

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1995, C. 38

- by -

Gardeli's Restaurant Ltd.
("Gardeli's")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE NO.: 96/729

DATE OF HEARING: March 7, 1997

DATE OF DECISION: March 14, 1997

DECISION

APPEARANCES

Patrick Rilkoff for the employer
Terry Duff for himself
Ed Wall for the Director

OVERVIEW

This is an Appeal under Section 112 of the *Employment Standards Act* (the "Act") by Gardeli's Restaurant Ltd. ("Gardeli's") of Determination No. CDET 004711, dated November 15, 1996, by a delegate of the Director of Employment Standards Branch (the "Director"). The Determination concluded Gardeli's had contravened subsection 63(2) of the *Act* when it failed to pay length of service compensation to Terry Duff ("Duff") upon termination of his employment on March 19, 1996. The Determination ordered Gardeli's to pay \$1,280.76. Gardeli's says the Determination should be set aside because Duff quit his employment on or about March 17, 1996.

ISSUE TO BE DECIDED

The issue is whether Duff quit his employment on or about March 17, 1996.

FACTS

Duff was employed at Gardeli's from September 19, 1993 as the Kitchen Manager. In March, 1996 Duff was suffering the effects of severe stree. On March 14, 1996 he saw his doctor who prescribed he take some time off work. The doctor wrote a brief note which said:

RE: Terry Duff
BD: October 10, 1958

It is strongly recommended that this man take a leave of absence form work for medical reasons. This should commence as soon as possible.

Yours sincerely,

Dr. R.V. Perrier. Ltd.

On March 15, Duff went to work. He met with Pat Rilkoff, the owner of the Gardeli's, and showed him the doctor's note. Mr. Rilkoff was concerned. Duff's departure would leave him in a bind. He asked Duff how long he would be gone. Duff replied: "Indefinitely". Mr. Rilkoff told him he would have to get a replacement. Duff told him to do what he had to do. Mr. Rilkoff pleaded with him to stay until he found a replacement. Duff agreed to stay until March 22.

On March 17, Duff was scheduled to work from 10:30 am to 7:00 pm. By 2:00 that afternoon, Duff felt he could not continue working. He felt sick. He arranged for another cook to cover off the remainder of his shift and went home. On March 18, Duff says he intended to come to work, but his wife felt he was too ill to do so. She convinced him to stay home and she called Gardeli's to advise them her husband would not be in that day, she was taking him to the hospital. Sometime later she called the restaurant again to say Duff would likely not be in at all. Duff says his wife tried to convince him to go to the hospital, but he refused. Instead, she made an appointment for him that day at the Castlegar Medical Clinic, Kinnaird Office. He says he saw a doctor there who told him he had the flu and should rest. By Friday, March 22, he felt better and was going to return to work. His wife convinced him not to go and he didn't.

On March 19, Mr. Rilkoff issued a Record of Employment for Duff. The document states as the reason for issuing it as "E", quit. The document also indicates Duff would not be returning. There was no evidence to confirm when Duff received the document, but he filed for unemployment insurance disability benefits on March 26. Duff said he did not feel it to have been necessary to communicate with Gardeli's to challenge the reason given for issuing the document as his claim was accepted as a disability claim. He also believed Gardeli's would be notified of that decision.

Duff did not communicate with Gardeli's until June 11, 1996 when he phoned to ask to be placed on the schedule for June 16. He was not placed on the schedule and Duff wrote a note on June 20 indicating he was available for work. Gardeli's notified him June 24 they took the position he had quit his employment. The events had sufficiently crystalized by June 20 and these communications add nothing to assist how the preceeding events should be viewed. Both parties appear to be posturing.

There was also some evidence about an attempt by Duff to resign in July, 1995, some notes of a staff meeting in November, 1995 and the opening of a restaurant in Trail by a company for which Duff's wife was president, 3D Restaurants Inc., in August, 1996. There was not, however, any evidence linking any of these matters to the argument Duff quit in March, 1996.

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. In a sense, length of service compensation is a statutory benefit conferred upon an employee. The amount of compensation increases as the employee's length of service increases to a maximum of 8 weeks' wages. An employer may effect a discharge 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: first, self terminating employment; second, retiring from employment; and third, giving just cause for dismissal.

There is no assertion Duff retired. In the Appeal, the remedy sought by Gardeli's asks the Tribunal to either find Duff quit or was dismissed for cause. At the outset of the hearing we discussed whether the issue of just cause would be pursued in the Appeal. After some discussion relating to what an employer must show to demonstrate just cause, Mr. Rilkoff conceded he could not meet the onus. It was recommended, and Mr. Rilkoff agreed, the argument of just cause be abandoned.

This left only the issue as whether, in all of the circumstances present in this case, I can find Duff quit his employment with Gardeli's. The position the Tribunal takes on the issue of a quit is now well established. It is consistent with the approach taken by Labour Boards, arbitrators and the Ontario Employment Standards Tribunal. It was stated as follows in the Tribunal's decision *Burnaby Select Taxi Ltd. -and- Zoltan Kiss*, BC EST #091/96

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; objectively, the employee must carry out some act inconsistent with his or her further employment. The rationale for this approach has been stated as follows:

“. . . the uttering of the words “I quit” may be part of an emotional outburst, something stated in anger, because of job frustration or other reasons, and as such it is not to be taken as really manifesting an intent by the employee to sever his employment relationship.”

Re University of Guelph, (1973) 2 L.A.C. (2d) 348

I am troubled by some aspects of the facts of this case, particularly the failure of Duff to challenge the notation on the Record of Employment indicating he had quit and the absence of any communication with Gardeli's for almost three months following the receipt of the Record of Employment. On the other hand, Duff made no suggestion when he gave the doctor's slip to Mr. Rilkoff he intended to quit. Also, while Mr. Rilkoff was concerned about the prospective absence of Duff and the impact it might have on his business, he did not refuse to accept the notion of a leave of absence for Duff. Duff told Mr. Rilkoff when he was ready to return, he would be the first to know. There is no conduct by Duff that is not consistent with a conclusion he left Gardeli's on doctor's advice and intended to return when he was better. Gardeli's has failed to show on clear and unequivocal evidence Duff quit.

While I have sympathy for Mr. Rilkoff for the position in which Duff left him on March 18 and some suspicions about the motivation of Duff, as an individual exercising a quasi-judicial function I am not allowed to base my decision on sympathies or suspicions. I must decide the issue on the facts, as proven and applied to the principles and policies of the *Act*.

The Appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order Determination No. CDET 004711, dated November 15, 1996, be confirmed.

David Stevenson
Adjudicator
Employment Standards Tribunal