

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 -

Anton's Gourmet Fine Foods Corp.
("Anton's")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorna Pawluk

FILE NO.: 98/107

DATE OF DECISION: May 21, 1998

DECISION

OVERVIEW

This is an appeal by Anton's Gourmet Fine Foods Corp. ("Anton's" or the "employer") pursuant to Section 112 of the *Employment Standards Act* (the "Act") from a Determination dated January 27, 1998 issued by the Director of Employment Standards ("the Director").

ISSUE TO BE DECIDED

The issue is whether the employer under section 63 of the *Act* had just cause to dismiss Makan Mafi ("Mafi") who was employed by the employer as a cook.

FACTS

Mafi was employed as a cook from February 9, 1996 until March 30, 1997 when his employment was terminated by Antonio Finamore ("Finamore"), the manager of Anton's. Mafi filed a complaint with the Director, claiming he had been wrongly dismissed. The Director's delegate conducted an investigation and concluded that Mafi was owed \$5,643.54 for unpaid wages, vacation pay, statutory holiday pay, overtime, compensation for length of employment and interest.

The Delegate found that Mafi was the only cook on duty on March 30 when the computer malfunctioned requiring all orders to be taken manually. According to the findings of the Delegate, this caused confusion in the kitchen as the handwritten orders were difficult to understand. Mafi called Finamore to advise of the problems and Finamore told Mafi that the restaurant was busy and short-staffed and that he should stop complaining. Finamore then got angry, started to swear and told Mafi to leave the restaurant. Mafi stayed, but, according to the Delegate, the situation deteriorated when Mafi shouted from the kitchen through the bar area to the restaurant to clarify orders. At that point, Finamore returned and told Mafi to "get the fuck out of my restaurant and don't bother coming back". At that point, Mafi left. Mafi has no record of unsatisfactory work performance or job-related problem which the employer can rely on to justify the dismissal.

The Delegate interviewed two witnesses (a server and a customer) who confirmed Mafi's loudness, although the issue of profanity on the night in question was somewhat less clear. The Delegate found that profanity was commonplace in the restaurant and often was initiated by Finamore, himself, who also tended to get quite loud regardless of the circumstances. The Delegate described the situation in the restaurant that day as "almost impossible" and concluded that Mafi was trying to ensure that the orders were prepared and served to the customers. "It appears as if he needed assistance but receive little, if any". The Delegate concluded that Mafi was dismissed without just cause.

The parties had engaged in settlement discussions and agreed that if Antonio's paid Finamore \$3,000.00, the complaint would be dropped. Antonio's gave Mafi two cheques of \$1500.00 each, the first payable immediately and the other payable in a month. Finamore describes what happened next:

We had made arrangements at the bank that that cheque would be honored on that date. We had talked to Mr. Mafi to certify that cheque if he wanted to which he said he would. After approximately one month we were notified by the Labor Standards that the cheque was returned. We immediately called the bank and we found out that he deposit the cheque a later that he should of. We immediately contacted Mr. Mafi and advised him that why he put the cheque later and he said he would come by and pickup a replacement but instead he contacted the Labor Standards again. We feel that the Labor Standards made Mr. Mafi understand that he did not have to honor the deal by reopening the case. We feel if he would of known that he Labor Standards could play this game we wouldn't of settled with Mr. Mafi and disputed the whole claim. We ask this Tribunal to overturn this case. (reproduced as written)

With respect to the merits of the unjust dismissal finding in the Determination, Finamore argues that Mafi's behaviour was loud and profane. Finamore says that on four different occasions that evening he warned Mafi to stop his behavior.

Mafi says that the incident occurred on a Sunday when the restaurant normally had two cooks and three "prep" men. On the particular Sunday, Mafi was the only cook, with three "prep" men to assist. Mafi said that the hand written orders did not have table numbers or names so he asked Finamore for assistance. Finamore promised to speak with the servers but indicated that the restaurant was busy and short staffed, so go "give them a break". Finamore also told Mafi to stop complaining and do his job; Finamore then left. Mafi said that the situation deteriorated in the restaurant; in particular, the servers were not doing their part in the difficult situation. He called upon Finamore for assistance; Finamore returned to the kitchen and the two began to shout and swear at each other. He denies having been contacted after the second cheque was not honored by the bank.

The Director says that the settlement discussions which included the Delegate included one certified cheque and another regular cheque in settlement. No time restrictions for cashing the cheque were discussed and there were no other conditions placed on the last payment by Finamore. The officer was unaware of any discussions between Mafi and Finamore concerning a replacement cheque. Past experience in the Branch with this employer made the officer very reluctant to accept any form of payment other than a certified cheque or money order. The Director described unsuccessful six attempts to receive a replacement payment from Finamore but each was thwarted, in one way or another, by Finamore. The Director's submission notes that the employer does not take issue with several other aspects of the Determination only that pertaining to the compensation for length of service.

In final response, Finamore said that the Delegate spoke to two long time employees who verified Finamore's version of events. Finamore denies that Mafi was the only cook on

duty on the night in question: "we had four more cooks and when he left we continued to work very effectively".

ANALYSIS

With regard to the settlement, I begin by saying that much of the dispute could have been eliminated by a written account of the settlement. Nevertheless, it is clear that the employer failed to provide the employee with the second half of the settlement and that only \$1500.00 had been paid to Mafi in the settlement of his claim. The employer blames Mafi for failing to cash the cheque at the appropriate time and for the bank's inability to honor the cheque. There is no merit to this submission: there can be no doubt Antonio's and not Mafi bears full responsibility for this problem. The employer compounded the initial problem by repeated failures to cooperate with the officer to make good on the settlement agreement. Thus, the merits of Mafi's complaint is properly before me.

Section 63 of the *Act* requires an employer to pay compensation for length of service to any employee whose employment is terminated unless there is just cause. The test for just cause is whether the employee's conduct is inconsistent with the continuation of the employment contract. (*Stein v. British Columbia Housing Management Commission* (1992), 65 B.C.L.R. (2d) 181 (C.A.)) In this case, the only grounds put forth by the employer to justify its actions are events one night in the restaurant when the computer was not working and all of the staff were working under considerable and unusual stress. The Delegate concluded that the employer did not establish just cause and nothing put forth by the employer has convinced me this is incorrect. This is true even if I accept the facts as put forth by the employer.

Mafi had worked for this employer for over a year without incident but encountered unusual difficulty one evening. He raised his voice louder than usual and probably used profane language. But this action must be taken in the context of that evening and the general environment of the restaurant. It was an unusual situation on the night in question. The restaurant was busy and short staffed, and was in the midst of a computer breakdown. Significant, too, is the general environment of the restaurant. The evidence shows that offending acts of shouting and profanity occurred regularly and, indeed, were often initiated by Finamore who now puts forth those actions to justify his decision to dismiss Mafi. It is difficult to see how Mafi could have known his behavior was not acceptable and moreover, had never been advised that continuation of this unusual behavior would result in his dismissal.

ORDER

Pursuant to section 115 of the Act, I confirm the Determination dated January 27, 1998 in this matter.

Lorna Pawluk

**Adjudicator
Employment Standards Tribunal**