

An appeal

- by -

Hua Hai International Enterprises Company Ltd.  
operating as Bob's Famous Restaurant  
("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:** M. Gwendolynne Taylor

**FILE No.:** 2002/570

**DATE OF DECISION:** February 18, 2003

## DECISION

### OVERVIEW

This decision is based on written submissions presented by Hua Hai International Enterprises Company Ltd. (“the employer”) and the Director of Employment Standards (“the Director”).

Pursuant to section 112 of the *Employment Standards Act*, the employer filed an appeal from a Determination by the Director dated October 29, 2002, concerning a complaint by a former employee, Sidney McLeod (“McLeod”). The Director’s delegate found that McLeod’s employment had been terminated through operation of section 66 and ordered the employer to pay \$2,063.52 for compensation in lieu of notice, vacation pay and interest.

On November 19, 2002, the employer appealed the Determination on the grounds that the Director’s reasoning was not logical, the arguments are disputable and section 66 is too vague to be applied to this situation.

### ISSUE

Did the Director err in finding that the unilateral alteration of salary from \$32,000 to \$24,000 per annum was a termination of employment under Section 66 of the Act?

### THE FACTS

The employer purchased the Knight and Day Restaurant on December 23, 2000. Mr. McLeod had been employed by the former owner since January 26, 1998. He received a salary of \$32,000 per year as chef and kitchen manager.

On April 25, 2001, the employer informed McLeod in writing that his salary was decreasing to \$2,000 per month. The employer told him the reduction was made due to financial reasons and if business improved the salary might be restored. McLeod responded by saying he accepted the change as a termination of his employment.

The employer and McLeod agreed that if compensation was owed, the amount was \$1,846.15, plus vacation pay.

### ARGUMENT

The employer argued that there was never an intention to terminate McLeod’s employment. Rather, he quit his high responsibility position without notice and caused much turbulence to the business.

The employer submitted that section 66 is too vague to apply to this fact situation because it does not distinguish between physical working conditions, rates of pay and status. The employer submitted that McLeod’s physical working conditions did not alter and his status remained the same. Other employees also had their salaries reduced and, if McLeod’s salary dropped below that of subordinates, that is not

unusual in the restaurant business where a large portion of income comes from tips. The employer submitted that the reductions were necessitated because of the financial position of the company.

The Director submitted that it is a well-established principle both in common law and in previous Employment Standard Tribunal decisions that an employee's wage rate, status and position are conditions of employment for the purposes of Section 66.

## ANALYSIS

Section 66 states that "If a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated."

"Condition of employment" as defined in section 1 of the Act means:

all matters and circumstances that in any way affect the employment relationship of employers and employees

The Director's rationale for the decision is stated as:

I accept that the employer did not intend to terminate Mr. McLeod and initiated the change in his salary for legitimate business reasons. However, section 66 examines the change in conditions, not the employer's intent.

...the employer unilaterally altered the conditions of employment resulting in a significant reduction in the employee's gross earnings. I find that a 25% reduction is considerably large, especially at that level of income, and amounts to a substantial alterations. It is clear that Mr. McLeod left as a result.

...

The reduction in wages amounted to a substantial alteration of Mr. McLeod's conditions of employment. As a result, I find that Hua Hai terminated Mr. McLeod's employment. As a result, compensation for length of service is owed based on section 63 of the Act. Section 97 establishes that the employment of an employee is deemed continuous for the purposes of the Act despite the sale of a business. Thus, as agreed by the parties, the amount of compensation for length of service outstanding is three weeks wages, or \$1,846.15 plus 4% vacation pay on that amount and statutory interest.

It is apparent from the employer's submission that he would argue that rate of pay is not a condition of employment for the purposes of section 66. Additionally, he would argue that since he did not intend to terminate the employment, section 66 does not apply.

I do not accept the employer's arguments about the application of section 66. While it is undoubtedly true that breaches of physical conditions and alterations in status could be viewed as substantial alterations of conditions of employment, it is more obvious that reduction of salary is a substantial alteration. I find that a unilateral significant reduction of salary is a fundamental breach that goes to the very root of any employment contract. I find that McLeod was justified in treating his employment as terminated and I find that the Director did not err.

**ORDER**

Pursuant to section 115 of the *Act*, I confirm the Determination issued October 29, 2002.

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**M. Gwendolynne Taylor**  
**Adjudicator**  
**Employment Standards Tribunal**