

An appeal

- by -

Mehdi Najari
("Najari")

- 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: M. Gwendolynne Taylor

FILE No.: 2001/574

DATE OF HEARING: October 22 and November 23, 2001

DATE OF DECISION: January 23, 2002

DECISION

APPEARANCES:

Mehdi Najari	Appellant
John Papaloukas	on behalf of 618865 B.C. Ltd., Respondent
Paul Simpson	owner, Med Grill Restaurants Ltd., as a witness for the Appellant

OVERVIEW

This is an appeal pursuant to Section 112 of the Employment Standards Act (the "*Act*") brought by Mehdi Najari ("Najari") of a Determination issued on July 13, 2001 by the Director of Employment Standards (the "Director"). Najari had filed a complaint with the Director requesting compensation for length service. The Director found that 618865 B C Ltd ("618865") had terminated Najari's employment for just cause and dismissed Najari's complaint.

Najari appealed on the grounds that the Director's delegate erred in finding facts and misrepresented what was said by Najari and others.

ISSUE

1. Did the Director err in finding that 618865 had just cause for terminating Najari's employment?
 - did Najari's conduct constitute just cause for terminating his employment?
 - were CW and GS in positions of authority over Najari and did they have authority to fire him?
2. If Najari was not dismissed for just cause, how much compensation in lieu of notice is he entitled to?

THE FACTS

This dispute concerns a restaurant in Victoria known as Villages Med Grill, or Med Grill Restaurant, referred to here as "the restaurant". The restaurant was owned and operated by Paul Simpson. On approximately December 8, 2000, the restaurant was forced into insolvency. The creditors asked the landlord, 618865 B.C. Ltd., to keep the restaurant open. John Papaloukas is the sole director of 618865; he assumed operation of the restaurant on December 8, 2000.

On December 8, 2000, Mr. Papaloukas had all of the employees sign Temporary Employment Contracts. The contracts were for 30 days. The contract contained an acknowledgement that this was a “new employment position unrelated to any previous employment of the Employee by Med Grill Restaurants Ltd.”. The contract also stated that the employee understood that “the Employer is in no way related to or a successor of Med Grill Restaurants Ltd..”

Najari has worked at the restaurant for 13 years, under 4 owners. At the time of this incident, he was employed as a baker. His employment ended January 9, 2001, following a disagreement with two other employees, CW and GS.

The disagreement arose over Najari’s authority and his proposed disposition of left over bread. He wanted to give it to staff and he approached CW with this proposal. CW did not want Najari giving the bread to staff. Najari and CW disagreed over which of them had authority to decide what to do with baking.

CW brought GS into the discussion, in GS’s office. GS said that CW had authority over the baking. Najari left the discussion and went back to his work station. CW and GS followed him, asked him if he would take orders from CW. Najari said that CW did not have authority over baking or over Najari. CW and GS considered this insubordination and told him he was fired. Najari left the restaurant. On January 11, 2001, he filed a complaint with the Director.

Paul Simpson resumed operation of the restaurant on approximately January 18, 2001. Shortly after, he re-hired Najari.

THE DETERMINATION

In the Determination, the Director noted that the incident was petty. However, the Director found that Najari’s refusal to follow the kitchen manager’s direction was an act of insubordination, which was compounded by refusing to acknowledge the authority of the general manager. The Director found that CW and GS were hired by Simpson, their positions were unchanged when Papaloukas took over and it was common knowledge that they occupied positions of authority. Najari did not want to acknowledge their authority, which amounted to wilful insubordination, and 618865 has just cause for terminating his employment without written notice or compensation for length of service.

SUBMISSIONS

There was disagreement between Najari and Papaloukas over the authority of CW and GS. Respectively, Papaloukas considered them to be the kitchen manager and general manager. Najari did not consider them to have authority over him.

Najari and Papaloukas disagreed about a staff meeting in December - whether Najari was in attendance, what was said at that meeting – and about other conversations establishing the lines

of authority after Papaloukas took over. Papaloukas submitted that all the employees, including Najari, knew that he had given CW and GS authority as managers.

Paul Simpson testified that he had considered Najari to be an experienced and highly respected employee whose advice he had sought on many occasions. CW was a kitchen supervisor to order food, ensure food preparation was done properly and oversee the operation. GS was the general manager but did not have responsibility over kitchen employees. He did not give either of them authority to fire any employees without his, Simpson's, consent. Mr. Simpson stated that it would have been ridiculous to give a 20 year old, inexperienced employee, the authority to fire a senior employee.

Mr. Simpson's testimony conflicts with the evidence attributed to him at p. 5 of the Determination.

By letter dated May 8, 2001, the Director set out a proposal for settlement involving Paul Simpson. Mr. Simpson testified that he knew nothing of this letter and had not seen it prior to this hearing. He testified he had told the Director's delegate that he considered compensation to be solely 618865's responsibility.

In the letter of May 8, the Director raised the issues of whether the employer is 618865 or, presumably, Paul Simpson's company and, if Najari got an order for compensation, how it could be collected.

FINDINGS

I find as facts that Najari approached CW about giving bread to the staff; he was upset with CW's refusal; he challenged CW's authority to make the decision; CW and GS told him they were in charge and had authority to make those types of decisions; Najari was angry, did not acknowledge their authority, left GS's office and returned to work; CW and GS pursued the discussion in Najari's work area, demanded that he acknowledge their authority and fired him when refused.

In the Determination, the Director's delegate found that Najari's claim that he did not know that he had to take direction from CW to be completely unsupported. He notes that CW and GS were hired by Simpson and that their positions remained unchanged. In the Determination, the delegate stated that Simpson said CW and GS "had authority to hire, fire and discipline employees, and that Najari understood that." This conflicts with the evidence Simpson gave orally at the hearing. I accept Simpson's evidence at the hearing over that attributed to him in the Determination. This applies also to the alleged settlement proposal letter of May 8, 2001.

The delegate found that Najari's assertions contained inconsistencies. In particular the delegate found that although Najari said he "would appeal to a higher authority" he left the restaurant without speaking with Papaloukas, who was on his way into the restaurant. Additionally,

although Najari claimed that GS did not have the authority to fire him, he accepted the direction and left. I do not understand why the delegate would fasten on these as “inconsistencies” to suggest that Najari’s evidence is not to be believed. Nor do I find that they support the delegate’s determination of wilful insubordination. (I have not detailed the disagreements over the facts surrounding these two parts of the scenario as I find they are not determinative, no matter whose version is correct.)

ANALYSIS AND DECISION

The burden of establishing that a Determination is incorrect rests with an Appellant. On the evidence presented, I find that burden has been met.

Section 63 of the *Act* creates a liability for employers to pay compensation based on length of service, unless the employer gives the employee written notice (s. 63(3)(a)), or dismisses the employee for just cause (s. 63(3)(c)). There are many tribunal decisions on the issue of what constitutes “just cause”. The following principles, set out in *Kenneth Kruger* BCEST No. D003/97, have been applied consistently:

The tribunal has addressed the question of dismissal for just cause on many occasions. The following principles may be gleaned from those decisions:

1. The burden of proving the conduct of the employee justifies dismissal is on the employer;
2. Most employment offences are minor instances of misconduct by the employee not sufficient on their own to justify dismissal. Where the employer seeks to rely on what are in fact instances of minor misconduct, it must show:
 1. A reasonable standard of performance was established and communicated to the employee;
 2. The employee was given a sufficient period of time to meet the required standard of performance and had demonstrated they were unwilling to do so;
 3. The employee was adequately notified their employment was in jeopardy by a continuing failure to meet the standard; and
 4. The employee continued to be unwilling to meet the standard.
3. Where the dismissal is related to the inability of the employee to meet the requirements of the job, and not to any misconduct, the tribunal will also look at the efforts made by the employer to train and instruct the employee and whether the employer has considered other options, such as transferring the employee to another available position within the capabilities of the employee.
4. In exceptional circumstances, a single act of misconduct by an employee may be sufficiently serious to justify summary dismissal without the

requirement of a warning. The tribunal has been guided by the common law on the question of whether the established facts justify such a dismissal.

In *Bodycraft Collision Ltd.*, BCEST No. D112/01, the tribunal weighed whether conduct was sufficient to justify summary dismissal and considered cases in which that had been the issue:

20 In exceptional circumstances, a single act of misconduct may be sufficiently serious to justify a summary dismissal without the requirement of a warning. (see Kruger BCEST #D003/97, Randy Chamberlin and Sandy Chamberlin operating as Super Save Gas BCEST #D374/97)

21 Insolence or insubordinate conduct has been recognized as cause for dismissal, although a single act of insolent conduct does not usually justify termination. Isolated outbursts, unprovoked words and actions that are insolent and insubordinate may be cause for dismissal where that conduct is incompatible with the continuation of an employment relationship. (Scott Doherty BCEST #D098/00)

22 The question of whether insolence or insubordination constitutes cause is one of degree. An unwarranted and brutal verbal assault on an employee's supervisor was held to constitute conduct repudiating the employer/employee relationship in *Clare v. Moore Corp. Ltd.* (1989), 29 C.C.E.L. 41 (Ont. Dist. Ct.) Insubordination that involves the use of profanity, the refusal to carry out an order, and physical threats also fall within that category of conduct.

23 In *Vatri v. Delco Wire & Cable Ltd.* (1983), 19 A.C.W.S. (2d) 209 (Ont. Co.Ct.) the plaintiff was involved in a confrontation with the vice-president of the defendant company. The plaintiff became very angry and lost his temper in a dispute with the vice-president, which was brought about as a result of a mistake the plaintiff made. The plaintiff stormed out of the office and sped away, returning an hour later. The vice-president asked the plaintiff to come into his office to discuss the dispute in private. The plaintiff was defiant, and loudly refused, telling the vice-president that he did not have to obey company rules and procedures. He also used a "disgusting expression" about the vice-president, which was heard by several other employees. The judge held that "this was...conduct that no employer who has any concern for running a well-disciplined company could possibly tolerate."

In the *Bodycraft Collision* case, the Tribunal found that the employee's verbal barrage against the employer, which included profanities and name-calling, in front of other employees, was unprovoked, disrespectful and uncivil. The Tribunal found the conduct was incompatible with the continuation of the employment relationship.

I find that 618865 has not established that Najari was dismissed for just cause. Considering the various factors surrounding this dispute – the temporary and uncertain nature of 618865's

involvement, the length of Najari's employment, the limits placed on managers' authority by Simpson – coupled with the very petty nature of the disagreement, leads me to conclude that Najari's conduct was not incompatible with the continuation of his employment. At best, I would consider this to an isolated incident. Najari had returned to work.

Najari's refusal to accept the authority of CW and GS could have provided grounds for termination if it had continued. There is no evidence that his attitude was disrupting the work place, or that he was taking action contrary to a direction that either of them had given.

Apparently CW and GS believed it was important to ensure that he understood their authority. To this end, following the standards for dismissal, they could have

- ensured that the employer had communicated their authority,
- warned Najari of their understanding and the consequences if he failed to accede to their authority in future, and
- given him a reasonable time to inquire into and accede to their authority.

The fact that Najari left the restaurant after being told he had been fired is of no consequence in determining whether he was terminated for just cause.

Having determined that Najari was not fired for just cause, whether he is entitled to compensation for length of service depends on whether he had at least 3 consecutive months of employment with the employer.

Papaloukas argued that, as landlord, 618865 had the right to enter the premises, as he did and take over the restaurant operation. He submitted that the temporary employment contracts were legal; Najari is not entitled to any compensation because the employment commenced on December 8, 2000 and lasted less than three months. Najari argued that 618865 was not entitled to require employees to enter into new employment contracts. He submitted that the agreements were not legal and that the former employment continued. The Director raised the issue of who the employer was but made no findings.

The issue is whether either sections 95 or 97 apply and, thus, whether the employment is continuous. The fact that the temporary employment contracts purport to establish that neither section applies is not determinative. I have attempted to answer this question based on the evidence before me, but find that there is too much information that I do not have. Many questions arise in determinations under these sections and I cannot do justice without further evidence. Accordingly, I find it necessary to refer this aspect of the case back to the Director for a further Determination.

ORDER

I cancel the Determination dated July 13, 2001 and refer this case back to the Director for determination of the length of Najari's employment and the amount of compensation due, pursuant to section 63 of the *Act*; and which company is responsible for the compensation.

M. Gwendolynne Taylor
Adjudicator
Employment Standards Tribunal