

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act S.B.C. 1995, C.38

- by -

Gay Nineties Spare Rib House Ltd.
("Gay Nineties")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 95/041

DATE OF DECISION: February 29, 1996

DECISION**OVERVIEW**

This is an appeal by Gay Nineties Spare Rib House Ltd/Cherry Bank Hotel (“Gay Nineties”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) against Determination # CDET 000295 issued by the Director on December 1, 1995. In this appeal, “Gay Nineties” seeks a cancellation of the Director’s Determination in which a former employee, Nina Vos (“Vos”) was found to be entitled to severance pay in lieu of notice under Section 42(3) of the former Act.

Consideration of this appeal falls under the transitional provisions of the Act. Section 128 of the Act states:

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- (3) *If, before the repeal of the former Act, no decision was made by the director, an authorized representative of the director or an officer on a complaint made under that Act, the complaint is to be treated for all purposes, including section 80 of this Act, as a complaint made under this Act.*
- (4) *Subject to subsections (5) and (6), section 63 applies to an employee whose employment began before section 63 comes into force and is terminated after that section comes into force.*
- (5) *An employer is liable to pay to an employee referred to in subsection (4), as compensation for length of service, an amount equal to the greater of the following:*
 - (a) *the number of weeks' wages the employee would have been entitled to under section 42 (3) of the former Act if the employment had been terminated without compliance with section 42 (1) of that Act;*
 - (b) *the amount the employee is entitled to under section 63 of this Act.*
- (6) *The employer's liability to an employee referred to in subsection (4) for compensation for length of service is deemed to be discharged if the employee is given notice according to section 42 (1) of the former Act or according to section 63 (3) of this Act, whichever entitles the employee to the longer notice period.*

The appeal (dated December 28, 1995) was received by the Tribunal without a copy of the Determination attached as required. A copy of the Determination and Reason Schedule was received by the Tribunal on January 12, 1996. In a letter dated January 25, 1996 Gay Nineties and Nina Vos were provided copies of information supplied by the Director and were requested

to make any written response by February 15, 1996. Nina Vos responded. Gay Nineties has not responded.

FACTS

Vos was employed as a bartender (full-time) in August, 1990. She remained as a full time employee until August, 1994 at which time she became a part-time employee. She was employed continuously until her employment was terminated on April 28, 1995. Vos filed a complaint with the Employment Standards Branch on June 15, 1995.

Vos' last day of work was April 28, 1995. On that day she was called to a meeting with Barbara Filby, General Manager of the Cherry Bank Hotel. That meeting was lengthy and there was a heated exchange of views by Vos and Filby. During the meeting Vos' employment was terminated by Filby.

The investigation which was conducted by the Director's delegate established that Vos' employment was terminated without notice and without pay in lieu of notice.

The reason schedule attached to the Determination contains the following statement:

The employer maintains that the complainant had been dismissed for just cause resulting from insubordination in the form of abusive and profane language being directed toward the manager during a disciplinary meeting on April 28, 1995. The complainant maintains that she did not use abusive and profane language until after she had been fired by the manager. Both the complainant and the manager agree that the disciplinary meeting on April 28, 1995 became very heated and lasted for approximately 3 1/2 hours. The main area of disagreement is when exactly was the complainant fired, very early in the meeting as purported by the complainant or very late as purported by the manager.

No evidence of progressive disciplinary action culminating in a final warning was provided by the employer.

Gay Nineties has not made a submission on the issue of disciplinary warnings nor whether there was just cause to terminate Vos' employment. However, in a letter to Vos dated April 29, 1995 Filby states:

Your hostile and threatening attitude towards me is totally unacceptable and requires no further as to why you are being terminated.

A document labeled "Cherry Bank Hotel - Liquor Service Policy" was attached to Gay Nineties' appeal. Vos makes the following comment concerning that policy:

I have never in the 4 1/2 years of being employed at the Cherry Bank as a bartender seen the attached Liquor Service Policy but I do, however, hold a "Serving It Right Certificate." I am fully aware of the liquor laws and the responsibility I face as a bartender. I pride myself on being a responsible and professional individual in all areas of the Hospitality Industry.

The ambiguity of Mrs. Filby's Appeal leads me to believe she has changed her mind as to the reasons for my dismissal. Her letter dated April 29, 1995 makes no mention of the Liquor Service Policies or my apparent inability to abide them.

ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether the employer's liability to pay compensation for length of service has been discharged under Section 42 of the former *Act*. That is, has Gay Nineties demonstrated, on the balance of probabilities that Vos was dismissed for just cause.

ANALYSIS

Vos' employment ended before November 1, 1995 (the date on which the *Act* was proclaimed into force) and, therefore, the relevant statute for purposes of determining the employers' liability is the *Employment Standards Act* (S.B.C. Chapter 10) (th "former *Act*"). The relevant parts of Section 42 and 43 of the former *Act* state:

Notice required

- 42. (1) An employer shall not terminate an employee without giving the employee, in writing, at least
 - (a) 2 weeks ' notice where the employee has completed a period of employment of at least 6 consecutive months, and
 - (b) after the completion of a period of employment of three consecutive years, one additional week's notice, and for each subsequent completed year of employment , an additional week's notice up to a maximum of 8 weeks' notice.

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Notice not required

- 43. Section 42 does not apply to
 - (a) an employee discharged for just cause,

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The burden of proof for establishing that Vos was dismissed for just cause rests with Gay Nineties.

It is widely accepted that in order to sustain a dismissal for just cause, the employer must establish that:

1. Reasonable standards of performance have been set and communicated to the employee;
2. Progressive discipline has been given to the employee for failure to meet such standards, which includes ensuring that the employee has been made clearly aware that his/her continued employment is in jeopardy if such standards are breached;
3. A reasonable period of time has been given to the employee to meet such standards;
and
4. The employee did not meet those standards.

In this case, Gay Nineties has not established that it has complied with any of these four points.

In particular, there is no evidence to show that prior to her employment being terminated on April 28, 1995 Vos was advised that her employment was in jeopardy.

The concept of “just cause” obliges an employer to inform employees, clearly and unequivocally, that their performance or behavior is unacceptable and that failure to meet the employer’s standards will result in termination of employment. The principal reason for receiving a clear and unequivocal warning is to avoid any misunderstanding and giving employees a false sense of security that the performance of their duties or their behavior is acceptable to the employer.

For these reasons I conclude, on the balance of possibilities, that Gay Nineties has not demonstrated Vos’ employment was terminated for just cause.

ORDER

Pursuant to Section 115 of the *Act*, I order that Determination # CDET 00295 be confirmed.

Geoffrey Crampton
Chair
Employment Standards Tribunal

February 29, 1996

Date

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