

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 -

504169 B.C. Inc.
operating as Restaurant Quality Foods

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: John M. Orr

FILE No.: 2000/536

DATE OF HEARING: October 11, 2000

DATE OF DECISION: December 8, 2000

says that he made everyone aware that certain moral standards were important to the survival of the business. He says that he told them that their after work activities would not usually be his business but because of their relationship with the public school system there was a potential for the company to lose its contracts.

Bourke says that he became aware that Ms Doiran was working in the sex trade through some of her co-workers. Apparently she had talked openly about it at work.

Bourke says that he called Ms Doiran into his office and told her that he couldn't accept her after work activities because of the potential damage to the business. He says that she felt there was nothing wrong with her second job and that she was planning to do it full-time. He says that he gave her the options to either quit the sex trade or resign her job.

Ms Doiran emphasized that she was not given the option to quit the phone sex job. She said that she was not ashamed of doing it and was looking at doing it full-time. She felt that it did not affect her ability to do her job. She says that Bourke first asked her to resign and she said that she wouldn't, as she did not see the conflict. She says that the only choice she was given was whether to be fired or laid off.

The Director's delegate pointed out that the contract between RQF and the school districts had a built-in mechanism for resolving any concerns that a district might have without canceling the contract.

ANALYSIS

Bourke submitted that the employer does not have to show actual damage to the business but is entitled to act to protect the business where there is potential harm. He claims that the sex trade work was fundamentally inconsistent with the employment relationship. He refers to the case of *Pamela Smith v. The Kamloops and District Elizabeth Fry Society* [1996] C.C.G.L. (2d) 303 (BCCA) in which a social worker employed by the Society had a sexual relationship with a client. The social worker concealed the relationship from the employer for eight months. The trial judge found that the employee had breached a fundamental condition of her employment by disobeying the code of ethics of her profession. The decision was upheld by the Court of Appeal.

The *Smith* case is distinguishable in that the social worker was covered by a very specific code of ethics which the trial judge found was a fundamental condition of employment. However, it does stand for the principle that an employee's conduct outside the workplace which is likely to be prejudicial to the business of the employer can constitute grounds for dismissal. It has to be noted however that the court was not dealing with a single problem but a series of errors of judgment including the concealment of the situation from the employer. The Court of Appeal noted that the Society was not dealing with a single instance of an error in judgment and stated that, "I accept that such an isolated act, so long as it did not amount to a fundamental breach of the employment contract, would not justify summary dismissal".

In this case, the Director's delegate found that the employer had not provided any evidence that showed or indicated that Ms Doiron's second job would cause be contracts with the school

districts to be cancelled. The Director's delegate also referred to the insurance policy which I find to be an irrelevant consideration.

It is not clear from the delegate's analysis whether he considered the issue of actual harm and potential harm to the employer's business. However, even in a case of likely prejudice the onus is on the employer to establish that such likely prejudice exists.

In this case the reaction of the school districts is entirely speculative. While I might suspect that some school district personnel might "raise an eyebrow" if they became aware of Ms Doiran's other profession I have no evidentiary foundation to be satisfied that this would be a concern. It was clear that Ms Doiran had no direct contact with children and even if she did there is no indication that children would be at risk in their dealings with her. It seems to me that it would be inappropriate for me to speculate about how the school district may or may not react to the news.

There was no evidence given during the investigation to the delegate nor was any evidence led at the hearing to establish even a potential prejudice to the employer. While Bourke may feel that this is self evident, in my view it is not something that I can assume. In the absence of some evidence of potential harm I cannot conclude that Ms Doiron's activities amounted to a fundamental breach of the employment contract or were fundamentally in conflict with her employment. In such case the ultimatum given to Ms Doiron amounted to dismissal or constructive dismissal.

I am not satisfied that the employer has met the onus of persuading me that the determination was wrong.

ORDER:

Pursuant to section 115 of the *Act* I order that the determination is confirmed.

John M. Orr

**John M. Orr
Adjudicator
Employment Standards Tribunal**

JMO/bls