

An appeal

- by -

539029 B.C. Ltd. operating as Best Western Baker Street Inn
and Convention Centre
("Baker Street Inn")

- 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: David B. Stevenson

FILE No.: 2003A/161

DATE OF DECISION: August 6, 2003

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by 539029 B.C. Ltd. operating as Best Western Baker Street Inn and Convention Centre (“Baker Street Inn”) of a Determination that was issued on April 30, 2003 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Baker Street Inn had contravened Part 8, Section 63 of the *Act* in respect of the employment of Tricia L. Lawrie (“Lawrie”) and ordered Baker Street Inn to cease contravening and to comply with the *Act* and *Regulations* and to pay Lawrie an amount of \$276.42.

In this appeal, Baker Street Inn challenges the decision of the Director that Lawrie was not terminated for just cause and was entitled to length of service compensation.

Baker Street Inn has requested an oral hearing, indicating that such a hearing “is necessary for the purpose of testing the credibility of the former employee’s evidence”. Generally, the Tribunal will not hold an oral hearing unless it is clear on the face of the record that an oral hearing is the only way of ensuring each party can state its case fairly (see *D. Hall & Associates Ltd. v. British Columbia (Director of Employment Standards)* [2001] B.C.J. No. 1142 (B.C.S.C.)). After considering the Determination, the appeal and the material on file, the Tribunal has decided an oral hearing is not necessary in order to adjudicate the appeal. The request for an oral hearing by Baker Street Inn appears to be premised on no more than a perception by their representative that their argument for summary dismissal might be improved by attempting to fill in evidentiary gaps identified in the Determination – specifically, relating to Lawrie’s intention when she misrepresented the number of hours she worked on April 19 and 20, 2002 and whether there was any explanation for her conduct. That is not the purpose of an appeal. I agree with the Director that the information which Baker Street Inn is seeking to elicit from Lawrie should have been acquired and considered before she was summarily dismissed and provided during the investigation.

ISSUE

The issue in this appeal is whether the Director erred in concluding Baker Street Inn did not have just cause to terminate Lawrie.

FACTS

Baker Street Inn operates a hotel and restaurant in Nelson, B.C. Lawrie was employed by Baker Street Inn from August 19, 2001 to May 11, 2002. She was summarily dismissed from her employment for allegedly inflating her time sheet on April 19, 2002 by 1 hour and on April 20, 2002 by ½ hour. During the investigation, Baker Street Inn characterized Lawrie’s conduct as fraud and dishonesty. The Determination set out the following findings of fact:

The undisputed evidence provided indicates that the complainant inflated her time sheet by one hour on April 19. The evidence for April 20 is not clear. . . .

. . .

It is undisputed that the complainant was permitted to continue in her job for not one, not two, but for three complete weeks before being terminated without notice. It is clear that the relationship between the employer and the complainant was not so damaged that summary dismissal was the appropriate response.

...

No evidence has been presented to show the complainant intended to misrepresent the number of hours she worked. . . .

No evidence has been presented that the complainant attempted to hide her timesheets or in any way attempt to cover up any information relating to the timesheet.

The Determination summarized the conclusions as follows:

. . . on at least one occasion the complainant entered the wrong time on her time sheet. The employer became aware of this error the next day but took no corrective action. The complainant made no attempts to cover up her error and no credible evidence has been presented to indicate she intended to defraud or behave in a dishonest manner. Three weeks later the employer terminated the complainant without compensation for length of service or written notice of termination.

ARGUMENT AND ANALYSIS

The burden is on Baker Street Inn to show there is an error in the Determination that justifies the intervention of the Tribunal under Section 115 of the *Act*. They say the Director committed several errors:

- the Director failed to comply with principles of natural justice in making the Determination;
- the Director misunderstood or failed to deal with a serious issue;
- the Director made a mistake in interpreting the facts; and
- the Director made a mistake in interpreting the law.

Subsection 112(1) of the *Act* says:

112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:

- (a) the director erred in law;*
- (b) the director failed to observe the principles of natural justice in making the determination;*
- (c) evidence has become available that was not available at the time the determination was made.*

The appeal says the Director failed to comply with principles of natural justice, “by accepting the Complainant’s story that contained no evidence or reasonable explanation over evidence provided by the employer and supported by documentation and reasonableness.”

