

An appeal

- by -

Sunset Ranch Golf Limited Partnership operating as Sunset Ranch Golf &
Country Club and Sunset Ranch Golf Developments Limited
("Sunset Ranch")

- 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: Cindy J. Lombard

FILE No.: 2000/661

DATE OF HEARING: December 12, 2000

DATE OF DECISION: January 22, 2001

DECISION

APPEARANCES:

For the Appellant, Sunset Ranch

Bob Calder

Norm Keglovic

Bruce Vermee

Neale Stead

For the Respondent, Chris Tereposky

Chris Tereposky

Kevin Strachan

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) by Sunset Ranch Golf Limited Partnership operating as Sunset Ranch and Country Club and Sunset Ranch Golf Developments Limited (“Sunset Ranch”) of a Determination which was issued on September 5, 2000, that Sunset Ranch had terminated the employment of Chris Tereposky (“Tereposky”) without notice or compensation in lieu of notice as required by Section 63 of the *Act*. The delegate of the Director determined that Tereposky was due compensation in lieu of notice in the amount of \$2,470.33 being 8 weeks earnings based on a bi-weekly salary of \$1,138.84, vacation pay at 4% and interest pursuant to Section 88 of the *Act*.

ISSUES TO BE DECIDED

Is Sunset Ranch liable to pay compensation in lieu of reasonable notice or is the employer excused from liability pursuant to Section 63(3)(c) on the grounds that Tereposky quit his employment and therefore is not due reasonable notice or compensation in lieu of notice.

FACTS

Tereposky commenced his employment with Sunset Ranch in April, 1991, as a seasonal employee as a cook. In 1995 his employment became yearly and he was paid a salary during the months that the golf course was closed in order to ensure that he was again available for employment at the commencement of each season.

Tereposky’s employment with Sunset Ranch ceased on January 22, 2000.

Sunset Ranch says that Tereposky quit and the evidence of the witness on behalf of Sunset Ranch is as follows:

1) Bob Calder (“Calder”)

Bob Calder (“Calder”) is one of the owners of Sunset Ranch. Calder says that in January, 2000, he initiated a conversation with Tereposky about his employment because he had heard that Tereposky may continue his employment with another restaurant, Manhattan Point, instead of returning in the spring. Calder was concerned that Tereposky was going to wait to tell them at the last opportunity in order that he could continue to collect his monthly winter salary. Calder says that Tereposky, Keglovic and himself were present at this meeting in the second week of January. Calder says that he asked Tereposky if he was going to take a job at Manhattan Point and that Tereposky brought up the fact that he was having difficulty working with the Food and Beverage Manager, Betty (“Betty”), a long-time employee at Sunset Ranch and therefore he was unsure about returning but that he would think about it for a couple of days.

Approximately one week later, Calder says that he again spoke with Tereposky and asked whether the problem with Betty could be resolved and Tereposky replied, “No, if she’s coming back, I’m not coming back.” Calder says that he told Tereposky that Betty was coming back and therefore, if any money was owing to him by Sunset he could pick it up at the end of the month because the office manager, Neal Stead, was on holidays.

2) Norm Keglovic (“Keglovic”)

Norm Keglovic (“Keglovic”) says that in early January, 2000, another employee of Sunset, Neal Stead, told him that Tereposky was working as a #2 in charge chef at Manhattan Point and that he was under the impression that Tereposky would not be returning to Sunset Ranch.

Keglovic says that he therefore asked Tereposky to come in to talk to himself and Calder.

Keglovic says that Tereposky told them that if Betty was coming back, he was not coming back. Keglovic says that he told Tereposky that it sounded like an ultimatum but that they would discuss it. He says that he did mention to Tereposky that “anyone over 60 should retire”. Betty was 63 but he said that it was difficult to try to talk to her into retiring, as she was a long-time employee who had some serious health problems.

Keglovic says that he spoke with Tereposky one more time when he couldn’t get his car up a hill on the Sunset property and he pulled him up. Keglovic says that Tereposky said that he told Calder that he was not coming back if Betty returned and that he replied “you’ll have to make up your mind because there is nothing I can do about that.”

Keglovic says that he did not see Tereposky again until he came into the office to collect his Record of Employment and hand over his keys.

3) Neal Stead (“Stead”)

Neal Stead (“Stead”) is the office manager whose duties include payroll. Stead says that when he returned from his holiday in February that he was told, likely by Keglovic, that Tereposky had quit. Stead says that he had a telephone conversation with Tereposky prior to making up his Record of Employment, dated February 7, 2000. In that conversation, Stead says that he said to Tereposky: “You quit because you couldn’t get along with Betty, eh?” and that Tereposky replied “wasn’t 100% of the reason why I quit”. On cross-examination, Stead was not certain that Tereposky used the words “why I quit”.

4) Bruce Vermees (“Vermees”)

Bruce Vermees (“Vermees”) is the golf pro at Sunset Ranch and has been employed there since January, 1998.

Vermees says that he had a conversation with Tereposky in January, 2000, wherein Tereposky stated that he was unhappy working with Betty and that “it was Betty or myself” which he intended to tell Calder and Keglovic. Stead says that he warned Tereposky that he shouldn’t make an ultimatum because no one wins.

Evidence of the Respondent/Employee, Chris Tereposky (“Tereposky”)

The employee/Respondent, Chris Tereposky (“Tereposky”) says that he did not quit rather he was fired without cause.

Tereposky says that in the first meeting with Calder and Keglovic they asked him about the fact that they had heard that there was friction between he and Betty. Tereposky says that the focus of the discussion was how to resolve the problem and that Keglovic said that he was going to try to get Betty to retire as they could use him “up front” (as opposed to in the kitchen). Tereposky denies that he issued an ultimatum that it would have to be him or Betty. Tereposky says that his employment at Manhattan Point was not long term. Tereposky says that the second meeting took place in the maintenance building and that again both Calder and Keglovic were present. He says that the conversation with Calder was a general one to the effect of what they could do for him in the upcoming year and that Keglovic said to him “keep this under your hat but we’re still trying to get Betty to retire”.

Tereposky says that the third meeting occurred with only Calder on January 22, 2000. In that meeting he says that Calder told him that he would have to let him go and asked how much compensation they owed Tereposky and further that he should contact Keglovic.

Tereposky says that he spoke with Keglovic who told him that he had spoken with Calder by cell phone who told him to offer Tereposky one week.

Tereposky says that an offer of permanent employment with Manhattan Point came after his employment ceased with Sunset Ranch on January 22, 2000. He signed a contract of employment on January 26, 2000, and is still employed there as sous chef in charge.

ANALYSIS

The onus is on the employer, Sunset Ranch, to show that the Determination was wrong.

Section 63 of the *Act* states that an employer is liable to pay an employee compensation for length of service when discharged unless the employee "... (c) terminates the employment, retires from employment, or is dismissed for just cause."

In this case, Sunset Ranch says that Tereposky terminated i.e. quit his employment when he issued an ultimatum that unless Betty was gone, he would not return.

We have concluded based on all the evidence that Tereposky did quit and therefore Sunset Ranch is not liable to pay compensation in lieu of notice.

The onus is on the employer to show that an employee did quit. The test is both an objective one. Objectively, there must be a clear statement of an intention to quit and some subjective act inconsistent with his future employment such as to demonstrate a true and continuing intention to quit as opposed to by an emotional outburst:

See for example, Re: Burnaby Select Taxi Ltd. [1996] BC EST #D091/96

 Re: RTO (Rentown) Inc. [1997] BC EST #D409/97

Tereposky conveyed on two occasions clearly to his employer that he would not return if they kept Betty on as an employee. Tereposky told Bruce Vermeé that he intended to issue this ultimatum to the employer. He carried through with it as testified by Calder and Keglovic. It is likely that Tereposky did intend to return as he expected that Calder and Keglovic would force Betty into retirement. Likely his confidence was fueled by knowing that a permanent job was available to him at Manhattan Point if his attempt to get Betty out failed. In fact, just four days following his leaving Sunset Ranch he signed a contract for permanent employment with Manhattan Point. However, Tereposky misjudged the situation. Calder and Keglovic say that this was the first time that any difficulty between Tereposky and Betty was brought to their attention. They were not given an opportunity to resolve any conflict between the two employees but instead were told that if Betty stayed, Tereposky was gone. Betty was a long time, loyal employee who had serious health problems and they felt letting Betty go simply was not an option.

In summary, we find that Sunset Ranch has discharged its onus of showing that the Determination was wrong and that on the facts Tereposky quit thereby excusing Sunset Ranch from any liability to pay compensation in lieu of notice.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination be cancelled.

CINDY J. LOMBARD

**Cindy J. Lombard
Adjudicator
Employment Standards Tribunal**