Employment Standards TRIBUNAL

An appeal

- by -

631724 B.C. Ltd., operating as Patty-Jo's Restaurant
("the employer")

- 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: M. Gwendolynne Taylor

FILE No.: 2003A/51

DATE OF DECISION: May 14, 2003

BRITISH COLUMBIA

DECISION

This decision is based on written submissions presented by 631724 B.C. Ltd. operating as Patty-Jo's Restaurant ("the employer"), Donna E. Lamarche ("the employee") and the Director of Employment Standards.

OVERVIEW

This is an appeal by the employer from a Determination of the Director dated January 6, 2003, concerning a complaint by a former employee. The Director's delegate found that the employee had been terminated without just cause and was owed compensation for length of service. The delegate ordered the employer to pay $2,787.56, including interest.

The employer appealed the Determination on the grounds that the Director erred in law and breached principles of natural justice and that new evidence has become available. Specifically, the employer argued that the Director erred in determining facts and erred in determining that the employer had altered the terms of employment resulting in loss of job prestige. Although 'new evidence' and 'breach of the principles of natural justice' were checked off the form, those grounds of appeal were not advanced in the written materials.

ISSUE

Has the employer substantiated the claim that the Director erred in law?

- Is the delegate's finding that the employer substantially altered the terms of employment reasonably supported by the evidence?

- Is the delegate's finding that the employer terminated the employment, rather than that the employee quit, reasonably supported by the evidence?

FACTS

The employer purchased the restaurant as a going concern on or about June 19, 2002. The employee worked at the restaurant for more than nine years, until August 21, 2002. The issue before the delegate concerned a conversation the parties had on August 21, and whether the employee quit or was fired. The delegate, Krell, conducted an oral hearing on December 12, 2002, and heard witnesses for both parties. It is apparent that another delegate, Morrison, had a meeting with the parties on November 6, 2002.

The employee had been away from work on a medical leave and returned on August 21 to advise the employer that she was able to return to work. During the conversation between them, the employer called another employee in to witness the conversation. That employee was a witness for both parties at the hearing. She was not able to testify to the totality of their conversation because she was also watching the restaurant and dealing with customers.

In the Determination, the delegate recited the employer's evidence that he believed he had grounds to terminate the employee but was prepared to give her a second chance, with condition:

1. the employee needed to provide a medical note saying she was medically able to work;

2. the employee would no longer perform supervisory or management duties. She would be a server. Her wage rate would drop from $10.00 to $8:00 per hour, if the reduction was not prohibited by law.

3. If the employee's conduct did not improve, appropriate termination notice would be given.

The employee's evidence was that the employer told her he was reducing her wage to $8.00, that the owners would be performing the management duties, the parties began yelling at each other, and the employer told the employee she was fired.

The witness to the conversation testified that the employee indicated her willingness to come back to work, the parties agreed on the medical note, the employer said the employee was no longer required to help in the office, the employer would look into reducing her wage to $8.00 per hour, the employee objected to the reduction, the parties argued and the employee said she would not stand there and take it, and the employer said he would bring her back for two weeks and then fire her. The witness did not know whether the two weeks was a trial period or a period of notice.

The delegate referred to section 66 of the Act:

> If a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated.

The delegate found there was no dispute that the employer was relieving the employee of her supervisory duties and that the parties had agreed that part of the employee's duties had included ordering product, scheduling and supervisory staff. The employer, on appeal, takes issue with this latter statement, as discussed below. The delegate found that the employee had been relieved of her supervisory duties and had been told that her wages would be reduced. The delegate found that the proposed reduction in wage (which is not prohibited by law) and the change in duties amounted to termination under the Act.

The delegate considered s. 66 and the common law doctrine of constructive dismissal. The delegate concluded:

> In regard to Section 66 of the Act, I am convinced that the removal of Ms. Lamarche's supervisory duties was substantial in and of itself. The loss in job prestige, both among co-workers and regular clientele in a position to recognize the change, is substantial. In addition, I am persuaded that a reduction in wage was to accompany the reduction in duties. This makes the combined changes even more significant.

ARGUMENT

The employer disputed the delegate's finding that the employee was ever responsible for ordering, scheduling or supervising. The employer also disputed the finding that the wage would be reduced and referred to a letter dated November 6, 2002 as proof of this. That letter, which is dated the same date as the meeting between the parties with delegate Morrison, confirms an offer of employment as a server, at

the previous rate of pay. The letter states: "After reviewing the job that you were doing in the past and considering that we as new owners have chosen to be owner operators this is the best position we can offer." The letter then sets two conditions – that a medical note be provided and that she provide reasonable notice of return to work so the employer can adjust the work schedule.

The employer concluded that the delegate erred because there had been no reduction in wages and, since the employee never did the ordering or scheduling, there was no loss in job prestige.

The employee replied to the appeal noting that she received the November 6 letter on November 8, after the meeting with delegate Morrison. She submitted that the employer, in fact, had no intention of hiring her back and wrote the November 6 letter only to attempt to cover up for firing her on August 21, 2002.

ANALYSIS

The appeal is brought under section 112 of the *Act*:

> 112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:
>
> (a) The director erred in law;
>
> (b) The director failed to observe the principles of natural justice in making the determination;
>
> (c) Evidence has become available that was not available at the time the determination was being made.

An appeal to the tribunal is not a re-investigation of the complaint. It is a proceeding to decide whether there is any error in the Determination. The tribunal will not substitute its opinion for that of the Director without some basis for doing so. The burden is on the appellant to demonstrate that there are grounds for cancelling or varying the determination.

This appeal is based on error of law, saying the employer did not terminate the employment and should not be required to pay compensation. The employer's position is that the delegate erred in making findings of fact and erred in applying section 66. Although error of fact is not a ground for appeal, there may be instances when errors in fact finding amount to errors of law. When that is alleged, the tribunal will consider the evidence that was before the delegate to decide whether the impugned finding of fact is unreasonable. As noted above, the burden is on the appellant to demonstrate that the delegate erred.

I find that the employer has not demonstrated that the delegate's finding of fact was unreasonable. The employer acknowledges that the employee's previous job description contained some management responsibilities. The employer does not say what those were. The delegate conducted an oral hearing, heard from a number of witnesses who worked at the restaurant, and heard from both parties. The alteration of the terms of the employment and the proposed reduction in salary, were key issues at the hearing. It was open to the employer to present evidence on these key issues before the delegate and on appeal. I find that it was reasonable for the delegate to make the findings he did concerning the previous job description based on the totality of the evidence, including the evidence from the employer.

The delegate considered the evidence given by the parties and the witness for the meeting on August 21, 2002, regarding the proposed salary reduction. The delegate did not refer to the letter of November 6, 2002. It is not clear to me whether that letter was before the delegate. However, if it was, it seems to me quite reasonable that the delegate would prefer the evidence of what was said on August 21 over what was written on November 6. The delegate concluded that the employee was told her wages would be reduced. I find that the delegate's fact finding on this aspect is not unreasonable.

The delegate found that the combination of change of job duties and reduction of salary, both communicated to the employee on August 21, 2002, amounted to dismissal. The employer disputed that there was loss of prestige to the employee. I find that the delegate appropriately considered the evidence of the witnesses and that the conclusion was reasonable and supported by the evidence. I further find that the delegate's analysis of section 66 is sound and that the delegate's conclusion is well founded in law.

I find that the employer has not substantiated the grounds for appeal.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination dated January 6, 2003, be confirmed in the amount of $2,787.56, together with any interest that has accrued pursuant to section 88 of the *Act*.

M. Gwendolynne Taylor
Adjudicator
Employment Standards Tribunal