BCEST #D033/97

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 -

Monk McQueen's Fresh Seafood & Oysters Bars Inc.
("Monk McQueen's")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorna A. Pawluk

FILE NO.: 96/662

DATE OF DECISION: **January 20, 1997**

DECISION

APPEARANCES

Robert Lindsay for Monk McQueen's
Kevin Bourdin for himself
Paul Harvey for the Director of Employment Standards

OVERVIEW

This is an appeal by Monk McQueen's Fresh Seafood & Oysters Bars Inc. ("Monk McQueen's")pursuant to section 112 of the Employment Standards Act (the"Act") against Determination #CDET 004381 of the Director of Employment Standards (the"Director") issued on October 21, 1996. In this appeal, the employer claims that it had just cause to dismiss Kevin Bourdin.

ISSUE TO BE DECIDED

The issue is whether the employee was dismissed for just cause.

FACTS

Monk McQueen's operates a restaurant in Vancouver. On February 26, 1996, Kevin Bourdin was terminated from his position as one of the Assistant Dining Room Managers. About a week earlier, he had dinner during his shift with his spouse and a friend and was dismissed for this incident. He had been employed with Monk McQueen's since April 26, 1995. Mr. Bourdin complained to the Director that he was unjustly dismissed. The Director's delegate agreed and issued a determination ordering payment of two weeks severance plus vacation pay. It is from this determination that Monk McQueen's appeals.

In a management team meeting either the same day or the day before the termination, Mr. Lindsay, an owner of Monk McQueen's, announced that he did not want to find anyone having dinner in the dining room. He says he made it clear that this was unacceptable but did not say that a breach meant termination. Mr. Lindsay said it was unacceptable in the restaurant industry generally for the managers to sit down and have dinner on the floor while on shift and he did not want this practice in his operation. He said that the managers belonged on the floor, checking meals and ensuring that the operation is running smoothly. Employees are trusted to decide when to take their meal break, although it is preferable for them to come in early to eat, or to wait until the end of their shift. Mr. Lindsay stated that he wanted to avoid a "heavy" management style and a workplace bound with formal, written rules and procedures.

Mr. Bourdin testified that he understood this prohibition extended to the normally busy period between 6:00 and 7:30 and other busy periods and that he had seen other employees, on shift, taking their meal on the floor. He also states that he was given

permission to have dinner on the floor by his immediate supervisor Mr. Trevor Herbert, who also testified in these proceedings. Mr. Bourdin said that on the night in question, even though it was Friday, the restaurant was uncharacteristically quiet. He ordered his dinner just before 8 p.m., picked it up about 20 minutes later and then sat down for about 20 minutes.

Mr. Herbert is no longer working at Monk McQueen's and much of his testimony was not directly relevant to the issue here. He testified that when he gave "permission", it was for a meal break. He did not realize that Mr. Bourdin was going to take his meal in the restaurant with his wife and friend. Indeed, he said he was surprised to see the three of them sitting together, since he had expected Mr. Bourdin to take his break away from the restaurant floor. He said he had never personally sat down to dinner in the dining room when he was on shift, but had seen others do it.

Mr. Bourdin testified that Monk McQueen's has a "three strikes" disciplinary procedure which terminates an employee with three infraction notices. (Mr. Lindsay testified that the three strike procedure was not followed in every case and that the decision to terminate was made according to the circumstances of each case. The "policy" is not included in the employee handbook.) If a problem develops with an employee, they are given a written infraction notice (signed by a manager and the affected employee) which is placed on the personnel file. Mr. Bourdin stated that one of the employees working the bar continues to work despite 11 infraction notices. He said that with the exception of a January 11, 1996 informal discussion with the General Manager about his home life, he had not been told of a problem with his work. Even the latter, he thought, was a discussion between two people, aside from their work relationship.

A list of problems with Mr. Bourdin's work performance was sent to the Director by Andrea Creelman on behalf of the employer but they were not referred to in the dismissal. None of those problems were the subject of an infraction notice (some of which occurred during Mr. Bourdin's 90 day probationary period) and were not brought to Mr. Bourdin's attention.

ANALYSIS

Section 63 of the Act outlines an employer's ability to terminate the employment of one of its employees:

> 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.
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> (2) The employer's liability for compensation for length of service increases as follows:
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> (a) after 12 consecutive months of employment, to an amount equal to 2 weeks' wages;

(b) after 3 consecutive years of employment, to an amount equal to 3 weeks' wages plus one additional week's wages for each additional year of employment, to a maximum of 8 weeks' wages.

(3) The liability is deemed to be discharged if the employee
(a) is given written notice of termination as follows:

(i) one weeks' 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.

Essentially, that section requires an employer to establish just cause; give an employee reasonable notice of termination, or a sum of money equivalent to wages for the notice period. Section 65 sets out other exceptions to the requirement of just cause or notice, but none apply here.

"Just cause" is derived from the common law and is determined according to the facts of each case. The onus to prove "just cause" rests with the employer. Here, Monk McQueen's terminated Mr. Bourdin's employment because he had dinner in the dining room during his shift, contrary to Mr. Lindsay's verbal instructions. While the employer sent a list of performance problems to the Director, those incidents did not appear to play a role in the decision to terminate and are not relied upon to show “just cause”.

An employer cannot usually rely on one minor infraction or act of disobedience to establish "just cause". Normally, one incident must be sufficiently serious to go to the heart of the employment contract and shows that the employee has, in effect, repudiated the employment contract. "To justify dismissal on the basis of a single act of disobedience, the act must be wilful or deliberate." (Elliot v. Parksville (City) (1990), 66 D.L.R.(4th) 107 (B.C.C.A.) Because the act must have an element of wilfulness, an employee who honestly believes he was acting within acceptable or permissible limits cannot be dismissed for just cause. (Petit v. I.C.B.C. (1995), 13 C.C.E.L. (2d) 62 (B.C.S.C.))

> I think it is not right to say that one act of disobedience, to justify dismissal, must be of a grave and serious character. I do, however think . . . that one act of disobedience or misconduct can justify dismissal only if it is of a nature which goes to show (in effect) that the servant is repudiating the

> contract, or one of its essential conditions; and for that reason, therefore, I think that you find . . . that the disobedience must at least have the quality that it is 'wilful': it does (in other words) connote a deliberate flouting of the essential contractual conditions.
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> (Laws v. London Chronicle (Indicator Newspapers) Ltd. [1959] 1 W.L.R. 698 @700)

Less serious incidents can also justify dismissal where they are frequent and the cumulative effect is serious, but the employer must warn the employee that employment is in jeopardy.

In this case, I find that the Director was correct in determining that Mr. Bourdin had not been dismissed for just cause. The evidence does not unequivocally establish the element of wilfulness necessary for one act of misconduct to justify dismissal. While Mr. Bourdin may have been "taking a chance" by eating his meal on the floor, it is very clear that he did not realize that he was risking dismissal. Moreover, it was a relatively minor incident that did not breach an essential element of the employment contract. While it may have been important for the manager to remain on the floor during busy periods in the restaurant, it was not busy at the time of this incident and there was another manager on the floor. In these circumstances, I agree with the Determination and deny the appeal.

Mr. Lindsay argues that he should not have to warn an employee three times before exercising the right to discharge for just cause. There is no requirement at common law. However, Monk McQueen's has adopted a "three strike" disciplinary policy that appears to be enforced rather haphazardly. Since the impact of that policy is not an issue in this case, I will not comment further beyond saying that such a policy can be determinative of "just cause".

ORDER

Pursuant to section 115 of the Act, I order Determination #CDET 004381 be confirmed.

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Lorna A. Pawluk
Adjudicator
Employment Standards Tribunal

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