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 -

Pellerine Holdings Ltd. c.o.b. as Lion's Head Pub
(the "appellant")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: E. Casey McCabe

FILE NO.: 2000/520

DATE OF DECISION: November 9, 2000

DECISION

APPEARANCES

Elmer Pellerine	for the employer
Lynda Parkes	for herself
Ed Wall	for the Director of Employment Standards

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") by the employer, Pellerine Holdings Ltd., carrying on business as Lion's Head Pub (the "employer") from a Determination dated July 5, 2000. That Determination found the employer liable for $3,606.24 for compensation in lieu of notice to Lynda Parkes (the "complainant"). The Director's Delegate determined that the employer had breached Section 63(3) of the *Act*.

ISSUES TO BE DECIDED

1. Did the employer terminate Lynda Parkes?

2. If the answer to the first question is yes, did the employer have just cause to terminate Lynda Parkes?

FACTS

The employer operates as the Lion's Head Pub in Castlegar. The complainant worked for the employer from October 1992 till February 1, 2000. According to the Record of Employment the complainant worked as a Manager/barmaid.

On January 1, 2000, the Workers' Compensation Board (WCB) introduced new regulations that banned smoking in all workplaces including pubs. This regulation caused considerable anxiety among the employees of the pub as some, if not all, were smokers. It is uncontested that the complainant was a smoker.

Sometime in late January a staff meeting took place in which the employer told the staff that he would be complying with the WCB regulations and therefore the employees could no longer smoke in the building. The employer went on to state that if the staff were not able to work a full 8-hour shift without a break, he would be forced to drop the shifts from 8 to 4 hours.

Ms. Parkes was not happy with this decision and had a meeting with the employer on February 1, 2000 in order to discuss the situation. The discussion between the two became

heated. Ms. Parkes left the office under the impression that she had been fired. Three days later the employer completed a Record of Employment indicating that Ms. Parkes had been dismissed.

ANALYSIS

The employer's first position is that Ms. Parkes was not fired. The employer states that the reason Ms. Parkes is no longer working for the employer is that she was unwilling to comply with the WCB regulations. The employer states in his reasons for appeal that he had no intention of firing Ms. Parkes. He further states that when Ms. Parkes kept repeating "I have been fired", he responded by saying "yes, you are fired if that is the way you want to put it… you are fired." The employer states that his reason for saying this was to encourage Ms. Parkes to leave the pub.

The test for determining whether or not an employee has quit, as the delegate rightly points out in the Determination, has both objective and subjective elements. The same test does not apply to determine whether or not an employee has been fired. It does not matter what was in the employer's mind when he spoke but the fact remains that he told Ms. Parkes ". . . you are fired." Given that the employer does not deny telling the complainant that she was fired the only possible finding is that the complainant actually was fired. This is supported by the Record of Employment which shows that she was dismissed.

The employer's second position is that the reason Ms. Parkes is no longer working is that she refused to abide by the WCB regulations. While it is unclear in the employer's appeal submission, I take this to mean that if he was found to have fired Ms. Parkes, it was due to her refusal to abide by the WCB regulations. Willful disregard of these regulations, especially after the employer makes it clear that the employees are expected to abide by them, could give rise to a finding that the employee was dismissed with cause.

Unfortunately for the employer there is no evidence before me to indicate that Ms. Parkes was disobeying these regulations. The uncontradicted evidence is that the employer did not decide to enforce these regulations until late January 2000. The evidence is that the employer allowed the employees to smoke in the pub. Therefore, it is not until after the meeting in which the employer's policy was made known to the employees that the employer would be justified in imposing any form of discipline on the employees for breaching the WCB regulations.

The employer states that after the meeting, and before the February 1 meeting, Ms. Parkes worked 3 shifts, and had off duty staff come in to relieve her so that she could go outside for a cigarette. The employer states that this was acceptable as a temporary measure only. It is unfortunate that no one attempted to make it clear exactly how many employees worked at this pub, and how many would be on shift at any one time. It would appear from the appeal that usually only 1 person worked per shift, otherwise there would not seem to be a problem with having a staff member go outside for a quick cigarette. Further, section 32 of the *Act* provides that an employer must ensure that no employee works more than 5 consecutive hours without a meal break, and that each meal break lasts at least a ½ hour. While it has not been argued here, the fact that an employee takes a break that is mandated by the *Act* cannot be grounds for just cause.

In conclusion, the employer has not shown any evidence that would show just cause to terminate Ms. Parkes.

ORDER

The Determination dated July 5, 2000 is confirmed.

E. Casey McCabe

E. Casey McCabe
Adjudicator
Employment Standards Tribunal