

An appeal

- by -

Round Table Enterprises Ltd. operating as The Troller Pub
("Round Table")

- 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

TRIBUNAL MEMBER: Carol L. Roberts

FILE No.: 2005A/59

DATE OF DECISION: May 27, 2005

DECISION

SUBMISSIONS

John Kavanagh on behalf of Round Table Enterprises Ltd.

Theresa Robertson on behalf of the Director of Employment Standards

OVERVIEW

This is an appeal by Round Table Enterprises Ltd. (“Round Table”) pursuant to Section 112 of the *Employment Standards Act* (“the *Act*”), against a Determination of the Director of Employment Standards (“the Director”).

Jimmy Foo filed a complaint with the Employment Standards Branch alleging that Round Table operating as The Troller Pub (“Round Table”) had contravened the *Act* by failing to pay compensation for length of service.

Following a hearing into Mr. Foo’s complaint, a delegate of Director of Employment Standards (“the Director”) determined that Round Table had contravened section 63 of the *Act*, and ordered it to pay compensation in the amount of \$1,071.82, including interest. The delegate also imposed a \$500 penalty under section 29 of the *Act* for the contravention.

Round Table’s late appeal was allowed (BC EST #D052/05).

The grounds for the appeal are that the director failed to observe the principles of natural justice in making the Determination. However, in reviewing the appeal submissions, it appears that Round Table suggests that the delegate erred in concluding that Mr. Foo’s employment had been terminated. It contends that Mr. Foo quit his job.

Round Table did not seek an oral hearing, and I am satisfied that this matter can be decided based on the written submissions of the parties.

ISSUES

Whether the delegate

- a) failed to observe the principles of natural justice, and
- b) erred in law in
 - ii) finding that Mr. Foo did not quit his job, and
 - ii) preferring oral evidence over unsworn written statements.

THE FACTS AND ARGUMENT

The delegate held a hearing into Mr. Foo's complaint on October 13, 2004. Mr. Kavanagh represented Round Table, Mr. Foo appeared on his own behalf. At issue before the delegate was whether Mr. Foo quit his employment or his employment was terminated.

Mr. Foo was employed at the Troller Pub ("pub") as a cook from June 5, 2002 until May 31 or June 1, 2004.

The delegate found the following undisputed facts:

On Monday May 31, or June 1, 2004, Mr. Foo arrived at the pub for what he assumed was his scheduled shift. He discovered he had not been scheduled for that shift, and he and the pub manager, Dan McDonald, had an argument about the schedule. Mr. Foo left. A few days later, he telephoned to see if he had been scheduled for work the following day. Mr. Kavanagh, the owner of the pub, told Mr. Foo that his name had been crossed off the schedule for that day. Mr. Kavanagh told Mr. Foo he would have to speak to Mr. McDonald to resolve the dispute. Mr. Foo told Mr. Kavanagh he was not quitting his job.

Both Mr. Kavanagh and Mr. Foo gave sworn evidence at the hearing, and Mr. Kavanagh submitted an unsworn statement from Mr. Finkle, another pub employee.

Mr. Foo testified that, during the argument, Mr. McDonald told him that if he didn't report to work on Tuesday, he wasn't to return. On Tuesday, Mr. Foo called the pub to find out what his schedule was, at which time Mr. Kavanagh told him his name was crossed off for the rest of the schedule, and that he would have to speak to Mr. McDonald. Mr. Foo testified that he told Mr. Kavanagh he did not intend to quit his employment, and to have Mr. McDonald call him. Mr. Kavanagh responded that he would. Mr. Foo testified that he did not hear from Mr. Kavanagh or Mr. McDonald again.

Mr. Kavanagh's evidence was that Mr. Foo worked May 30 and 31st, and was paid for those days. He testified he knew nothing of the argument between Mr. Foo and Mr. McDonald until June 2, 2004 when he saw a notation in the report book. He testified that Mr. Foo telephoned him on June 2 and told him that he was scheduled to work June 4. Mr. Kavanagh told Mr. Foo that his name was crossed off the schedule for that day and that he needed to speak to Mr. McDonald. Mr. Kavanagh denied that he told Mr. Foo that his name did not appear on the rest of the schedule. Mr. Kavanagh acknowledged that Mr. Foo told him that he was not quitting his job, and that he might have told Mr. Foo that he would ask Mr. McDonald to call him.

Mr. Kavanagh further testified that Mr. Finkle, told him that Mr. Foo reported for work on Tuesday and had a dispute with Mr. McDonald. He further testified that Mr. Finkle told him that Mr. Foo told Mr. McDonald that he would not be in to work on Thursday. Mr. Kavanagh told Mr. McDonald that he would have to resolve the matter with Mr. Foo. When Mr. Finkle picked up Mr. Foo's paycheque on June 3, Mr. Kavanagh and Mr. McDonald assumed Mr. Foo had quit his employment.

Mr. Finkle's statement indicated that Mr. Foo was angry, that Mr. McDonald told him to go home, and that Mr. Foo would be taking the next two days off as well.

The delegate considered the evidence of Mr. Kavanagh and Mr. Foo, and the statement of Mr. Finkle. She advised Mr. Kavanagh that little weight would be placed on Mr. Finkle's statement since he was not

present to be cross-examined on his document, and because it was written several months after the incident. The delegate noted that the statement contained no references to dates or the details of the incident. The delegate further noted that the report book and schedules Mr. Kavanagh referred to were not presented by either party, and in fact, that the original schedules had been destroyed.

The delegate also noted that Mr. Kavanagh's knowledge of the events was hearsay, as he had not been present at any of the discussions. However, she noted that Mr. Kavanagh agreed that Mr. Foo told him that he was not quitting his job.

The delegate assessed the credibility of the parties, set out the test for determining whether an employee had quit, and concluded, on the evidence presented, that Round Table had not met the burden of establishing that Mr. Foo had quit his employment.

Round Table submits that the delegate erred in setting out some of the facts. Mr. Kavanagh's submission references dates and details of the events set out by the delegate. I need not set those out in detail here, as most are not relevant to the issue before the delegate or under appeal.

The most critical issue which Mr. Kavanagh takes issue with is the delegate's finding that Mr. Foo stated he was not quitting his job. Mr. Kavanagh asserts that Mr. Foo did not ask whether he had been fired, and did not say he was not quitting his job. The delegate submits that Mr. Kavanagh's evidence at the hearing was that Mr. Foo told him he was not quitting his employment, as was set out in the Determination.

Mr. Kavanagh also states that he submitted a second witness statement from Mr. Leary which the delegate does not refer to in the Determination. The delegate submits that Mr. Kavanagh did not enter any other witness statements into evidence, and that, in any event, if he had, the contents of those statements differed little from Mr. Finkle's statement.

Mr. Kavanagh further argues that if he had known Mr. Finkle "could only give verbal information, we would have scheduled him to be present. However, we were told to submit written statements by any person present we wished to represented." [reproduced as written] The delegate's response is that Mr. Kavanagh was provided with the Branch's Fact Sheet on preparing for complaint hearings. She further replies that the Branch contacted Mr. Kavanagh prior to the hearing and advised him that, without the witnesses being present, their statements would not be given much weight. She further states that she repeated that caution during the hearing. She submits that Mr. Kavanagh did not seek an adjournment to call Mr. Finkle to give oral evidence.

Mr. Kavanagh submits that Mr. Foo yelling at his boss is relevant. The delegate submits that, unless Mr. Kavanagh is suggesting that Mr. Foo was dismissed for cause for swearing or having an argument with his boss, this fact is not relevant. Mr. Kavanagh also submits that Mr. Foo telling his boss he is not reporting for his next shift is relevant.

Mr. Kavanagh contends that Mr. Foo "quit his employment by his deeds". Mr. Kavanagh states "Mr. Foo quit his job. He never discussed quitting or his dismissal with his employer. Mr. Foo failed to notify us, question us or confirm with us his status".

Finally, Mr. Kavanagh submits that, although the delegate "caught" Mr. Foo "lying" on five issues, she still "gave him credibility".

The delegate submits that the decision speaks for itself, and seeks to have the Determination upheld.

ANALYSIS AND DECISION

Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

- (a) the director erred in law
- (b) the director failed to observe the principles of natural justice in making the determination;
or
- (c) evidence has become available that was not available at the time the determination was being made

Principles of natural justice are, in essence, procedural rights that ensure parties a right to be heard by an independent decision maker.

