

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1995, C.113

- by -

Tony Girardi

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	John M. Orr
FILE No:	1999/222
DATE OF HEARING:	July 07, 1999
DATE OF DECISION:	July 13, 1999

DECISION

APPEARANCES

Tony Girardi On his own Behalf
Ada Acton On her own Behalf

OVERVIEW

This is an appeal by Tony Girardi ("Girardi") pursuant to Section 112 of the *Employment Standards Act* (the "Act") from a Determination (File No. 080851) dated March 23, 1999 by the Director of Employment Standards (the "Director").

Girardi was employed by Ada Acton ("Acton") at a small cafe in Victoria known as Ada's Original Cinnamon Cafe for approximately 14 months. His employment ended on August 7th or 8th, 1998. Girardi claims that he was dismissed without just cause but Acton says that Girardi terminated his own employment.

The Director's delegate investigated and determined that Girardi left his employment by his own choosing and therefore was not entitled to compensation. Girardi has appealed the Determination on substantially the same grounds as were before the delegate but he claims that the delegate was wrong in concluding that he quit his job.

ISSUES TO BE DECIDED

The issue to be decided in this case is whether Girardi was dismissed or whether he terminated his own employment.

PRELIMINARY MATTERS

In his appeal documents Girardi raised a number of issues to do with proper payment of his regular wages, overtime, and statutory holidays. These matters do not appear on his original "Complaint and Information Form" and are not the subject matter of the Determination herein. I ruled that I would not hear evidence on these issues as they were not properly the matter of an appeal as there had been no Determination of them.

Girardi also raised a number of issues that were more properly the subject of a Human Rights Complaint and I ruled that I was only willing to refer to the issue of Girardi's homosexuality in so far as it related to the termination of his employment.

It was agreed by Acton that there was not just cause for dismissal. The position of the employer was that Girardi quit or abandoned his position and was not dismissed.

FACTS

Girardi was employed initially as a janitor by Acton but it is clear that they became quite good friends. In June 1998 Acton organised a subsidy to allow Girardi to get more hours of work and some training in other aspects of the business and he was moved to a position dealing directly with customers as a "counter person".

After a few months of his initial employment Girardi disclosed to Acton the fact that he was homosexual and that he was struggling with a lifestyle that included drinking, drug use, and homosexual prostitution. Acton is obviously an active "Christian" and had many heart to heart discussions with Girardi about his lifestyle struggles. There is no indication that she was homophobic or in any way condemned Girardi's homosexuality. These discussions were not unwelcome nor objectionable. At no time did Girardi suggest or request that they stop.

The evidence about what happened at the time that Girardi's employment terminated is contradictory. Girardi testified that on Friday August 7th, 1998, he attended work at approximately 9:30 am and that Acton approached him and said that a customer had complained about his work and that perhaps he should consider going back to his janitorial duties. Girardi says that he wanted time to think about it and went into the kitchen and started to wash dishes. He testified that Acton followed him into the kitchen and started to "pick" at him about his personal lifestyle. He says that he asked her to find someone to work for him and started to leave the workplace. She asked him why he was leaving and he said that he needed time to think about going back to the janitorial position. He testified that "basically I walked out" at about 11:30 am. He says that he told Acton he would see her tomorrow and that she said "Don't come in if you have the same attitude".

Girardi testified that on Saturday August 8th at 7 am he phoned in to work and told Acton that he would not be coming in that day but would come in on Monday. He claims that Acton told him that they had thought of keeping him part-time but that they had now decided to let him go. He says that was "end of conversation". He says he never intended to quit and never did actually quit his employment.

Acton testified that on August 7th Girardi came to work in a bad mood and really upset about something. She says that Girardi told her that he didn't want to work out-front that day, that he didn't want to be around people, and that he said "I wish I had a gun I would shoot everybody". He asked if he could do dishes and he seemed very agitated. Acton gave him permission to do dishes even though there were only three of them working that day. She testified that at some point she went in to talk to him and suggested that maybe he needed some time off. She says that he blew-up, threw his apron on the floor, and said "I'm getting out of here !". She says that she tried to talk to him but he swore at her and left. She says that she was really shocked. He had been a good employee and generally was very polite. She says that on the 8th Girardi called in and said that he wasn't coming-in anymore and that he wanted his separation papers. She testified that she did not dismiss Girardi. He was a good worker and she had a subsidy program in place which she would lose if his employment ended.

ANALYSIS

The applicable provisions of the *Act* are as follows:

Liability resulting from length of service

63. (2) (a) *after 12 consecutive months of employment, to an amount equal to 2 weeks wages;*

(3) *The liability is deemed to be discharged if the employee*

(c) *terminates the employment, retires from employment, or is dismissed for just cause.*

As noted above the employer is not alleging just cause. I also note that this is not a case where the employer made a substantial alteration in the conditions of employment to amount to constructive dismissal because, while there was talk of reducing the employee's hours, no decision had been made at the time that the employee walked off the job. Therefore the only issue is whether the employee terminated his own employment.

In first instance the onus is on the employer to show that the employee quit his job. There must be clear and unequivocal evidence that the employee intended to quit and of some objective acts inconsistent with his further employment. The Director's Delegate considered and weighed all the appropriate evidence and came to the conclusion that Girardi intended to quit and by walking off the job and failing to report the next day he confirmed this intention with acts which were inconsistent with his continued employment.

On an appeal to the Tribunal the onus is on the appellant to show that the Delegate's Determination was in error. In this case the evidence before me is equivocal. I am not satisfied on a balance of probabilities that the Determination is wrong. I note that the Delegate had also the opportunity of interviewing a third witness who was not called to testify at this hearing. I am not prepared to simply substitute my opinion for that of the Delegate.

I must comment however that simply on the evidence before me that there seemed to be a significant misunderstanding between the parties. It seemed clear that Acton did not intend to dismiss Girardi. She had been, and continued to be, supportive of him and considered him to be a good employee. On the other hand it seemed that Girardi did not really want to quit his job but acted emotionally on the spur of the moment in walking off the job site and failing to report to work the next day. If the parties had been able to sit down and discuss the situation calmly it is quite possible that Girardi would still be employed at the Cinnamon Cafe. However, in my opinion the Delegate had ample evidence upon which to base his decision and, as mentioned above, I am not persuaded to reverse his Determination.

ORDER

I order, under Section 115 of the *Act*, that the Determination is confirmed.

John M. Orr
Adjudicator
Employment Standards Tribunal