

**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 -

361537 B.C. Ltd. operating  
The Landis Hotel & Suites  
("Landis Hotel")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Norma Edelman

**FILE NO.:** 97/057

**DATE OF HEARING:** May 8, 1997

**DATE OF DECISION:** May 24, 1997

**DECISION**

**APPEARANCES**

John Clisby	on behalf of 361537 BC Ltd. operating The Landis Hotel & Suites
Mark Reynolds	for himself
Weldon MacIntosh	on behalf of Mark Reynolds

**OVERVIEW**

This is an appeal by 361537 BC Ltd. operating The Landis Hotel & Suites (the “Landis Hotel”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) against a Determination issued by the Director of Employment Standards (the “Director”) on January 10, 1997. In this appeal, the Landis Hotel claims that no compensation for length of service is owed to Mark Reynolds (“Reynolds”) under Section 63 of the *Act*.

**ISSUE TO BE DECIDED**

The issue to be decided in this appeal is whether Reynolds’ employment was terminated by the Landis Hotel, or whether he abandoned his job.

**FACTS**

Reynolds commenced employment with the Landis Hotel on August 18, 1988. On September 27, 1995 he went on a medical leave. At that time, the leave was expected to last about one month. Near the end of October, 1995 the Landis Hotel received a letter from Reynolds’ doctor which indicated he would likely be off work for three to four months. On February 13, 1995, the Landis Hotel issued a Record of Employment (“ROE”) to Reynolds which indicated the reason for issuance as “K-Other”, with the comment: “Claimant went on medical benefits which have now ceased. No position is open for him to return to.”

Patty Little (“Little”), who filed the appeal on behalf of the Landis Hotel, stated in the reasons for the appeal that Reynolds contacted them on January 12, 1996 to say he was ready to return to work. She advised him that he was to provide proof of attending and successfully completing a rehabilitation program as his lengthy illness was due to a substance abuse problem. The next time they heard from him was in mid-February, 1996 when he called to ask for an amended ROE as his medical UIC benefits had expired and he wanted to continue his claim. She asked him if he had enrolled in or completed a rehabilitation program and he said he had not. He made no mention of a doctor’s note.

Little stated that given Reynolds' actions they felt he was only concerned about continuing on UI and not concerned about returning to his job. Since Reynolds had made no attempt at returning to his position, they found it necessary to fill his position. Up to this point, his position had been left vacant as it was their belief that he would return to his job and it was their intent to rehire Reynolds.

Little said that the ROE which was issued on February 13, 1996 indicated that there was no position for Reynolds to return to as his position had been filled. This was only due to the fact that Reynolds made no attempt to return to his position as he was unwilling to meet their criteria. She stated that perhaps their choice of words in the comment section of the ROE was not ideal. Although they did not state "abandonment of position" as the reason for leaving, that is what they feel happened when Reynolds chose not to enroll in a rehabilitation program and return to Vancouver and his job when he had completed such a program. It is their position that Reynolds' employment was not terminated by the Landis Hotel. Rather he abandoned his position and therefore is not entitled to compensation.

Little did not attend the hearing. John Clisby ("Clisby"), the General Manager of the Landis Hotel, appeared at the hearing on behalf of the appellant. Clisby advised that Little no longer works at the Landis Hotel.

Clisby entered two letters dated October 21, 1996 and November 1, 1996 from Little to the officer at the Employment Standards Branch who investigated Reynolds' complaint. These letters, for the most part, reiterate the statements made by Little in the reasons for the appeal. However, she indicates that the last conversation she had with Reynolds took place on February 5, 1996 and she states that the first she saw of the January 23, 1996 doctor's note, which indicated that Reynolds was able to return to work, was on November 1, 1996.

Clisby stated that it is the position of the Landis Hotel that Reynolds abandoned his job. He said Little told him that Reynolds had a substance abuse problem and was going to be off work for a few months. As a result, they sought and received legal advice that indicated they had a right to ask Reynolds for proof that he had completed a substance abuse program. Reynolds never provided any proof of his rehabilitation and told Little in February that he had not even commenced a rehabilitation program. In these circumstances, they concluded that Reynolds was abandoning his job. Clisby stated that this conclusion is further supported by the fact that Reynolds moved to Nanaimo during his leave.

According to Reynolds, he never abandoned his job. When he commenced his leave it was due to stress. Subsequently, his doctor put him on Prozac, and this caused him to drink alcohol and smoke marijuana. During a Christmas party in December, he told Little about his problems with Prozac and he told her that he thought he would be back to work in January.

Reynolds stated that he got a doctor's note on January 23, 1996 to give to Little because he was ready and able to return to work. By this time he had no substance abuse problems as he had earlier taken himself off Prozac. Reynolds said he mailed the note to Little and then phoned her on February 5, 1996 to say he was ready to come back to work. He told her that he had mailed her a doctor's note confirming he could come back to work. Little said she had not received the note. She further said she was sorry there was no position available as he had been off too long and they were unable to keep his position open and he was being terminated. Reynolds said he phoned Little again sometime between February 5 and February 8 and she said she would take him back if he could prove he had completed a rehabilitation program. Reynolds replied he had no proof as he had not gone through a program and now he was completely recovered. Subsequently, he received his ROE which confirmed to him that he had been dismissed.

Reynolds stated that he had no conversation with Little on January 12, 1996, and he would not have advised her, on that day, that he was ready to return to work as he had not yet seen his doctor to confirm he could return to work. He said that during his leave he went to Nanaimo, off and on, to stay with his friend, Weldon MacIntosh ("MacIntosh"). He gave up his Vancouver apartment in January and lived with his mother and friends until he moved to Nanaimo permanently after his employment was terminated by the Landis Hotel.

Reynolds stated that if his intention was not to return to work after being on medical leave, he would not have taken the time or incurred the expense to go to Vancouver to see his doctor when he was completely recovered. If he intended to abandon his job he would not have called Little on February 5, 1996, nor given her the doctor's note. He worked for eight years at the hotel and had a good job and good salary and he would not just walk away from it. It is his position that his employment was terminated due to a short term illness that was curable and had no side effects.

MacIntosh confirmed that Reynolds went to Vancouver on January 23, 1996 got a doctor's note which said he could return to work, and mailed it to Little on the following day. MacIntosh also stated that he listened in on the telephone conversation between Little and Reynolds on February 5, 1996 and during the conversation Little told Reynolds that since he was off the job so long there was no position for him to return to and he was being terminated. During this conversation, or during one thereafter, Little told Reynolds that she may consider taking him back if he attended AA and counseling, to which Reynolds made no reply.

MacIntosh stated that Reynolds did not abandon his job and he was off medication and alcohol effective Thanksgiving of 1995. He also stated that he thinks Reynolds moved to Nanaimo in January.

**ANALYSIS**

Section 63 of the *Act* establishes a statutory liability on an employer to pay length of service compensation to an employee upon termination of employment. An employee may cause an employer to be discharged from this liability by quitting or self-terminating employment, retiring, or giving just cause for dismissal.

In this appeal, the Landis Hotel wants the Tribunal to find that Reynolds abandoned or quit his job.

The position taken by the Tribunal on the issue of a quit is now well established. It is consistent with the approach taken by Labour Boards, arbitrators and the Ontario Employment Standards Tribunal. It was stated as follows in the Tribunal decision *Burnaby Select Taxi Ltd. -and- Zoltan Kiss*, BC EST #D091/96:

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.

I find that the Landis Hotel has not demonstrated the clear and unequivocal facts necessary to support a conclusion that Reynolds quit or abandoned his employment.

There is insufficient evidence to support a claim that Reynolds formed an intent to quit his job. He never stated he quit his job. Rather, he indicated he was ready to return to work.

Further, I am not satisfied that Reynolds carried out some act consistent with quitting his employment. Even if, as suggested by Clisby, the act of moving to Nanaimo indicates that Reynolds quit his job, (and I am not convinced that it does in itself), there is no conclusive evidence that Reynolds permanently moved to Nanaimo prior to February 5, 1996. Moreover, it is my view, that Reynolds' conduct concerning the doctor's note does not show an intent to quit. I accept that Reynolds got a doctor's note on January 23, 1996 and mailed it to Little. This is the uncontradicted evidence of Reynolds and MacIntosh. As well, in the Determination, the Director states that the doctor confirmed he had issued the note. In my view, obtaining and mailing this doctor's note, regardless of whether it was received by Little before February 5, 1996, is conduct inconsistent with a desire to quit a job.

I am satisfied, however, that the evidence supports the view that Reynolds' employment was terminated by the Landis Hotel on February 5, 1996 and that the issue of Reynolds completing a rehabilitation program only came up after Reynolds had already been dismissed by Little. First, Reynolds denied he had the conversation with Little on January 12, 1996. There was no evidence presented at the hearing to contradict this position. As well, the doctor's note is dated after January 12, 1996 and I find it more likely than not that Reynolds would call Little about a return to work after he received this note, rather than before receiving it. Second, Little was not present at the hearing to directly challenge the evidence of Reynolds and MacIntosh that Reynolds was told by Little on February 5, 1996 that there was no position available and his employment was terminated, and that it was only after dismissing Reynolds that Little raised the issue of the rehabilitation program. Third, there is nothing on the ROE to suggest an abandonment of position or refusal to enroll in a rehabilitation program. Rather, the comment on the ROE supports the testimony of Reynolds and MacIntosh as to what transpired on February 5, 1996.

The burden is on the employer to show that an employee has quit. In this case, the Landis Hotel has not established that Reynolds quit or engaged in some conduct indicative of an intent to quit his employment. Rather, the evidence, objectively and on balance, is more consistent with a conclusion that Reynolds' employment was terminated by the Landis Hotel.

There is no dispute on quantum in this case. Accordingly, for the above reasons, I conclude that Reynolds is owed the amount of compensation as set out in the Determination.

**ORDER**

Pursuant to Section 115 of the *Act*, I order that the Determination dated January 10, 1997 be confirmed.

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**Norma Edelman**  
**Adjudicator**  
**Employment Standards Tribunal**

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