

An appeal

- by -

Nils Fredrickson
("Fredrickson")

- 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: C. L. Roberts

FILE No.: 2000/792

DATE OF HEARING: April 17, 2001

DATE OF DECISION: April 26, 2001

DECISION

APPEARANCES:

Nils Fredrickson:	On his own behalf
No one appeared	On behalf of the Director of Employment Standards
Zack Bhatia:	On behalf of Mayfair Properties

OVERVIEW

This is an appeal by Nils Fredrickson ("Fredrickson"), pursuant to Section 112 of the Employment Standards Act ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued October 31, 2000.

Mr. Fredrickson complained that he was owed vacation pay and compensation for length of service by Mayfair Properties Ltd. operating as Days Inn Vancouver Downtown ("Days Inn"). After reviewing Fredrickson's complaint, the Director determined that the Act had not been contravened, and ceased investigating the complaint pursuant to Section 76(2) of the Act.

ISSUE TO BE DECIDED

At issue is whether the Director erred in concluding that Fredrickson was not owed compensation for length of service.

FACTS

Mr. Fredrickson worked as the head chef for Days Inn from June 30, 1994 to January 11, 2000, at which time he took medical leave for stress and anxiety. Mr. Fredrickson's mother-in-law had recently passed away, and Mr. Fredrickson felt that his supervisor, Mr. Lee, had not treated him with consideration.

Mr. Fredrickson, Mr. Lee and Mr. Bhatia had a meeting on January 24 at Mr. Fredrickson's request. Mr. Fredrickson had wanted an apology for Mr. Lee's behaviour, and wanted to return to a less stressful working environment.

Mr. Fredrickson contends that Mr. Bhatia told him that when he returned, it would be as a cook, not as the head chef. Mr. Fredrickson further states that he was told that another individual had been hired to perform his job, and that he could no longer return to work in the position for which he was hired. Mr. Fredrickson also said that Mr. Bhatia showed him letters of complaint from two other employees, which formed part of the reason he had been demoted.

Mr. Bhatia denied Mr. Fredrickson's version of events. He stated that he never told Mr. Fredrickson that he would be returning as a cook; in fact, Mr. Bhatia says that he encouraged Mr. Fredrickson to return to work as soon as possible. It was also Mr. Bhatia's evidence, which Mr. Fredrickson did not dispute, that he apologized to Mr. Fredrickson on behalf of the hotel, and attempted to persuade Mr. Lee to do so also. Mr. Lee refused.

On January 27, Mr. Fredrickson provided Days Inn with a second doctor's note that stated "it is suggested that [Mr. Fredrickson] not return to work... his next review in 2 weeks".

On February 3, Mr. Fredrickson sent Mr. Bhatia a fax, in which he set out his understanding of the meeting, including his belief that he would be returning as a cook, and rejecting Mr. Bhatia's conditions on which he was to return to work. In that fax, Mr. Fredrickson also informed Mr. Bhatia that he was prepared to work on February 14 with his doctor's approval.

Mr. Fredrickson also alleges that, during a telephone conversation with Mr. Bhatia on February 9, he was told that if he returned to work on February 14, he would be removed from the premises, forcibly if necessary.

On February 10, Mr. Fredrickson provided Days Inn with a third doctor's note stating that "he has been advised to remain off work...A return to work date will be established at a later date".

On February 16, Mr. Fredrickson's counsel wrote to Days Inn contending that he had been constructively dismissed, seeking \$20,365.31 severance.

Days Inn's counsel, John Morgan, replied to that letter on March 6, stating that Mr. Fredrickson's employment had not been terminated, that his position was still available, and that Days Inn was waiting for Mr. Fredrickson to indicate when he would be able to return to work. On March 20, Mr. Morgan sent another letter to both Mr. Fredrickson and his counsel, stating that if he did not hear from them by the end of the business day, Days Inn would assume that Mr. Fredrickson did not intend to return to his employment.

On March 30, Mr. Morgan sent Mr. Fredrickson's counsel another letter stating that, since it had not heard from Mr. Fredrickson, Days Inn considered Fredrickson's conduct to be a refusal of the employment contract, which Days Inn accepted.

The Director's delegate determined that, since Days Inn had told Mr. Fredrickson on three separate occasions that his job was still available, and Mr. Fredrickson had not replied to any of these letters, the allegation of constructive dismissal had not been made out, and dismissed the complaint.

Mr. Fredrickson acknowledged that he did not respond to any of Mr. Morgan's letters, saying that he had no job to return to, having been constructively dismissed in January, and did not want to waste money on a lawyer doing so. In addition, Mr. Fredrickson acknowledged that he had started another job as of February 29, and was no longer available to work for Days Inn.

Mr. Bhatia stated that although he had little previous interaction with Mr. Fredrickson, he found Mr. Fredrickson to be one of his most valuable employees, and had given him a \$1000 Christmas bonus, which he gave to very few employees. Mr. Bhatia denied ever telling Mr. Fredrickson that he was fired, or that he would never return to work as the chef, as he had no reason to do so. Mr. Bhatia acknowledged that, at the January meeting, he pointed out to Mr. Fredrickson that other employees had complained about Mr. Fredrickson's behaviour, and showed him copies of letters from other employees. However, Mr. Bhatia stated that his intent in doing so was to suggest that employees often have interpersonal difficulties, similar to that Mr. Fredrickson had with Mr. Lee, and that they had to deal with them as best they could.