In the appeal reasons, Mr. Kavanagh contends that Mr. Foo “quit his job rather than apologize or confront the pub manager for his bad behaviour”. These reasons neither relate to whether Round Table was given a fair hearing, or how, or example, the delegate might have been biased. Mr. Kavanagh appeared at the hearing and presumably had the opportunity to give sworn testimony, and to cross-examine Mr. Foo on his evidence. Indeed, Mr. Kavanagh does not suggest otherwise. I find no basis for this ground of appeal.

Mr. Kavanagh alleges certain errors of fact. Section 112(1) does not provide for appeals based on findings of fact. However, I have reviewed those alleged errors and conclude that, even if the delegate did misstate some facts, on which I need not make a finding, most of those facts do not relate to the central issue of whether Mr. Foo’s employment was terminated or he quit.

The delegate correctly placed the burden on Round Table to establish that Mr. Foo had quit:

The act of resigning, or quitting, employment is a right that is personal to the employee and there must be clear and unequivocal evidence supporting a conclusion that this right has been voluntarily exercise by the employee involved. There is both a subjective and objective element to the act of quitting: subjectively, an employee must form an intention to quit; objectively, that employee must carry out an act that is inconsistent with further employment (*Wilson Place Management Ltd.* (BC EST #D047/96))

The delegate had the opportunity to hear from the parties. At the hearing, Mr. Kavanagh agreed that Mr. Foo did not say that he quit, although he disputed that in his submissions. In the absence of clear and compelling evidence, I have no basis to disturb this factual finding.

In the face of conflicting evidence about whether Mr. Foo quit, the delegate had to weigh the evidence, and make findings of credibility. She applied the test in *Faryna v. Chorney*, (1952) 2 D.L.R. 354 (B.C.C.A) and preferred Mr. Foo’s evidence over Mr. Kavanagh’s hearsay evidence and unsworn witness statements. I am unable to find that she erred in doing so.

Mr. Kavanagh submits that the delegate erred in preferring sworn testimony over unsworn documentary evidence, and that, had he been so advised, he would have had Mr. Finkle present to give oral evidence. Mr. Kavanagh did not respond to the delegate’s submission that he was advised prior to the hearing by a

Branch employee that written statements would be given less weight than oral testimony. Further, he did not dispute the delegate's statement that he was advised during the hearing process that unsworn written statements would be accorded less evidentiary weight. He also did not respond to the delegate's assertion that only one statement was admitted into evidence, not two. I am unable to find that the employer was either misled into providing evidence that would carry less weight or denied an opportunity to present the best evidence (i.e. to call Mr. Finkle to give oral evidence). I note in any event that the unsworn documents both relate to the same altercation between Mr. Foo and another cook. Whether there was an altercation between Mr. Foo and Mr. McDonald is irrelevant to the issue of whether Mr. Foo quit, and the delegate, quite correctly, found she did not have to make a determination on that issue.

I find this argument unsubstantiated.

The delegate found that neither Mr. Foo's words nor his actions clearly indicated that he intended to quit, or did quit his employment. I note that Mr. Finkle's statement indicates only that Mr. Foo stated he would be taking off the next two shifts. There is nothing in the witness statement that supports the employer's submission that Mr. Foo quit his employment.

The delegate preferred Mr. Foo's evidence that he was told that his name was crossed off the rest of the schedule and that he needed to speak to Mr. McDonald about it to that of Mr. Kavanagh's evidence that Mr. Foo's name was only crossed off for one day. The employer did not provide original records of the schedule, and there was no evidence to corroborate Mr. Kavanagh's assertions.

I am not persuaded that the delegate erred in her assessment of the evidence, or the weight she attributed to the employer's evidence. As the Tribunal has stated on many occasions, an appeal is not an opportunity to re-argue a case. Although it is clear that Mr. Kavanagh disagrees with the conclusion, he has not set out any compelling and persuasive basis for setting aside the Determination.

The appeal is dismissed.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination, dated December 24, 2004, be confirmed in the amount of \$1,571.82, plus whatever interest might have accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal