

**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 -

Audrey Smith

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Geoffrey Crampton

**FILE NO.:** 99/033

**DATE OF HEARING:** March 31, 1999

**DATE OF DECISION:** April 15, 1999



commencing work at 5:00 p.m., Ms. Smith spoke to Rebecca Echon (Esposito's accountant) and told her that she refused to comply with the Employer's policy of requiring bartenders to reimburse "cash shortages". She also showed Ms. Echon a copy of the relevant section of the *Employment Standards Act*.

There is no dispute that the Employer's policy requires staff to reimburse "cash shortages". According to Mr. Gregory Buck, CA "... this is the only accountability the have for money entrusted to them for their shift."

The President of the company, Paul Esposito, met with Ms. Smith and Ms. Echon shortly before 5:00 p.m. During their brief meeting Ms. Smith advised Mr. Esposito that she would refuse to reimburse "cash shortages" and referred to the provisions of the *Employment Standards Act* which prohibits unauthorized deductions from wages. Mr. Esposito confirmed that he expected all staff who handled cash to pay their "cash shortages" and advised her: "...if you can't accept this, you should go home." Ms Smith replied by stating that she did not want to quit and that she would not quit as she enjoyed her job. In Mr. Esposito's view Ms. Smith was "pleading to be fired." Ms. Smith disagrees strongly with that view.

The Record of Employment ("ROE") which was issued on July 29, 1998 showed dismissal (code "M") as the reason for issuance

Gregory Buck testified that he is a chartered accountant who provides professional advise to the Employer. He arrived to meet with Mr. Esposito while Ms. Smith, Ms. Echon and Mr. Esposito were meeting. Since the office door was open, he heard their conversation. Mr. Buck testified that he heard the following exchange:

Smith: I will not quit

Esposito: You'll have to go home if you won't follow the policies.

Smith: You'll have to fire me. I won't quit.

Esposito: What reason should I put on your documents?

Smith: It doesn't matter to me...that's up to you. When can I pick-up final paperwork?

After Ms. Smith left the office Mr. Buck reviewed her personnel file with Mr. Esposito and concluded that there were a number of incidents which "...would be sufficient for termination."

Esposito has a typical electronic accounting/cash management/inventory control system in place. All liquor and food sales must be entered into the cash register before any products are served to a customer. All employees who handle cash are required to prepare a "deposit" at the end of their shift which records the cash receipts and credit card vouchers.

These amounts are compared against the cash register reports and, if all transactions are recorded correctly, the amount deposited should be the same as the revenues recorded in the cash register. Employees are allowed to count their “deposit” in the presence of another employee (auditor) who confirms its accuracy. However, it is not until the next working day that an employee is advised whether his or her “deposit” matched the cash register report.

Ms. Smith testified, and this was not rebutted or challenged by the Employer, that she often worked with another bartender with whom she shared a cash drawer although each had a unique key for entering sales on the cash register. Furthermore, she testified, the manager would often enter sales and make cash transactions from the same cash drawer when the pub was busy. There was only one cash drawer in the cash register she used.

The following memorandum, dated October 4, 1996 appears in Ms. Smith’s personnel file:

Further to our previous conversation regarding the unsatisfactory conduct of yourself with a regular customer, Bill Black, combined with an unpleasant incident with Mr. Buck on October 1, we would like to warn you that we can no longer tolerate a similar incident to happen. Due to these incidents, I am placing you under probation. In conjunction with the commitment you’ve made to Finnegan’s Pub and myself, if these types of incidents will happen again, you will be dismissed immediately.

Ms. Smith was disciplined by her Employer as a result of an incident on August 16, 1997. A memorandum dated August 18, 1997 contains the following:

It has been brought to my attention that your attitude toward customers and staff to say the least is less than pleasant. During the course of last Saturday evening, I overheard your discontent about working several times and notice the friction that was caused between yourself and several staff members. This type of behaviour is unwarranted and causes me to suspend you from work without pay from Tuesday, August 19 to Friday, August 22. I am informed that you leave for holidays after that period and trust your extended holidays will serve you well. On the matter of dress standards, more appropriate shorts or slacks should be worn. They should be pressed and neat in appearance.

If this situation ever reoccurs, consider this letter as your two week notice of termination as bartender at Finnegan’s Pub.

Ms. Smith acknowledges that she gave “Sole to Soul Massage for Every Body” business cards to Esposito’s customers. However, when requested by Mr. Esposito to cease doing so, she complied with his request. Her employment was not terminated at the time of that incident.

Another incident occurred on June 5, 1998 which gave rise to the following memorandum to Ms. Smith:

It is our responsibility that we provide safety for our employees. For us to provide this we ask for you to use the Hotel entrance for leaving our premises and making sure that front desk is notified when you are leaving.

Also, when visiting another establishment we ask that you refrain from wearing your uniforms so that Finnegan's Pub/The Inn at King's Crossing doesn't cause any embarrassing situation for each party.

The Determination is set out as follows:

**Allegations**

In your complaint you alleged you were owed for overtime, statutory holiday pay, compensation for length of service and unauthorized deductions from you wages.

I have completed my investigation into these allegations. These are my findings:

The payroll records of the company indicate that you were paid in full for all overtime and statutory holidays. There were unauthorized deductions for uniforms and cash shortages and these were repaid to you by a cheque in the amount of \$189.87 sent to you on 23 November, 1998 through my office. The issue remaining is that of the employer's liability to pay compensation for length of service. In this regard, your employer claims to have just cause for your dismissal and thus is discharged from that liability pursuant to section 63(3)(c) of the Employment Standards Act.

The just cause cited was the fact that you were engaging in the business of providing massage services to the customers of the bar where you worked and you passed out business cards for that purpose. The employer regarded this as a threat to the reputation of his business and warned you about it on a previous occasion before dismissing you on a subsequent offence.

I agree with the employer that the conduct cited above was liable to cause irreparable harm to the reputation of the business. As a result, your claim for compensation for length of service is dismissed.

Your complaint will now be closed on our file.

[Reproduced as written]

**ANALYSIS**

I begin my analysis by commenting on certain aspects of the Determination. The form of the Determination is somewhat confusing in that the entire text (except the first two lines) falls under the heading of "Allegations". However, it is clear that the Determination sets out not just Ms. Smith's allegations and, in fact, the Director's delegate determined that Esposito's had just cause to terminate Ms. Smith's employment because she was "...engaging in the business of providing massage services to the customers of the bar...and ...passed out business cards for that purpose." As a result, Ms. Smith's claim for compensation under Section 63 of the act was dismissed.

In its written submission to the Tribunal, Esposito's gives a somewhat different set of reasons for dismissing Ms. Smith. The evidence and submissions lead me to find that the issue which resulted in Ms. Smith's employment being terminated on July 25, 1998 was her refusal to reimburse "cash shortages" (through payroll deductions) to Esposito's. The sole purpose of the meeting on that date was for Mr. Esposito and Ms. Echon to explain and to enforce the Employer's policy of having employees reimburse cash shortages. Such a policy is contrary to Section 21 of the *Act* which states:

**Deductions**

21. (1) Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.
- (2) An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations.
- (3) Money required to be paid contrary to subsection (2) is deemed to be wages, whether or not the money is paid out of an employee's gratuities, and this Act applies to the recovery of those wages.

"Cash Shortages" are an employer's business expense and, therefore, cannot be withheld or deducted from an employee's wages. Section 22(4) of the *Act* allows an employer to honour an employee's written assignment of wages to meet a credit obligation. However, there is nothing in the evidence before me which would suggest that Ms. Smith authorized any deduction from her wages. On the contrary, Ms. Smith was quite emphatic that she did not authorize any deduction from her wages for "cash shortages" and Esposito's does not dispute that evidence.

To be clear, I find that the reason for Ms. Smith's employment being terminated on July 25, 1998 was her refusal to reimburse Esposito's for "cash shortages". However, having told Ms. Smith to go home if she would not follow the Employer's policy on cash shortages, Mr. Esposito entered into a discussion about what other reasons might be used

to explain or justify her dismissal. Mr. Esposito and Mr. Buck reviewed Ms. Smith's file after Ms. Smith had been dismissed. That review led Mr. Buck to conclude and to advise Mr. Esposito that "... any one of the infractions (in her file) would be sufficient for termination." I do not accept the Employer's submission that Ms. Smith's dismissal was due to "...misconduct and lack of cooperation and lack of professionalism towards company policy and towards customers." I find that Ms. Smith's employment was terminated because she refused to comply with a policy which contravened Section 21 of the *Act*. After making the decision to dismiss Ms. Smith, Esposito's sought to justify that decision by relying on her record of employment which, as can be seen from the summary set out above, was not unblemished. However, Ms. Smith's employment/disciplinary record does not constitute just cause for her dismissal.

The Tribunal's approach to interpreting and applying the "just cause" provisions in Section 63 of the *Act* has been applied consistently in the following manner:

Section 63 of the *Act* establishes a statutory liability on an employer to pay length of service compensation to an employee upon termination of employment. That statutory liability may be discharged by the employer giving appropriate notice to the employee, by providing a combination of notice and payment in lieu of notice to the employee or by paying the employee wages equivalent to the period of notice to which the employee is entitled under the *Act*.

The employer may be discharged from this statutory liability by the conduct of the employee where the employee terminates the employment, retires or is dismissed for just cause.

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.

*Kenneth Kruger, BC EST #D003/97 (at page 4)*

Based on the evidence in this appeal, Esposito's has not proved that Ms. Smith's conduct justified her dismissal without notice or compensation. The conduct described in the memoranda of October 4, 1996 and August 18, 1997 did not occur again. Thus, those disciplinary warnings served the purpose of correcting unsatisfactory performance and preventing future occurrences of similar conduct. On the evidence before me, I cannot find that Ms. Smith's conduct constituted a fundamental breach of the employment relationship or that she acted in a manner which was inconsistent with continuation of the employment relationship. (*Stein vs. British Columbia Housing Management Commission* [1992] 65 BCLR (2d) 181).

For all these reasons, I find that the Determination must be cancelled and that Ms. Smith is entitled to compensation for length of service under Section 63(2)(a) of the *Act* in the amount of two (2) week's wages.

**ORDER**

I order, under Section 115 of the *Act*, that the matter be referred back to the Director to calculate the *quantum* of compensation owed to Ms. Smith. I further order that the Determination be cancelled for the reasons given above. The monies held in trust by the Director should be released forthwith to Ms. Smith.

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**Geoffrey Crampton**  
**Chair**  
**Employment Standards Tribunal**

GC:bls