

An appeal

- by -

Golden Crown Restaurants Inc., operating as Burger King
(“Golden Crown”)

- 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: Norma Edelman

FILE No.: 2001/784

DATE OF DECISION: February 18, 2002

DECISION

OVERVIEW

This is an appeal by Golden Crown Restaurant Inc. operating as Burger King ("Golden Crown") pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") against a Determination issued by delegate of the Director of Employment Standards on October 17, 2001. The delegate found that Golden Crown dismissed Van K. Tang ("Tang") and as a result it owed him compensation for length of service. Golden Crown argues that the Determination is wrong because Tang quit his employment and therefore it is not liable for compensation for length of service.

ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether Tang quit his employment or whether Golden Crown dismissed him.

FACTS AND ARGUMENTS

Tang was employed by Golden Crown from November 19, 1997 to March 17, 2001.

Tang was on medical leave between November 2000 and February 8, 2001.

In the Determination, the delegate stated that after returning to work from his medical leave, Tang formed a belief that Mark Sarty ("Sarty"), the Manager of Operations, was scheduling him to shifts and work assignments that disadvantaged him in terms of future opportunities for promotion.

On March 17, 2001, Tang wrote an e-mail message to Sarty. Within that message, he said:

I recently have been offered to transfer to McDonald's Restaurant, and have a week to apply. They told me on March 12, 2000 (sic) when I was applying that they were not hiring and would put my resume on file. Within seven hours they called me in for an interview and wanted to hire me on the spot. They explained to me they normally do not hire from other fast food restaurant chains, but felt I would be an asset to their company because of the cover letter written from a former Burger King employee. Please do not make a comment on this because other employers do see the potential I have to become management in their store. Not to mention McDonald's starts their shift coordinators at \$9.00per/hr. Do you recommend me to hand in my notice?

Tang's e-mail led to a meeting between Sarty, Jan Brandon ("Brandon"), the Assistant Manager, and Tang. Tang's account of the meeting was that Sarty in effect fired him. Tang said Sarty

advised him that he accepted the e-mail as a resignation notwithstanding his explanation that the e-mail did not say he quit; just that he wanted a promotion. Sarty's account of the meeting was that Tang quit his employment. Sarty said after Tang confirmed he wrote the e-mail, he told him he accepted his resignation. Tang looked surprised so he repeated the statement and told him they needed his keys. Tang came back about ten minutes later and said that he did not want to quit to which Sarty replied that his resignation had already been accepted. The delegate said that Brandon confirmed that although it was "vague" whether Tang actually quit during the meeting, she and Sarty accepted Tang's e-mail as a resignation. Sometime later Tang advised them he did not quit to which they confirmed they had accepted his resignation.

Later on March 17, Tang e-mailed a message to Rick Stolle ("Stolle"), Vice-President Operations and Development, which states in part:

This letter dated March 17, 2001, states to you and the employees of Burger King that I did not willfully leave Burger King today. I feel that there were no grounds to fire me or lay me off. Mark Sarty told me to go home because of a misunderstanding. My letter to him (enclosed) was simply a letter as (sic) management on how I felt about how he has treated me. I have no intentions of taking the position at McDonald's should I have to....

The delegate concluded that Tang did not quit his job. He was not convinced Tang formulated an intention to resign his employment or that Tang conducted himself in a way that was inconsistent with continued employment. He found it was Golden Crown that reached the decision to end the employment relationship with Tang. In his opinion, it was unreasonable for Golden Crown to interpret Tang's e-mail as a resignation. This interpretation, even over the verbal and written objections of Tang, served Golden Crown's objective, not Tang's.

The delegate concluded that given Golden Crown terminated its employment relationship with Tang, under Section 63 of the *Act* it was required to provide Tang with three weeks compensation for length of service in lieu of notice in the amount of \$1101.07.

Stolle, on behalf of Golden Crown, filed an appeal of the Determination.

Stolle said Tang resigned his position and was not terminated from his employment. He explained that Sarty and Brandon met with Tang on March 17, 2001 and asked him twice if he wrote the e-mail in which he handed in his notice and Tang twice confirmed his resignation. Stolle said that although the e-mail was slightly vague, they believe they acted in good faith as Tang indicated that he had already made an application for employment with a competitor, McDonalds Restaurant, on March 12, 2001 and had already been offered a position "on the spot". This action in itself was a clear indicator that Tang had chosen to leave their employ. Further, by not disputing the fact that he had resigned his position, and consequently leaving his keys before exiting the building, Tang did show an intent to leave their employ, as the keys to the restaurant are required to perform a manager's everyday duty. Tang did try to discuss the matter again five to ten minutes later, and change his version of the story, and tried to get his job back, but this was not an option for them.

In Stolle's view, Tang's resignation was clear. Tang displayed with his actions and his behavior what his intentions truly were. His acceptance of a job with another quick service restaurant, at more favorable terms, caused them to accept his resignation.

Both the delegate and Tang replied to the appeal. The delegate stated that Golden Crown's appeal does not dispute the facts as set out in the Determination but is essentially a disagreement over his application of the law as it relates to those facts. Tang submits that the Determination is correct. He states that his e-mail was not meant as a resignation and his job interview at McDonald's was guaranteed if he wanted it in June 2001 for the opening of a new store in October.

ANALYSIS

Section 63 of the *Act* places a statutory liability upon an employer to pay length of service compensation to each employee upon completion of three consecutive months of employment. The amount of compensation increases as the employee's length of service increases to a maximum of 8 weeks wages. An employer may be discharged from this statutory obligation by providing written notice to the employee equivalent to the length of service entitlement of the employee or by providing a combination of notice and compensation equivalent to the entitlement of the employee. An employee may cause an employer to be discharged from the statutory obligation by doing one of three things: self terminating employment (or quitting); retiring from employment; or giving just cause for dismissal.

In this appeal, Golden Crown argues that Tang quit his employment. This is the same position that it submitted to the delegate during his investigation of Tang's complaint.

What I must decide in this case is whether Tang has discharged Golden Crown from its statutory liability to pay compensation for length of service by quitting his employment. It is trite law that the Appellant, in this case Golden Crown, bears the onus of establishing that the Determination is wrong and therefore should be varied or cancelled.

The position the Tribunal takes on the issue of a quit is now well established. It was stated as follows in the Tribunal's Decision Burnaby Select Taxi Ltd BCEST #D091/96:

The right to quit is personal to the employee and there must be clear and unequivocal facts to support a conclusion that this right has been exercised by the employee involved. There is both a subjective and an objective element to a quit; subjectively, the employee must form an intent to quit employment; objectively, the employee must carry out some act inconsistent with his or her further employment.

I note that the delegate adopted the above test in making his Determination.

In my view, Golden Crown has not demonstrated the clear and unequivocal facts necessary to support a conclusion Tang quit his employment.

Stolle states that Tang twice confirmed his resignation during the meeting with Sarty and Brandon. He says that is what was presented in the Determination. However, that is not what was presented in the Determination. The delegate said that Sarty and Brandon told Tang twice that they accepted his resignation not that Tang twice confirmed he had resigned from his job. Stolle also says that Tang showed intent to quit by leaving his keys before exiting the building. What Stolle fails to address, however, is that the delegate says Sarty asked him to leave his keys. Stolle does not challenge that finding.

Stolle further says that Tang accepted another job, but there is no evidence to support that view and that is not what Tang said in his e-mail. The e-mail, in my view, is crystal clear and not at all vague. In it, Tang asks Sarty whether he should resign. Nowhere in the e-mail does Tang say he is resigning or that he actually has accepted another job. Making an application for a job and even being offered a job at McDonalds does not establish Tang intended to quit his job at Burger King on March 17, 2001.

Finally, Stolle does not dispute that after Sarty and Brandon advised Tang they had accepted his resignation, Tang indicated, verbally to Sarty and Brandon and by e-mail to Stolle, that he did not quit. This conduct is inconsistent with voluntarily quitting a job. Moreover, there is no evidence that Tang ever said words to the effect that he was quitting.

Given the above circumstances I find there is insufficient evidence to show Tang formed an intent to quit or engaged in some conduct inconsistent with his continued employment at Burger King. Rather, the circumstances in this case are more consistent with Tang being dismissed by his employer.

The appeal of Golden Crown fails. I am satisfied that Golden Crown is obliged to pay Tang compensation for length of service in the amount set out in the Determination.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated October 17, 2001 be confirmed.

Norma Edelman
Adjudicator
Employment Standards Tribunal