

An appeal

- by -

574013 B.C. Ltd. operating as Humpty's Family Restaurant
(the "employer")

- 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: Gwendolynne Taylor

FILE No.: 2001/042

DATE OF HEARING: May 25, 2001

DATE OF DECISION: June 26, 2001

DECISION

APPEARANCES:

David Humphries	on behalf of the employer
Stacy Smith, by telephone	on her own behalf (“the employee”)
Ron Corrigan	on behalf of the Director

OVERVIEW

Pursuant to section 112 of the *Employment Standards Act*, (the “*Act*”) the employer filed an appeal from a Determination by the Director dated December 13, 2000. The Director found that the employer terminated the employee on March 31, 2000, without just cause, and did not pay compensation for length of service (CLOS). The Director ordered the employer to pay \$257.36 for CLOS plus vacation pay and interest.

On January 5, 2001, the employer appealed the Determination alleging that the Director erred in determining the facts and in the calculation. The employer appealed to have the determination overturned and the case referred to a different delegate of the Director.

ISSUE

Did the employer terminate the employee, or did the employee quit?

If the employer terminated the employee, did the employer have just cause? Does the evidence support a finding that the employee was absent without permission?

THE FACTS

Stacy Smith worked for the employer from June 11, 1999 to March 26, 2000, as a line cook at the rate of \$8.50 per hour. On March 26, 2000, she gave notice that she would be leaving as of April 9, 2000. She was scheduled to work on March 27 and 30, but did not attend.

Ms. Smith did not have a telephone. She alleges that her uncle’s number was on file at Humpties as the emergency number. Mr. Humphries maintains that she did not give them a contact number.

On March 27 and 30, Ms. Smith’s uncle telephoned the employer to advise that she was ill. On both occasions he telephoned Mr. Humphries just before or just after the 3:00 p.m. shift change. On March 30, Mr. Humphries told him to have Ms. Smith contact him directly, or not bother

coming back to work. On March 31, Ms. Smith contacted Mr. Humphries. She had a note from the Gorge Medical Clinic dated March 31, 2000, indicating she had been “treated here and should be able to return to work tomorrow.” Mr. Humphries told her she could move up her resignation date or he would fire her. On April 3, 2000, Ms. Smith filed a complaint with the Director.

Humpty’s Personnel Policies and Guidelines require employees to call the manager 8 hours in advance if unable to come to work due to illness; in the same document, “absent from work without permission” is listed as an offence for which an employee can be terminated. Two other offences, failure to call in an absence 24 hours before a shift begins and failure to follow instructions, can result in a written warning followed by termination. In another document, Restaurant Rules and Regulations, #15 requires an employee or family member to inform the manager as soon as possible if the employee is unable to report to work.

ARGUMENT

According to Mr. Humphries, Ms. Smith chose to move up her resignation date. The Record of Employment indicates that she quit. In her submission of February 2, 2001, she admits that she moved up the resignation date because she didn’t want a dismissal on her record.

In the alternative, Mr. Humphries submits that Ms. Smith’s conduct amounts to just cause for termination. She breached company rules. He submits that she gave no notice of not coming to work because she did not tell him in advance. He takes exception to the Director’s interpretation of the company rules respecting how much notice is required. In his view, the rule about illness is very specific and requires 8 hours notice. Ms. Smith is the only employee who gave notice of illness after the shift started.

Mr. Humphries says he told Ms. Smith’s uncle on March 27 to have her call him. It was only after he threatened her employment on March 30 that she responded. At this point, she was absent from work without permission, had not provided proper notice, and was not obeying instructions.

FINDINGS

I accept the evidence that Mr. Humphries told Ms. Smith, on March 31, 2000, that she could either move up her resignation date or be fired. I don’t accept Mr. Humphries’ contention that this amounted to a choice for Ms. Smith. Either way, he had fired her. I find that she was presenting herself as able to return to work but he was not prepared to allow that.

The question then is whether he had just cause to terminate her employment. Probably this situation would not have arisen if Ms. Smith had a telephone, or if her uncle had telephoned earlier each day. I find that her conduct was irresponsible in not arranging for advance notice. However, I find that her conduct did not warrant termination of her employment. The rules

permit either the employee or a family member to give notice. That was done. I do not accept Mr. Humphries' submission that late notice is no notice.

I accept that Ms. Smith was ill. Given that she was ill, it is not reasonable to characterize her absence as being "without permission", resulting in termination of employment. She gave notice, albeit late, and this is not an absence that would require employer permission. Termination is not indicated in the Rules for failure to give 8 hours, or 24 hours, notice and, even if it was, I would question whether it would be a reasonable term. Similarly, termination is not indicated for failure to follow instructions

MONETARY CALCULATIONS

Pursuant to section 63 of the *Act*, the employer owes Ms. Smith one week's wages. This is calculated based on the total of all her wages during the last 8 weeks in which she worked normal or average hours. Mr. Humphries submits that the Director miscalculated by using the period of February 1 to March 31, instead of February 5 to March 31. The employer pays twice per month. He says his review of the records indicates Ms. Smith worked 15 hours during February 1 to 4, which should not be included.

The Director issued a Demand for Employer Records requiring records relating to wages, hours of work, etc. In response, the employer provided only an employment insurance history report, which does not breakdown the amounts or the hours per day.

I appreciate that the employer's records are based on bi-monthly pay periods and that using the last 4 pay periods, as the Director did, will not result in a calculation of exactly 8 weeks. However, it is apparent that Mr. Humphries never provided a statement of the days and hours Ms. Smith worked. He said he inspected the time cards, but he did not provide them to the Director, or me.

Mr. Humphries submits that to deny the appeal is to deny mathematical fact. I am not prepared to accept his submission of "mathematical fact" without further evidence to support it. He could have provided that evidence to the Director or in the hearing before the Tribunal.

I find that the Director made a reasonable calculation based on the evidence presented.

ORDER

Pursuant to section 115 of the *Act*, I confirm the Determination issued December 13, 2000.

Gwendolynne Taylor
Adjudicator
Employment Standards Tribunal