There is, however, nothing in the Determination that indicates the Director “accepted” Lawrie’s story at all. It is clear from the Determination that rather than either accepting or rejecting Lawrie’s position, the Director addressed the issue from the perspective of whether there was sufficient evidence to support a finding that Lawrie intended to defraud Baker Street Inn or behave in a dishonest way, and found there was not¹. The Determination also addressed the matter of a reasonable explanation as follows:

Since the complainant was not confronted with this discrepancy until three weeks later, it is impossible to know whether a reasonable explanation could have been given at the time.

The “natural justice” ground of appeal is nothing more than an effort by Baker Street Inn to have the Tribunal review the evidence and reach a different conclusion than the Director on the matter of Lawrie’s intention when she filled out her time sheet on April 19, 2002. I note from the material that, on the day she was terminated, Lawrie was neither asked for an explanation nor informed of the days on which it was alleged she had inflated her time sheets. As a matter of principle, Baker Street Inn should have given Lawrie notice of their concerns and given her an opportunity to respond. The other concern with this argument is that even if I agreed that Lawrie intended to claim for time she did not work, it does not necessarily justify altering the finding that just cause for dismissal was not established. In such a case, it would likely be remitted to the Director to consider the just cause issue in the context of any conclusions made by the Tribunal.

On the second ground of appeal, I can find no basis for the assertion that the Director failed to deal with a serious issue. There was only one issue for the Director to consider - did Baker Street Inn have cause to terminate Lawrie - and that issue was addressed. Like the previous argument, this ground of appeal does no more than seek to have the Tribunal review the case and reach a different conclusion.

Baker Street Inn argues the Director erred in interpreting the facts. In the main, this aspect of the appeal also seeks to have the Tribunal review and re-weigh findings of fact made by the Director in the Determination. One element of this argument warrants specific comment. In the appeal submission, Baker Street Inn refers to the matter of the three week delay before terminating Lawrie and says the Director, “was provided with reasonable explanations, but simply rejected those reasons out of hand.” The appeal alleges the Director did not give “due consideration” to the explanations for the delay, which the appeal says included the following matters:

- the hotel was particularly busy at that point in time
- the restaurant had just changed its chef
- the infractions occurred on Friday and Saturday night shift
- it is difficult to have all those involved available for a meeting because of shift work
- short staffing the restaurant was not an option
- keeping the restaurant open and operating efficiently was a priority

The appeal submission indicates that Baker Street Inn “assessed” the risk of keeping Lawrie employed, took steps to reduce the risk and looked for a suitable replacement for her.

¹ The Determination found that it was “not clear” on the evidence that Lawrie had, in fact, inflated her hours on April 20.

There is no indication the Director “rejected those reasons out of hand”. I agree with the suggestion by Baker Street Inn that the Director could have accepted those reasons as a complete explanation for their delay in dismissing Lawrie, but it was also open to the Director to find the decision of Baker Street Inn to allow Lawrie to continue her employment for three weeks after becoming aware of the material facts was a factor mitigating against summary dismissal. I am unable to say the decision of the Director on this matter was without any evidentiary basis, or was so unreasonable that the intervention of the Tribunal on that matter is justified.

In that context I note that, as a matter of law and even accepting Lawrie’s conduct indicated dishonesty, dismissal is no longer an automatic response to such conduct. Even where conduct indicating dishonesty is established, it still must be shown that such conduct is incompatible with the continuation of the employment relationship (see *McKinley v. B.C. Tel*, [2001] S.C.J. No. 40). In that sense, it is difficult to accept that Lawrie’s conduct was incompatible with the continuation of the employment relationship when, after becoming aware of the material facts, Baker Street Inn made a conscious business decision to continue her employment.

Finally, Baker Street Inn says the Director erred in law. I disagree. This argument appears to be based on an incorrect presumption that any conduct indicating dishonesty justifies summary dismissal. That is not the law (see *McKinley, supra*). Rather, the law requires that each case be examined on its own particular facts and circumstances, with appropriate consideration given to the nature and seriousness of the conduct in order to assess whether it is reconcilable with sustaining the employment relationship. I am satisfied the Director took the correct approach to the issue raised by this case.

For the above reasons, the appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated [date] be confirmed in the amount of \$276.42, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal