Employment Standards TRIBUNAL

An appeal

- by -

Big River Brewing Company Ltd.
("Big River")

- 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: E. Casey McCabe

FILE No.: 2002/159

DATE OF HEARING: June 12, 2002

DATE OF DECISION: July 15, 2002

DECISION

APPEARANCES

Lorenzo Lepore	for the Big River Brewing Company Ltd.
Mark Andrewsky	for himself

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") by Big River Brewing Company Ltd. (the "employer") from a determination dated March 4, 2002. That determination found the employer liable in the amount of $2,461.81 for compensation in lieu of notice to Mark Andrewsky (the "complainant").

ISSUE TO BE DECIDED

1. Did the complainant quit his employment?

2. Is the complainant entitled to compensation in lieu of notice?□□□□□

FACTS

The Big River Brewing Company Ltd. is a brewpub located in Richmond, British Columbia. The complainant commenced work as a server at the rate of $7.00 per hour on January 26, 1998 which was shortly after the pub opened. Approximately one year later Mr. Andrewsky received a small rate increase and was also given occasional bar tending shifts at a rate of $8.00 per hour. His employment remained part-time. On or about February 7, 2000 Mr. Andrewsky was promoted to assistant manager with a yearly salary of $32,000.00.

It must be noted that at the time of the hearing into this matter the Big River Brewing Company Ltd. had filed for bankruptcy. D. Manning and Associates had been appointed the Trustee. Mr. Lepore assured the Tribunal that he has the authority to act for the employer in this matter. Therefore the matter proceeded.

At the time of the complainant's promotion the chief operating officer of the employer was a Mr. Larry Bradshaw. In August of 2000 Mr. Lorenzo Lepore became the chief operating officer although Mr. Lepore states that there was an overlap with Mr. Bradshaw of approximately one month in August and early September of 2000. Unfortunately Mr. Bradshaw did not appear to give evidence in this matter.

The complainant testified that after his promotion to assistant manager that he was subsequently given the position of manager of the pub. He presented two documents dated July 27, 2000 which, on their faces, are job descriptions for the position of restaurant manager with the employer. Mr. Andrewsky testified that the first job description was one that he complied and that the second job description was one complied by Mr. Bradshaw.

The one complied by Mr. Bradshaw is entitled Job Description for the position of restaurant manager, Big River Brewing Company, Richmond, British Columbia. That job description then goes on to set out duties that would clearly fall within the scope of managerial functions, such as: responsibility for keeping the general manager informed of all issues and events that may be relevant to the business, such as staffing issues, operational issues, customer and supplier issues, marketing and promotional issues etc.; responsibility for scheduling of all services and bar staff and the review and approval of schedules prepared by the kitchen manager; responsibility for the printing and posting of all schedules and ensuring that staff is aware of the schedules; ensuring that staff adhere to the schedules and that a proper procedure is followed where scheduled changes are necessary due to sickness or other excusable absences; responsibility for initiating disciplinary action and keeping clear and concise documentation of such actions; responsibility for ensuring that new hires receive proper training and orientation and that employees receive ongoing training and regular critiques of performance.

Additionally the manager is responsible for supervising staff during business hours and to ensure that staff follow procedures and requirements; he is responsible for ensuring that staff members conduct themselves in a highly professional manner; the manager has the authority to dismiss for theft, use of violence, threat of violence or sexual harassment; the manager has the duty to field customer concerns and complaints and take whatever action was necessary; the manager is responsible for the machinery and equipment in the office and that all areas of the restaurant that were accessible to customers were safe and in good repair; he was responsible for ensuring appropriate standards of cleanliness were maintained; he was also responsible for yearly marketing and promotional plan including time tables and estimating projections. The restaurant manager was responsible together with the general manager and the kitchen manager to critique food and beverage offerings and to ensure, with the bar manager, that drinks were consistent and made according to prescribed recipes; he was also charged with working with the brew master to ensure that the beers were dispensed properly and of the highest quality; he was also required to work with the bowling center manager to ensure that food and beverage service was adequately provided.

On Tuesday, September 19, 2000 Mr. Lepore met with the complainant. A discussion ensued regarding the complainant's status with the pub. Mr. Lepore took the position that the complainant was an acting manager. The complainant's position was that he was the manager. However, regardless of the title that he was to be given, what comes out of this meeting is that his duties and job functions remained as described in the aforementioned job description plus there was a salary increase from $32,000.00 per annum to $1,500.00 bi-weekly or approximately $39,000.00 yearly. The complainant was also told that he would be on a probation period for 90 days and thereafter his job status would be listed as manager with a salary increase to $42,000.00 per year provided that he met the labour and combined food/beverage costs targets.

The evidence indicates that the complainant continued to function and perform the managerial duties forward to his termination on April 4, 2001. However, the employment situation did experience some turbulence. On March 14, 2001 the complainant received a formal written reprimand. It was addressed to him personally and did not include his title. He was disciplined for a lack of performance over his administration of company policy regarding the wearing of uniforms and nametags. Furthermore and a situation with a particular employee was raised. In the final paragraph of the written reprimand Mr. Lepore stated:

> "This lack of action and communication is totally not acceptable management behavior, all policies must be adhered to and all infractions must be handled expediently and properly."

Approximately 2 weeks later, on March 27, 2001 the complainant received a negative employee evaluation. This evaluation did refer to his position as "Acting Manager".

In a meeting on or about April 4, 2001 the complainant was informed by Mr. Lepore that he was not capable or experienced enough at the time to run the pub. Mr. Lepore informed the complainant that he intended to bring in a more experienced management team and that the complainant would be demoted to assistant manager with his previous salary of $32,000.00 per annum. Mr. Lepore asked the complainant to remain with the pub in that capacity in the hope that if he were to work with a more experienced manager he would progress to the point where he could manage the restaurant more successfully.

The complainant was not willing to accept the demotion both in terms of the loss of status and salary. The employer and the complainant then discussed termination options. The employer really wanted the complainant to remain in the work place for at least one week to orient the new manager. The employer asked the complainant to remain for that one week and offered an additional two week's termination pay. Due to the circumstances at the time the complainant rejected the offer and left the meeting.

ANALYSES

I find as a fact that the complainant was the restaurant manager at the time that Mr. Lepore became the chief operating officer of the employer. I do not put any weight on the fact that there was a reference in the September 20, 2000 letter to the position of acting manager. The facts are clear that the complainant's duties remained the same with an increase in salary. Therefore I conclude that the complainant was the restaurant manager during the relevant times.

The evidence also indicates that Mr. Lepore became disenchanted with the complainants performance. However, the evidence also reveals that the first indication of dissatisfaction with the complainant's performance came with the March 14, 2001 written reprimand which was closely followed by the evaluation dated March 27, 2001. Finally, it is clear that the events of April 4, 2001 amounted to a significant demotion.

The employer argues that the complainant, by failing to accept the combination of working notice and money, quit his employment. In order for an employee to quit he/she must show both a subjective intent and an objective manifestation of that intent, i.e. a subjective declaration that "I quit" followed by the objective act of cleaning out one's locker. In this case I do not agree that the subjective and objective tests have been met. The facts of the case are more akin to a constructive dismissal. As such it is more appropriate to apply the tests associated with a "constructive dismissal" than a "quit".

Not all changes in conditions of employment will constitute a constructive dismissal. The changes must be substantial in the sense that the changes reflect a fundamental shift in the employment relationship. The test to be applied in such cases is objective. One must look at the nature of the employment relationships; the conditions of employment; the changes that have been made; the legitimate expectation of the parties; and whether there were any express or implied agreements or understandings. In the instant case the complainant's position of restaurant manager was reduced to assistant manager; his salary was reduced by $7,000.00 per annum; he would have been required to work under a new manager with reduced responsibilities, but yet continue working with the employees that he previously supervised. Furthermore I do not feel that it is a legitimate expectation on behalf of the employer to expect the complainant to train/orient the new manager and then continue to work under that person with the

employees that he formerly supervised. Additionally, I do not find that there was any express or implied agreement that the complainant was an acting manager subsequent to the September 19, 2000 meeting.

For the above reasons I find that the complainant did not quit his employment. Nor do I find that the employer had just cause or to claim that it had just cause to terminate the employment. The employer did not intend to terminate the employment, indeed it wanted to have the complainant continue on, but in the reduced capacity of assistant manager. The employer's concerns about the complainant's work were not concerns that give rise to a disciplinary response but were rather concerns with respect to the lack of experience and ability in the position.

I turn finally to the issue of notice. The employer argues in the April 4, 2001 meeting it offered the complainant a combination of working notice and pay in lieu of notice. In a recent decision by the Tribunal, *B & C List(1982) Ltd.* BC EST # RD641/01 (Reconsideration of BC EST # D387/01), it was held that in cases of constructive dismissal the question of whether the employee was given the option of a combination of working notice and pay in lieu of notice was irrelevant when the notice applied to working under the new conditions. As stated in that decision, "the appropriate quantum of compensation accrues to the employee at the moment of termination." In other words, for the notice in this case to discharge the statutory requirement, the working period must have been completed while the complainant was still the manager. Even if I am wrong on this point however, there is no evidence to support that the notice was given in writing. Section 63(3)(a) allows the liability resulting from length of service to be discharged if the employee "…is given written notice of termination as follows:" Furthermore Section 63(3)(b) allows that a combination of notice and money equivalent may discharge the liability. However, the employer argues that because Section 63(3)(b) does not specifically state that the combination of notice and money equivalent must be in writing that his verbal offer would discharge his liability. I disagree. In my view the intent of the Section is to require both the written notice and any combination of notice and money equivalent to be in writing. It seems to me that it is consistent with the intent of the Section, which is to provide an employee with clear notice that his employment is being terminated and he is entitled to compensation for length of service, to require written notice under 63(3)(a) but allow verbal notice if a combination of justice and money equivalent is given under Section 63(3)(b). For the above reasons I find that the appeal by the employer should be dismissed.

ORDER

The Determination dated March 4, 2001 is confirmed with interest to date.

E. Casey McCabe
Adjudicator
Employment Standards Tribunal