

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

- by -

Solihull Lodges Ltd. and Bluegum Investments Ltd. operating as the
Witch of Endor Neighborhood Pub and Beer & Wine Store
(the "Appellant")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: E. Casey McCabe

FILE No.: 2000/85

DATE OF HEARING: April 25, 2000

DATE OF DECISION: May 12, 2000

DECISION

APPEARANCES

Ray Trimble	for the appellant
Theresa Brown	for herself
No one	for the Director of Employment Standards

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”), by Solihull Lodges Ltd. and Bluegum Investments Ltd. operating as the Witch of Endor Neighborhood Pub and Beer & Wine Store (the “employer”) from a Determination dated January 27, 2000. That Determination found the employer liable in the amount of \$2,031.32 to the complainant as compensation for length of service plus a prorated calculation for vacation pay with accrued interest on the aforementioned amounts.

ISSUE(S) TO BE DECIDED

Did the complainant quit her employment thereby relieving the employer from an obligation to pay compensation for length of service and vacation pay on that amount?

FACTS

The complainant worked for the employer as a bartender from September 1991 until September 1999. At the time her employment terminated she earned \$10.75 per hour. The complainant’s immediate supervisor was the manager, Mr. Pete Reynolds.

Prior to July 1999 the complainant worked 4-5 days a week on an average of 6.5 to 7.5 hours per day. In early July the complainant approached Mr. Reynolds to ask that her hours be reduced. She indicated that her husband had received a better paying job and the couple no longer required the complainant to work the hours she had been working. Shortly after this request, in early July, the complainant asked for vacation time of two weeks commencing in mid August.

Apparently Mr. Reynolds was not able to accommodate the holiday request on the schedule. Therefore the complainant commenced her holidays on August 22, 1999, a week later than requested. She was to return from holidays on September 7, 1999.

The complainant testified that when she returned from her holidays she was told by another employee that she was on the schedule for September 7. She testified that when she went to look at the schedule her name had been scratched off. She testified that she went to see Mrs. Janet Trimble who referred her to Pete Reynolds. She was not able to meet with Mr. Reynolds until the following Friday, September 10, 1999.

The complainant testified that Mr. Reynolds acknowledged that she was not on the schedule. He told her he didn't know what to do with her but that he would put her on call. The complainant was surprised by this and told him that she was available to do both bartending and waitressing. She did not receive a call for either. She testified that approximately three weeks later she noticed an ad in the newspaper for a bartender/waitress at the pub. Shortly after this she filed her complaint.

The complainant testified that at no time did she give Mr. Reynolds notice of her intent to terminate her employment. She acknowledged that there had been talk in the work place of her moving to Calgary or Ontario in order to spend more time with her husband. However, she adamantly denied that she had given notice to Mr. Reynolds. She stated that she had been an employee at the pub since 1991, had enjoyed working there, enjoyed the working relationship with the Trimbles and that she would not have left her employment, out of good conscience, without notifying the Trimbles' that she was leaving.

Mr. Trimble candidly acknowledged that he had no direct knowledge of the situation as it developed in August and September 1999. He stated that he had to rely entirely on statements made to him by his manager Pete Reynolds. Mr. Trimble also stated that he relied on the letters and statements submitted by customers and employees of the pub that they believed that the complainant had quit. Mr. Trimble testified that Mr. Reynolds had terminated his employment in December 1999 and was now living in Nova Scotia. Mr. Trimble also testified that he didn't understand why somebody didn't come to talk to him about the situation. I accept Mr. Trimble's sincerity in making that statement.

I turn firstly to the letters submitted by the employer. Those letters were written by employees and patrons of the pub. The letters all indicate that the writers believed that the complainant had intended to quit her employment. However, none of the letters indicated that the complainant had stated a specific date for her termination. I have no doubt that there was much talk amongst the patrons and staff that the complainant would be leaving. However, I believe that it was just that – talk.

Likewise Mr. Trimble recognizes that because he was not directly involved in the situation the evidence that he has to contribute is only that which was told him by Pete Reynolds. Mr. Trimble candidly acknowledges the hearsay aspect of that evidence. Unfortunately, Mr. Reynolds was not available to testify.

I am left to resolve this matter based on the complainant's testimony and the law regarding resignations. The complainant testified that she had not told Mr. Reynolds that she intended to resign. She acknowledged that she had asked for vacation time and that she had left the province during that time. However, she further testified that she returned within the time allotted for her vacation and expected to return to work. She testified that in her conversations with Mr. Reynolds he stated that he didn't know what to do with her and that he would put her on call. He did not provide her with any work and indeed advertised her position in the local newspaper.

I am not able to accept that the complainant quit her position. I accept the complainant's evidence, which is the best evidence, that she did not submit a resignation. She returned to the work place fully expecting to be on the schedule. There was no subjective intention to quit nor was there any objective evidence to indicate that she no longer wished to work at the pub.

Indeed, her willingness to accept casual employment rather than regular shifting indicates a desire to continue working.

I find that in the probabilities of this case the complainant's evidence is preferable. The hearsay evidence tendered by the employer does not meet the test of reliability and necessity. There is no indication that the employer was unhappy with the complainant's work during her employment or that there were any workplace conflicts that would support a conclusion that she intended to leave her employment. For these reasons I am unable to find that the complainant quit her position.

ORDER

The Determination dated January 27, 2000 is confirmed with the additional interest to date to be calculated.

E. Casey McCabe
Adjudicator
Employment Standards Tribunal