

An appeal

- by -

Princeton Way Pub Ltd.
(“PWP”)

- 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 (as amended)

TRIBUNAL MEMBER: Carol L. Roberts

FILE No.: 2012A/104

DATE OF DECISION: November 15, 2012

DECISION

SUBMISSIONS

Fred Rezanson

on behalf of Princeton Way Pub Ltd.

OVERVIEW

1. This is an appeal by Princeton Way Pub Ltd. (“PWP”), pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination of the Director of Employment Standards (the “Director”) issued August 13, 2012. In that Determination, the Director ordered PWP to pay its former employee, Tanya Dixon, \$1,422.68 in wages, annual vacation pay, interest and compensation for length of service for contravening sections 18, 58 and 63 of the *Act*. The Director also imposed an administrative penalty in the amount of \$500 for PWP’s contraventions of section 63, for a total amount payable of \$1,922.68.
2. PWP appeals the Determination contending that the delegate failed to comply with principles of natural justice in making the Determination.
3. Section 114 of the *Act* and Rule 22 of the Tribunal’s *Rules of Practice and Procedure* provides that the Tribunal may dismiss all or part of an appeal without seeking submissions from the other parties or the Director if it decides that the appeal does not meet certain criteria.
4. These reasons are based only on PWP’s written submissions, the section 112(5) “record” that was before the delegate at the time the decision was made, and the Reasons for the Determination. If I am satisfied that the appeal, or part of it, has some presumptive merit and should not be dismissed under section 114 (1), the Respondent and the delegate may be invited to file further submissions. If the appeal is not meritorious, it will be dismissed.

FACTS AND ARGUMENT

5. PWP does not dispute the Director’s conclusion that PWP had not reimbursed Ms. Dixon for an NSF cheque.
6. Notwithstanding its grounds of appeal, PWP asserts that the Director required PWP to provide “evidence that would not and could not exist”, was biased against PWP by requiring a “higher burden of proof” than it required of Ms. Dixon and misconstrued the evidence in concluding that PWP had failed to pay Ms. Dixon compensation for length of service. The facts set out by the delegate on that issue are as follows.
7. Ms. Dixon was employed as a cashier at PWP’s liquor store from January 1, 2010, until November 29, 2011. On November 21, 2011, the store closed due to financial difficulties. Ms. Dixon said that the store manager, Lara Roberts, told her that the store would be closed for a short period of time and would be re-opening and that Ms. Dixon would continue to have employment at PWP. After the liquor store closed, Ms. Dixon worked at the business on November 28 and 29, 2011, doing odd jobs and inventory. When she did not receive any further work assignments, Ms. Dixon asked that PWP issue her a record of employment (ROE) so she could file an employment insurance claim. Charles Roberts, one of the Directors of PWP, issued Ms. Dixon an ROE on December 7, 2011, setting out the reason for issuance as “shortage of work”. Ms. Dixon alleged that even though the store re-opened, she was not called back to work. Ms. Dixon denied that she had quit her employment.

8. The Director's delegate attempted to contact PWP by telephone in early January 2012 without success. The delegate sent a number of emails regarding the allegations to Ms. Roberts in January, February, and March. On March 23, 2012, the delegate received an email from Ms. Roberts, and exchanged additional emails between March and May 22, 2012. After that date, the delegate unsuccessfully attempted contact on several occasions by both telephone and email. On July 30, 2012, the delegate sent a final email to Ms. Roberts requesting that she provide any additional information she felt needed to be considered. The delegate issued the Determination on August 13, 2012, without receiving any additional information from PWP.
9. Ms. Roberts advised the delegate that she had given Ms. Dixon two weeks' notice and that during that time Ms. Dixon could work when she wanted, as long as she wanted. Ms. Roberts further stated that she had planned to bring Ms. Dixon back to manage the store when it reopened until Ms. Dixon sent her a text message saying that Ms. Roberts could "stick your job". The delegate asked Ms. Roberts to provide any evidence of that text message and any written notice given to Ms. Dixon as Ms. Dixon denied both statements. Neither Ms. Roberts nor anyone else from PWP provided that evidence. On May 16, 2012, PWP sent the delegate an email restating its position that Ms. Dixon quit her employment and that, as a consequence, it was discharged from its obligation to pay compensation for length of service. PWP re-asserted that it offered to keep Ms. Dixon on payroll until the store re-opened and that it was Ms. Dixon who ended the employment when she requested an ROE, and told them that they could "stick" their job.
10. The delegate noted that PWP initially advanced the position that it had provided working notice to Ms. Dixon when it allowed her to work for two weeks following the closure of the store. When Ms. Dixon disputed that statement, PWP asserted that Ms. Dixon quit her employment and told Ms. Roberts to "stick" her job. PWP was unable to provide any evidence to support either of these positions. The delegate noted that PWP issued Ms. Dixon an ROE that supported Ms. Dixon's position that she was laid off. The delegate found that as Ms. Dixon was not recalled to work after the business was reopened, she was terminated from her employment on November 29, 2011, without notice or compensation for length of service.
11. The delegate noted that where there is a dispute as to whether or not an employee quit her employment, the employer must provide clear and unequivocal evidence that the employee did in fact quit. The delegate found that the only documentary evidence was the ROE indicating that Ms. Dixon was terminated due to a shortage of work.
12. The delegate found it incredible that PWP would issue Ms. Dixon an ROE saying that she was terminated due to a shortage of work if Ms. Dixon had earlier sent her a text message telling her that she could "stick" her job.
13. The delegate also reviewed the text message Ms. Dixon sent Ms. Roberts on December 5, 2011, requesting an ROE and found no evidence that she told Ms. Roberts to "stick" her job.
14. The delegate determined that PWP was not discharged from its obligation to pay termination pay.
15. Mr. Rezanson says that PWP closed the liquor store in mid November 2011, for "reorganization and preparation for the holiday season". He says that the closure was projected to be about two weeks. He also says that Ms. Dixon was asked to stay on and to continue working doing whatever tasks she could find to occupy herself. PWP asserts that Ms. Dixon was told that if there was not enough work, she could perform "management type duties" at another pub operated by PWP. Mr. Rezanson further asserts that Ms. Dixon worked for two days when the store was closed and that on December 5, 2011, she requested an ROE, stating that she would prefer to be laid off than have to report for work. PWP says that Ms. Dixon called Ms. Roberts on December 7, 2011, to ask if she could pick up her ROE and that Ms. Roberts told her that if

she wanted a hard copy, she would have to pick it up the following day from PWP's payroll service. It is at this point that PWP asserts that Ms. Dixon told Ms. Roberts to "stick your job". PWP says that Ms. Roberts interpreted Ms. Dixon's comment to "stick your job" to mean that she quit.

16. Mr. Rezanson asserts that at all times PWP was prepared to keep Ms. Dixon on payroll until the store re-opened and to recall her but that Ms. Dixon chose to sever her relationship with PWP. PWP says that Ms. Roberts "made every attempt" to explain why the ROE carried the code "shortage of work" on it, but the Director "did not seem to be receptive to her explanation". He further contends that the Director had the sequence of events wrong and "created a false scenario to arrive at a false conclusion". It claims that Ms. Dixon asked for the ROE on December 5, 2011, and that Ms. Roberts instructed the payroll service to prepare the ROE on December 7, 2011. It says that it was on December 7, 2011, that Ms. Dixon asked about the status of the ROE and at that point, told Ms. Roberts she could "stick her job".
17. Mr. Rezanson says that the Director's delegate erred in requiring a heavier burden of proof from PWP than from Ms. Dixon. He asserts that PWP regarded Ms. Dixon as a valued employee and made every effort to retain her services. Mr. Rezanson contends that the Director failed to understand that it was Ms. Dixon who initiated the request for an ROE even though PWP was prepared to continue to pay her wages and find her duties to perform.

ANALYSIS

18. Section 114 of the *Act* provides that at any time after an appeal is filed and without a hearing of any kind the Tribunal may dismiss all or part of the appeal if the Tribunal determines that any of the following apply:
 - (a) the appeal is not within the jurisdiction of the tribunal;
 - (b) the appeal was not filed within the applicable time limit;
 - (c) the appeal is frivolous, vexatious, trivial or gives rise to an abuse of process;
 - (d) the appeal was made in bad faith or filed for an improper purpose or motive;
 - (e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;
 - (f) there is no reasonable prospect the appeal will succeed;
 - (g) the substance of the appeal has been appropriately dealt with in another proceeding;
 - (h) one or more of the requirements of section 112(2) have not been met.
19. Having reviewed the section 112 record and PWP's submissions, I find no reasonable prospect that the appeal will succeed.
20. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
 - the director erred in law;
 - the director failed to observe the principles of natural justice in making the determination;
 - evidence has become available that was not available at the time the determination was made.
21. The Tribunal has consistently said that the burden is on an appellant to persuade the Tribunal that there is an error in the Determination on one of the statutory grounds.

22. Although PWP's sole ground of appeal is that the Director failed to observe the principles of natural justice, there is nothing in the submissions, nor the record, that supports that ground of appeal. The record shows that the delegate provided PWP with the details of the complaint and repeatedly sought PWP's response.
23. PWP's submission is almost entirely a repetition of the information provided by Ms. Roberts to the delegate during the delegate's investigation of the complaint, although some of the details are inconsistent with the information PWP initially provided. For example, Mr. Rezanson asserts that the store was closed for "reorganization", when Ms. Roberts informed the delegate that the store was closed "due to a high tax bill and lack of stock". Mr. Rezanson also asserts that Ms. Dixon requested an ROE although Ms. Roberts informed the delegate that she "offered Ms. Dixon an ROE" when she was waiting for the store to re-open. However, the essential facts are not in dispute. Ms. Dixon received an ROE in early December stating that she had been laid off due to a shortage of work. PWP then asserted that Ms. Dixon quit her job, allegedly when she told Ms. Roberts to "stick her job". Although the delegate repeatedly sought evidence of that statement, PWP did not provide it. I understand PWP's argument to be that the delegate was wrong to require the employer to provide evidence Ms. Dixon quit. In essence, PWP says that the delegate erred in law by improperly placing the burden of proof on the employer.
24. In my view, PWP's submission does not establish an error of law. There is no dispute PWP laid off Ms. Dixon and did not recall her. If an employee is not recalled to employment within a certain period of time, their employment is deemed to be terminated. (Section 1 of the *Act*)
25. As the Tribunal has said on many occasions, it is the employee's right to resign or quit their employment and there must be clear and unequivocal evidence of the employee's intention to quit as well as some objective evidence of the quit. The burden is on the employer to prove a quit. If the employer is unable to do so, then a finding of termination will follow. (see *Burnaby Select Taxi Ltd.* (BC EST # D091/96), *Gardeli's Restaurant Ltd.* (BC EST # D126/97), and *O'cana Enterprises Ltd.* (BC EST # D503/97)).
26. As Ms. Dixon both denied that she quit or that she told Ms. Roberts to "stick her job" either in a text message or otherwise, the delegate properly sought evidence of her quit from PWP. The only documentary evidence provided to the delegate was the ROE indicating that Ms. Dixon had been laid off.
27. Even if the Director's delegate misunderstood the timing of the alleged "stick it" comment as PWP contends, the fact is that PWP provided no evidence Ms. Dixon quit even after repeated requests by the delegate.
28. I find no basis for PWP's argument that the Director's delegate either failed to observe the principles of natural justice or was biased by requiring PWP to prove that Ms. Dixon had quit her employment.

ORDER

29. Pursuant to section 114 (1)(f) of the *Act*, I dismiss the appeal on the grounds that there is no reasonable prospect that it will succeed. Accordingly, the Determination, dated August 13, 2012, is confirmed in the amount of \$1,922.68 together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal