

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

- by -

Brady's Burnside Fish & Chips Ltd.  
(" Brady's ")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Hans Suhr

**FILE NO.:** 96/130

**DATE OF DECISION:** May 21, 1996

## DECISION

### OVERVIEW

This is an appeal by Brady's pursuant to Section 112 of the *Employment Standards Act* (the "Act"), against Determination No. CDET 001055 issued by the Director on February 6, 1996. In this appeal Brady's claims that no compensation for length of service is owed to Bobbi-Jo Webb ("Webb") 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 under this Act.

I have completed my review of the written submissions made by Brady's and the information provided by the Director.

### FACTS

Webb was employed as a supervisor, cook, waitress and counter person by Brady's from July 6, 1994 to October 2, 1995.

Webb provided a letter of resignation on September 25, 1995 to be effective October 8, 1995.

Webb was ill at the time and expected to return to work October 4, 1995 to complete her notice period.

Brady's provided a note to Webb dated October 2, 1995 which stated "I do not need you to work your last week even if you are better. As I have not heard from you one way or the other, I covered your shift. P.S. you can pick up your final check on October 4, 1995 once you pay your \$30.00 I.O.U. and return my shirts".

Webb filed a complaint with the Employment Standards Branch ("the Branch") on October 20, 1995 alleging that she was owed compensation for the balance of her notice period.

The Director investigated Webb's complaint and, subsequently, determination # CDET 001055 was issued.

### ISSUES TO BE DECIDED

The issues to be decided in this appeal are:

1. Whether the employer's liability to pay compensation for length of service has been discharged under Section 63(3)(c) of the Act. That is, has Brady's demonstrated, on the balance of probabilities, that Webb was dismissed for just cause.
2. If the employer's liability under Section 63(3) has been discharged, does the employer have any liability to the employee ?

## **ARGUMENTS**

Brady's argues that the letter of resignation from Webb was ambiguous with respect to whether she would be returning to work to finish her last week of the notice given.

Brady's also argues that Webb's mother was to call on October 2, 1995 to confirm that Webb was feeling better and would be able to work.

Brady's further argues that they attempted to contact Webb on two occasions on October 2, 1995, left a message on the answering machine and received no response.

Webb argues that no telephone calls were received from Brady's on October 2, 1995 as both she and her mother were at home all day.

The Director contends that Brady's terminated Webb's employment contrary to the provisions of the *Act*.

## **ANALYSIS**

Section 63 of the *Act* states that a statutory liability is placed on the employer in the favour of the employee and such liability begins to accrue after 3 months of employment. This liability is only deemed to be discharged under very limited circumstances. Those limited circumstances are set forth in section 63(3) and state:

- (3) The liability is deemed to be discharged if the employee
  - (a) is given written notice of termination as follows:
    - (i) one week's notice after 3 consecutive months of employment;
    - (ii) 2 weeks' notice after 12 consecutive months of employment;
    - (iii) 3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice;
  - (b) is given a combination of notice and money equivalent to the amount the employer is liable to pay, or
  - (c) terminates the employment, retires from employment, or is dismissed for just cause.

There is no dispute that Webb gave notice of resignation to Brady's to be effective October 8, 1995.

The question which then arises is whether the notice of resignation provided by Webb constitutes "termination of employment" as contemplated by section 63(3)(c) and subsequently discharges the liability on Brady's to pay compensation for length of service. I am persuaded that Webb has in fact, terminated her employment by the provision of the notice of resignation although the execution or the "act" of termination is not to take place until October 8, 1995, some 2 weeks after the date of the notice.

For the reasons set forth above, I conclude that Brady's liability under section 63(3) has in fact been discharged by Webb terminating her employment.

We are then left with the circumstances of an employer dismissing an employee after the employee has provided notice of resignation. I must therefore consider what constitutes a fair balance between the rights of the employee as set forth under the *Act* and the liability of the employer in these circumstances, that is, what result would provide a benefit to the employee commensurate with the expectations of the notice of resignation and which would also not prejudice the interests of the employer. Section 2 of the *Act*, sets forth the purposes of the *Act*, among which the main purpose is, I believe, to "promote the fair treatment of employees and employers".

The purpose of the notice of resignation is to advise the employer that the employee would not be available for work after a certain date. The employer would rely on this notice to then take the necessary steps to obtain a replacement employee, train other employees or adjust its work schedules to reflect the reality of Webb's departure October 8.

The real issue then becomes a question of whether Brady's breached the fundamental contract of employment with Webb, as amended by the specific terms of the notice of resignation, by dismissing her before the agreed date of termination, October 8, 1995.

I submit that when Brady's accepted Webb's notice of resignation, they accepted a proposal by Webb with respect to the termination of her employment (termination agreement). The termination agreement contained the specific terms and conditions to be met for the "act" of termination to occur, that is, employment would continue until October 8. When Brady's decided to dismiss Webb prior to the specified end date of the employment relationship, they in fact breached the termination agreement they had entered into with Webb and are therefore liable for the wages which would have been paid for the period of work up to and including October 8, 1995.

As stated in her notice of resignation, Webb anticipated being available for work on October 4, 5, 6, 7, & 8.

As Webb normally worked 7.5 hours per shift at a rate of \$7.25 per hour, the wages she would have earned for the period October 4 to 8 would be  $36.5 \times \$7.25 = \$264.63$ . Additionally 4% vacation pay of \$10.59 is owed on that amount for a total owing of \$275.22.

For the above reasons, I conclude that Brady's owes wages to Webb in the amount of \$281.00 which includes the interest as calculated by the Director pursuant to section 88 of the *Act*.

**ORDER**

Pursuant to Section 115 of *Act*, I order that Determination No. CDET 001055 be confirmed in the amount of \$281.00

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**Hans Suhr**  
**Adjudicator**  
**Employment Standards Tribunal**

May 21, 1996  
**Date**

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