

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act

- by -

D.R.D Ventures Inc.
(" DRD ")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Hans Suhr

FILE NO.: 96/065

DATE OF DECISION: April 30, 1996

DECISION

OVERVIEW

This is an appeal by DRD pursuant to Section 112 of the Employment Standards Act (the “Act”), against Determination No. CDET 000579 issued by the Director on December 22, 1995. In this appeal DRD claims that no compensation for length of service is owed to Anita Edlund (“Edlund”) under Section 63 of the *Act*.

Consideration of this appeal falls under the transitional provisions of the Act. Section 128(3) of the Act states:

(3)If, before the repeal of the former Act, no decision was made by the director, an authorized representative of the director or an officer on a complaint made under that Act, the complaint is to be treated for all purposes, including section 80 of this Act, as a complaint made under this Act.

Written submissions were received from DRD and Edlund, and information was provided by the Director. Subsequently, an oral hearing was conducted on April 19, 1996 in 100 Mile House, British Columbia. Subsequent to the Determination issued by the Director, D.R.D. Ventures Inc. was sold and no longer operates the Dairy Queen in 100 Mile House, however, there is no dispute that if the Determination is upheld, D.R.D. Ventures Inc. is the appropriate party.

Persons in attendance at the hearing were:

For the Appellant, D.R.D. Ventures Inc.	Dean Redlick Roxy Redlick
The Complainant	Anita Edlund
For the Director	Betsy Arnott, Employment Standards Officer Earle Thompson, Industrial Relations Officer

FACTS

Edlund was employed by D.R.D. Ventures Inc. operating Dairy Queen (“DRD”) as a cook from June 1, 1994 to January 24, 1995.

Edlund had requested the month of February 1995 off for the purpose of settling matters in the United States with respect to the estate of her late father.

While Edlund was away, her daughter picked up her last pay cheque and attached to the cheque was a Record of Employment (“ROE”). The ROE indicated that Edlund’s reason for leaving was

“K” (Other), and that she would not be returning to work. The ROE also contained the comment that “has gone on holidays and wants to collect unemployment insurance benefits”. The ROE was signed by David Redlick, one of the owners.

Edlund filed a complaint with the Employment Standards Branch (“the Branch”) alleging that her employment had been terminated without notice or just cause.

The quantum as set forth on the Directors Determination is not in dispute.

ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether Edlund’s employment was terminated without written notice or just cause or, whether as alleged by DRD, Edlund abandoned her employment.

EVIDENCE

Dean Redlick testified that:

- at all material times he was the personnel manager of DRD
- he normally worked the night shift and Edlund worked the day shift at this time
- he made up the work schedules and did not schedule Edlund to work only 4 hour shifts on January 25, 26, 27, 1995
- the reason that 2 cooks were scheduled for January 25, 26 and 27 to commence work at 9:30 a.m. was that one of the cooks, Crystal Kidwell was in training
- Edlund did not tell him about her plans to take February off until late in January
- Edlund told him that she would like to be laid off in order to collect U.I. benefits but that she didn’t care if she was laid off, fired or quit, she was taking the month of February off
- Edlund left a note on the schedule board on the night of January 24, 1995 stating that she would not be in to work on Thursday January 26 and Friday January 27, 1995 and requested that someone else be found to work those shifts
- On January 25, 1995 he was called in to work between 11:00 a.m. - 12 noon by Roxy Redlick as Edlund did not show up to work her scheduled shift
- Company policy (unwritten) required that any changes to the work schedule be requested by Friday of the previous week, except in cases of illness
- Company policy (unwritten) does not permit any employee to have free food or other product from the restaurant without his express permission
- at no time during January 25, 1995 did Edlund come into the restaurant and have coffee with Roxy Redlick or was told to go home by Roxy Redlick
- when Edlund did not come into work on January 25, 1995, he erased her hours for January 25, 26, & 27
- he did not phone Edlund at home to inquire why she did not show up for work and is not sure if anyone else phoned her

- when DRD was requested to provide a copy of the work schedule for the Employment Standards Branch officer, David Redlick put the hours on the schedule again and crossed them out

Roxy Redlick testified that:

- she did not recall what hours Edlund was scheduled for on January 25, 26, 27, 1995
- she did not recall if Edlund had coffee with her on January 25, 1995
- she did not recall if she called Dean Redlick in to work Edlund's shift on January 25
- she did not recall telling Edlund that she could have January 25 off
- she did not recall telling Edlund to post a note if she wanted a replacement for January 26 and 27
- it was not normal to put up a note requesting a replacement on such short notice but that it had been done before
- she did not recall receiving the key for the restaurant from Edlund on January 25
- it is not normal to schedule 2 cooks for the same shift but that it sometimes is required when training a new cook
- she does recall Edlund talking to the staff about going to the United States for quite awhile
- she does recall Edlund talking to her in mid January or earlier about going to the United States
- she normally comes into work around 9:00 a.m. or 9:30 a.m. depending on what has to be done prior to opening at 10:00 a.m.
- she did not recall if she phoned Edlund to inquire why she was not at work on January 25 although she thinks that there may have been a phone conversation with respect to some time off
- Edlund was permitted to have some of the restaurants products on occasion

Edlund testified that:

- in early January she requested the month of February off in order to travel to the United States to settle her late father's estate
- in order to facilitate the time off, she helped to train a replacement cook, Crystal Kidwell
- at no time did either David Redlick, Roxy Redlick or Dean Redlick tell her that she could not take the time off or that if she did, that her job would be in jeopardy
- as she normally worked each week Monday to Friday from 9:30 a.m. to 5:00 p.m., she was not aware that her hours for January 25, 26 & 27 had been changed to 11:00 a.m. to 3:00 p.m. (4 hour shifts) until she was informed by some of the other staff
- she advised Roxy Redlick on January 24 that she was upset about the reduction in her scheduled hours but that she would be in to work on January 25
- she further told Roxy Redlick that it wasn't worth her while to only work for 4 hour shifts so she would not be in to work on the 26 & 27, however, at Roxy's request, she posted a note requesting a replacement for the 26 & 27

- she reported to work at 10:00 a.m., 1 hour before her scheduled start time of 11:00 a.m., had coffee with Roxy who then informed her at approximately 10:50 a.m. that she would not be needed that day and she should go home
- Roxy told her to have a good trip and she would see her when she got back
- she then telephoned her daughter who came to the restaurant to pick her up and take her home
- she did not collect unemployment insurance benefits while she was in the United States
- she attempted to talk to David Redlick on at least 2 occasions in order to discuss her termination but he wouldn't speak with her, he only informed Roxy Redlick to tell her if she had a problem to take it up with the Labour Relations Board

Edlund provided a statement from her daughter which indicates that Edlund was driven to work at 10:00 a.m. and then called for a ride home shortly before 11:00 a.m. on January 25, 1995. Edlund's daughter was not available to give evidence in person as her infant daughter was sick.

Edlund also provided statements from 2 former co-workers which corroborate her evidence with respect to the 11:00 a.m. to 3:00 p.m. shifts scheduled and that she did report for work on January 25 as scheduled and was sent home. Neither of these 2 co-workers, both of which are no longer employed with this employer, were available to give evidence in person.

ARGUMENTS

DRD argues that even though Edlund's hours for January 25, 26 and 27 on the work schedule were erased and re-written, close examination of the schedule clearly indicates that Edlund's hours were to be from 9:30 a.m. to 5:00 p.m. on January 25, 26 and 27 and not 11:00 to 3:00 p.m. as Edlund states.

DRD further argues that the note left by Edlund to advise that she would not be in to work on January 26 and 27 indicates a clear intent by Edlund to abandon her employment.

DRD finally argues that the fact that Edlund did not come into the restaurant for 6 weeks after she returned from the United States, and then only to request severance pay, is consistent with her having abandoned her job and then belatedly wanting severance pay.

The Director contends that it has been acknowledged that the schedule of Edlund's hours for January 25, 26 and 27 had been altered and that I should accept Edlund's evidence on this point.

The Director further contends that Edlund posted the request for a replacement for her scheduled shifts on January 26 and 27 as requested by Roxy Redlick on January 24. The Director states that this would not have been necessary if Edlund was planning to abandon or "quit" her job the next day.

The Director further contends that the unchallenged evidence of Edlund that she was sent home on January 25 by Roxy Redlick clearly does not indicate an abandonment of her job.

The Director finally contends that the Record of Employment does not indicate that Edlund abandoned her position, but rather it clearly indicates that she was gone on holidays

ANALYSIS

The burden of proof for establishing that Edlund abandoned her employment and therefore is not entitled to compensation for length of service rests with DRD. DRD has not provided a reasonable explanation of why Edlund's hours were erased from the schedule and then re-written and crossed out before being provided to the Branch. Furthermore, Edlund's evidence of what transpired on January 25th when she claims she reported to work as scheduled was not challenged in any way by the evidence of Roxy Redlick who, for the most part, was unable to recall any specific details surrounding the events of that day.

The fact that Edlund left a note for a replacement for January 26 and 27 lends credence to her evidence that she was unhappy about her hours being cut and therefore she did not feel that it was worth her while to work on the 26th and 27th. DRD did not provide a reasonable explanation of why the ROE, issued on February 2, 1995, contained the comment that Edlund had gone on holidays. There is no mention on the ROE that Edlund had abandoned her job or in any other way indicated that she had quit her employment. The fact that the ROE also indicates that Edlund would not be returning to her job, appears to confirm that her employment was terminated by DRD.

For the above reasons, I conclude that DRD owes compensation for length of service to Edlund in the amount calculated by the Director.

ORDER

Pursuant to Section 115 of *Act*, I order that Determination No. CDET 000579 be confirmed in the amount of \$488.64

Hans Suhr
Adjudicator
Employment Standards Tribunal

April 30, 1996
Date

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