Employment Standards TRIBUNAL

An appeal

- by -

Willard Edwards and Ethna Edwards operating as
Willard Edward's and Co. Restaurant
("the Edwards")

- 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: Lorne D. Collingwood

FILE No.: 2001/427

DATE OF HEARING: August 15, 2001

DATE OF DECISION: August 23, 2001

DECISION

OVERVIEW

The appeal is pursuant to section 112 of the *Employment Standards Act* ("the *Act*") and by Willard Edwards and Ethna Edwards operating as Willard Edward's and Co. Restaurant (I will refer to the Edwards as "the employer" in this decision and also as "the Appellant"). The employer appeals a Determination issued on May 14, 2001 by a delegate of the Director of Employment Standards ("the Director"). In that Determination, the Appellant is ordered to pay Alice Smith $405.32 in compensation for length of service, vacation pay and interest.

As I understand the Determination, it is that the delegate found that the employer gave the employee working notice but that the employment was terminated by the employer prior to the announced date of termination. Underlying that latter decision is a determination that there is no evidence to support a conclusion that the employee quit.

The employer, on appeal, argues, once again, that the employee quit.

An oral hearing was held in this case.

APPEARANCES:

Willard and Ethna Edwards	On their own behalf
Alice Smith	On her own behalf

ISSUES TO BE DECIDED

The issue is whether the employee did or did not quit.

What I must ultimately decide is whether the Appellant has or has not shown that the Determination ought to be varied or cancelled, or a matter referred back to the Director, for reason of an error or errors in fact or law.

FACTS

Alice Smith worked as a waitress for the employer from February 9, 2000 to August 9, 2000.

On the 3rd of August, 2000, Smith gave the employer verbal notice that it was her intention to quit in 30 days. Willard Edwards told Smith that he did not need 30 days of notice and that if she wanted to leave before that point that was okay with him. In fact, he told the employee that she could leave that very day. Smith indicated that she did not want to leave right away but needed to work. Hearing that, the employer gave Smith verbal notice that she would be terminated in two weeks.

The employer hired a waitress called Hadda. Hadda started work on the 8th of August, 2000. Smith was not at work that day. She had arranged to have the day off.

Ron Fast, a regular customer, went to the restaurant on the 8th. He knows Smith and views her as a friend. On noticing that she was absent and that there was a new waitress, he asked Ethna Edwards where Smith was. Ethna responded to his question by saying "she's gone". Finding that odd, Fast asked her what she meant by that. Ethna, not wanting to supply personal information about staff, said "gone, gone" and at that point she left, bringing an end to the conversation.

Rightly or wrongly, Fast assumed that Smith had been fired. He telephoned Smith but she was not home and so Fast left voice mail. In doing so, he expressed how sorry he was that she had lost her job at the restaurant.

A short while later, Smith returned home and she checked her voice mail. That led her to telephone Fast. Fast told her how Ethna Edwards had responded to his questions.

The employer posts its work schedules and Smith immediately went to the restaurant as that would tell her whether she was still scheduled to work. She was.

Smith reported for work on the 9th of August. On doing so, she met Hadda, the new waitress.

On or about 1:30 p.m., Willard Edwards approached Smith and he said that he wanted to meet with her on the restaurant's patio. According to Edwards, in doing so, he noticed that Smith was holding her apron and he said "you won't be needing that". According to Smith, Edwards said "leave your apron and grab your personal belongings, you won't be returning". Dawne Walker overheard Edwards and, as far as she is able to recall, he did not tell Smith to grab her personal belongings but said only that she should leave her apron as "you won't be needing that". I am prepared to accept that the employer did in fact say that. I am equally satisfied, however, that Smith may well have misunderstood the employer and that she thought that he meant "leave your apron, you won't be needing that again, ever". She was after all expecting to be fired.

The matter of what was said on the patio is also disputed. Both parties tell me that the employer began the discussion by telling Smith that she was no longer needed. I find that Smith told the employer that she had given him 30 days' notice and that she wanted to work the entire notice period or severance pay. And I find that the employer's response was to remind Smith that he had in turn given her two weeks' notice. But according to Edwards, the conversation ended with Smith agreeing that she would continue working and do so until the 15th of August. [That in effect meant that her last day of actual work would be the 12th as the restaurant is closed on Mondays and Tuesdays (the 13th and the 14th) and Smith had already arranged to have the 15th off as a vacation day.] Smith, on the other hand, denies that. She claims that it was made clear to her that she was being terminated that very day.

There are no witnesses to the conversation. But as matters are presented to me, I find that the employer is not suggesting that the employee went to far as to say that she was quitting that very

day. I find that there is not clear evidence to show that the employee did say that she would continue working. While nothing turns on it, I am inclined to believe that the employer, in telling Smith that she was no longer needed, meant only "that if you want to leave right away, you can" but that the employee misunderstood the employer to say "you are no longer wanted as an employee".

I reach the latter conclusion for several reasons. The employee knew that the employer had hired a new employee. She was expecting to be fired on the basis of what Fast had had to say and her understanding of what it was that the employer had just said regarding her apron. Dawne Walker tells me that Smith left visibly upset and in tears. That is inconsistent with just learning that you still have a job. And I find that Smith, once home, telephoned the restaurant and, in getting Kelly Hanson, said, "Have you heard, I was fired?"

