed. This is not a case where the defendant employer is raising justification. The issue is whether Mr. Walker left the company on his own volition or whether he was dismissed. Counsel for Mr. Walker cited a decision of the Nove Scotia Court of Appeal in *McInnes v. Ferguson*, (1900), N.S.R. p. 517. This decision holds that the onus lay on the employer where the issue was whether or not the employee left voluntarily, but there is no judicial discussion about it. I have considerable difficulty with this proposition which shifts the onus of proof to the defendant. This is a concern I share with Prowse J., as she then was, who in *Osachoff v. Interpac Packaging Systems Inc*., unreported, Vancouver Registry, April 21st 1992 C910344, discussed this decision and declined to follow it, as I do. In that case, as in this, the onus is on the plaintiff to establish on the balance that he was dismissed."

The Delegate erred when she appeared to place the onus on the Employer to prove that Mr. Carano was dismissed. The onus is on Mr. Carano to show on the balance of probabilities that he was dismissed.

I agree with the adjudicator's comments in *RTO (Rentown) Inc*., BCEST #D409/97, where he notes:

> "Both the common law courts and labour arbitrators have refused to rigidly hold an employee to their "resignation" when the resignation was given in the heat of argument. To be a valid and subsisting resignation, the employee must clearly have communicated, by word or deed, an intention to terminate their employment relationship and, further, that intention must have been confirmed by some subsequent conduct. In short, an "outside" observer must be satisfied that the resignation was freely and voluntarily and represented the employee's true intention at the time it was given."

The material facts are that there was a conversation between Mr. Fretter and Mr. Carano in a coffee shop about the latter's attitude. It is clear that Mr. Fretter did not tell Mr. Carano that he was dismissed or "fired." Mr. Carano returned the Employer's keys and walked out. He did not return to the workplace, nor is there anything to suggest that he contacted the Mr. Fretter to let him know that he wished to return. He simply did not return to work. In my view, that is consistent with a quit.

Second, Mr. Fretter expressed concern about the Delegate and the basis of her Determination. He said that she told him that "they [the Branch, presumably], in the absence of witnesses, always rule in favour of employees." To an extent, his concern is borne out by the quote from the Determination set out above. In my view, the Delegate must properly and fairly consider the evidence of the parties to arrive at a factual basis for her conclusion, including, for example, the credibility of the witnesses. The B.C. Court of Appeal noted in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, at 357:

> ".... the best test of the truth of the story of a witness ... must be its harmony with preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in the place and in those conditions."

I hasten to add that there is no real credibility issue before me. I accept that both Mr. Fretter and Mr. Carano testified in a forthright and credible manner. To decide against the Employer, as the Delegate appears to have done, on the basis that there was "no witnesses to the incident" is improper. It ignores the fact that there were, in fact, two witnesses, namely Mr. Fretter and Mr. Carano. If there were any material factual inconsistencies in their evidence, those issues would need to be resolved. The delegate failed to consider, or properly consider, the evidence before her which, as I noted above, was largely not in dispute. Those material facts were that Mr. Carano returned the company keys to Mr. Fretter, walked out of the meeting, and did not return to work.

Having considered all the circumstances, I am persuaded that the appeal must succeed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated July 23, 20021 be cancelled.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal