Employment Standards TRIBUNAL

An appeal

- by -

Le Soleil Hospitality Inc.
("LSH")

- 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 (as amended)

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE No.: 2014A/25

DATE OF DECISION: June 24, 2014

DECISION

SUBMISSIONS

Wilfred Chan	counsel for Le Soleil Hospitality Inc.
Derek E. Garnier	on his own behalf
Megan Roberts	on behalf of the Director of Employment Standards

INTRODUCTION

1. Derek E. Garnier ("Garnier") was employed by Le Soleil Hospitality Inc. ("LSH") as a "night auditor" at its downtown Vancouver hotel from June 21, 2004, until his termination, allegedly for cause, on August 7, 2013. Mr. Garnier's duties as a night auditor – which were undertaken during an overnight shift ending at about 7 AM the following morning – included completing billing transactions, checking guests in and out, monitoring the telephone and alarm systems including emergency calls from guests. During the evening only the night auditor and a night bellman are on duty. Mr. Garnier was terminated following LSH's discovery that during the early morning hours of August 6, 2013, he left his front desk duties and slept for over an hour on a couch in a public area of the hotel.

2. Mr. Garnier filed a timely complaint under section 74 of the *Employment Standards Act* (the "*Act*") seeking compensation for length of service under section 63 of the *Act*. Compensation for length of service is presumptively payable, or an equivalent amount of written notice must be given (or some combination of the two), to an employee who is being terminated without just cause. The only issue raised by Mr. Garnier's complaint was whether he was lawfully terminated under the *Act*. An employee dismissed with just cause is not entitled to compensation for length of service (see subsection 63(3)(c) of the *Act*).

3. On January 10, 2014, the parties appeared before a delegate of the Director of Employment Standards (the "delegate") at a complaint hearing to argue their respective positions. On January 24, 2014, the delegate issued a Determination and accompanying "Reasons for the Determination" (the "delegate's reasons") ordering LSH to pay Mr. Garnier the sum of $6,482.73 on account of compensation for length of service together with concomitant vacation pay and section 88 interest. In addition, and also by way of the Determination, the delegate levied a single $500 monetary penalty against LSH (see section 98) based on its contravention of section 63 of the *Act*. Thus, the total amount payable under the Determination is $6,982.73. LSH does not challenge the delegate's calculation of Mr. Garnier's entitlement; rather, it simply says that he was not entitled to any section 63 compensation.

4. LSH appeals the Determination, and seeks to have it cancelled, on the grounds that the delegate erred in law and failed to observe the principles of natural justice in making the Determination (see subsections 112(1)(a) and (b) of the *Act*).

5. I am adjudicating this appeal based on the parties' written submissions and, in that regard, I have before me submissions filed by LSH, Mr. Garnier, and the delegate. In addition, I have also reviewed the subsection 112(5) "record" that was before the delegate.

6. Although LSH seeks an oral appeal hearing, it has not provided any particulars regarding why this matter cannot be fairly adjudicated by way of a written submission hearing. In my view, given the completeness of

the record, the nature of the grounds of appeal, and the fact that this appeal does not turn on any new evidence (indeed, LSH has not advanced the "new evidence" ground of appeal, namely, subsection 112(1)(c) of the *Act*), I am satisfied that an oral hearing would only delay the adjudication of this matter and unnecessarily burden the parties with additional expense. In my view, consistent with sections 103 of the *Act* and 36 of the *Administrative Tribunals Act*, this appeal should be adjudicated by way of a written submission hearing.

7. LSH also sought an order under section 113 of the *Act* to have the Determination suspended pending the adjudication of this appeal. I understand that the full amount of the Determination has been deposited into the Director of Employment Standards' trust account and that the Director has undertaken to hold these funds until this matter is concluded. Accordingly, the Tribunal previously advised LSH that it would not be issuing a section 113 order (see Tribunal correspondence dated March 4 and 5, 2014, on Tribunal File Number 2014A/26).

REASONS FOR APPEAL

8. As noted above, LSH appeals the Determination on two grounds, namely, that the delegate erred in law and failed to observe the principles of natural justice in making the Determination. LSH, through its legal counsel, says that the delegate erred in law in two separate respects: first, in finding that LSH condoned Mr. Garnier's misconduct and, second, that she failed to consider, and give proper weight to, evidence relating to Mr. Garnier's work record and LSH's actions with respect to his work record. LSH also advances two arguments under the "natural justice" ground but, in my view, these two arguments more appropriately relate to the error of law ground of appeal. In essence, under this "natural justice" ground, LSH says that the delegate failed to consider relevant evidence or otherwise misconceived the evidence before her. In my view, LSH's core attack on the Determination is simply that the delegate erred in finding that it did not have just cause to dismiss Mr. Garnier.

9. Whether an employer has just cause for dismissal is a matter of mixed fact and law in that the decision-maker must apply a legal standard to a given set of facts (see *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 at para. 26). In this case, the central event leading to Mr. Garnier's termination is not disputed – as determined by the delegate: "The triggering event for his termination was seeing the August 6th security footage that showed him sleeping on the job" (delegate's reasons, page R11). Further, the delegate also found as a fact that Mr. Garnier had engaged in similar behaviour "on several previous occasions" (page R12). However, the delegate ultimately concluded that this behaviour did not give LSH just cause to dismiss Mr. Garnier because it had condoned this sort of behaviour and/or otherwise did not adhere to the principles of progressive discipline.

FINDINGS AND ANALYSIS

10. The central facts in this matter are not seriously in dispute; rather, the parties have differing views about the legal consequences that flow from the facts of this case. More particularly, while the delegate ultimately found that Mr. Garnier was sleeping (or, at least, "napping" or "lying down on the job") during the early morning hours of August 6, 2013, and that "the evidence provided by witnesses satisfies me that he did so on several previous occasions" (delegate's reasons, page R12), this behaviour did not provide LSH with just cause to summarily terminate Mr. Garnier's employment.

11. In essence, the delegate appeared to apply the common law notion of "condonation" and, alternatively, found that LSH failed to abide by the principles of "corrective" or "progressive" discipline. Condonation was

recently described by our Court of Appeal in the following terms (*Staley v. Squirrel Systems of Canada, Ltd.*, 2013 BCCA 201 at para. 40):

> The principle of condonation was expressed in *McIntyre v. Hockin* (1889), 16 O.A.R. 498 at 501-502 (C.A.) as follows:
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> > When an employer becomes aware of misconduct on the part of his servant, sufficient to justify dismissal, he may adopt either of two courses. He may dismiss, or he may overlook the fault. But he cannot retain the servant in his employment, and afterwards at any distance of time turn him away. It would be most unjust if he could do that, for one of the consequences of dismissal for good cause is, that the servant can recover nothing for his services beyond the last pay day, whether his engagement be by the year or otherwise...If he retains the servant in his employment for any considerable time after discovering his fault, that is condonation, *and he cannot afterwards dismiss for that fault without anything new*. No doubt the employer ought to have a reasonable time to determine what to do, to consider whether he will dismiss or not, or to look for another servant. So, also, he must have full knowledge of the nature and extent of the fault, for he cannot forgive or condone matters of which [he] is not fully informed.
>
> (my *italics*)

12. Thus, an employer is not entitled to subsequently dismiss an employee for conduct that it previously condoned but, at the same time, the fact of the prior misconduct does not, of itself, give rise to an estoppel such that the employer cannot discipline (including dismissal) the employee for new misconduct of the same nature.

13. Progressive or corrective discipline is a principle that was developed by labour arbitrators who, it should be noted, unlike adjudicators under the *Act*, have the power to cancel a termination and substitute a lesser disciplinary sanction (see B.C. *Labour Relations Code*, subsection 89(d)). Pursuant to this doctrine, an employee is subject to successively more stringent sanctions for continuing misconduct (which, standing alone, may not give just cause for dismissal; for example, continuing tardiness) culminating, ultimately, in dismissal. Some non-union employers have adopted this principle into their employment policies (see, *e.g.*, *Sinclaire v. Intrawest Resort Ownership Corp.*, 2005 BCCA 10). There is no evidence in the record before me that LSH had a formal progressive discipline policy and, of course, this doctrine has no application to misconduct that, by itself, gives the employer just cause for dismissal. In the non-union environment, the leading case regarding just cause is the Supreme Court of Canada's decision in *McKinley v. BC Tel*, [2001] 2 S.C.R. 161 where Iacobucci, J., for the court, observed (at para. 57):

> …I favour an analytical framework that examines each case on its own particular facts and circumstances, and considers the nature and seriousness of the dishonesty in order to assess whether it is reconcilable with sustaining the employment relationship. Such an approach mitigates the possibility that an employee will be unduly punished by the strict application of an unequivocal rule that equates all forms of dishonest behaviour with just cause for dismissal. At the same time, it would properly emphasize that dishonesty going to the core of the employment relationship carries the potential to warrant dismissal for just cause.

14. Although speaking directly to just cause based on dishonesty, Justice Iacobucci's remarks have been more generally applied to all forms of employee misconduct (see, *e.g.*, *Brazeau v. International Brotherhood of Electrical Workers*, 2004 BCCA 645; *Grewal v. Khalsa Credit Union*, 2012 BCCA 56)

15. The delegate made several findings that are relevant to the central issue in this appeal (*i.e.*, whether LSH had just cause to terminate Mr. Garnier) at pages R12 – R14 of her reasons:

Despite the previous allegations of Mr. Garnier sleeping on the job, there is no record of any related disciplinary or other action being taken as a result. When considering this with the testimony of Le Soleil's witnesses, it is apparent that Le Soleil had historically approached Mr. Garnier's behaviour with a significant degree of tolerance and repeatedly turned a blind eye to the allegations made against him. Conversely, Le Soleil now seeks acceptance of their position that Mr. Garnier's unprofessionalism, reduced attendance on shift and lack of attentiveness to visual 911 alerts on August 6th were of a serious enough nature to warrant his summary dismissal. However, I find Le Soleil's disregard and lack of follow up on the multiple concerns raised about Mr. Garnier more indicative that his actions as alleged were not considered serious enough to merit investigation, never mind termination...I see no justifiable reason, given the suggested gravity of the behaviour, why Mr. Garnier was not interviewed about the incidents or at least advised through word, meeting or even memorandum that leaving the front desk unattended for periods of time was unacceptable. In considering Le Soleil's failure to ever raise the behaviour with Mr. Garnier as problematic they have failed to satisfy me that, on their own, Mr. Garnier's actions on August 6th were intentionally disobedient or so egregious that they irreparably undermined Le Soleil's trust and confidence to the degree that it justified his immediate termination.

Turning now to Le Soleil's argument that Mr. Garnier's behaviour on August 6th was the culminating event in a series of minor misconducts, I find the following: Le Soleil provides Mr. Garner's disciplinary record as evidence. Of particular significance is his March 2012 performance appraisal, which on the whole was favourable, but which identified tardiness as a problematic area of his performance. His rating under "Dependability" implied increasing disciplinary measures would be taken if it did not improve. However, even if interpreting the performance comments under this section of the appraisal extended beyond lateness, it is not clear that lying on the couch, although agreeably unprofessional, would constitute a further breach of this criteria [*sic*]. I find this because, firstly, the evidence satisfies me that Le Soleil repeatedly disregarded concerns around Mr. Garnier's sleeping on the job in the years prior to his termination. While Le Soleil terminated Mr. Garnier for this behaviour on August 6, 2013, no reasonable standards of performance (i.e., remain at front desk for the duration of your shift) or consequences of failure to do so were previously applied for this behaviour despite their knowledge that such could have been and was occurring. Secondly, I accept that from April 2011 to March 2012 Mr. Garnier was late several times and Mr. Eisnor [the Guest Services Manager and Mr. Garnier's immediate supervisor] addressed this with him both verbally and in writing. An October 17th, 2011 written warning for tardiness indicates "There will be **no** further warnings in regards to this". [**boldface/underlining** in original text] However, the March 2012 appraisal references ongoing concerns on the issue and states only that there would be "no further verbal warnings" if Mr. Garnier was late or not ready to start his shift at the scheduled time. In both cases, Le Soleil fails to set out any specific consequence for future lateness and in fact, appears to suggest the consequences for failure to perform were reduced over time. Finally, Le Soleil's disciplinary record for Mr. Garnier does not indicate a continued pattern of lateness or other related infractions after his March 2012 appraisal. Even if termination was the consequence for additional tardiness or attendance issues, an assertion that Mr. Garnier disagrees with, Mr. Eisnor testified Mr. Garnier was in fact subsequently late/not ready to start his shift on time. Yet the matter was dealt with through a discussion and Mr. Garnier's employment appears to have continued without any consequence or formal record of any related action. Accordingly, without evidence that the consequence of additional poor performance was consistently enforced and clearly explained to him by Le Soleil, I am not persuaded Mr. Garnier was adequately notified his employment was in jeopardy for such behaviour.

I accept management at Le Soleil was aware of his behaviour since at least 2008 when Mr. Eisnor reported it to Mr. Garnier's then supervisor. However, no record of related disciplinary action is provided. I also accept that concerns over this behaviour continued to be voiced to management over at least the last two years of his employment, this time being to Mr. Briton [the hotel's Guest Services Supervisor but not Mr. Garnier's direct supervisor] and Mr. Eisnor who each held varying degrees of authority over Mr. Garnier. Yet the issue was never raised with Mr. Garnier. In fact, Le Soleil agrees they did not provided [*sic*] written or verbal warnings that Mr. Garnier's employment was in jeopardy specific to resting on the job or leaving the front desk unattended or that he was ever clearly advised of or understood the consequences associated to such behaviour. Instead, Mr. Briton and Mr. Eisnor gave Mr. Garnier "the benefit of the doubt", despite having seen him lie down on the job before and repeatedly

> hearing the same allegations from different employees. In turn, I find Le Soleil condoned Mr. Garnier's behaviour while at work and allowed it to continue unchallenged throughout his employment.
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> When relying upon an argument for just cause in a matter of termination, an employer bears the burden of proving the terminated employee's behaviour breached the employment agreement so severely the relationship could not continue. In consideration of all the evidence, I find Le Soleil has not met this burden, either through showing that Mr. Garnier's actions warranted immediate dismissal or that requisite steps through corrective discipline were met as claimed.

16. The record includes a DVD, compiled from security camera footage, showing Mr. Garnier sleeping on a couch at the hotel on August 6, 2013. The footage spans the period from 1:55 to 3:19 AM and shows that Mr. Garnier was, in fact, sleeping on the job. Mr. Garnier maintains that he was only "napping" and only because he was not feeling well but also acknowledges in his submission that his behaviour amounted to misconduct that could have justified a "reprimand of [*sic*] suspension without pay" but not dismissal.

17. "Sleeping on the job" cases are not uncommon, particularly in the unionized environment, and, in general, this sort of misconduct almost never gives the employer just cause for dismissal (see *Richardson v. Davis Wire Industries Ltd.*, 1997 CanLII 4221 (B.C.S.C.) at para. 23), although it will give the employer just cause for some lesser disciplinary action. In my view, the employer's summary dismissal of Mr. Garnier for having slept on the job was an excessive response to the misconduct in question particularly given the fact that, apparently, this was not the first time this sort of behaviour came to the employer's attention but it failed to take any affirmative prior disciplinary action against him.

18. Mr. Garnier's employment record is not pristine but the record before me shows that he was generally considered to be a valued and competent employee during his approximately 9-year tenure. Given my finding that the single act of sleeping on the job on August 6, 2013, did not, standing alone, give LSH just cause for dismissal (although I think it beyond question that it did give LSH just cause to levy some lesser disciplinary sanction), I must now consider whether in light of Mr. Garnier's work record, considered in its totality, this event was a culminating event that ultimately turned the tide in favour of his dismissal.

19. Mr. Garnier's work record has some blemishes. I have reviewed the record that was before the delegate and it contains the following disciplinary notations:

- an April 21, 2010, event in which Mr. Garnier was absent from the front desk when a guest called about a "plugged toilet" problem – Mr. Garnier promised to "be more vigilant from now on to keep at the desk";
- an April 6, 2011, warning for "continual tardiness";
- an October 17, 2011, "written warning" for being continually late to commence his scheduled shift;
- a note in his March 12, 2012, performance appraisal regarding a problem with being tardy; otherwise, his performance was generally rated to be "commendable" (4 on a 5-point scale); and
- a March 16, 2012, disciplinary note of a written warning/suspension (although there is no record that any sort of suspension was ever served) for making inappropriate comments to a guest – Mr. Garnier noted on this form that he "sincerely apologized" for this conduct and promised "to never let this situation happen again".

20. It is to be noted that while LSH management apparently had received information about Mr. Garnier sleeping on the job prior to August 6, 2013, I cannot find anything in the record before me suggesting that anyone, at any time, spoke to Mr. Garnier (let alone levied any disciplinary sanction) about this sort of behaviour prior to his dismissal.

21. In my judgment, it is inaccurate to suggest that LSH "condoned" prior misconduct in the form of sleeping on the job. Simply put, there is nothing in the record to show that the employer ever dealt with what its own counsel referred to as "unsubstantiated allegations" (prior to August 6, 2013) about Mr. Garnier sleeping on the job. Rather than condoning misconduct, I think the more accurate way to characterize LSH's response to these "allegations" was to simply ignore them. LSH could have, and with the benefit of hindsight might now feel that it should have, conducted some sort of inquiry – at the very least, put their "suspicions" to Mr. Garnier directly – but it took no action until after it had clear evidence on August 6, 2013, that Mr. Garnier had, on at least that one occasion, slept on the job.

22. Counsel for LSH notes that Mr. Garnier was aware of the company's "standards of conduct" that specifically refer to "Loitering or sleeping on the job" as an example of behaviour that "*may* result in termination without previous written warnings" (my *italics*). I am not satisfied that the delegate, as was asserted by legal counsel, "ignored" this evidence (it was part of the record before her) but its probative value is limited. Certainly, this document does not affirmatively suggest that "sleeping on the job" will inevitably lead to dismissal and, even if it did suggest as much, LSH would still have to prove that such conduct irreparably damaged the employment relationship consistent with the Supreme Court of Canada's dictate in *McKinley*, *supra*. Certainly, some of the things listed in this document would give LSH immediate cause for dismissal – conduct such as bringing a deadly weapon to work, or selling narcotics while on duty, or making sexual advances to a hotel guest. But, surely, other listed conduct, standing alone, would not justify immediate summary dismissal – such as unauthorized use of hotel guest facilities or failing to follow the hotel's dress or grooming policy.

23. I have no trouble accepting the proposition that "sleeping on the job" is a serious matter and that it justifies some sort of disciplinary response. In the instant case, Mr. Garnier was one of only two individuals on duty on the shift and his lack of attendance at the front desk could have proven to be very consequential, especially if an emergency call had come through from one of the hotel's guests. That said, the evidence before the delegate conclusively showed that the *only* occasion when any sort of disciplinary action was meted out to Mr. Garnier was in relation to the events of August 6th. LSH had received prior reports about similar conduct but chose to take absolutely no action – at the very least, it could have raised the issue with Mr. Garnier and impress upon him the fact that such conduct would be taken extremely seriously and would put his continued employment at risk.

24. LSH has not provided any authority for the proposition that a single incident of transient sleeping on the job, without more (*e.g.*, a previous related disciplinary history or accompanying egregious dishonesty or other misconduct) justifies an employee's summary termination without pay or notice. I have conducted my own research and have not been able to turn up a single authority in the post-*McKinley* (or even pre-*McKinley*) supporting such a result. As previously noted, sleeping on the job invariably gives the employer just cause for discipline; but rarely, and only in the most extraordinary and aggravating circumstances, will a single act of sleeping on the job give the employer just cause for dismissal.

25. The delegate did not ignore relevant evidence. Rather, the delegate determined that based on the very thin evidentiary foundation provided to her by LSH, a case of a just cause dismissal was simply not made out. I cannot conclude that the delegate erred in reaching that conclusion.

ORDER

26. This appeal is dismissed. Pursuant to subsection 115(1)(a) of the *Act*, the Determination is confirmed as issued in the amount of $6,982.73 together with whatever further interest that has accrued, under section 88 of the *Act*, since the date of issuance.

27. Subject to a further order from the Tribunal, the Director may now release the funds being held in her trust account relating to this matter to Mr. Garnier.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal