

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 -

Mahoneys Sports Grill Ltd.
("Mahoneys")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Hans Suhr

FILE No.: 97/740

DATE OF HEARING: November 18, 1997

DATE OF DECISION: November 20, 1997

DECISION

APPEARANCES

Drew Wilson on behalf of Mahoneys Sports Grill Ltd.
Thomas Lutes counsel for Mahoneys Sports Grill Ltd.
Craig J. Soon on his own behalf

OVERVIEW

This is an appeal by Mahoneys Sports Grill Ltd. (“Mahoneys”), under Section 112 of the *Employment Standards Act* (the “Act”), against a Determination dated September 15, 1997 issued by a delegate of the Director of Employment Standards (the “Director”). Mahoneys alleges that the delegate of the Director erred in the Determination by concluding that Soon was entitled to compensation for length of service.

PRELIMINARY ISSUE

Counsel for Mahoneys requested that an adjournment be granted as he had only been retained the previous day and required an opportunity to review the facts and prepare for the hearing.

Mahoneys filed this appeal on October 8, 1997 and the fact that they chose not to arrange for counsel until the day before the hearing does not persuade me that a compelling reason exists for granting the request for adjournment.

The request for an adjournment is therefore denied.

ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether Mahoneys is required to pay Soon for compensation for length of service.

FACTS

The following facts are not in dispute:

- Soon was employed by Mahoneys as a manager from May 8, 1996 to August 10, 1996 as noted on the Record of Employment (“ROE”) prepared by Mahoneys;
- At the time of Soon’s hiring, Mahoneys was jointly owned by Blair Wilson, Ron Zien and Bruce Zien;
- In early August 1996, Blair Wilson arranged to purchase the shares in Mahoneys held by Ron and Bruce Zien;
- the purchase was to be finalized within 60 days of August 2, 1996;
- As a condition of the purchase of the shares, Soon was required to sign a letter of resignation;
- Soon signed an undated letter of resignation in early August 1996;
- As a result of obtaining early financing, the purchase of the shares was concluded on August 9, 1996;
- Soon was given 2 days off work and upon his return on August 12, 1996, he was advised that the undated resignation had now been dated for August 9, 1996 and that Soon was no longer employed.

Terrance Drew Wilson testified on behalf of Mahoneys and stated that:

- the Zien family provided the day to day management of Mahoneys during the period of Soon’s employment;
- he had been fired by Zien at the end of July to force his brother Blair Wilson to take action in regard to either purchasing the Ziens’ shares or to sell his shares to them;
- the agreement between the Ziens and Blair Wilson was that Soon would sign a letter of resignation to facilitate the sale/purchase of the shares;
- Soon voluntarily signed the letter of resignation;

Soon testified and stated that:

- he was hired jointly by Blair Wilson and Ron Zien;
- Blair Wilson had made Soon’s resignation a condition of the purchase and Blair Wilson asked him to sign the letter of resignation;
- he signed the letter of resignation and was told by Blair Wilson that his job was secure as the only reason the letter was required was to prevent Soon from “suing him down the road”;

- he had no intention of resigning as he enjoyed his job.

In response to cross examination by counsel for Mahoneys, Soon stated that:

- he received direction from both Blair Wilson and the Ziens with respect to work;
- he considered both Blair Wilson and the Ziens as his bosses;
- Blair Wilson thanked him for signing the letter of resignation and assured him that his job was secure;
- the letter of resignation was undated at the time he signed it;
- he would not have signed the letter of resignation if he knew that he would lose his job;

In response to questions from the Tribunal Soon stated:

- the date written on the letter of resignation is not in his handwriting;
- he signed the letter of resignation sometime prior to August 9, 1996;
- he continued to work at Mahoneys after he signed the letter of resignation.

Counsel for Mahoneys argued that there was no compelling evidence of a forced resignation by Soon. Counsel further argued that Zien was the employer as they controlled the day to day operations of Mahoneys. Counsel further argued that the inconsistencies surrounding when the letter of resignation was actually signed and the other circumstances at the time make it very difficult to determine the facts of what happened. Counsel finally argues that alternatively, I should refer this matter back to the Director for further investigation.

Soon argued that he had no reason to leave his job and, under the belief that he would continue to be employed by Blair Wilson, he signed the undated letter of resignation in order to facilitate the purchase of the shares by Blair Wilson.

ANALYSIS

The burden of establishing that the delegate of the Director erred in the Determination rests with Mahoneys.

The obligation on an employer to pay compensation for length of service is found in Section 63 of the *Act*. The relevant portions of Section 63 state:

Section 63, Liability resulting from length of service

63. (1) *After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.*

.....

(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.

I must now consider whether the undated letter of resignation signed by Soon was in reality an expression of his intent to voluntarily resign his employment and therefore discharging the liability of Mahoneys to pay compensation for length of service.

Mahoneys did not provide any evidence that Soon signed the letter of resignation for any other reason except to facilitate the purchase of the Zien's shares by Blair Wilson.

The uncontradicted evidence of Soon was that he was assured by Blair Wilson that the letter of resignation was for the future and that Soon's job was secure.

Soon continued to work after signing the letter of resignation with the expectation that his employment would continue after Blair Wilson purchased the shares from the Ziens.

The letter of resignation was dated August 9, 1996 by someone other than Soon.

According the information provided by the ROE, Soon worked after the August 9, 1996 date.

Soon was informed by Blair Wilson that the date had been put on the letter of resignation and therefore Soon was no longer employed.

Based on the evidence and on the balance of probabilities, I conclude the undated letter of resignation did not reflect the intention of Soon to terminate his employment. Soon continued to work after signing this letter and was assured that his employment would not

be affected by the letter. The undated letter of resignation was signed by Soon at the request of Mahoneys in order to facilitate the sale/purchase of the Zien's shares by Blair Wilson and was not an expression of Soon's intention of leaving his job.

I further conclude, based on the evidence and on the balance of probabilities that the actions of Mahoneys with respect to Soon are more consistent with Mahoneys terminating the employment of Soon.

There was no evidence that Mahoneys provided **written** notice of termination of employment or that Soon was dismissed for just cause, therefore pursuant to Section 63 of the *Act*, Mahoneys is required to pay compensation to Soon in the amount as calculated by the delegate of the Director and set forth in the Determination.

With respect to the argument by Counsel for Mahoneys that Blair Wilson was not the employer of Soon, that issue is, in my view, not relevant to this appeal. The facts are clear, Mahoneys was the employer who hired Soon and Mahoneys was the employer at the time that Soon last worked. The sale/purchase of the shares of Mahoneys from one shareholder to another does not change the fact that Mahoneys was the employer at all times material to this appeal.

The appeal by Mahoneys is therefore dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated September 15, 1997 be confirmed in the amount of \$962.05.

Hans Suhr
Adjudicator
Employment Standards Tribunal

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