Hanson's response to the comment, "Have you heard, I was fired?", was to say "No, you've quit". I find, however, that in saying that, Hanson could only have been recognizing the fact that Smith had said, on the 3rd, that she was quitting. Hanson did not hear Smith announce a plan to quit on the 9th. Willard Edwards, moreover, had announced to staff after his meeting with Smith on the patio, that Smith was going to work to and including the 12th.

Smith failed to report for work on the 10th and the employer decided that she had in fact quit. I find that it had no way of knowing that however. For all the employer knew, the employee was sick.

The employer made no attempt at this point to contract the employee. I find that odd and unlikely. The employer itself tells me that it was at this point aware that Hadda was not going to work out and, as such, Smith was sorely needed. Hanson had told the employee that Smith had telephoned and said that she had been fired. And, according to the employer at least, the employee had not said that she was quitting but that she would work until the 12th. In those circumstances, it is likely that the employer would have acted to establish why the employee was not at work. It did not, however, and because of that the employee was left thinking that she had been terminated by the employer. The employment was severed because of that.

ANALYSIS

Section 63 of the *Act* provides for the payment of compensation for length of service. It also establishes that there are circumstances where the liability is to be deemed to have been discharged.

> **63** (3) The liability is deemed to be discharged if **the employee**
> (a) **is given written notice of termination** as follows:
> (i) one week's notice after 3 consecutive months of employment;
> (ii) 2 weeks' notice after 12 consecutive months of employment;

(iii) 3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice;

(b) is given a combination of notice and money equivalent to the amount the employer is liable to pay, or

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

It is an employee's right to resign and that right is personal to the employee. An employer may not deem that an employee has quit.

The Tribunal has long held that there must be clear, unequivocal facts to show that the employee voluntarily exercised his or her right to quit [*Burnaby Select Taxi Ltd. and Zoltan Kiss*, (1996), BC EST #D091/96]. And it has held that quitting has both a subjective and an objective element. Subjectively, the employee must form the intention to quit. Objectively, he or she must act in a way, or demonstrate conduct, which is inconsistent with continuing the employment.

In this case there are not clear unequivocal facts to support a conclusion that the employee quit. The employee announced an intention to resign on the 3rd of August but the resignation was to take effect in 30 days. There is not evidence to show that the employee announced that she was revising her plan to quit and that she was quitting on August 9. Not even the employer is suggesting that the employee did that.

There is in this case no evidence of any act or conduct which is inconsistent with continuing the employment. She had not made other arrangements. There was no other job to go to. She was in fact out of a job.

In the absence of plain, clear evidence to support a conclusion that the employee quit, it follows that termination was at the hand of the employer. And, I am satisfied of that, even if it was only through a lack of action on the part of the employer. In telephoning the employer on the 9th as she did, Smith acted to convey a belief that she had been fired. Yet the employer did not act to tell Smith that she was wrong in assuming that she had been fired or determine why it was that she did not report for work on the 10th. If the employer did not actually tell the employee that she was terminated, it is clear that the employment was then severed through a massive failure to communicate on the patio and the subsequent failure of the employer to set matters straight. In either case, the result is the same. Termination is by the employer.

The delegate has awarded compensation for length of service but he indicates that there was "working notice" because verbal notice was given. I do not understand the delegate on this point. The *Act* is, however, perfectly clear. It is not sufficient that an employee be given verbal notice. An employer must given written notice of termination if it is seeking to avoid paying length of service compensation. The legal equivalent of verbal notice is no notice at all.

The employee was terminated on the 9th and at that point she had completed more than three months but less than one year of employment. As such she was entitled to one weeks' written

notice of termination, or failing that, the equivalent in pay. For whatever is the reason, the delegate has awarded Smith one week of pay as compensation for length of service. In calculating the length of service compensation, however, the delegate does so on the basis of the employee's average insurable earnings in the last 26 weeks of the employment. That is inconsistent with the *Act*.

Length of service compensation is to be calculated as follows:

> **63** …
> (4) The amount the employer is liable to pay becomes payable on termination of the employment and is calculated by
> (a) totaling all **the employee's weekly wages, at the regular wage**, during the **last 8 weeks** in which the employee worked **normal or average hours** of work,
> (b) **dividing the total by 8**, and
> (c) multiplying the result by the number of weeks' wages the employer is liable to pay. (my emphasis)

For reason of the failure of the delegate to calculate compensation for length of service correctly, I have decided to refer this matter back to the Director for recalculation of the amount owed. As that is a relatively easy thing to do, and as time is of the essence in these matters, I ask that the Director see to it that the calculations are done quickly so that the employee receives that which she is due, promptly, not 6 or 8 months from now.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated May 14, 2001 be confirmed in respect to the order to pay one weeks' compensation for length of service but, as the delegate has incorrectly calculated that compensation, I refer the matter of recalculation of the amount awarded through the Determination back to the Director so that Alice Smith will receive exactly what she is owed in the way of length of service compensation, vacation pay and interest. In doing so, I order that the Director add what further interest has accrued pursuant to section 88 of the *Act*.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal