

An appeal

- by -

Lynda Feeny
("Feeny")

- 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.: 2003A/202

DATE OF HEARING: November 7, 2003

DATE OF DECISION: January 21, 2004

DECISION

APPEARANCES

Murray G. Madryga, Esq.	on behalf of Lynda Feeny
Gary Nygren	on behalf of O’Ryan’s Tap & Grill Ltd.
Diane Roberts	on behalf of the Director of Employment Standards

OVERVIEW

This is an appeal by Lynda Feeny (“Feeny”) pursuant to Section 112(1) of the *Employment Standards Act* (the *Act*) against a Determination issued by the Director of Employment Standards (the “Director”) on June 6, 2003. The Determination found that Feeny was not entitled to compensation for length of service, overtime and statutory holiday pay because she was a manager under the *Act* and was dismissed for just cause by her former employer O’Ryan’s Tap & Grill Ltd. Operating as Blue Button Club (the “Employer”). Feeny appealed the Determination on the grounds that she was entitled to overtime pay for time worked, that she had not resigned her employment and that the Director had failed to observe the principles of natural justice in making the Determination. Feeny further argued that the delegate was biased against her, but accepted that she was a manager during her term of employment. The Employer argued that Feeny has been discharged for cause and that she was not entitled to overtime pay. Counsel for the Director took the position that Feeny’s testimony was not credible

ISSUE

The issues to be decided in this case are whether Feeny was entitled to pay for all hours worked, whether she was discharged for cause and whether the Director’s delegate was biased in his administration of Feeny’s complaint.

THE FACTS AND ANALYSIS

The Employer operates a bar in Burnaby, B. C. Feeny was employed from November 2000 until February 2002. In her initial complaint, Feeny sought overtime and statutory holiday pay, but at the hearing her counsel acknowledged that she was a manager throughout her period of employment, so she was not entitled to overtime. The Employer paid Feeny for statutory holidays and vacation. Evidence presented concerned the hours she worked and the circumstances of her termination of employment.

Hours of work

According to Feeny, she was hired as the manager of the Employer’s bar and to assist with bookkeeping. A bar manager assigned staff for that operation, ordered liquor and the like. She was told to open the premises each day at 7:30 a.m., clean up and deposit cash from the previous night in the bank. She estimated that the cash took between one and 1.5 hours each day. Another individual, Don Hamilton (“Hamilton”) took care of the cash on her days off.

The nature of Feeney's contract of employment was in dispute. She stated that she was hired as the manager and bookkeeping was added to her duties when another employee was terminated. She and Gary Nygren ("Nygren"), the owner of the business, agreed that she was to work a 40 hour week and would receive time off in lieu for work over that amount. Prior to filing her complaint in February 2002, she had never requested any time off or mentioned her entitlement to anyone else in the organization. Feeney stated that she never took any days off because she did not want any extra time away from the job until January 2002. Nygren denied ever agreeing to compensate Feeney with time off in lieu for overtime work. He further stated that he had not discussed overtime with Feeney prior to her complaint to the Employment Standards Branch.

Feeney testified that she spent most of her time at on bookkeeping tasks, especially entering data on the computer. She had warned Nygren when he hired her that she did not know bookkeeping or the computer program the business used. Because of her inexperience, she worked slowly, especially at the beginning of her employment. Feeney also met with the customers, organised parties and supervised staff. The number of employees ranged from 12 to 18, of which 4 worked in the kitchen, 4 in the bar and 4 did other tasks. She scheduled their work. On Monday nights when a football game was televised, Feeney stayed until the game was over and handed out prizes to the patrons. She did not take a lunch break during the day.

Feeney testified that she began recording her hours worked in a day timer in December 2000. She wrote her starting and finishing times, plus notes about events of the day or reminders to herself about tasks to be completed. The first page of the day timer was lost after she filed her complaint, but the other pages were submitted in evidence to the Tribunal. No one else was responsible for recording her hours.

John Hoffard worked for the Employer since 1993, and he was the bar manager during the events in question. He scheduled staff for the bar, except when he asked Feeney to do this task. Schedules were very stable, so this was not a major function. He ordered liquor. He observed Feeney counting the cash and taking it to the bank each morning, a task that required between 30 and 60 minutes. Normally, Feeney finished work by 4:30 p.m. Occasionally she worked later, but she also left early every two weeks or so. These observations were casual, since he was not responsible for keeping track of Feeney's hours. Tom Clarke also had worked for the Employer since 1993 as a bartender. He also testified that Feeney left the bar between 4:00 and 4:30 and was confident that Feeney was not present 9 hours per day.

Peter Tompkins, an employee of the Employer from September 2001 until January 2002, testified that Feeney was his supervisor. He was a bar tender and usually started work at 11:00 a.m. and finished at 4:00 or 5:00 p.m. Feeney was on the premises when he arrived and still there when he left. He was a friend of Feeney, and she arranged for him to be paid in cash as a casual employee. He did not recall pouring any drinks for Feeney.

Norma Short ("Short") started work for the Employer in August 2002 as the bar manager. She had no computer experience when she started work and took a course with the support of the Employer. As the manager, she made coffee, did the cash for the three departments in the operation, entered sales into the computer bookkeeping system and deposited cash. She normally did her banking by lunchtime and then made up cheques and did the payroll.

Short estimated that depositing cash took 1.5 hours per day, and she spent an equal time working on the computer. She bought cigarettes and groceries, but someone else picked up the liquor. She also decorated the premises for special occasions and made posters. The kitchen and bar managers order food and liquor. She helped the staff when they were busy.

Short stated that she normally could perform her duties in 8 hours per day and take a lunch break. It would be necessary to invent work to take more than the regular workday. She recalled working 10 hours on a day when a wake took place in the bar, but that was exceptional. Short did not believe she was entitled to any time off in lieu of overtime.

Nygren acknowledged that he did not have any direct knowledge of the time Feeney worked. When he was actively involved in the business, he was seldom in the bar for longer periods of time. He did not ask Feeney to work at night, even when a football game was on television. He did not know that she was working overtime until after her termination of employment. He then discussed the issue with the Director's delegate. He regarded the position of manager of the bar as someone who would help out as necessary, not working to a regular schedule.

The only documentary evidence of the hours Feeney worked is her day timer. Short testified that overtime was not necessary for the same position when she held it. No other witness could recall a pattern of Feeney working beyond 4:30 p.m. Similarly, there was not corroborating evidence of her contract of employment. According to the day timer she had worked approximately 400 hours of overtime during her employment.

Feeney argued that, in the absence of other evidence, the notes in her day timer should be accepted as evidence of the hours she worked. Under Section 18 of the *Act*, she was entitled to be paid for all hours worked. Perhaps Short was more efficient as a bookkeeper, but her performance did not detract from the time Feeney worked. In a letter to the delegate, Nygren referred to flexibility in Feeney's hours of work, by which she "was given another day off in lieu of the day worked" if she worked extra hours.

Counsel for the Director argued that credibility was the major issue in this part of the Determination. Other witnesses, Hamilton, Brown, Hoffard and Clarke, all contradicted Feeney on some parts of her evidence.

The Tribunal has accepted employee records of time worked when there was no other evidence available. See *Re Davies*, BC EST #D273/01. In this case, the delegate did not accept Feeney's records as "a useful record to support a complaint for unpaid wages." The basis for his conclusion was the inclusion of other information on the day timer and the pattern of the entries that led him to conclude that the information on hours worked was not made contemporaneously.

Feeney bore the onus of persuading the Tribunal that the Determination was incorrect in its analysis of the evidence. Based on the balance of probabilities, I prefer the evidence of other witnesses to Feeney. Admittedly, her records were the only evidence available. However, the delegate inspected them and concluded that they were not made contemporaneously. I found Short's description of the demands of the position especially instructive. By contrast, Feeney was vague about how she spent her time at work. She claimed to have accrued over 400 hours of overtime without ever taking time off in lieu, as she stated her contract provided, or mentioning the liability to anyone above her in management.

Termination

Initially, Feeney reported to Nygren. In the spring of 2001, Nygren sold at least part of the business to Randy Roziek ("Roziek"). The two had a falling out, apparently in January 2002, and Nygren took control of the business again. Consequently, Nygren did not come to the bar for the period between the sale of the bar and January 2002.

