

An appeal

- by -

453428 B.C. Ltd. operating as Bagel Street Café

- 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: Norma Edelman

FILE No.: 2002/336

DATE OF HEARING: September 5, 2002

DATE OF DECISION: September 9, 2002

DECISION

APPEARANCES

Jack Wong for 453428 B.C. Ltd. operating as Bagel Street Café

Marlene Levasseur on her own behalf

OVERVIEW

This is an appeal filed by 453428 B.C. Ltd. operating as Bagel Street Café ("Bagel Street") pursuant to Section 112 of the Employment Standards Act (the "Act"). Bagel Street appeals a Determination that was issued by a delegate of the Director of Employment Standards on May 24, 2002 pursuant to which Bagel Street was ordered to pay its former employee, Marlene Levasseur ("Levasseur") the sum of \$1138.79 on account of three weeks' wages as compensation for length of service (see Section 63 of the Act) accompanied with vacation pay and interest. Bagel Street argues that Levasseur quit her job after receiving notice and therefore the company is not liable for compensation for length of service.

ISSUE TO BE DECIDED

Is Levasseur entitled to compensation for length of service?

FACTS AND ANALYSIS

Levasseur commenced employment at Bagel Street on August 14, 1998. Her last day of work was January 14, 2002. Bagel Street issued Levasseur a Record of Employment on January 25, 2002 which indicated that she quit her job.

At approximately 1 p.m. on January 14, 2002 Jack Wong ("Wong"), the owner of Bagel Street, gave Levasseur and another employee, Betty Lapuz ("Lapuz"), letters which stated: "I regret to inform you that due to the state of the economy we are giving you this layoff notice effective today January 14th, 2002."

The parties disagree as to what else transpired on January 14, 2002.

In the Determination the delegate set out Bagel Street's position as follows:

...Wong...states that when this notice was given to Levasseur she promptly gave Mr. Wong her keys to the café and left. Mr. Wong's position is Levasseur quit and the employer issued a Record of Employment to the effect.

The delegate set out Levasseur's position as follows:

Levasseur states there was herself and another employee that were given "notice" on January 14, 2002. When the employees read the notice they took it to mean they were laid off effective immediately. Levasseur and the other employee asked if they were going to be getting severance

pay and were told by Mr. Wong they would not. At this point both employees gave their keys to the café to Mr. Wong and left. Mr. Wong did not suggest that they must finish the day. Levasseur state (sic) that she did not quit.

The delegate concluded that Wong did not give proper notice to Levasseur. She stated: "Proper notice should have been 3 weeks from January 14, 2002, which should have been stated in the notice of layoff." She further stated: "The employer's attempt to interpret Levasseur's leaving to mean that she quit must fail. The employer initiated the layoff process without proper notice. Compensation for length of service is owing."

Wong filed an appeal of the Determination on June 14, 2002. He says there is an error in the facts; there is a different explanation of the fact; some facts were not considered and he was denied the opportunity to respond to the investigation. He wants the Tribunal to cancel the Determination. He also says:

I am appealing the Determination because there is an error in the facts. I Jack Wong gave Levasseur written notice of layoff on January 14, 2002 at approximately 1:00 pm and said to Levasseur and another employee: "Business is bad I am sorry but I have to give you three weeks notice of layoff effective today." I handed each employee a written notice of layoff letter. They threw down their keys and walked out of the café one hour before the end of their shift. They did not return to work the next day.

An oral hearing was scheduled to hear this appeal. Wong and Levasseur attended the hearing, along with Roy Harris, a Business Consultant, who gave evidence in support of Wong, and Lapuz who appeared as Levasseur's witness.

Wong testified that when he gave the letters to Levasseur and Lapuz he verbally advised them that business was bad and he had to give them, respectively, 3 and 2 weeks notice effective that day. Levasseur and Lapuz then turned in their keys and left. Lapuz worked from 9 a.m. to 1 p.m. so she did not leave early. Levasseur, who worked from 6 a.m. to 2 p.m., left her shift early.

Levasseur testified that Wong came in to work around noon on January 14, 2002 and she advised him she had to leave an hour early. She said Wong agreed she could leave early. Wong stated that he could not recall telling Levasseur she could leave work early on that day. Levasseur also stated that when she first came in to work on January 14 she noticed her name had been erased from the board. Wong stated he knew nothing about this as he arrived at the café at noon on January 14.

Levasseur further testified that at approximately 10 minutes to 1:00 pm Wong approached her and Lapuz and said: "I'm sorry, business is bad, I have to hand you this". She and Lapuz then read their notices. She said she was stunned and she didn't understand it as it was supposed to say she was being given 3 weeks notice. Lapuz asked Wong about getting 2 weeks notice and he said no. She then started taking her keys off her chain. She said if Wong thought she was misinterpreting things he could have corrected it at that time by saying she had 3 weeks notice. She then left and did not return because she believed she was terminated that day. She says she did not quit her job.

Lapuz testified that just before leaving work on January 14, Wong came over to her and Levasseur and handed them letters, which said they were being terminated effective that day. She asked Wong if she was going to get two weeks pay and he said no. She then asked if she needed to come back tomorrow and he said no. She and Levasseur then handed in their keys to Wong and left the café.

Wong testified that he never told Lapuz and Levasseur they were being terminated. Rather he told them they were being laid off and this was the language used in the notice letters. He also said he never asked for their keys, they just gave them to him and Lapuz did not ask him if she was to work on the following day.

Harris advised he was not present at the café on January 14, but he was there on the following day and he saw Levasseur's name on the board on that day. Further, the café was in a state of turmoil because Lapuz and Levasseur had not reported to work as expected. He had to help out in the café and get things organized and Wong had to scramble to hire new employees. In his view, the notice letters were perfectly clear that notice was being given on January 14 but the end date of employment was not January 14. He posited that Levasseur did not understand the letter because she is French, to which Levasseur replied she understands the English language and she thought her employment was terminated on January 14.

It is well established that in an appeal before the Tribunal the burden is on the Appellant, in this case Bagel Street, to show that the Determination is wrong and should be varied or cancelled.

I am not satisfied that Bagel Street has met that burden.

First, there is no evidence whatsoever that Bagel Street was denied the opportunity to respond during the delegate's investigation.

Second, I do not accept that Levasseur received written notice as required under the Act or that she quit her employment at Bagel Street.

Section 63 of the Act provides that an employer becomes liable to pay an employee compensation for length of service upon termination of employment. The liability is deemed to be discharged when written notice in the appropriate amount is given or where the employee quits, retires or is dismissed for just cause.

Bagel Street claims it gave three weeks notice to Levasseur and then she immediately quit her employment. There is no question Levasseur received a letter on January 14, which stated: "...we are giving you this layoff notice effective today January 14th, 2002." Wong states he told Levasseur and Lapuz, when he gave them their letters, that he was giving them 3 and 2 weeks notice, respectively, effective that day. Levasseur and Lapuz deny they received the verbal notice.

In my view, it is not necessary to resolve the factual dispute about whether verbal notice was given or not. The Tribunal has consistently held, and I completely agree, that the requirement for written notice under the Act cannot be satisfied by an equivalent amount of verbal notice. (See *Sun Wah Supermarket Ltd.* BCEST #D324/96; *Jual Furniture* BCEST #D358/01). Therefore, even if verbal notice was given to Levasseur on January 14 that her last day of work would be 3 weeks following January 14, the notice has no effect.

The next issue is whether the January 14 letter constitutes written notice under the Act such that Bagel Street is not obliged to pay compensation for length of service. I agree with the delegate that the letter does not constitute proper notice. Proper written notice should clearly and unequivocally set out the appropriate amount of weeks of notice that an employee is entitled to receive under the Act. In Levasseur's case, she was entitled to receive 3 weeks' written notice of termination of employment. However, the January 14 letter says absolutely nothing about three weeks of notice. In my view, Levasseur's

conclusion that she was being immediately dismissed is not an unreasonable one. The letter gives no indication that her last day of work is some day other than January 14. I do not accept that Levasseur misunderstood the letter because her first language is French. During the hearing it was more than apparent that Levasseur understands the English language perfectly well. The problem is not with Levasseur's language skills. The problem is the absence of a date in the letter to show Levasseur was given 3 weeks written notice.

The purpose of written notice is to ensure that all parties can clearly see that advance notice of termination of employment has been given and that the amount of notice is in accordance with the Act. Proper notice creates certainty and avoids precisely the kind of issue that has occurred in this case, which is whether notice was given at all, and if given, when the notice ends or takes effect.

For the above reasons, I agree with the delegate that Levasseur was dismissed without written notice and she did not quit and as a result she is entitled to three weeks' wages as compensation for length of service.

ORDER

Pursuant to Section 115 of the Act, I order that the Determination be confirmed.

Norma Edelman
Vice-Chair
Employment Standards Tribunal