

**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-

McMorran's Cordova Bay Ltd. operating McMorran's Beach House  
("McMorran's")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** C. L. Roberts

**FILE NO.:** 1999/202

**DATE OF HEARING:** June 22, 1999

**DATE OF DECISION:** June 28, 1999

**DECISION**

**APPEARANCES**

For McMorran's

Jill Beaton

James Page, Martin Mills and Collin Schmit

For the Director of Employment Standards

G. Omstead

**OVERVIEW**

This is an appeal by McMorran's Cordova Bay Ltd. operating McMorran's Beach House ("McMorran's"), pursuant to Section 112 of the Employment Standards Act (the "Act"), against a Determination of the Director of Employment Standards ("the Director") issued March 22, 1999. The Director found that McMorran's contravened Section 63 of the Act in failing to pay Randall Ginger ("Ginger") one week's termination pay or compensation in lieu of notice, and Ordered McMorran's to pay \$294.40 to the Director on his behalf.

**ISSUE TO BE DECIDED**

At issue on appeal is whether the Director erred in determining that Ginger is entitled to compensation in lieu of notice. McMorran's contends that Ginger quit or abandoned his position, and that no compensation is owed.

**FACTS**

Ginger was employed as a cook by McMorran's from March 20, 1998 to August 8, 1998. Ginger filed a complaint with the Employment Standards Branch on August 21, alleging that his employment had been terminated without notice and that McMorran's had failed to pay statutory holiday pay.

Ginger told the Director's delegate that he had hurt his back, and presented three doctor's notes in support of his position. The first, dated August 11, indicates that Ginger was not able to work for three days. The second, dated August 13, indicates that Ginger was unable to work until August 17. The third, dated August 21, states that Ginger was unable to work until September 1. Ginger contended that all three notes were provided to McMorran's.

Ginger also advised the Director's delegate that on August 13, he spoke with "Steve," telling him to advise the chef that he would not be able to work. He told the delegate that he attempted to call again on August 15, but received no answer, and faxed the doctor's note to McMorran's that day. Ginger also stated that on August 16, he spoke to "Colin" and asked to speak to the chef. It was his position that Colin told him the chef was too busy, but that he would relay the message.

On August 21, Ginger's mother went to McMorrans to pick up his paycheque. She was advised that Ginger's employment had been terminated, and was given his paycheque and Record of Employment (ROE).

McMorrans advised the Director's delegate that Ginger abandoned his position. Ms. Beaton confirmed that Ginger contacted her on August 11, and told her that he would be off work for three days. He did not return as expected on August 14. Beaton indicated that the chef called Ginger three times and left messages and received no response. It was her evidence that McMorrans never received the doctor's note of August 13. After Ginger missed three shifts, McMorrans concluded that he was not returning to work.

McMorrans' employee schedule indicated that Ginger was away on August 11, 12, and 13, and was scheduled to work on the 14th and 15th. He was off the 16th and 17th, and scheduled for the rest of the week.

The Director's delegate relied upon Burnaby Select Taxi (BC EST #D091/96) in which the Tribunal set out objective and a subjective test of quitting. He also referred to the decisions in Gardieli's Restaurant Ltd. (BC EST #D126/97) and O'cana Enterprises Inc. (BC EST #D503/97).

After reviewing the positions of the parties, the delegate found that Ginger had not abandoned his position. The delegate concluded that since Ginger obtained three doctor's notes indicating that he was unable to work, he "had enough concern about his job to have the doctor provide him" with those notes. The delegate noted that if Ginger had intended to abandon his position, he would not have made the effort of getting the notes.

The delegate found McMorrans' conclusion that Ginger had abandoned his position was premature, and that Ginger was entitled to compensation in lieu of notice. The delegate found that McMorrans had paid Ginger statutory holiday pay.

## **ARGUMENT**

Ms. Beaton contended that the issue to be decided was whether Ginger's evidence was credible. She argued that James Page, the chef, had attempted to contact Ginger on a daily basis, without success. She also argued that McMorrans had not received Ginger's second note, and by the time it received the third, McMorrans had already concluded that Ginger had quit or abandoned his position, since he had missed the third scheduled shift. She contends that Ginger could not have attempted to contact McMorrans since there would have been someone to answer the telephone at all times. She contends that McMorrans made a number of efforts to contact Ginger without success, and it was appropriate for her to conclude that he had quit.

The Director's delegate argued that McMorrans ought to have taken more steps to determine that Ginger was quitting, such as notifying him that if he did not come to work, it would conclude that he had abandoned his position. He contended that there was an onus on the employer to advise the employee what they were going to do.

**DECISION**

Pursuant to Section 63 of the Act, an employer is liable for length of service compensation to an employee upon termination of employment, unless the employee quits, retires, or is dismissed for cause.

In Burnaby Select Taxi Ltd., the Tribunal stated as follows:

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 am unable to find any evidence that Ginger formed an intent to quit. He had obtained three doctor's notes which indicated that he was unable to work. I am unable to find that the Director's delegate erred in concluding that Ginger's act of obtaining those notes negates any subjective intent to quit.

Having found that the subjective element of the test has not been met, I need not consider the objective element. McMorran's contends that the issue is one of credibility. I agree that credibility may be an issue in circumstances where there is evidence of an intent to quit. However, in the absence of any evidence of a subjective intent to quit, it is not necessary to decide that issue. It is also unnecessary for me to determine whether missing three shifts constitutes an act inconsistent with continued employment.

I am unable to find that there are clear and unequivocal facts to support the conclusion that Ginger had quit, and dismiss the appeal.

**ORDER**

I order, pursuant to Section 115 of the *Act*, that the Determination, dated March 22, 1999 be confirmed, together with any interest accruing since the date of the Determination.

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