In September 2001, Feeney and Nygren had a falling out. After a telephone conversation, Nygren told Feeney that she was fired. A note from Nygren dated September 25, 2001 stated "Linda your fired maybe 1 day 2 weeks." Feeney recalled that Hamilton delivered the note to her home. Hamilton testified that he had never been to Feeney's residence. Feeney was on Workers' Compensation leave at the time, although she did assist in the operations of the bar from her home. After she recovered from her injury, she returned to her job and worked as before, since Nygren was not active in the management of the enterprise. In his evidence before the Tribunal, Nygren could not recall why he was angry with Feeney.

Feeney took a vacation between January 23, 2002 and February 7, 2002. By prior arrangement, Feeney came to the bar on February 8 to prepare several cheques, which she did in a few minutes. She told one of the managers who was there at the time Bernie Bayer ("Bayer") that she would return to work on February 11, since he could deposit the cash in the meantime. Feeney said that she went home, not feeling well, and went to bed. Bayer came to her house 2-3 hours later and told her that Nygren was back and she might not have a job. At the time, Nygren apparently believed that Feeney had taken \$2500 from the bar receipts improperly. Subsequently, this issue was resolved and was not a factor in these proceedings. But Bayer told Feeney that Nygren believed that she had taken \$2500.

Feeney testified that she called Nygren on February 8, and he told her that he wanted her to show him how to operate the bookkeeping system so he could lay her off. Feeney told Nygren that he owed her pay for overtime worked. Nygren did not reply, but he was angry about an unpaid insurance policy. Feeney, still feeling unwell, called her doctor and asked for an appointment. As she was leaving her residence, Nygren called and said that Scott Brown ("Brown") was at the bar to do an inventory of the liquor in stock. He needed passwords for the computer to do the inventory. At this point, Feeney's evidence differs from other witnesses.

Feeney stated that Brown had the passwords and did not need her help. Moreover, he did not need the passwords to complete the audit. The call ended, and she went to her doctor, who told her not to return to work. Feeney gave a copy of the doctor's note to Bayer.

Nygren testified that his partnership with Roziek ended in January because Roziek was not current in his payments to suppliers or to Nygren. Nygren hired his two daughters to work in the bar, one of whom was to take over some of Feeney's duties. Nygren was uncertain about the date when Feeney was supposed to return to work. Both Feeney and Nygren recalled calling the other on February 8. Feeney stated that she called and asked if she had a job. Nygren said that he told Feeney to help his daughter with the computer, and he would lay her off in two weeks. He asked Feeney for the passwords, and she refused to give them to him, and he fired her. Brown was present for the conversation and may have called Feeney back to ask for the passwords.

He and his daughter wrote a letter of termination to Feeney, signed by Nygren and Bayer. The grounds for termination were her refusal to give them the "codes" for the computer and she had taken \$2500 without leaving a receipt. The letter also stated that she had given money to Roziek without authorisation, and she had an unpaid bar tab of \$914.00.

Brown testified by telephone as the final witness, not having heard any of the previous evidence. In the first conversation on February 8 between Feeney and Nygren, Feeney said that Brown had the passwords in his folder. Brown did not have the folder with him that day, so he called Feeney back, and she had refused to give him the computer passwords. On April 12, 2002, Brown wrote a letter to Nygren describing the events of February 8. He confirmed that Feeney refused to give the passwords to Nygren or to himself. As a result, he was unable to complete his audit.

The delegate reviewed the evidence before him in his reasons for the Determination. His conclusion was that Feeney's actions were not "consistent with those of someone who desired to clarify her employment status, especially someone in a management position." He further concluded that Nygren never sent the termination letter and that the uncertainty about the date of her return to work did not constitute grounds for termination. However, her refusal to provide the computer passwords when asked was insubordination and was cause for termination. Counsel for the Director argued that Nygren fired Feeney as a culminating incident, relying on her previous deficiencies as contained in the letter of termination.

Feeney argued that Nygren had decided to terminate her employment before she returned from her vacation. He had "fired" her the previous September and had already hired his daughters to take over Feeney's work. Feeney denied refusing Nygren's request for the passwords, and the other grounds in the letter of termination were not substantiated.

The evidence before the Tribunal clearly indicates that Nygren had decided to fire Feeney before she returned to work in February. In an emotional outburst, he had already attempted to terminate Feeney's employment the previous September. He had hired his daughters to replace Feeney and told her directly that she would be laid off as soon as she had instructed one or both of his daughters in the performance of her duties. I accept the testimony of Nygren and Brown that they asked Feeney for the computer passwords, and she refused. Feeney admittedly was in an emotional state. Her doctor told her not to report to work a few hours or minutes later. There was no evidence to support a conclusion that Feeney intended to resign. She was concerned about her future employment when she learned that Nygren has regained control of the Employer, but she assumed that she would report to work after her vacation.

Insubordination is a serious offense in the employment relationship. However, a mere act of insubordination is not necessarily grounds for dismissal. The most general principle governing dismissal is that the employer must establish a reasonable standard of performance, inform the employee of that standard, give the employee a reasonable period of time to meet that standard and notify the employee that her conduct will result in termination. (*Re British Columbia (Director of Employment Standards*, BC EST #D122/03. In the more specific cases of insubordination, the Tribunal normally expects that the employee was aware at the time or should have known that the insubordinate act would cause termination if the act of insubordination is the basis for termination. See *Re Lil'Putin' Children's Fashions Ltd.*, BC EST #D320/97.

Bias/Denial of Natural Justice

Feeney appealed the Determination on the grounds that the Director's delegate failed to observe the principles of natural justice in the course of his investigation of her complaint. In particular, Feeney stated that the delegate told her she "had no case" during a telephone conversation early in the investigation. This comment caused Feeney to address her subsequent correspondence to another representative of the Employment Standards Branch. Feeney objected to the adversarial tone in the delegate's letters to her in the course of the investigation. In a letter to Feeney in February 2003, the delegate stated that he had concluded that his original decision denying her complaint should stand, showing that he had prejudged her case. In particular, Feeney claimed that she did not have the opportunity to rebut evidence provided by the Employer, specifically four letters from former or present employees of the Employer concerning Feeney's hours of work.

Feeney testified that her first conversation with the delegate was cordial. Later conversations were less pleasant. He said that he believed Feeney had taken the \$2500 without informing Nygren and he did not

believe her. This left her in tears. She also stated that the delegate also told her that she could not engage a lawyer to represent her.

Counsel for the Director argued that the delegate had acted in keeping with the principles of natural justice. In particular, he provided Feeney with numerous opportunities to rebut the Employer's evidence against her. The delegate was investigating her complaint and made his conclusion based on the evidence before him. The four letters Feeney mentioned were not central to the Employer's case.

After reviewing the written communications between the delegate and Feeney, I do not find convincing evidence that the delegate violated the principles of natural justice or was biased against Feeney. Counsel for Feeney and the Director agreed that an allegation of bias is serious. Consequently, the Tribunal requires that such a finding be based on very clear evidence consisting of objective evidence that demonstrate bias or a reasonable apprehension of bias. *Re Dusty Investments Ltd. (c.o.b. Honda North)*, BC EST #D043/99. The letters written to Feeney were pointed in their tone and perhaps abrupt, but they were also probing and very direct. The substance of the letters reflected the delegate's role as an investigator. In fact, Feeney benefited from the specific nature of the questions, which left her in little doubt as to the evidence and facts the delegate was seeking. Three of the authors of the letters in question testified in these proceedings. I cannot conclude that the questions revealed a predisposition against Feeney's case.

Obviously, I had no evidence of the content or tone of their telephone conversations. I have difficulty accepting that the delegate told Feeney she could not be represented by a lawyer. As counsel for the Director argued, delegates typically welcome the participation of lawyers, who usually are knowledgeable about administrative law. I also note that Feeney was in a difficult emotional state as a result of her encounters with the Employer and may have perceived that the delegate was not interested in her case.

ORDER

For the reasons stated above, I uphold the Determination with respect to Feeney's entitlements under Section 18 of the *Act*. I was not persuaded that Feeney accumulated approximately 400 hours of overtime in slightly more than 13 months of employment. On the balance of probabilities, I conclude that Nygren did not have cause to terminate Feeney, so she is entitled to compensation for length of service under Section 63 of the *Act*. The Determination is varied to provide payment to Feeney as calculated by the delegate. Feeney should also receive interest as provided by Section 88 of the *Act*. Finally, I do not find that the delegate failed to respect the principles of natural justice in his investigation of Feeney's complaint. He may have been abrupt in his dealings with a complainant, but the test for violation of the principles of natural justice is high. A substantial body of objective evidence is necessary to support a conclusion that the delegate was biased, and that test was not met in this case.

Mark Thompson
Adjudicator
Employment Standards Tribunal