

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 -

Abbott Street Holdings Ltd. Operating as Mission Creek Golf Course
("Mission Creek")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE NO.: 96/500

DATE OF HEARING: October 25, 1996

DATE OF DECISION: November 9, 1996

DECISION

OVERVIEW

The appeal is by Abbott Street Holdings Ltd. operating as Mission Creek Golf Course (“Mission Creek”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) against Determination No. CDET 003573 of the Director of Employment Standards (the “Director”), a decision dated August 2, 1996. In that Determination Karen Swanson is found to be owed compensation for length of service and interest, an amount totalling \$3,043.91.

Mission Creek has appealed the Determination alleging that Swanson quit and that it had just cause to terminate Swanson.

APPEARANCES

John Welder	Owner of Mission Creek
Jamie Blair	General Manager of Mission Creek
Karen Swanson	On her own behalf
Graham Jickling	For the Director

FACTS

Karen Swanson began working for Duffers Restaurant at the Mission Creek golf club on September 25, 1989. Abbott Street holdings acquired the golf course, and Swanson as an employee, on April 30, 1990. Swanson’s last day of employment at the restaurant was September 1, 1995. She was at that time the manager of the restaurant.

Mission Creek had been having trouble with its two pool tables for quite some time, to the great annoyance of Swanson, who as manager was concerned with the smooth running of Mission Creek facilities. In the last week of August, 1995, balls had gone missing from both tables and, believing them stolen, Swanson had spent a couple of hours looking for replacements only to find that the balls had been taken by John Welder, owner of Mission Creek. With the Kelowna Eight Ball Association arriving for pool in the evening, Swanson telephoned Welder on the 30th with a view to recovering the missing pool balls. Welder was not reached but Swanson spoke to his wife, co-owner of Mission Creek, and she delivered balls from another table.

Swanson told Mrs. Welder, on the 30th, that she wanted to talk to Mr. Welder. Despite leaving another message, the next day, Swanson had still not heard from Welder on September 1st when he arrived at the restaurant with a view to installing new parts for a pool table. Swanson went to speak to him and they ended up having a heated exchange in a small office near the bar. They give

widely different accounts of what was said. In short, Swanson says that she was fired. Welder says that she quit.

The Director's Delegate, in issuing the Determination, reported that he found no evidence to support the claim that Swanson quit. The Director's Delegate also found no evidence to support a finding that Mission Creek had just cause in terminating Swanson. He went on to say in response to Mission Creek complaints about Swanson and her work, that *"the employer should have provided written notice or progressive discipline, making it clear as to what his expectations were."*

In filing its appeal, Mission Creek filed a written submission which states, *"John Welder is an experienced business manager and as such would not fire a senior manager over a small dispute especially going into the busiest month of the year without a replacement."* The submission goes on to say that Swanson started the altercation on the 1st, wanted to start it, had an ulterior motive for starting it, carried on in front of staff and customers and, as a result, compromised Welder. Mission Creek goes on to say that Swanson was under the influence of alcohol at the time and that during the course of the exchange, demanded a \$1,000 a month raise under threat of leaving if she didn't get the raise.

On the outset of the hearing, it appeared that Mission Creek had decided to accept the Determination on the point of whether it had just cause, but as the hearing wore on, the employer, Welder in particular, began to suggest once again that it had just cause, for the reasons set out in its written submission. Mission Creek's position is in the main however that Swanson quit and in that regard, the employer states that it had no plan to fire her, that she was a good employee who quit, that is why no termination slip was issued, and that the Determination is illogical in that it fails to recognise that an experienced employer would not fire a valuable employee like Swanson just as it was about to enter the busiest time of its year.

