Employment Standards TRIBUNAL

An appeal

- by -

Northern Yarder Contracting Inc. operating as Murphy's Pub

- 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: Wayne R. Carkner

FILE No.: 2001/352

DATE OF HEARING: October 2, 2001

DATE OF DECISION: October 25, 2001

DECISION

APPEARANCES:

For the Appellant	Bill Bailey Charlene Dubac ("Dubac")
For the Respondent	Debbie Young
For the Director	No Appearance

OVERVIEW

This is an Appeal by Northern Yarder Contracting Inc. (operating as Murphy's Pub) pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) of a Determination issued by the Director of Employment Standards (the "Director") on April 11, 2001. The Determination concluded that the Appellant had contravened Section 63 (1) & (2) of the *Act* and provided as a remedy to the Respondent an amount of $1825.50 comprised of five weeks of wages for average hours of work over the last eight weeks of employment, $1650.54, as compensation for length of service ("CLOS"), $99.03 of vacation pay based on the CLOS payment, and an interest payment of $75.93 pursuant to Section 88 of the *Act*. The Appellant submits that the Director erred as the Respondent quit her employment and that pursuant to Section 63 (3) (c) no payments for CLOS are owing to the Respondent. The Respondent submits that the Appellant terminated her employment without cause and that the Director properly concluded that CLOS was owed to her under the *Act.* Both written submissions from all of the parties, and an oral hearing were utilized to hear this appeal.

ISSUES

1. Was the Investigation of the complaint conducted in a professional manner?

2. Did the Respondent quit her employment voluntarily or was the Respondent's employment terminated without cause?

ARGUMENT

The Appellant argues that the Respondent quit her employment when she requested a Record of Employment (the "ROE") to take to the Employment Insurance Commission. He argues that when the Appellant requested the ROE from the pub manager, Dubac, the Respondent stated that "she was ill and didn't feel that she would ever be able to do the job anymore anyway do to the illness and the stress on the job". This is a direct quote from the Appellant's submission. Based on this the Determination should be canceled. The Respondent argues that she requested the

ROE to apply for sick benefits due to her illness and that she never had any intention to quit. She submits that she made these statements in fairness to the Appellant as she did not know when she would be able to return to work or if she would ever be able to return to work. The Respondent submits that the appeal should be dismissed. The Appellant also argues that the method the Delegate of the Director conducted the investigation was unprofessional as the Delegate would contact one party for details then express those details to the other party, who would reply to the details, then the response would be expressed to the other party, and so on. The Appellant did not think that this was a proper procedure for conducting an investigation. The Director submitted by written submission that the process:

> "is simply the process of investigation where each party is informed of the issues raised or claims made by the other and is given the opportunity to respond. This process is within the concept of natural justice of not only informing the parties involved of issues raised and claims made against them, but also of providing them with the opportunity to respond. In the case at hand, as in any other case, both parties were contacted more than once by telephone and informed of the other's positions. They were also asked for their responses."

The Director also submitted that the Appellant did not raise any factual or legal issues that warrant consideration and that the appeal should be dismissed.

FACTS AND ANALYSIS

Dealing first with the issue of the manner in which the investigation was conducted, I must conclude that there has been no breach of procedures during the investigation. The Appellant did not allege any denial of natural justice or make any allegations of bias. He simply did not like the procedure used by the Director. The procedure outlined in the Director's written submission is proper and based on this conclusion this ground of appeal is dismissed. The following facts were contained in the determination and were not contradicted at the hearing:

- The Respondent was employed at Murphy's Pub, a restaurant/pub, from October 1994 until December 14, 1999. Her rate of pay at the time of termination of employment was $9.25 per hour.

- On December 15, 1999, the respondent's mother called the Appellant to inform them that the Respondent was at the hospital for health reasons and that she would be off work for awhile.

- The Respondent suffered from medical disabilities from December 15, 1999 until sometime in August 2000.

- The respondent suffered from a further medical problem sometime in December 2000.
- The Appellant, at the Respondent's request, issued a ROE, for the Respondent on January 24, 2000.
- The reason given for issuing the ROE, as provided for in the ROE, was "illness or injury".
- The ROE contained no expected date of recall.
- The Respondent provided the Appellant with medical notes from her Doctor on an ongoing basis.

The Appellant testified that he was of the opinion that the Respondent had quit her employment when she requested an ROE. He stated that someone named Oakley at the Employment Insurance Commission had told him that the Respondent had effectively resigned her employment when she requested an ROE. The Appellant acknowledged that the Respondent had provided Doctor's certificates with the exception of the one dated August 14, 2000, which was first brought to his attention by the Delegate of the Director after the complaint was filed. (This certificate provided clearance for the Respondent to return to work on a fulltime basis) The only medical certificate that he had seen that cleared the Respondent for work had identified a clearance for part time work only. He testified that the operation of Murphy's Pub required a fulltime cook and that he was unable to accommodate the Respondent with part time work. He stated that the Respondent had approached Dubac and requested an ROE to attempt to seek other income and that the Respondent had told Dubac that she may never be back to work due to her illness and the stress of the job. The Appellant testified that as he had not seen the August 14, 2000 medical certificate and he was unaware that the Respondent was available for fulltime work from August 14 2000 until December 2000.

Dubac testified that the Respondent had requested the ROE to seek other sources of income and that she didn't know if she would ever be able to return to work. Dubac had also seen all the medical certificates with the exception of the August 14, 2000 certificate which she became aware of after the Respondent filed the complaint. She stated that the respondent would bring the certificates into the Pub and leave them with whoever was working at the bar. Dubac stated that they only had a requirement for fulltime positions and that as far as she was aware the Respondent could only work in part time positions.

When asked if the Respondent had ever told them that she was quitting both the Appellant and Dubac replied in the negative and reaffirmed that they concluded the respondent was quitting when she requested an ROE. Both also acknowledged that the respondent had brought in a medical certificate after the ROE had been issued.

The Respondent testified that when she became ill she was uncertain that she would ever be able to return to her job. She testified that she had requested the ROE to enable her to apply for sick

benefits and that an ROE was necessary to do this. She testified that she was cleared to return to fulltime work in the August 14, 2000 medical certificate and that she took this certificate to the Pub and left it with whoever was working at the bar as she had with all the other certificates. She acknowledged that she had continued to take certificates to the Pub after she had received the ROE. She testified that she became aware that another person was working her fulltime position and that was the reason she filed the complaint. She testified that at no time did she have any intention of quitting her employment.

The Appellant took no issue with either the length of employment calculated in the Determination, including the service transferred from the former owner of Murphy's Pub, or the calculations of remedy contained in the Determination.

The Appellant bears the burden of proof to show any errors of fact or errors of conclusion in the Determination. The Appellant has not met this onus.

> In the Tribunal's decision *Burnaby Select Taxi Ltd. -and- Zoltan Kiss,* BC EST #91/96 the following excerpt has established the tests to deal with the issue of whether or not an individual has quit their employment:
>
> > "The right to quit is personal to the employee and there must be clear and unequivocal facts to support a conclusion that this right has been exercised by the employee involved. There is both a subjective and an objective element to a quit: subjectively, the employee must form an intent to quit; objectively, the employee must carry out some act inconsistent with his or her further employment."

Here neither element is met. The Respondent never told the Appellant or his manager, Dubac, that it was her intent to resign her employment. In fact, based on the evidence, the opposite is true. The ROE identified the reason for layoff as "illness or injury". This is supported by the fact that the respondent continued to keep the Appellant informed by taking a medical certificate to the Appellant after the ROE was issued. This clearly shows an intention to continue employment.

All the witnesses were credible and frank in their testimony and I find that the Appellant and his manager concluded, erroneously, that the respondent was quitting her employment. This would likely have been avoided if a few follow up questions had been asked of the Respondent.

I therefore must conclude based on the evidence of all the witnesses that the Respondent was terminated without cause by the Appellant and therefore is entitled, pursuant to Section 63 of the *Act*, to compensation for length of service.

ORDER

Pursuant to Section 115 of the *Act,* I order the Determination dated April 11, 2001 be confirmed in the amount of $1825.50 plus any interest accrued pursuant to Section 88 of the Act.

Wayne R. Carkner
Adjudicator
Employment Standards Tribunal