

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, c.113

-by-

Cecconis Trattoria
(" Cecconis ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: C. L. Roberts

FILE No: 97/892

DATE OF HEARING: March 3, 1998

DATE OF DECISION: March 11, 1998

DECISION

APPEARANCES

W. M. Gudgeon	For Cecconis Trattoria
Heather Johns	
Ionel Dumitru	
R. Stea	For the Director
M. Caldwell	On his own behalf

OVERVIEW

This is an appeal by Cecconi's Trattoria ("Cecconis"), pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued November 13, 1997. The Director found that Cecconis contravened Sections 28(1), 40(1) and 63(2)(c) of the *Act* in failing to pay Matthew Caldwell ("Caldwell") overtime wages and compensation in lieu of notice. Cecconis was ordered to pay \$1944.85 to the Director on behalf of Caldwell.

Cecconis claims that the Director's delegate made errors of fact, made findings of fact unsupported by the evidence, and erred in finding that Caldwell's employment was improperly terminated.

At the commencement of the hearing, the parties agreed that errors had been made in the calculation of overtime wages and vacation pay. The parties agreed that \$160.74 was owed in overtime wages, and that no amount of vacation pay was owed. From this amount, advances in the amount of \$120.00 was agreed to be deducted, leaving a balance of \$45.74 owing to Caldwell.

ISSUE TO BE DECIDED

Remaining at issue is whether the Director correctly determined that Caldwell is entitled to compensation in lieu of notice.

FACTS

Caldwell started work for Cecconis on September 21, 1995 as a dishwasher, working his way up to a prep person. The parties agreed that he was terminated on May 7, 1997, rather than April 7 as found by the Director's delegate.

On the evening of May 5, Caldwell gave a free dinner (promotion) to a guest who was having a birthday. The following day, Caldwell's supervisor, Ionel Dumitru, advised Caldwell that he could not promo meals for guests having a birthday. He told Caldwell that he had to pay back the amount of the meal. Caldwell did pay the amount back on the following day, and when Caldwell returned to work his next shift, he was advised he was fired.

The Director's delegate determined that there was no evidence Caldwell had promoted a meal before, nor did Cecconis provide any evidence that Caldwell had been disciplined in the past.

Consequently, the Director's delegate determined that Cecconis did not have just cause in firing Caldwell, and ordered Cecconis to pay him two weeks compensation for length of service.

Argument

Cecconis argued that Caldwell's position did not include the authority to give away promotional dinners. Cecconis stated that Dumitru was advised of Caldwell's attempt to promo a meal on May 6, after the weekend off. Dumitru contends that he spoke to Caldwell about this, and that he had warned him about his behaviour on previous occasions. In their written submissions, Cecconis indicated that Caldwell completed his shift, but refused to pay for the meal at that time. At the hearing, Dumitru indicated that Caldwell had not refused to pay for the meal when requested to.

Caldwell contended, and the Director's delegate agreed, that because Caldwell had been allowed to finish his shift on May 6 after indicating he would pay back the cost of the meal, his job was not in jeopardy. Caldwell paid back the amount of the meal on May 7 after reporting to work. He was then advised that he was terminated.

Dumitru agreed that, prior to the incident in May, there had never been another issue regarding promos involving Caldwell, and that he had never spoken to Caldwell about promos before that time. He also conceded that while he had warned Caldwell about his behaviour in the past, it had never involved a promo meal matter. He further agreed that Caldwell had never refused to pay for the meal when requested to do so.

Gudgeon confirmed that there had not been a written policy manual presented to Caldwell when he began work regarding his authority on promo meals, although he argued that Caldwell ought to have been aware of the limits of his authority.

Caldwell argued that he had never attempted to hide the promo, and that he paid it back when requested.

ANALYSIS

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

In determining whether just cause exists to terminate an employee where unsatisfactory performance is concerned, the following criteria applies: (see *Kenneth Kruger* BC EST #D003/97)

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.

I accept that Caldwell's actions were viewed as tantamount to theft by Dumitru. Nevertheless, I accept that there was no written or verbal communication of the limits of his authority, and that there had been no verbal or written warnings to Caldwell on previous occasions regarding this issue. I further accept that Caldwell did not refuse to repay the money when requested to do so.

I find that Cecconis did not meet the requirements set out above and deny the appeal.

ORDER

I order, pursuant to Section 115 of the *Act*, that the Determination, dated November 13, 1997, be confirmed in the amount of \$504.92, plus the amount agreed on by the parties for overtime, less advances, in the total amount of \$45.74, together with any interest that may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

Adjudicator
Employment Standards Tribunal