Mr. Bhatia acknowledged that he did not respond to Mr. Fredrickson's fax of February 3. However, he stated that he was very busy managing 7 hotels, and that the note indicated that Mr. Fredrickson would be returning to work. Furthermore, he said that, shortly after receiving the fax, he received a note from Mr. Fredrickson's doctor indicating that he was not able to return to work until a later date.

Mr. Bhatia denied that he had any other conversations with Mr. Fredrickson. He said that he did not have a telephone conversation with Mr. Fredrickson, although he did receive a telephone message on February 10 that Mr. Fredrickson had tried to call him to cancel a meeting.

Mr. Bhatia further testified that he did not hire a chef to replace Mr. Fredrickson until May 3, when it was clear Mr. Fredrickson was not returning. He testified that two chefs were hired on a temporary basis until May 3.

Mr. Fredrickson called two witnesses, Mr. Chow and Ms. McLean. I do not find it necessary to refer to their evidence in any detail. Both of the witnesses testified that they had no knowledge of whether Days Inn hired a permanent chef as of January 26. They acknowledged that there were two or three chefs working during the period January to May, 2000.

ARGUMENT

Mr. Fredrickson contends that the Determination was not based on the principles of natural justice, and that it did not reflect "decisions reached in similar cases adjudicated under the common law".

He argues that the delegate erred in preferring the assertions contained in Mr. Morgan's letters over his verbal evidence of what occurred in the meeting of January 24. He alleged that the delegate also ignored his evidence of what occurred in the meeting of February 9.

Mr. Fredrickson also argues that, if Mr. Bhatia had not dismissed him on January 24, he had the opportunity to clarify or correct his misunderstanding by replying to his fax of February 3. He contended that this behaviour constituted a refusal by Days Inn to allow him to return to perform the job for which he was hired, and a breach of the employment contract. Further, Mr.

Fredrickson argues, Days Inn only offered him his job after Mr. Fredrickson's counsel sought compensation for wrongful dismissal.

Mr. Bhatia contended that the evidence spoke for itself. He contended that Mr. Fredrickson was not dismissed, that Days Inn, through its solicitor, advised Mr. Fredrickson of that, and that Days Inn did not replace Mr. Fredrickson until May 3. Mr. Bhatia submitted that all of the evidence supported the delegate's Determination.

DECISION

Section 76(2) of the Act provides that the Director may refuse to investigate a complaint or may stop or postpone investigating a complaint if

...

(d) there is not enough evidence to prove the complaint.

On the basis of the evidence and the submissions, I am unable to conclude that the delegate erred in dismissing the complaint.

I agree with Mr. Fredrickson that the delegate erred in failing to assess his verbal evidence, relying entirely, it appears, on doctor's notes and the letters of counsel for both parties, none of which is evidence of any fact. At most, counsel's letters set out the positions of the parties.

Nevertheless, having reviewed those documents, the delegate reviewed the circumstances surrounding the alleged dismissal, and concluded that Mr. Fredrickson chose not to return to work. Although I am unable to find that the conclusion is in error, I would arrive at the same conclusion for different reasons.

There is no dispute that Mr. Fredrickson was considered a good employee up to at least January 24, and there was no basis for Mr. Bhatia to dismiss him. Mr. Fredrickson had just received a Christmas bonus.

Mr. Fredrickson alleges that Mr. Bhatia not only demoted him from chef to a cook at a meeting on January 24, but that, during a telephone conversation on February 9, he told him he would have him forcibly removed from the premises if he returned to work on February 14. Mr. Bhatia disputes Mr. Fredrickson's allegations that he told him he would have to return as a cook during the meeting. He also disputes that he had any conversation with Mr. Fredrickson at all on February 9, and denies telling him at any time that he would have him forcibly removed from the premises if he did show up for work. The issue then, is one of credibility, which the delegate did not address.

Having heard the submissions of the parties, and after reviewing all of the circumstances surrounding the alleged dismissal, I am unable to find Mr. Fredrickson's version of the events has the ring of truth.

Mr. Bhatia had no motive or reason to dismiss Mr. Fredrickson. He considered Mr. Fredrickson a good employee, and had recently given him a bonus. At the meeting on January 24, Mr. Fredrickson does not dispute that Mr. Bhatia apologized to him on behalf of the hotel in front of other staff, and asked Mr. Lee to do the same. These are not the actions of a manager intending to dismiss Mr. Fredrickson.

In addition, the evidence is that Days Inn did not hire a permanent chef to replace Mr. Fredrickson until May 3. Days Inn continued to offer Mr. Fredrickson his position until March 20, which is consistent with the employment contract with the permanent chef.

Finally, Mr. Fredrickson's doctor sent two notes to Days Inn indicating that he was unable to return to work after January 24. These actions are inconsistent with Mr. Fredrickson's assertion that he was dismissed on January 24. If Mr. Fredrickson believed he no longer had the chef's job after that date, it would make no sense to have the doctor indicate that he was not able to return to it.

I accept that, as of the end of February, Mr. Fredrickson had found alternative employment, and would not leave that to return to his position at Days Inn. Nevertheless, he made no attempt to advise Days Inn that he was not returning to the job it confirmed that he still had.

I find no basis to allow the appeal.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination, dated October 31, 2000 be confirmed.

C. L. ROBERTS

C. L. Roberts
Adjudicator
Employment Standards Tribunal