Employment Standards TRIBUNAL

Citation: Storms Restaurant Ltd. (Re)
2018 BCEST 70

An appeal

- by -

Storms Restaurant Ltd.
(the "Employer")

- of a Determination issued by -

The Director of Employment Standards

pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

PANEL: Kenneth Wm. Thornicroft

FILE NO.: 2018A/35

DATE OF DECISION: July 30, 2018

DECISION

SUBMISSIONS

Alexander Lange	on behalf of Storms Restaurant Ltd.
Christina Ewasiuk	on behalf of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*ESA*"), Storms Restaurant Ltd. (the "Employer") appeals a Determination issued on February 16, 2018, by Christina Ewasiuk, a delegate (the "delegate") of the Director of Employment Standards (the "Director"), on the grounds that the Director failed to observe the principles of natural justice in making the Determination and on the ground that it now has material evidence that was not previously available (see subsections 112(1)(b) and (c) of the *ESA*).

2. The delegate issued separate "Reasons for the Determination" (the "delegate's reasons") concurrently with the Determination and in her reasons, she summarized the parties' evidence given at a January 24, 2018, complaint hearing and her findings with respect to issues in dispute.

3. The delegate ordered the Employer to pay its former employee, Brian W. Henderson (the "complainant"), the total sum of $851.37 on account of unpaid wages ($758.40 of which was section 63 compensation for length of service) and section 88 interest. Further, and also by way of the Determination, the delegate levied three separate $500 monetary penalties (see section 98) based on the Employer's contraventions of sections 17 (failure to pay wages at least semimonthly), 28 (failure to keep payroll records), and 63 of the *ESA*.

4. Although the Employer's Appeal Form indicates that the appeal is based solely on subsections 112(1)(b) and (c) of the *ESA*, the Employer's written reasons for appeal appended to its Appeal Form clearly indicate that one of the Employer's central arguments is that the delegate erred in finding that it did not have just cause for dismissing the complainant. Whether an employer has just cause in a particular case fundamentally raises an issue of mixed fact and law, inasmuch as it requires the decision-maker to "apply a legal standard to a set of facts" (*Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 at para. 26). Thus, and in accordance with *Triple S Transmission Inc.*, BC EST # D141/03, I invited the parties to file submissions regarding whether the delegate erred in law when she determined that the Employer did not have just cause to dismiss the complainant.

5. In adjudicating this matter, I have reviewed the entire subsection 112(5) record that was before the delegate and the written submissions filed on appeal by both the Employer and the delegate. Although specifically invited to file a submission, the complainant did not file a submission in response to the Employer's appeal.

THE DETERMINATION

6. As recounted in the delegate's reasons, the Employer operates a licenced restaurant in Kamloops. The complainant was employed as a bartender from February 15, 2013, until March 31, 2016, at which time his employment ended (by proper written notice) as a result of a sale of the business. On April 1, 2016, the complainant entered into a new employment relationship with the Employer and continued working as a bartender until May 17, 2017, when he was terminated, allegedly for just cause. The complainant was earning $16 per hour when his employment ended.

7. The complainant filed an unpaid wage complaint claiming $1,712.00 in unpaid regular wages, $140.22 in vacation pay, $1,793.60 for compensation for length of service, and $93.05 for "meals not deducted during working hours".

8. The delegate accepted the complainant's evidence that he performed certain additional "landscaping" in the nature of cutting down some trees bordering the front of the restaurant property, but did not accept the complainant's position as to the number of hours worked in this regard. The delegate awarded the complainant 4 hours at minimum wage ($10.85) for this work. The delegate wholly rejected the complainant's claim for "the monetary equivalent of discounts [the Employer] allegedly failed to apply to his meals" (delegate's reasons, page R7), holding that an employer is not obliged to offer staff discounts for meals under the *ESA*.

9. An employer is not required to pay compensation for length of service (or otherwise provide written notice of termination) if the employer has just cause for dismissal (subsection 63(3)(c) of the *ESA*). With respect to just cause, the Employer argued that it was not relying on a "single issue" but rather, the complainant "repeatedly failed to follow supervisor instructions, demonstrated wilful misconduct, and used supervisor POS [point of sale computer system] passwords to void and discount meals and drinks without authorization" and that, in addition, he "attempted to cover-up his unauthorized use of the POS system" (delegate's reasons, page R4). The Employer also argued that the complainant's "refusal to stop free-pouring alcohol was an ongoing issue and in conflict with [the Employer's] duty to its customers" (page R4). Although the Employer "did not issue written warnings…it issued multiple verbal warnings" and that "it had no choice [except dismissal] given the magnitude of reasons for dismissal that had come to our attention and [the complainant's] unadjusted behaviour even after we sat down with him to tell him about our expectations as well as concerns" (page R4).

10. The delegate held that although the Employer demonstrated just cause for *discipline*, there was no just cause for *dismissal*. The delegate's reasons in this latter regard are as follows (pages R8 – R9):

> For instances of minor misconduct, the employer must demonstrate that it clearly and progressively disciplined the employee by setting a reasonable standard of performance, allowing a sufficient opportunity to meet the standard, and warning the employee that failure to meet the standard will result in termination. For a singular event to result in summary dismissal it must be characterized as serious in nature, deliberate and intentional, and a fundamental breach of the employment contract.
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> …
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> While [the complainant's] actions were deserving of discipline, I find that [the Employer] neither established why any singular event warranted [the complainant's] summary dismissal or that it

> otherwise provided clear, appropriate, and corrective discipline for the numerous and varied incidents that culminated with [the complainant's] termination on May 17. I find on the evidence that [the Employer] did not have just cause to terminate [the complainant's] employment. Consequently, I find that [the complainant] is entitled to compensation for length of service.

11. Based on his period of service with the Employer, the complainant was entitled to two weeks' wages under section 63, and the delegate calculated this sum to be $758.40 – the Employer does not challenge the delegate's calculation of the section 63 award only the complainant's entitlement to be paid compensation for length of service.

REASONS FOR APPEAL

12. As previously noted, the Employer's Appeal Form raised two grounds of appeal – "natural justice" and "new evidence". The Employer did not separately set out its reasons for appeal regarding each ground of appeal. The evidentiary and/or legal foundation for these two grounds of appeal is somewhat unclear.

13. As best as I can determine, the Employer's "natural justice" ground is based on an allegation that since the complainant never claimed any additional wages during his tenure, and because there never was any agreement in place regarding supplemental pay for duties beyond tending bar, the delegate should not have awarded the complainant any monies on this account. This allegation could be characterized as a failure to observe the principles of natural justice (i.e., by making a decision without a full and proper consideration of the evidence) or as an error of law relating to a finding of fact. The Employer also says that the delegate's finding that the complainant worked "one day in the spring of 2017 on which Mr. Innes witnessed [the complainant] using a chainsaw to cut down bushes" (page R7) was made based on a wholly erroneous interpretation of Mr. Innis's evidence. The Employer's final "natural justice" argument concerns the delegate's treatment of certain written statements that were submitted at the hearing and her refusal to hear the *viva voce* testimony of two witnesses.

14. The Employer's "new evidence" appears to fall into three particular categories, as follows:

- "Please also find attached daily timesheets for this same time frame on which [the complainant] recorded his hours worked. Given the substantial number of pages involved here we were not able to receive these in time to submit to the Director of Employment Standards from our bookkeeper before the deadline on Jan 03, 2018."
- "We are further submitting photo evidence of the area [the complainant] claims to have landscaped and pruned as during the time of the hearing this area was covered under a significant amount of snow and would not have represented any value."
- Although the Employer submitted some video evidence at the complaint hearing before the delegate (see delegate's reasons, page R6), it now wishes to submit further video evidence: "Although we believed that this single video proofs [*sic*] [the complainant's] failure to utilize a measuring device to ensure portion control we have further video files available to submit as additional video evidence."

15. The Employer says that the delegate erred in determining that it did not have just cause to dismiss the complainant. In particular, the Employer maintains that the complainant was specifically instructed not to "free pour" alcohol but rather, to use a jigger for purposes of measuring the correct volume of alcohol to be placed in a cocktail. The Employer notes that free pouring "is not an acceptable practice in accordance with B.C. Serving It Right Standards [and] our house policy is to measure any liquor poured using bar jiggers or shot glasses to ensure drink recipes and ratios are being followed".

16. The Employer also challenges the delegate's finding that it never utilized any prior form of corrective discipline. In particular, the Employer says that its decision to deny the complainant access to the POS system (which the complainant conceded was a disciplinary action – see delegate's reasons, page R8) was a significant disciplinary action and that "by eliminating [the complainant's] ability to earn gratuities through serving customers at the bar directly we had made it very clear to him that our next step in disciplining should he fail to abide supervisor instructions, use proper portion control, continue to open expensive bottles of wine intended to only be sold by the bottle (not by the glass) could very well include his termination therefore posing in fact a very clear indication that [the complainant's] job was at risk."

FINDINGS AND ANALYSIS

17. There are two components to the complainant's unpaid wage award. First, there is a relatively modest award for unpaid wages ($43.40) for work undertaken "one day in November 2016" and "one day in the spring of 2017". Second, there is a more substantial $758.40 award for compensation for length of service representing two weeks' wages.

18. With respect to the former unpaid wage award, the delegate acknowledged the unsatisfactory state of the evidence before her inasmuch as although the complainant claimed over $1,700 on this account, he "did not provide a record of his hours" and the Employer "did not maintain a record for that portion of his work" (page R7). There was no wage agreement between the parties regarding this "landscaping" work and thus the delegate based her award on the prevailing minimum wage. Based on the evidence before her, she concluded that there was evidence supporting an award of "minimum daily pay for two days of work" and I am unable to conclude that the delegate made a palpable and overriding error in making that finding.

19. The delegate's award with respect to just cause, however, is more problematic. I propose to now address this award under the "error of law" ground.

Error of Law: Just Cause & The Complainant's Misconduct

20. The complainant made several admissions and, in addition, the delegate made several key factual findings that are relevant to whether the Employer had just cause for dismissal:

- the complainant acknowledged having received at least two verbal warnings and that the Employer cancelled his POS privileges (page R3);
- the complainant admitted that he would free pour alcohol (page R6);

- the delegate, referring to the cancellation of the complainant's POS privileges, held that this action "supports a finding that [the Employer] likely did warn [the complainant] of a future consequence should he fail to enter drinks into the system" (page R8);
- the delegate held that the complainants' various transgressions "were deserving of discipline" (page R8) and that his transgressions were "numerous and varied" (page R9).

21. In addition to the foregoing, the delegate did not make any specific findings with respect to other evidence of misconduct that was before her. The delegate merely held that although the complainant's actions were worthy of discipline, she also held that the Employer's evidence did not establish any "singular event" that warranted summary dismissal (page R8) and that, in any event, the complainant's dismissal was unlawful because the Employer never gave the complainant "clear, appropriate, and corrective discipline for the numerous and varied incidents that culminated with [the complainant's] termination" (pages R8 – R9).

22. The Employer's *uncontroverted* evidence regarding the complainant's misconduct – evidence the delegate seemingly accepted since she did not make any finding rejecting the veracity of these assertions – included the following incidents of misconduct by the complainant:

- using a supervisor's POS code without authorization and attempting to "cover-up his unauthorized use of the POS system" (page R4);
- taking meal discounts without authorization (pages R4 and R6);
- repeatedly failing to follow supervisor instructions (page R4);
- continuing to free pour alcohol despite being told not to do so (page R4);
- selling wine "by the glass" from a bottle that was only to be opened and sold as a full bottle (page R4);
- "generously" pouring alcohol without using a bar shot glass (page R5);
- not charging customers for alcohol consumed – either not at all, or charging a "single" price for a "double" drink (page R5);
- "fighting with staff and creating a hostile work environment in view of customers" (page R6); and
- "throw[ing] a drink tray and refus[ing] to clean glasses that were stacked in the bar" (page R6).

23. The delegate summarized the complainant's testimony at page R3 of her reasons. Although the complainant took some issue with the Employer's evidence regarding his use of the POS system, he apparently did not deny any of the other serious allegations against him. As noted above, the complainant did not participate in these appeal proceedings. He specifically admitted to free pouring alcohol.

24. The delegate also had several written witness statements before her but she refused to accord any weight to the allegations contained in those statements because, in the case of two of the statements, the evidence was "redundant and otherwise unnecessary" (page R6). The Employer, as part of its

"natural justice" argument, maintains that it intended to have these witnesses testify by teleconference "later in the day" but was prevented from doing so because the delegate refused to extend the hearing so as to allow these witnesses to testify. The delegate appears to have refused to consider the statements from two other witnesses (who the Employer did not intend to call) because their evidence "cannot be heard and challenged under questioning" (page R7).

25. Leaving aside the natural justice issue as it relates to the two witnesses who the Employer intended to call as witnesses, their statements are not, in my view, redundant regarding allegations of misconduct. In one of the statements, the witness explains that she saw the complainant, shortly before closing, pouring "four shots" and telling the witness that there was no need to ring this alcohol into the POS system. Far from being redundant, this evidence could be taken as demonstrating a pattern of misconduct and insubordination justifying the most serious employer response available, namely, summary dismissal.

26. The statement from the other witness indicated that the complainant frequently "ignored" instructions almost immediately after being told to proceed in a certain manner; argued with servers in front of customers; created a hostile work environment; refused to clean glassware, maintaining that this was not part of his bartender duties, and used another staff member's POS code to improperly obtain staff meal discounts for menu items that were not subject to the discount policy. While it may be accurate to say, as the delegate did, that some of this witness's proposed testimony would corroborate events about which other witnesses had testified, this, at least in my view, does not make this evidence presumptively inadmissible as "redundant" and "unnecessary". Rather, if the testimony of these two witnesses had been presented, their evidence may well have demonstrated a pattern of misconduct and could been relied on to address any issues surrounding how frequently the complainant breached his employment obligations – insofar as the law surrounding "just cause" is concerned, a continuing *pattern* of misconduct can be quite a different matter compared to a single isolated incident of misconduct.

27. In *McKinley v. BC Tel*, [2001] 2 S.C.R. 161, the Supreme Court of Canada stressed that misconduct (in that case, alleged dishonesty) must be assessed globally, with a view to determining if the misconduct gives rise to an irreparable breakdown in the employment relationship. The decision-maker should assess whether the misconduct in question "violates an essential condition of the employment contract", "breaches the faith inherent to the work relationship", or "is fundamentally or directly inconsistent with the employee's obligations to his or her employer" (para. 48). At para. 51, the court observed:

> I conclude that a contextual approach to assessing whether an employee's dishonesty provides just cause for dismissal emerges from the case law on point. In certain contexts, applying this approach might lead to a strict outcome. Where theft, misappropriation or serious fraud is found, the decisions considered here establish that cause for termination exists. This is consistent with this Court's reasoning in *Lake Ontario Portland Cement Co. v. Groner*, [1961] S.C.R. 553, where this Court found that cause for dismissal on the basis of dishonesty exists where an employee acts fraudulently with respect to his employer. This principle necessarily rests on an examination of the nature and circumstances of the misconduct. Absent such an analysis, it would be impossible for a court to conclude that the dishonesty was severely fraudulent in nature and thus, that it sufficed to justify dismissal without notice. [underline in original]

28. Various appeal courts, including the B.C. Court of Appeal, have stated that although the "proportionality" approach set out in *McKinley* arose in a case of alleged dishonesty, all forms of misconduct should be analyzed in light of the *McKinley* framework. The B.C. Court of Appeal has issued, in the past few years, several decisions addressing *McKinley* and what constitutes just cause in a particular case. It should be noted that in this case, the Employer's stated grounds for dismissal reflect, at least in part, concerns about the complainant's integrity and honesty, although allegations of insubordination also permeate the Employer's stated justification for summarily dismissing the complainant. In its May 18, 2017, letter to the complainant, the Employer indicated that it was terminating the complainant's employment based on repeated insubordination, "willful misconduct", using the POS system without authorization to obtain meal discounts and free meals, and dishonesty (lying about the latter).

29. In *Roe v. British Columbia Ferry Services Ltd.*, 2015 BCCA 1, our Court of Appeal, referring to *McKinley*, set out the appropriate framework in a just cause case. First, the decision-maker must be satisfied that the misconduct occurred and, second, determine if the proven misconduct is of such a nature and degree so as to justify termination (see para. 26). At para. 27, the court observed:

> …the test requires an assessment of whether the employee's misconduct gave rise to a breakdown in the employment relationship justifying dismissal, or whether the misconduct could be reconciled with sustaining the employment relationship by imposing a more "proportionate" disciplinary response (paras. 48, 53 and 57). A "contextual approach" governs the assessment of the alleged misconduct at this stage of the test (para. 51). That assessment includes a consideration of the nature and seriousness of the dishonesty, the surrounding circumstances in which the dishonest conduct occurred, the nature of the particular employment contract, and the position of the employee (paras. 48-57). The ultimate question to be decided is whether the employee's misconduct "was such that the employment relationship could no longer viably subsist" (para. 29).

30. In *Steel v. Coast Capital Savings Credit Union*, 2015 BCCA 127 (leave to appeal to the Supreme Court of Canada refused: 2015 CanLII 58373, the majority observed, at para. 27, "that a single act of misconduct can justify dismissal if the misconduct is of a sufficient character to cause the irreparable breakdown of the employment relationship". Thus, the employee's breach of trust (accessing confidential information found in other employees' files) was, standing alone, just cause for dismissal especially in light of the trust that her employer had reposed in her.

31. The delegate did not engage in the type of analysis mandated by *McKinley*. The delegate did not refer to *McKinley* or any other judicial or Tribunal decision. Although it appears that the delegate accepted that serious misconduct was proven, noting that there were "numerous and varied incidents" and that the complainant's actions "were deserving of discipline", she did not consider whether this conduct "gave rise to a breakdown in the employment relationship justifying dismissal" (*Roe*, *supra*), nor did she examine the severity of the behaviour in question. Rather, the delegate appears to have determined that the Employer did not have just cause because it "likely did not warn [the complainant] of a future consequence" and allowed him "to continue working with no clear indication that his job was at risk" (page R8). In my view, the delegate did not conduct the sort of analysis that is mandated in a just cause case and, as such, erred in law.

32. In my view, and leaving aside the evidence of the witnesses who did not testify at the hearing, the complainant's proven misconduct was most serious. Taking meal discounts without authorization (and

not paying for meals at all) is a form of theft, as is undercharging (or not charging at all) customers for drinks. The complainant apparently engaged in a concerted pattern of insubordination and created a hostile work environment. Although told on several occasions that he must not free pour alcohol – a practice that is not consistent with the "Serving It Right" program that he completed – he continued to do so. This latter practice constitutes either misappropriation of the Employer's property if the customer is "over poured", or misappropriation of the customer's order if the drink is "under poured". There is a legitimate public safety (and possible liability) issue if a customer is consistently over poured. For example, a customer believing they have consumed three one-ounce cocktails when, in fact, the drinks were two ounces, may unwittingly believe they are sober and drive home when they are actually impaired putting themselves and other drivers/passengers/pedestrians at risk. The complainant admits he was warned – twice – and the suspension of his POS privileges was clearly a disciplinary action. Any yet he continued to be insubordinate and dishonest. There is no evidence that the Employer ever condoned the complainant's misconduct. Indeed, it disciplined him on multiple occasions by warnings and the removal of his POS privileges.

33. In my view, the evidence before the delegate clearly demonstrated a totality of misconduct of such severity so as to render the employment relationship irreparably broken. The complainant resolutely failed to follow instructions, was insubordinate, repeatedly misappropriated the Employer's property, and created some measure of havoc in the workplace. On the evidence before the delegate, the Employer had just cause for summarily dismissing the complainant and thus the section 63 award must be cancelled.

Natural Justice

34. In light of my decision regarding the just cause issue, I do not find it necessary to examine in detail the Employer's natural justice arguments. However, with respect to the two witnesses who were not allowed to testify, I am satisfied that was a breach of the principles of natural justice. The Employer intended to call these witnesses later in the day and thus, in effect, was seeking to have the hearing adjourned for a short time so that these two witnesses (who apparently had work commitments) would be able to testify. According to the delegate's submission, the hearing concluded at 11:20 AM and the Employer wished to call these two witnesses "during their lunch breaks in the afternoon". However, rather than treating the matter as a request for a short adjournment (perhaps no more than an hour or two), the delegate held that their evidence would be "redundant and unnecessary" – a conclusion that was not accurate – and thus refused to reconvene the hearing later on in the day so as to allow the Employer to call these witnesses. It may be that there would have been valid reasons for refusing an adjournment if the delegate had treated the matter as an adjournment request and taken submissions on the matter. However, the delegate never fully explored the reasons underlying the adjournment request and whether there would be any prejudice if a short adjournment were granted; she simply refused to hear the witnesses' evidence because it was redundant or unnecessary. I consider that approach to have unfairly compromised the Employer's ability to fully present its case.

New Evidence

35. In my view, none of the "new evidence" tendered meets the stringent test for admissibility set out in *Davies et al.*, BC EST # D171/03. All of this evidence was available prior to the hearing and, with proper diligence, could have been gathered, collated and submitted at the complaint hearing.

ORDER

36. Pursuant to subsection 115(1)(a) of the *ESA*, the Determination is varied by cancelling the section 63 compensation for length of service award ($758.40) and the concomitant vacation pay on this award. The $500 monetary penalty issued based on a section 63 contravention is similarly cancelled. The Director shall recalculate the Determination and section 88 interest in accordance with these orders. In all other respects, the Determination is confirmed.

Kenneth Wm. Thornicroft
Panel
Employment Standards Tribunal