

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 -

Slumber Lodge Motel Corporation Ltd.

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 97/138

DATE OF DECISION: April 22, 1997

DECISION

OVERVIEW

This is an appeal by Slumber Lodge Motel Corporation Ltd. ("Slumber Lodge"), under Section 112 of the *Employment Standards Act*, (the "Act"), against a Determination issued by a delegate of the Director of Employment Standards (the "Director"), on February 11, 1997. The Determination requires Slumber Lodge to pay "compensation for length of service" to Charles Sharkie ("Sharkie"), in accordance with Section 63 of the *Act*.

ISSUE TO BE DECIDED

Was Mr. Sharkie laid off temporarily or indefinitely?

FACTS

Charles Sharkie was employed as a cook at the Slumber Lodge Motel in Terrace, B.C. from June 15, 1995 to February 18, 1996.

The essential facts in this appeal, which are set out at some length in the Determination, can be summarized as follows:

Sharkie's complaint (dated February 19, 1996) states that he was "laid off without proper notice"

Sharkie alleges that Gary Turnavitski (relief manager) advised him by telephone at approximately 9:45 p.m. on February 18, 1996 that "everybody is being laid off indefinitely and the restaurant is being closed."

Brian MacDonald (general manager) acknowledged that all employees were laid off on February 18, 1996. He also acknowledged that the employees received written notice of lay-off, or termination and none was given an expected recall date.

Sharkie found alternate employment on February 20, 1996.

On February 28, 1996 Bob Reid (manager) contacted Sharkie at his new place of employment and told him that the restaurant was reopening the next day and he was scheduled to work.

The Director's delegate sets out the following findings as the basis for making the determination that Sharkie is entitled to "compensation for length of service":

Sharkie's statement that he was told via telephone call on February 18, 1996 that "...the restaurant was being closed and that he was laid off immediately and indefinitely" was corroborated by other employees.

Brian MacDonald's statements confirm Sharkie's statement that he was given no notice of lay-off nor any expected return-to-work date.

Sharkie did not resign from his employment with Slumber Lodge and his subsequent employment with another employer on February 20, 1996 is not relevant in deciding Slumber Lodge's liability under the *Act*.

Neither the closure of the restaurant nor the length of the lay-off were described as temporary in nature.

Slumber Lodge asserts in its appeal that Sharkie resigned his employment on February 23, 1996 when he returned his cook's uniform and received his regular pay cheque from Bob Reid (manager).

The Record of Employment ("ROE") which was issued to Sharkie on March 6, 1996 shows code "E" as the reason for it being issued. Code "E" indicates that an employee "QUIT".

ANALYSIS

The appeal by Slumber Lodge argues that the Determination is wrong because Sharkie's employment was not terminated on February 18, 1996. Rather, Slumber Lodge argues, its employees were laid off temporarily. As a result, Slumber Lodge argues, neither notice of termination nor compensation for length of service are required by the *Act*.

The central issue which I must decide is whether Mr. Sharkie was laid off temporarily or indefinitely.

Section 1 of the *Act* defines a "temporary layoff", for employees who do not have a right of recall), as a layoff of up to 13 weeks in any period of 20 consecutive weeks.

The *Act* does not require an employer to give notice of a temporary layoff. Nor does the *Act* require an employer to specify an expected date of recall at the time that it decides to layoff an employee. But, if an employee does not have a right of recall, a layoff which exceeds 13 weeks in any period of 20 consecutive weeks is deemed to constitute termination of employment. (The provisions in Part 8 of the *Act* set out the rights and responsibilities of employers and employees under such circumstances).

Under the statutory scheme as I have described it and understand it, an employer is free to decide during the thirteen weeks following a layoff what action it will take concerning laid-off employees. If circumstances warrant, some or all of the laid-off employees may be recalled to work. If, on the other hand, an employer does not recall laid-off employees within 13 weeks, it would be required to comply with the provisions set out in Part 8 - Termination of Employment.

Also, I note that Slumber Lodge's actions on February 18, 1996 and immediately thereafter are not consistent with those of an employer contemplating an indefinite layoff. For example, it did not issue final pay cheques to its employees. It did not pay out vacation pay as required under Section 58(3). It recalled Mr. Sharkie ten days after he was laid off. Also, the ROE issued to Mr. Sharkie showed code "E" ("Quit") as the reason for its issuance.

While I have some considerable sympathy for the unfortunate circumstances in which Mr. Sharkie and his co-workers found themselves on February 18, 1996, I am unable to find that Slumber Lodge has contravened the *Act*. Mr. Sharkie reacted to the lay-off by seeking alternative employment and was successful in that search. He then returned his uniform and collected his regular paycheque from Slumber Lodge on February 23, 1996.

The Director's delegate, relying on information provided by Mr. Sharkie, found that Bob Reid contacted Mr. Sharkie on February 28, 1996 to inform him that the restaurant was reopening the next day and to schedule him for work. Mr. Sharkie was unable to report for work as requested because of his responsibilities to his new employer.

For all of the reasons which are set out above I am led to conclude that Mr. Sharkie was laid off temporarily on February 18, 1996.

ORDER

I order, under Section 115 of the *Act*, that the Determination be cancelled.

Geoffrey Crampton
Chair
Employment Standards Tribunal