Employment Standards TRIBUNAL

An appeal

- by -

Esposito Bros. Management Services Ltd. operating as Inn at Kings Crossing
("Esposito" or the "Employer")

- 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: Ib S. Petersen

FILE No.: 2001/857

DATE OF HEARING: April 4, 2002

DATE OF DECISION: April 8, 2002

DECISION

APPEARANCES:

Mr. Paul Esposito	on behalf of the Employer
Mr. Paul Esposito, Jr.	
Mr. Frank Esposito	
Ms. Rebecca Echon	
Mr. Chris De Haan	on behalf of Ms. Christine De Haan
Ms. Christine De Haan	

OVERVIEW

This is an appeal by the Employer pursuant to Section 112 of the Employment Standards Act (the "Act") of a Determination of the Director of Employment Standards (the "Director") issued on November 13, 2001. The Determination against the Employer concluded that the Employer terminated Christine de Haan (the "Employee") without just cause and that she, in the result, was owed $1,048.70 on account of compensation for length of service (and unauthorized deductions).

ISSUE

The Employer does not take issue with the Delegate's findings regarding the unauthorized deductions of $443.96. The issue before me, therefore, is this: Did the Employer have cause for the termination of Ms. De Haan?

FACTS

A hearing was held in Abbotsford on April 4, 2001.

The background facts are largely not in dispute and may be gleaned from the Determination:

1. Ms. De Haan worked for the Employer, operating a full service hotel, with a restaurant and a pub, as a server from October 6, 1999 to January 6, 2001.

2. The Employer deducted $443.96 from Ms. De Haan's wages due to "dine and dash," loss of business and broken property.

3. Ms. De Haan was terminated based on her conduct at a staff party held in December 2000. The Employer explained to the Delegate that Ms. De Haan became intoxicated, loud and disruptive to the detriment of the business. She was yelling, running in the hall way and knocking on doors, resulting in three guests leaving the hotel.

4. Ms. De Haan told the Delegate that the staff party was held by the Employer, who supplied the alcohol and food. According to the Determination, she did admit to knocking on the doors, occupied by staff who had elected to stay in the hotel.

Mr. Paul Esposito testified that he left the staff Christmas party at about 10:30 - 10:45 p.m. The party was held in a banquet room in the hotel. He instructed his sons, Mr. Frank Esposito and Mr. Paul Esposito Jr., to shut down the part around 11:00-11:30 p.m. Up until that time all employees and their guests had a "good time." It was his understanding that Ms. De Haan and other "ladies" wanted the party to continue and more liquor. He explained that several employees, including Ms. De Haan, went upstair to rooms taken by employees to continue the party.

Mr. Esposito, who was the person who made the decision to terminate Ms. De Haan's employment, relied on the following alleged conduct on her part:

1. Ms. De Haan used profane language towards his sons when they shut down the party.

2. Ms. De Haan had an "argument" with her husband on the way upstairs. She accused him of "sleeping" with another employee of the hotel, who was also attending the party.

3. Ms. De Haan went to confront the employee in question and went knocking on doors. She was yelling in the hall way upstair. This, according to Mr. Esposito, caused guests to leave the hotel, including a family with a young child and a corporate customer.

4. Ms. De Haan "slapped" the employee who was supposed to have been sleeping with her husband.

5. In the days following the party, Mr. Esposito interviewed all staff regarding the incident(s). He disciplined other employees involved, including suspensions.

6. Ms. De Haan's conduct caused the hotel to lose a valued corporate customer. As well, there was damage to carpets from spilled wine.

The testimony of Mr. Frank Esposito and Mr. Paul Esposito Jr. essentially conformed that of Mr. Esposito. Mr. Frank Esposito explained that Ms. De Haan, and other employees approached him, and that she used the word "bullshit" to characterize the decision to shut down "their party" around midnight and called him and his brother "ass holes." His brother explained that they had brought their own "dates" to the party and they felt embarrassed by the conduct of these employees. Ms. De Haan was apparently intoxicated and so was, it would seem, other employees who had participated in the party. Mr. Frank Esposito agreed that Ms. De Haan and her husband had an argument before going upstairs and that she was "pushing him." He did not hear what they were talking (or arguing) about. He also testified that Ms. De Haan went "banging" on doors upstairs.

From the Employer's evidence, I understand that the party finally shut down around 4:00 a.m. The Employer's witnesses explained that the night auditor, the employee in charge over night, was able to observe at least part of the "action" in the hall via video monitors. The night auditor did not testify. Both Esposito brothers left the hotel after shutting down the party in the banquet room, although Mr. Paul Esposito Jr. said that he told the night auditor "to call if anything happened." The night auditor did not call and Mr. Paul Esposito Jr. did not find out what had happened until the next day.

The Employer's witnesses also explained that Ms. De Haan as a server had taken the "Serving it Right" course and, thus knew how to serve liquor and how to behave. As well, they said that she contravened company policy, set out in a manual.

