

An appeal

- by -

Hartley & Associates Investments Inc. operating as  
Valley Estates Vintning & Brewing  
("Hartley")

- 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:** Carol L. Roberts

**FILE No.:** 2002/25

**DATE OF HEARING:** May 1, 2002

**DATE OF DECISION:** May 15, 2002

## DECISION

### APPEARANCES:

A. D. (Tony) Hartley and Julie Battye:	For Hartley & Associates Investments Inc.
David Rusling	On his own behalf

### OVERVIEW

This is an appeal by Hartley & Associates Investments Inc. operating as Valley Estates Vintning & Brewing ("Hartley"), pursuant to Section 112 of the Employment Standards Act ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued January 3, 2002. The Director found that Hartley contravened Section 63(1) of the Act in failing to pay David Rusling compensation in lieu of notice and statutory holiday pay. The Director's delegate Ordered that Hartley pay \$460.32 to the Director on Mr. Rusling's behalf.

Hartley contends that Mr. Rusling quit his employment, and that no compensation is owing.

### ISSUE TO BE DECIDED

Whether the Director correctly determined that Mr. Rusling was fired, rather than quit his employment.

### FACTS

For the purposes of this appeal, the facts are as follows.

Mr. Rusling worked for Hartley from March 17, 2000 to January 8, 2001 as a production worker/salesperson. On January 9, Mr. Rusling suffered a non job-related injury, and advised Hartley that he would be off work for some time. Hartley issued Mr. Rusling a Record of Employment ("ROE") setting out the reasons for leaving as illness/injury. On February 22, 2001, Hartley issued another ROE setting out "shortage of work" as the reason for leaving.

Mr. Rusling filed a complaint with the Employment Standards Branch contending that he had been fired from his employment, and that he was entitled to length of service compensation. Hartley contended that Mr. Rusling quit.

Following an investigation, the Director's delegate determined that there were no clear and unequivocal facts to support Hartley's assertion that Mr. Rusling quit. The delegate was unable to find that Mr. Rusling formed an intent to quit his employment, and concluded that he was entitled to compensation for length of service.

## ARGUMENT

Hartley contends that the delegate erred in concluding that Mr. Rusling had not quit his employment. He alleges that he attempted on a number of occasions in early February to meet with Mr. Rusling to determine when he was capable of returning to work, but that Mr. Rusling did not return his telephone calls. He contends that, on February 6, Mr. Hartley arranged to meet Mr. Rusling at the store on February 7, and that Mr. Rusling did not appear. Mr. Hartley stated that, on February 8, he rescheduled a meeting for later that day, and that Mr. Rusling again did not appear. Mr. Hartley says that Mr. Rusling appeared on February 9 without an appointment, and that he advised Mr. Rusling that his hours of work would be slightly reduced because the U-Brew business slowed down during that time of year. Mr. Hartley contends that Mr. Rusling told him that he wanted full time work, and that he would not be returning.

Mr. Hartley says that Mr. Rusling appeared at the store on February 18, and gave his shirts and key to another employee, without speaking with him.

Mr. Rusling had a doctor's note indicating that he was fit to return to work. The note indicated that it was to replace a note issued February 2, which had apparently been lost. Mr. Rusling contended that he telephoned Mr. Hartley on February 2 to indicate his desire to return to work, and that Mr. Hartley told him that he had hired a replacement. He further alleges that Mr. Hartley then told him that, due to a concern that he could be injured at work, he had been laid off. Mr. Rusling stated that he never met Mr. Hartley in person about his return to work.

Mr. Hartley contends that he juggled the schedules of other employees to cover Mr. Rusling's shifts, and increased his own hours, in anticipation of Mr. Rusling's return. He denied that he hired a new employee to replace Mr. Rusling. Mr. Hartley never saw the doctor's note until after the complaint had been filed.

Mr. Hartley acknowledged that the ROE may have been issued in error. Ms. Battye stated that she entered the code she did because she understood that Mr. Rusling quit because he was upset that his hours were being reduced.

## ANALYSIS

The burden of establishing that a Determination is incorrect rests with an Appellant. On the evidence presented, I find that burden has been met.

The parties presented vastly different versions of the events surrounding the end of Mr. Rusling's employment. Hartley contends that it attempted a number of times to meet with Mr. Rusling in early February and that Mr. Rusling never responded to the telephone calls or showed up for the arranged meetings. Mr. Rusling says he got a doctor's note on February 2 to demonstrate that he was able to return to work, and that when he contacted Mr. Hartley to indicate he was fit to do so, he was told he had been laid off and that another worker had been hired.

I prefer the evidence of Mr. Hartley, who kept a daytimer on a daily basis which set out his attempts to contact Mr. Rusling. Mr. Rusling denied that there was ever a face to face meeting. Mr. Rusling's evidence varied somewhat from his written submissions, in that he acknowledged that another employee, not Mr. Hartley, told him that a replacement worker had been hired.

Hartley did not issue an ROE until after Mr. Rusling returned his keys and shirt to the store. I accept Ms. Battye's evidence that she erred in preparing the ROE and ought to have put "quit" as the reason for the end of the employment.

*In Burnaby Select Taxi Ltd. (B.C.E.S.T. D091/96)* and subsequent cases, the Tribunal has held:

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 uttering of the words "I quit" may be part of an emotional outburst...and as such it is not to be taken as really manifesting an intent by the employee to sever his employment relationship.

In my view, Mr. Rusling's actions were not consistent with an intent to either return to work as soon as he was able, or to remain on the job. Mr. Rusling conceded that he missed an appointment set up by Mr. Hartley on February 7, but contended that was because he showed up late and the store had already closed. This is inconsistent with his assertion that he was told he was fired on February 2. It would make no sense for Mr. Rusling to arrange to meet with his employer to discuss his continued employment if his job had been terminated. Furthermore, the evidence is that Mr. Rusling made less than diligent efforts to contact Mr. Hartley to return to work, which is inconsistent with his assertion that he was eager to return to work. Indeed, the efforts were all Mr. Hartley's. This is not consistent with Mr. Rusling's allegations that he had been laid off.

Furthermore, Mr. Rusling's second ROE was not issued until after he returned his keys and clothing. Hartley had issued the first ROE immediately upon being advised of Mr. Rusling's injury. The issuance of the ROE well after Mr. Rusling did not return to work is more consistent with Hartley's version of the events than Mr. Rusling's.

I accept that Mr. Rusling told Mr. Hartley that he quit, and I find that Mr. Rusling formed an intention to quit.

Consequently, based on all of the evidence, I find that the Determination was incorrect, and allow the appeal.

## **ORDER**

I Order, pursuant to Section 115 of the Act, that the Determination issued January 3, 2002, is cancelled.

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**Carol L. Roberts**  
**Adjudicator**  
**Employment Standards Tribunal**