In respect to what happened on September 1, 1995, Welder says that the exchange between Swanson and himself began with her saying *"What in the hell are you trying to accomplish by sabotaging the pool tables?"*, a comment that he finds preposterous given that he had told the bartender that he had removed balls for sizing and given that he was the owner, as he says, *"My pool tables, my golf course, my restaurant and lounge!"* He says that he should have suspected that there was more wrong with Swanson than just her being angry over missing pool balls, given her trouble pronouncing words and her leaning on the wall in a peculiar way. According to Welder, he subsequently confirmed *"that Scotty (Swanson) had been drinking at the bar by the bartender on shift that afternoon"*. Beyond that he admits that Swanson did complain that he was impossible to get a hold of and said that they had to talk. He says however that Swanson was loud, shouting in fact, and that as the restaurant was packed and there were numerous staff and customers, he said that he would be happy to talk to her at another time and place. He says Swanson persisted and, it is the testimony of Welder, gave him an ultimatum, either she got a \$1,000 raise or *"she was out of here"* (quitting Mission Creek). Welder said that he wasn't giving her a raise and he says that an angry Swanson then moved into the general bar area and said in front of many staff and customers, *"He is going to tell you that I quit but he just fired me,*

don't believe anything that he says!" Welder says that he then came out of the office and asked for her set of Mission Creek keys and was told that *"you'll get your keys when I get my final cheque and separation slip"*.

Mission Hill still does not have that set of keys.

It is the testimony of Swanson that she drank no alcohol while working, that the bar bill which Mission Creek submitted to the Director's Delegate as proof that she had consumed alcohol was a bill for drinks bought for customers and off duty staff, something that she says that the manager is to do, a point not contested by Mission Creek. Swanson has letters from Mission Creek employees and a patron of the bar, five people in all, which support Swanson's position that she did not drink alcohol and as far as they could tell, was not under the influence of alcohol at the time of her speaking to Welder on the 1st, that she merely bought drinks for others.

Further review of the letters reveals that three people state that they could not hear what Swanson and Welder said to each other. Three letters refer to Swanson's being fired, none refer to her saying that *"He is going to say that I quit . . ."*. One of the letters is from the day-shift bartender. He says he thought that the missing pool balls had been stolen. That is contrary to the position of Welder, namely, that he told the bartender that he was removing balls for sizing. The letter also contradicts Welder's contention that at the time of his altercation with Swanson the restaurant was packed and numerous staff and customers were at the bar. The bartender describes business as slow.

In respect to the matter of who said what to whom on the 1st, according to Swanson she began by asking Welder, *"What were you hoping to achieve by taking pool balls from both tables and not telling anyone?"* She says Welder said nothing, that she asked him the question again, and that he then said that he had told Kevin Forsythe, the bartender on day-shift, that he took the balls. Swanson says that Welder then asked her, *"What's your point?"*, in reply to which she said that she thought that they were working in two different directions. She says that he again said, *"What's your point?"*. Swanson then proceeded to ask for a \$1,000 raise. She testifies that she expected to receive less and that she did not give Welder an ultimatum. She also testifies that Welder response was, *"You're out of here!"* According to Swanson, she then asked if that meant by that she was fired and Welder's reply was *"Give me your keys."* According to Swanson she then left the premises, stopping only to tell her staff that she had been fired. On being asked, if she said *"He is going to tell you that I quit . . ."* or words to that effect, Swanson testified that she did not.

ISSUES TO BE DECIDED

The first question is, Did Swanson quit or was she fired? That issue was visited by adjudicator Stevenson in *Burnaby Select Taxi Ltd. and Zoltan Kiss* [1996] BCEST #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 employment; objectively, the employee must carry out an act inconsistent with his or her further employment. The rationale for this approach has been stated as follows:

“ . . . the uttering of the words “I quit” may voluntarily be part of an emotional outburst, something stated in anger, because of job frustration or other reasons, and as such it is not to be taken as really manifesting an intent.” (University of Guelph, [1973] 2 L.A.C. (2d) 348)

Should it be found that she was fired, the employer raising matters as it did, there is then a need to consider whether Mission Creek had just cause.

ANALYSIS

The Director's Delegate found no support for the claim that Swanson quit. I agree. The evidence is far from clear and unequivocal that Swanson quit, indeed on hearing the parties, and on careful consideration of the evidence before me, I find that it leads me to a conclusion that is to the contrary, Swanson was fired.

I see no evidence of an intent to quit. Prior to their meeting on the 1st, Swanson made quite an effort towards getting the pool tables operational and she made several requests to speak with Welder. That is consistent with an employee that plans to stay not one that is about to quit. Clearly, if Swanson had decided to quit, she did not need a meeting with Welder in order to carry out her plan.

It is also not clear to me that Swanson decided to quit during the course of the heated exchange on the 1st. While the parties differ greatly on what was said and by whom, there is much on which they agree. Welder accepts that Swanson raised the matter of the missing pool table balls, suggested that they were working in two different directions, said Welder was impossible to get a hold of and that they had to talk, and asked for a raise. Again, I find that consistent with an employee who plans to stay, not one bent on quitting. I am satisfied that Swanson had not decided to quit prior to her hearing Welder's response to her request for a raise. Did she then decide to quit?

The parties' testimony on what happened next is poles apart. Welder says that Swanson quit, Swanson says that she was fired. My inclination is to accept the testimony of Swanson, I found her credible on all matters, if not the best judge of when to ask for a raise. Welder on the other hand would accept Swanson as a valuable employee one minute and engage in character assassination the next. He also admits to being overworked and to finding offensive Swanson's questioning of why he took pool balls and her asking for a \$1,000 raise when she did. I find him less convincing as a result, indeed it leads me to conclude that he did fire Swanson. Overworked and offended, more than one employer had fired valuable employees during the course of a heated argument. But

there is more and that is that Welder is also contradicted by Mission Creek employees on several points, something for which he made no attempt to explain. He is contradicted on four points, that Swanson was under the influence of alcohol, that she was loud to the point where others could hear what she was saying, that Duffers was packed with many customers at the bar, and that he told the bartender that he took pool balls for sizing. Welder is found to be less convincing as a result of that as well.

Welder and Mission Creek have nothing more than the testimony of Welder on which to offer in respect to the issue of whether Swanson quit or was fired. As such they are unable to show clearly and unequivocally that Swanson quit. And, as the testimony of Swanson is found convincing whereas that of Welder much less so, I am led to the conclusion that Swanson was fired, there being nothing but the testimony of Welder to the contrary.

I now turn to the matter of whether Mission Creek had just cause. In that respect, I find as the Director's Delegate found, that it did not.

The employer alleges that Swanson was under the influence of alcohol and insubordinate. In respect to the first allegation, the employer is unable to offer any proof of that. Swanson on the other hand insists that she had not been drinking and I found Swanson credible on this point as well. She also has letters which support her testimony. It all leads me to conclude that she was not under the influence of alcohol. Even if it were true, however, that she was under the influence of alcohol, Mission Creek would still not have just cause to terminate Swanson. Welder is mistaken in that regard. Given her work record, exemplary Mission Creek says, and the nature of her work, a warning is all that is appropriate.

I find that Swanson was not insubordinate such that Mission Creek had just cause to terminate her. There is no evidence of serious misconduct. The new managing partner of Mission Creek describes the altercation between Swanson and Welder as a "small dispute". I agree with that characterisation.

In summary, there are not clear and unequivocal facts to support a conclusion that Swanson quit. It is my conclusion that the evidence supports a conclusion that she was fired. The evidence is found to support a conclusion that the employee had not been drinking, contrary to the allegation of the employer. And finally, it is my conclusion that the employee was not insubordinate such that Mission Creek had just cause to terminate her employment.

The Determination is accordingly confirmed.

ORDER

I order, pursuant to Section 115 of the *Act*, that Determination # CDET 003573 be confirmed.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal

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