In her testimony, Ms. De Haan acknowledged that she had told the D.J. to "keep playing" along with the "other girls." She also acknowledged that she may have used profane language towards two Esposito brothers when they were shutting down the party. She agreed in cross examination that she was intoxicated at the time. She explained that she became upset because she overheard other employees saying "poor Christine she doesn't even know her husband had sex with [a fellow employee] in the elevator." She agreed that she went upstairs, first to the room of [one employee], then to the room of [the employee who was supposed to have had sex with her husband], and finally to the room of a third employee. She denied "banging on doors" except for the door to the room occupied by the employee "in question." She said she found that employee "naked and puking in the bathroom" and denied "slapping" her. She also denied yelling in the hall way except once. Both she and her husband said that they left the hotel at approximately 12:30, as they had a "sitter," and denied responsibility for damage to the hotel and for guest leaving. They both pointed to the Employer's evidence that the guests left later, around 4:00 a.m., around the time the party in the rooms was over.

Ms. De Haan denied receiving the policy manual relied upon by the Employer.

ANALYSIS

The burden is on the Employer, as the Appellant, to persuade me that the Determination, on the balance of probabilities, is wrong and should be set aside. In the circumstances, I am not satisfied that the Employer had met that burden.

When an employer terminates an employee, the employee is entitled to notice or pay in lieu to a maximum of 8 weeks (see Section 63 of the Act). However, an employee is not entitled to notice or pay in lieu if, among others, the employee is dismissed for "just cause" (Section 63(3)(c)).

The Tribunal has had occasion to deal with the issue of just cause in a number of previous decisions (see, for example, Kruger, BCEST #D003/97). The principles consistently applied by the Tribunal have been summarized as follows:

> "1. The burden of proving the conduct of the employee justifies dismissal is on the employer.
>
> 2. Most employment offenses 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 instances of minor misconduct, it must show:
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> 1. A reasonable standard of performance was established and communicated to the employee;
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> 2. The employee was given a sufficient period of time to meet the required standard of performance and demonstrated they were unwilling to do so;
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> 3. The employee was adequately notified their employment was in jeopardy by a continuing failure to meet the standard; and
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> 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 my view, the delegate considered the termination in terms of just cause as contemplated by the test in Kruger.

In the circumstances, I would be reluctant to characterize Ms. Haan's conduct as serious misconduct. While I do not completely accept her version of the material events, in essence, she--and, to an extent, her husband--were the only the only witnesses with first hand knowledge of the events that transpired upstairs, i.e., after the employees left the downstairs banquet room to continue partying. Ms. De Haan, while acknowledging, in part, some of the conduct attributed to her, sought to downplay her role. There can be no doubt that she used profane language towards the Esposito brothers. She acknowledged that she was intoxicated, that she did "bang" on at least one door and did yell once. I find it hard to believe that she was as restrained as one might be lead to believe if her evidence was taken at face value. I accept that her behaviour was anything but appropriate. It is clear, on the evidence, that she was intoxicated and very upset due to the suggestion or rumour that her husband had engaged in sex with another employee. This, to say the least, clouded her judgement.

On the other hand, first, it is clear that the Employer presented nothing but hearsay evidence to support it allegations of what it alleged transpired in the hall way and rooms upstairs. The night auditor who, the Employer explained, could monitor the "goings on" upstairs did not testify at the hearing. If what happened was as serious as is now alleged, I am surprised that the Employer did not telephone Mr. Paul Esposito Jr. or, perhaps, testify to provide an explanation of why he did not. As well, the night auditor, and other employees, who participated in the party, could have been called to testify as to what actually transpired upstairs: did Ms. De Haan cause the ruckus the Employer said she did? did she "slap" a fellow employee as alleged? did she cause damage to hotel property as alleged? As well, I am of the view that the question of responsibility must be viewed in the context of an Employer sponsored party, where, according to all of the evidence, the Employer provided the liquor and the facility where it was consumed.

Second, the Employer arrived at the conclusion that Ms. De Haan was the main culprit based on its investigation. Other employees were disciplined as well. Some employees were suspended, others were placed on probation. Ms. De Haan testified that Mr. Paul Esposito did not speak to her prior to making his decision. In my view, there is no requirement for a "hearing" in the circumstances of Ms. De Haan's employment. However, if the Employer cannot carry the burden to show cause, the appeal must fail.

Third, in the circumstances, I am reluctant to attribute the alleged damage to hotel property--and guests leaving--to Ms. De Haan. The un-controverted evidence was that she and her husband left at 12:30 and the party went on until about 4:00 a.m. On the evidence there were other very intoxicated employees on the premises after the De Haans left. On the evidence, the employer is simply unable to connect the damages to hotel property by guests leaving to Ms. De Haans.

In short, I am prepared to accept that Ms. De Haan behaved in an inappropriate manner at the party. In my view, in the circumstances, her conduct may be characterized as "minor" misconduct. I am not prepared to accept that the Employer had "just cause" for the termination.

In brief, the appeal is dismissed.

ORDER

Pursuant to Section 115 of the Act, I order that Determination in this matter, dated November 13, 2000, be confirmed.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal