

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

- by -

505155 B.C. Ltd operating as
Humpty's Family Restaurant
(" Humpty's ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Hans Suhr

FILE No.: 1999/634

DATE OF HEARING: February 4, 2000

DATE OF DECISION: April 6, 2000

DECISION

APPEARANCES:

Romy Kiel	on behalf of 505155 B.C. Ltd. operating Humpty's Family Restaurant
Debbie Harsch	on behalf of 505155 B.C. Ltd. operating Humpty's Family Restaurant
Richard Hogan	on his own behalf via teleconference

OVERVIEW

This is an appeal by 505155 B.C. Ltd. operating Humpty's Family Restaurant (Humpty's) under Section 112 of the *Employment Standards Act* (the "Act"), against a Determination dated September 29, 1999 issued by a delegate of the Director of Employment Standards (the "Director"). Humpty's alleges that the delegate of the Director erred in the Determination by concluding that Richard Hogan ("Hogan") was entitled to compensation for length of service in the amount of \$368.92.

ISSUE

The issue to be decided in this appeal is whether Humpty's is liable, pursuant to Section 63 of the *Act*, to pay compensation for length of service to Hogan.

FACTS

The parties agree the following facts are not in dispute:

- Hogan commenced employment with Humpty's as a cook February 13, 1998;
- Hogan's last day of work was June 19, 1998;
- Humpty's issued a Record of Employment ("ROE") on July 9, 1998;
- the ROE indicated the reason for issuing as "M" - Dismissed;

Romy Kiel ("Kiel") Debbie Harsch ("Harsch") and Hogan testified at the hearing. I will only reproduce the relevant evidence provided at the hearing and through the submissions of the parties.

Kiel testified that:

- the restaurant operates on a 24 hour basis;
- the normal staffing complement for the "front end" (serving customers") is 1 supervisor and 5

servers;

- Hogan asked to be laid off work on June 18, 1998;
- she refused to lay Hogan off as Humpty's was short of cooks and Hogan was needed;
- Hogan then gave verbal notice that he was going to quit in 10 days and wanted to work those 10 days straight without any time off;
- she accepted the verbal notice but refused to schedule Hogan for the 10 days straight;
- the payroll periods are cut off on the 15th and the end of each month with paydays being the 20th and 5th respectively;
- if payday falls on a weekend, the employees are paid the previous Friday;
- Hogan worked on June 19, 1998 which was also a payday;
- Hogan did not report for work on June 20, 1998 as scheduled;
- when she arrived at work on June 20, 1998 she was advised that Hogan did not show up;
- she telephoned Hogan's residence but got no answer;
- she was advised by a number of employees that Hogan had left Fort St. John to go home to 100 Mile House;
- she heard nothing from Hogan for some time and, after discussing the issues with offices of the Employment Standards Branch ("Branch"), she had an ROE issued to indicate "M" - dismissed as he had failed to show up for work;
- after the ROE was made up, she received a Doctor's note indicating Hogan was offwork due to illness;
- she threw this note away as she had already issued the ROE;
- she was contacted by Hogan who was only interested in receiving his last 4 days pay and his ROE;
- Hogan did not mention anything to her at this time in regard to his illness or when he would be able to return to work;
- the restaurant was forced to close for 2 weeks in July/August due to a shortage of cooks;
- Hogan's final cheque and ROE were sent to the address of record Humpty's had but they were returned;
- Hogan's final cheque and ROE were eventually sent to an address in 100 Mile House as requested by Hogan in a telephone call;
- she did not see the Doctor's note dated July 6, 1998 supplied by Hogan to the delegate of the Director prior to receiving a copy during the appeal;
- when contacted by the delegate of the Director, Kiel advised that Hogan was considered to have been "fired" for failing to report for work for a number of days;
- she presented a letter from another employee of Humpty's who stated that Hogan had informed her that he was going to quit.

Kiel argued on behalf of Humpty's that the actions of Hogan in failing to report for work as scheduled for an extended period of time constitutes "just cause" for dismissal. Kiel further argues that it is unlikely that Hogan came into the restaurant to leave the first Doctor's note as none of the employees who were working saw him. Kiel further argues that Hogan had no intentions of returning to work as he did not even raise this issue with Kiel during the telephone conversations about his final cheque and ROE. Kiel finally argues that no compensation should be owed as Hogan gave verbal notice to quit and then, after working on pay day, did not come in

to work.

Harsch testified that:

- she was the “front end” supervisor on the dayshift June 20, 1998;
- she was advised by the kitchen staff that Hogan had not reported for work;
- as it is her responsibility to arrange for a replacement, she first telephoned Hogan’s residence shortly after 7 a.m. but got no answer;
- she then advised Kiel that Hogan did not show up for work and that she had called his residence but got no answer;
- later that same morning, Kiel advised her that she had also telephoned Hogan’s residence but got no answer;
- the restaurant office door has a mail slot in it for messages and notes to be dropped in if there is no supervisor readily available;
- she frequently picks up notes etc. when she opens the office door;
- she never saw Hogan enter the restaurant at anytime on June 20, 1998;
- she never saw any Doctor’s note from Hogan.

Hogan testified that:

- he went to see the Doctor on June 20, 1998;
- the reason for seeing the Doctor was because he was overworked and unable to sleep properly because of the stress in the work place as a result of all the overtime hours he had to work;
- he put the Doctor’s note in an envelope, went to the restaurant and put it through the mail slot in the office door;
- when he went back to see the Doctor on July 6, 1998, the Doctor advised him to stay off work for a total of one month;
- after seeing the Doctor on July 6, 1998, he again put the Doctor’s note into an envelope, went to the restaurant and put it through the mail slot in the office door;
- he stayed around the Fort St. John area for a few days as he was waiting for his money and when it didn’t come, he went home to 100 Mile House;
- he assumed that Kiel would know when he was to return to work from the information on the Doctor’s notes;

Hogan further states in his submissions that:

- Dec. 17/98 - “I felt it would be better to be with my family than be by myself while I was on medical leave and then go home and work when the Doctor said I should go back on the 21/07/98.”
- Aug. 8/98 - letter to HRDC re: E.I. benefits “I gave a note from the Doctor to Humpty’s to let them have proper procedures. I waited a few days later for my paycheck and Romy (the owner) said she mailed it. I waited a few more days went to her again and she said it came back and she mailed it again, I waited and by that time I couldn’t afford to stay in my place with no money coming in I moved back home.”

- Aug. 11/98 - Employment Standards Complaint form - claims for regular wages, overtime wages, statutory holiday pay, termination pay, hardship extra expenses;

In response to cross examination by Kiel, Hogan stated:

- he never requested to be laid off;
- no other employee saw him when he dropped of the Doctor's notes;
- he spoke to Kiel on the telephone prior about 1/2 way through the month medical leave, probably around July 15.

In response to questions from the panel, Hogan stated:

- he felt he was owed overtime wages but apparently the officer didn't agree with him;
- he saw the Doctor on 2 occasions, June 20 and again on July 6, 1998 after travelling up from 100 Mile House;
- he saw no other employee on either occasion when he dropped off the Doctor's notes;
- when he dropped off the Doctor's note on July 6, 1998 he still hadn't gotten his pay and asked Kiel where it was. She said it had already been mailed.
- he never received any telephone calls from Humpty's on June 20, 1998 as his phone had an answering machine hooked up;
- he never gave verbal notice of quitting;
- prior to leaving Fort St. John, he went in to speak to Kiel and then telephoned her after leaving town;
- he was not able to explain *what* money he was waiting for before he left as he had already been paid up to date on June 19, 1998;
- he went to 100 Mile House 4 days after seeing the Doctor on June 20, 1998;
- he knew the employee who wrote the letter stating he (Hogan) had told her he was going to quit, but she is lying, she didn't like the afternoon shift workers.

The delegate of the Director investigated the circumstances in this matter and concluded in the Determination “ The only evidence in this case, other than the Record of Employment, is verbal. The fact that Mr. Hogan gave verbal notice of quitting and then subsequently supplied a doctors note, indicates that there was no intention to follow through. It would have been prudent for the employer at that time to ascertain his intentions. It appears that at some point the employer terminated and issued the record of employment accordingly.”

ANALYSIS

The burden of establishing that the delegate of the Director erred in the Determination rests with the appellant, in this case, Humpty's.

The obligation of an employer to pay compensation for length of service is set forth in Section 63 of the *Act* which provides:

Section 63, Liability resulting from length of service

(1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.

(2) The employer's liability for compensation for length of service increases as follows:

(a) after 12 consecutive months of employment, to an amount equal to 2 weeks' wages;

(b) after 3 consecutive years of employment, to an amount equal to 3 weeks' wages plus one additional week's wages for each additional year of employment, to a maximum of 8 weeks' wages.

(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.

(4) The amount the employer is liable to pay becomes payable on termination of the employment and is calculated by

(a) totaling all the employee's weekly wages, at the regular wage, during the last 8 weeks in which the employee worked normal or average hours of work,

(b) dividing the total by 8, and

(c) multiplying the result by the number of weeks' wages the employer is liable to pay.

(5) For the purpose of determining the termination date, the employment of an employee who is laid off for more than a temporary layoff is deemed to have been terminated at the beginning of the layoff.

There is no dispute with respect to the basic facts of this matter. Hogan did not attend at work after June 19, 1998. Humpty's issued a ROE dated July 9, 1998 indicating that the reason for issuing was "M", dismissed.

Section 63 (3) (c) *supra* provides that the liability of an employer to pay compensation for length of service is discharged if, among other things, the employee was dismissed for 'just cause'. The issue therefore is whether Humpty's had "just cause" to dismiss Hogan.

A central issue in cases such as this is often the credibility of the participants and the witnesses.

A guide frequently relied on with respect to credibility issues is found in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) at 356-8 where the court said:

....The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of a story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses and of those shrewd persons adept in the half-lie and of long and successful experience in combining skillful exaggeration with partial suppression of the truth....

In my view therefore, when assessing the credibility of a witness, a number of factors are to be considered. These include:

- the demeanour of the witness
- opportunities for knowledge
- powers of observation
- judgment and memory
- ability to describe clearly what has been said and heard
- the probability of the event happening in the manner suggested

The evidence of Hogan was at times evasive and contradictory, both in regard to his earlier submissions and statements made to the delegate of the Director. For example, Hogan clearly and unequivocally testified that he never gave verbal notice to Humpty's yet that assertion clearly contradicts the findings of fact of the delegate of the Director and the evidence of Kiel and Harsch. Furthermore, Hogan testified at one point that he left town 4 days after his visit to the Doctor on June 20, 1998 yet, in his letter to the HRDC (EI) he states he left immediately after seeing the Doctor as he couldn't afford to stay without money. During his evidence however, Hogan changed his story of when he actually left Fort St. John a number of times. Further, when Hogan was asked what money he was waiting for as June 19 was payday, he was not able to provide an answer. In reality, considering the circumstances, the only reason Hogan would be entitled to any wages at that point in time was if he had quit or was terminated, otherwise, the wages for the period June 15 - 19 would normally not be payable until the 5th of the following month. Finally Hogan categorically states that he did not receive any telephone calls on the

morning of June 20, 1998.

I further find that it would be improbable to believe that on two separate occasions, Hogan went through an area of the workplace where no less than 5 other employees normally work and was not seen by anyone.

I am simply not able to accept Hogan's version of what transpired in these circumstances. I therefore conclude that where the evidence of Hogan contradicts the evidence of the other witnesses, I prefer the evidence of the other witnesses.

The facts are clear. Hogan asked to be laid off and when this was refused he then gave verbal notice of quitting in 10 days. Hogan also asked to be able to work his notice period without any days off and when this was refused, he worked on payday, got his cheque and then left Fort St. John.

Based on the evidence provided and on the balance of probabilities, I conclude that the first Doctor's note allegedly dated June 20, 1998 (but not introduced or provided as evidence) was not in fact provided to Humpty's until sometime later in June or early July.

The retroactive attempt to establish a medical reason for not attending work does not ring true especially when considering the number of times Hogan claims to have spoken to Kiel yet **at no time** did he mention being off sick or discuss the anticipated return to work.

Based on the evidence provided, I conclude that Hogan failed to attend work without a valid reason commencing June 20, 1998.

For all of the above reasons, based on the evidence provided and on the balance of probabilities, I conclude that Humpty's have established that just cause existed for the termination of Hogan for failure to attend work.

The appeal by Humpty's is therefore allowed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated September 29, 1999 be cancelled.

Hans Suhr
Adjudicator
Employment Standards Tribunal