

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-

Comox Valley Business Management Inc.
operating as ABC Family Restaurant (Courtenay)

(“ABC Courtenay”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 97/383

DATE OF DECISION: July 11th, 1997

DECISION

OVERVIEW

This is an appeal brought by Allan Haynes on behalf of Comox Valley Business Management Inc. operating as ABC Family Restaurant (Courtenay) (“ABC Courtenay” or the “Employer”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by the Director of Employment Standards (the “Director”) on April 23rd, 1997 under file number 41923. The Director determined that ABC Courtenay owed its former employee, Agatha M.F. Lavoie (“Lavoie”), the sum of \$379.52 on account of unpaid statutory holiday pay for Christmas Day 1996 and two weeks’ wages as compensation for length of service.

FACTS

Lavoie was employed by ABC Courtenay as a server from August 1994 until December 1996. Sometime in late November 1996, Allan Haynes, a director of ABC Courtenay, called a staff meeting to announce the possible closure of the restaurant effective December 31st, 1996. The assembled employees were advised that they were free to seek other employment and, if an employee obtained other part-time employment, ABC Courtenay would endeavour to schedule that employee’s hours so as to allow that employee to work for both ABC Courtenay and their new employer. Ultimately, the restaurant continued operations and was still in business as at the date of issuance of the Determination.

On or about December 6th, 1996 Lavoie advised Allan Haynes that she had obtained part-time employment with a local retail store. Although Lavoie’s name continued to appear on the ABC Courtenay shift schedule throughout the balance of December, she was not assigned any hours throughout the month of December except for two four-hour shifts on December 10th and 11th. Sometime in January 1997 Lavoie was issued a Record of Employment, stating that she had “quit”, and a cheque for her accumulated vacation pay.

Lavoie maintains that she never quit but rather was terminated without notice or termination pay.

ISSUE TO BE DECIDED

In its “Reasons for Appeal”, the employer says that Lavoie quit her employment and, therefore, was not entitled to compensation for length of service by reason of section 63(3)(c) of the *Act*. Alternatively, although this point is only obliquely referred to in the Reasons for Appeal, the employer asserts that after December 6th, 1996 Lavoie’s employment status changed to that of a casual employee and thus, she was not entitled to claim compensation for length of service by reason of section 65(1)(a) of the *Act*.

ANALYSIS

The employer does not challenge the Determination with respect to the payment for the Christmas 1996 statutory holiday. The only issue in dispute is Lavoie's entitlement to compensation for length of service.

It is clear, and in any event the employer does not assert, that Lavoie was never given *written* notice of termination at the November 1996 staff meeting, or at any subsequent time. Indeed, in my view, the employer's announcement in late November 1996 of a pending possible closure, coupled with the statement that employees should look for new employment, can be characterized as a constructive dismissal within section 66 of the *Act* thereby triggering an obligation to pay compensation for length of service.

In its "Reasons for Appeal" the employer states that:

"She was not discharged in early January but left on the basis that had been explained in early December, i.e., that there would be no work available for a second part time server, at least for the next several months."

Given that the employer created the situation whereby the employee was, in effect, told that her full-time job was to be terminated at the end of December 1996, Lavoie's decision to seek other employment can hardly be characterized as a voluntary quit. The employer asserts that it was Lavoie who quit her "full-time" job in early December 1996. However, as I perceive the situation, this action on Lavoie's part was merely a response to the employer's earlier announcement that Lavoie's full-time employment would be terminated at the end of December 1996, *i.e.*, a termination which then triggered an obligation on the part of the employer to give either appropriate *written* notice of termination or pay compensation for length of service--the employer did neither.

In the absence of written notice, Lavoie was entitled to two weeks' wages calculated in accordance with 63(4) of the *Act*; I am satisfied that the Director has correctly calculated Lavoie's entitlement under this provision of the *Act*.

As for the employer's assertion that Lavoie was a "casual" employee, and therefore not entitled to notice or termination pay, I am satisfied that at the point of her effective termination (late November 1996--see section 66) and, indeed, throughout the balance of part-time employment in December 1996, Lavoie was not a "casual" employee as defined in section 65(1) of the *Act*.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination issued in this matter, dated April 23rd, 1997 and filed under number 419233, be confirmed as issued in the amount of \$379.52 together with whatever further interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal