BC EST # D197/96

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1995, C.38

- by -

Broadway Entertainment Corporation
operating as
Wharfside Eatery
("Wharfside")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	Genevieve Eden
FILE NO.:	96/166
DATE OF HEARING:	July 9, 1966
DATE OF DECISION:	July 26, 1996

DECISION

APPEARANCES

Bruce Jordan	Counsel
Maria Morrison	General Manager of Wharfside Eatery
Gordon Trenaman	on his own behalf
Robin Walraven	on his own behalf
Ray Stea	on behalf of the Director of Employment Standards

OVERVIEW

This is an appeal by Broadway Entertainment Corporation operating as Wharfside Eatery ("Wharfside") pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") against Determination No. CDET 000815 issued by the Director of Employment Standards on February 8, 1996. The Director found that:

Gordon Trenaman ("Trenaman") was entitled to two weeks severance pay in the amount of $262.06 including interest

Robin Walraven ("Walraven") was entitled to two weeks severance pay in the amount of $556.54 including interest,

Sarah Beeston ("Beeston") was owed two weeks severance pay, nonpayment for scheduled hours of work, and minimum daily pay, for a total amount owing of $705.32 including interest.

In this appeal, Wharfside alleges that Trenaman, Walraven and Beeston were dismissed for cause.

A hearing was held in Victoria on July 9, 1996. It was agreed at the hearing that the appeal concerning Beeston would proceed on the basis of written submissions. This order pertains to the appeal concerning Trenaman and Walraven. All witnesses gave evidence under oath or affirmation.

Consideration of this appeal with respect to Trenaman and Walraven falls under the transitional provisions of the *Act*. Section 128 (3) of the *Act* states:

> *If, before the repeal of the former Act, no decision was made by the director, an authorized representative of the director or an officer on a complaint made under that Act, the complaint is to be treated for all purposes, including section 80 of this Act, as a complaint made under this Act.*

ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether the employer's liability to pay compensation for length of service has been discharged under section 63(3) of the *Act*. That is, has Wharfside demonstrated, on the balance of probabilities, that Trenaman and Walraven were dismissed for just cause.

While the employer alleges that both Trenaman and Walraven were dismissed for cause, the two matters are independent from one another. I will deal with each one in turn.

GORDON TRENAMAN

FACTS

Trenaman was employed by Wharfside as a Server from November 1992 to June 16, 1995. His employment was terminated without notice or compensation.

The Reason Schedule attached to the Determination includes the following statements:

> *Employer advises that the complainant's live-in partner stole a knife belonging to another employee and the complainant was an accomplice to the theft.*
>
> *The complainant's employment was therefore terminated for just cause, according to the employer.*
>
> *Mr. Trenaman submits that he did not know about the theft until several days later and when it came to his attention he told his partner, who had taken the knife, to return it, which she did.*
>
> *Mr. Trenaman's partner, Kira Gerwing, confirms that the complainant had no knowledge of the theft and he instructed her to return the knife when she told him about it.*
>
> *After advising Mrs. Maria Morrison, representing the employer that there was no evidence to support her allegation Trenaman was involved directly or indirectly in the theft, she submitted that the complainant's employment was terminated because he told her to f___ off during a conversation regarding his alleged involvement in the above-noted theft.*

The Determination was appealed on March 4, 1996. The Reasons for Appeal state that Trenaman was dismissed for cause and was guilty of gross insubordination towards management. In a subsequent letter to the Tribunal dated April 9, 1996, the employer again took the position that Trenaman had engaged in an act of gross insubordination by language

directed toward his employer which it submitted constituted just cause for dismissal. At the hearing, the employer reverted to its original reasons for dismissal noted on the Determination, that is, that Trenaman was involved in a theft and kept the incident of theft from management. This was considered an act of dishonesty warranting dismissal. The employer made it clear that the cause they were relying upon was involvement in theft.

It is common ground that a former employee of Wharfside "Kira" took a knife from the kitchen at Wharfside. She later learned that the knife in question belonged to another employee, Andrea M. On June 16, 1995, Kira spoke to Andrea M. and arranged to return the knife. Andrea M. then informed the management of Wharfside of the discussion.

Maria Morrison ("Morrison"), the General Manager of Wharfside, and Andrea Jackson ("Jackson"), a manager reporting to Morrison, met later on June 16, 1995 with Kira. Handwritten notes dated the same day, and signed by Morrison and Jackson, contain the following statements:

- *"Gord was with me"*
- *"Forgive & lighten up"*
- *"It wasn't personal, it was an urge"*
- *"It is between Andrea & me"*
- *"I don't have to justify it."*
- *" I saw the knife there, I didn't know it was Andrea's so I took it."*

The foregoing statements, enclosed in quotations on the notes, are followed by two brief paragraphs, not in quotations, stating that Kira admitted to stealing the knife, that she thought it was a kitchen knife and no one would notice it, and that she would return it. Morrison maintained that Kira returned the knife when she recognized it was not the company's, rather it belonged to Andrea.

Evidence was heard with respect to the foregoing discussion from Morrison and Jackson. They both testified that, in addition to their handwritten notes, Kira also stated at the meeting "Gord told me not to do it".

Also, while the notes include the statement "Gord was with me", Morrison's evidence is that Kira said "Gord was with me when I took the knife". Morrison also testified that "it was without a shadow of doubt she was implying that Gord was with her when she took the knife". When queried on cross examination regarding omission of the latter part of the statement "when I took the knife" on her notes, Morrison continued to maintain that Kira's statement included the reference to Trenaman being there when she took the knife and that the notes were written quickly as a memory jogger and did not reflect every word that was said.

Jackson's evidence was that she was "quite sure" that Kira said "Gord was with me when I stole the knife". On further cross examination she stated "I definitely know she said Gord was with me", "I can't remember word for word" and "I'm not positive about what was said after".

Kira was dismissed by Morrison that same day, June 16, 1995.

On June 17, 1995, Morrison met with Trenaman on the mezzanine of Wharfside. Handwritten notes by Morrison of the same date contain the following statements:

> *- opening statements by Maria Morrison.*
> *"You know why you are here, you are an accesory (sic) to a crime, you are in possesion (sic) of stolen property. You have broken 2 crimes under the criminal code."*
> *- Gord said, "I told Kira not to do it!"*
> *- I told him he was done. Got up & walked away. He then shouted "fuck you" I turned around and then Gord, said "yeah I said it." I told Gord, "You are fired for insubordination."*

These notes conclude with a statement signed by Jackson that she heard Trenaman tell Morrison to "fuck-off" and Morrison then told him that he was "fired for insubordination". However, at the hearing, Jackson stated she could not make out any words said between Trenaman and Morrison and that she couldn't recall whether he uttered the expletive.

Trenaman filed a complaint with the Employment Standards Branch on August 15, 1995 claiming severance pay. In a letter to the Tribunal dated April 7, 1996 Trenaman sets forth his position on the matter. He submitted that he was not involved directly or indirectly in any theft, nor was he aware of the alleged theft until the day before Kira returned the article when he told her to take it back. He asserts that, if anything, he was instrumental in the ultimate return of the knife. The letter includes Trenaman's acknowledgement that he said "f___ off" or "f___ you" at a point of exasperation with just having been falsely accused and wrongfully dismissed.

Evidence was also heard regarding management's response to this and other thefts occurring at Wharfside at the time. Other items had also been reported missing including a bike, wallet and scales. Morrison testified that when she became aware the knife was stolen shortly after June 3, 1995, she called two meetings warning the staff not to bring valuables to work. Several staff members were unable to attend given the necessity of covering the floor. According to Morrison the word of theft spread like wildfire.

Three other witnesses testified at the hearing -- Justine Till ("Till"), Elizabeth Bryan ("Bryan"), and Demian Merino ("Merino") all current or former employees of Wharfside. Jackson, Till, Bryan and Merino all testified that they were aware at the time that a knife had been stolen and that other things were missing at Wharfside. All four witnesses used the word "shock" or "shocked" to describe management's response. Three of the witnesses (Jackson, Till, Merino) were aware Morrison held one or two staff meetings regarding the missing articles. However, only Merino actually attended one of these meetings and he could not recall who else attended.

Morrison also testified regarding a warning Trenaman had been given on June 3, 1995 for refusing to comply with a Wharfside policy that staff pay a tip pool to the bartenders.

According to Morrison, Trenaman had stated he didn't agree with the policy and felt it was his right to be a "pot stirrer" if it got management to look at situations that needed to be addressed. This was regarded as an aggressive act towards the company which was not tolerated.

Trenaman's recounting of the knife incident is that he was in the staff room alone with Kira when she picked up a knife on the table and said she thought she would take it home with her. Trenaman testified: "I said Kira you don't need it, put it down. So I went to start my shift." Trenaman's evidence is that, to the best of his knowledge, the knife was put back on the table before he left.

According to Trenaman, he had not been at any meetings held by Morrison where missing articles had been discussed, and he never thought about the matter again until it came up later in conversation with Kira. His evidence is that "I said to Kira, you should take this back; I said it should be returned."

On cross exam, Trenaman insisted he had not been been aware of theft of the knife until the day prior to its return. In response to a query whether he was aware other articles were missing, Trenaman stated:

> *"No I wasn't, there were discussions, I wasn't present at the meetings. It was hearsay. I don't recall anything specific. Thefts were going on on a regular basis."*

On further cross exam, Trenaman again acknowledged that he was aware of thefts from general discussions but was not aware of specific incidents. When pressed regarding the time frame of his knowledge of such thefts in relation to the knife incident, Trenaman stated "the incident occurred previous to my awareness of other incidents of theft". When Jordan put to him "But after this incident you were fired", Trenaman responded "the incident occurred some time before; there was a time lag between the theft and return of the knife". Although Trenaman could not say for certain, he thought the time lag might have been about two weeks. During this period, he had heard general conversations about thefts, but there was nothing concrete; it didn't sink in. He maintained there were thefts every summer; as an example, Kira's bike had been stolen the previous summer. He also maintained that theft was a problem in other establishments he had worked in over several years in the hospitality industry, especially over the summer with new staff. Trenaman asserted he did not hear of the knife theft and did not make any correlation between the general discussions of thefts and Kira's comments regarding the knife in the staff room. He contended that the knife discussion had been "done humorously by her" and it never crossed his mind afterwards.

Trenaman apologized at the hearing regarding his response to Morrison at the termination meeting on June 17, 1996. He said he reacted spontaneously in frustration at being dismissed for something he was not involved with and taken aback when falsely accused.

ARGUMENTS

Jordan ("Jordan"), on behalf of the employer, argued that Trenaman had been fired for cause for his involvement in theft of the knife. Kira had been living with him at the time, and faced with the issue of credibility, more reliance should be placed on the version of evidence by the employer according to Jordan.

Jordan submitted Trenaman was present at the time of the theft, and that he acquiesced to the deed in that he knew thefts were occurring and didn't bring the knife incident to the attention of management. He maintained that reliance should be placed on Jackson's evidence as she was the least interested party and she had confirmed that Kira said Trenaman was there when she took the knife. Although she may have wavered under intense cross exam, account should be taken of the obvious pressure, and that she was nervous and upset, but nevertheless said there was something beyond the statement "Gord was with me". Her testimony was consistent with Morrison's who had not been shaken on cross exam and said the notes were not meant to be verbatim of the entire conversation according to Jordan.

Jordan noted that Kira had not been called as a witness and submitted that an adverse inference should be drawn that the testimony she would give would not support the evidence of Trenaman.

On reviewing Trenaman's testimony, Jordan maintained that Trenaman had gone from no knowledge of a theft problem, to knowledge of the problem only after the knife incident, to knowing theft was an annual problem. Jordan found it significant that it never twigged in Trenaman's mind to approach his partner and question her about the knife.

Jordan submitted that, on the balance of probabilities, it was clear Trenaman was covering something up. The evidence supported that he was present at the time Kira took the knife and he acquiesced to the theft in that he did not bring this to the attention of management. That acquiescense was involvement in theft and a dishonest act according to Jordan.

Jordan cited a BC Court of Appeal decision, *Durand v. Quaker Oats Co. of Canada*, (1990) 32 C.C.E.L. 63 in support of the proposition that dishonesty is grounds for summary dismissal. *McPhillips v. British Columbia Ferry Corp.* (1994) 5 C.C.E.L. (2d) 49 was also referred to wherein it was stated at page 54 "Dishonesty is always cause for dismissal because it is a breach of the condition of faithful service. It is the employer's choice whether to dismiss or to forgive." Jordan submitted it was clear that a single isolated act of dishonesty is grounds for termination and that the Court has held that progressive discipline is not appropriate.

Jordan further argued that Trenaman's involvement in theft revealed enough of Trenaman's character that Morrison could no longer trust him. Further, her previous run-in with Trenaman two weeks before was a revelation of his character confirmed by Trenaman's subsequent antics when he verbally abused Morrison. This behaviour revealed that Trenaman was not prepared to carry on in a trusting relationship with his employer.

Jordan added that trust in the employment relationship is particularly important in the hospitality industry given that so many employees deal with large sums of money. He emphasized that the evidence revealed the seriousness with which management took this episode and how seriously management regards the relationship of trust.

Jordan concluded that a finding must be made of dismissal for just cause.

Trenaman argued that the employer seemed to be asserting that, since he had general knowledge of thefts occurring, that he knew about the knife being taken. He submitted that his evidence was that he did not know about this until it came up some time later in discussion with Kira. He added that he would not be at the hearing for the amount of about $250 if he didn't feel wrongly accused and that he was not involved in the theft.

Stea argued that no definitive evidence was heard that Trenaman stole the knife or was an accessory. He maintained that the only evidence close to suggesting Trenaman was present at the time were the notes taken by Morrison and Jackson on June 16, 1995, and that, at the hearing, they added "when I stole the knife" to Kira's alleged statement that "Gord was with me". However, Trenaman's evidence was that he was not in the staff room when the knife was taken. Stea questioned Jackson's credibility having testified that she had not heard what was said between Morrison and Trenaman when Trenaman was dismissed but that her signed statement of June 17th was that she heard Trenaman tell Morrison to "fuck-off" and Morrison then told him that he was "fired for insubordination".

Stea argued that, if an adverse inference was to be drawn about Kira not being called as a witness, it should be against the employer given that it was the employer who had led evidence quoting Kira.

Stea submitted that, with the information Morrison had, she extrapolated to the extent that Trenaman had been involved. He argued that the evidence revealed that Trenaman took Kira's comments about taking the knife as a joking suggestion, that he left the staff room and didn't think about it again. When it came up in conversation some time later, his immediate response was to take it back and that Kira arranged to return it the next day. According to Stea, this was not the behaviour of someone who would assist in stealing.

Stea concluded that there was absolutely no evidence that Trenaman had participated in a theft, or equally important, that he had knowledge of the theft. Moreover, it was the responsibility of the employer to have far more evidence before accusing someone of theft or that they had participated in or had knowledge of it.

ANALYSIS

Section 63 of the *Act* provides that when an employer terminates the employment of an employee, the employer is liable to pay the employee compensation for length of service. The

liability is discharged, however, if written notice is given to the employee, or if the employee is dismissed for just cause.

The burden of proof for establishing that Trenaman was dismissed for just cause rests with the appellant employer, Wharfside.

A knife was stolen and within two weeks arrangements were made for its return. Trenaman did not steal the knife. The employer alleges that Trenaman was present when the knife was stolen; Trenaman's evidence is that he was not. The employer relies on a statement that it purports was made by Trenaman's then live-in partner, Kira, that Trenaman was present at the time. The employer's evidence is not based upon personal and direct observations or knowledge that Trenaman was present, rather the witnesses were repeating what they allege Kira said to them. Kira's statement, even if made as purported by the employer, is an unsworn statement made outside the hearing room and put into evidence by the employer who is not the author of the statement. In effect, the employer's testimony regarding this statement was hearsay evidence. The difficulty with such evidence is that its reliability cannot be tested on cross examination. There is no direct, sworn evidence that Trenaman was present when the knife was stolen.

Further, I am not satisfied that Kira did say that Trenaman was present when she took the knife. Without impugning the credibility of Jackson's testimony, she appears to have a less-than-perfect recollection of exactly what was said. With respect to Morrison's testimony, her initial evidence that "it was without a shadow of doubt she was implying that Gord was with her when she took the knife" casts reasonable doubt on her subsequent testimony that Kira actually said Trenaman was with her when she took the knife. Moreover, the handwritten notes do not contain the latter phrase "when I took the knife". I note that the meeting in question took place over a year ago; memories can fade over time. It may well be that Morrison believed that Kira was referring to Trenaman's presence when she took the knife, but I am not satisfied that this was actually stated.

Trenaman's direct, sworn evidence is that he was not present at the time the knife was taken. Trenaman was forthright in his testimony and his statements were consistent throughout the hearing and with the Determination issued. He freely acknowledged that he was present when Kira made comments about taking the knife but assumed it was in jest.

I reject the employer's submission that I should find an adverse inference against the employee for not calling Kira as a witness. According to the Determination, the employer changed its reason for dismissal from being an accomplice to theft to an allegation that Trenaman had said f___ off to Morrison. Moreover, both the reasons for appeal, and subsequent communication to the Tribunal, refer to alleged insubordination on Trenaman's part; there is no mention of the theft. It is simply not open to the employer to argue that an adverse inference should be drawn for not calling a witness to testify about circumstances regarding theft when the reasons for appeal indicate a reliance on insubordination as the cause for dismissal.

Based on the evidence before me, I am not satisfied that Trenaman was present when the knife was stolen.

I am also not satisfied that Trenaman had knowledge of the knife theft during the approximate two weeks following the incident. In short, there is no clear and unequivocal evidence that Trenaman had such knowledge. There was no evidence that Trenaman had attended the staff meetings conducted by Morrison; indeed three of the employer's witnesses had not attended the meetings. I do not have difficulty with Trenaman's testimony during the course of cross examination regarding his knowledge of the thefts. He readily acknowledged at the outset that he was aware of thefts from general discussions he'd heard but that he did not recall specific incidents. Further, I do not find it improbable that Trenaman assumed Kira's comments were made in jest. Nor do I find it improbable that he did not associate her comments with the thefts. Therefore, I reject the employer's suggestion that, because Trenaman had knowledge of thefts at Wharfside, he should have asked Kira about the knife.

I also reject the employer's submission that Trenaman's character was such that he could no longer be trusted by the employer. The prior warning given to Trenaman regarding his refusal to pay the tip pool to bartenders was not characterized as an act of dishonesty in the documentation completed at the time, nor in testimony at the hearing, rather it was regarded as an aggressive act towards management. I am not satisfied that this incident reveals anything of Trenaman's character that bears on the issue of trust in the employment relationship. Further, I do not find that Trenaman's uttering of the expletive reflects negatively on his character in the circumstances. There are no clear and unequivocal facts supporting a conclusion that his conduct during the discussion was more than an emotional response to the belief that he was falsely accused, dismissed, and not given an opportunity to explain what role, if any, he had in the events.

The employer's own evidence from two witnesses was that Kira said "Gord told me not to do it". This is not illustrative of an untrustworthy character. I find it surprising that the employer never explored this statement further, either with Kira, or particularly with Trenaman. Even if the employer believed Trenaman was present during the incident, I find that it was incumbent on the employer to ask for a further explanation of what Trenaman's
role was given that he told her not to do it.

Cause must be determined objectively. It is well established in law that if cause objectively determined does not exist, the employee must be provided with notice. The subjective reactions or honest intention of the company are not the standards utilized by the courts.

Based on the evidence before me, I conclude, on the balance of probabilities, that Trenaman was not involved in theft at Wharfside. Wharfside has not provided sufficient evidence to substantiate its contention that Trenaman was present at the time the theft occurred nor that he acquiesced to it. The employer has not discharged the burden of establishing that just cause for dismissal exists, and I deny the appeal.

FACTS

Walraven was employed by Wharfside as an Expediter/Runner from July 28, 1994 to September 1995. His employment was terminated without notice or compensation. While his last day worked was September 9, 1995, the employer's evidence was that the actual termination date was either Monday, September 11, 1995 or Tuesday, September 12, 1995.

The Reason Schedule attached to the Determination includes the following statements:

> *Mrs. Maria Morrison advises that the complainant was intoxicated the night before his termination of employment. Mrs. Morrison and her husband had attended the same party where Mr. Walraven was drunk and allegedly 'bad mouthing' the Wharfside Eatery.*
>
> *The following day, Walraven called in sick and spoke with one of the restaurant managers who directed him to obtain a physician's certificate confirming his illness.*
>
> *Mr. Walraven admits to being intoxicated at the subject party but advises he believes he had the flu and that is why he called in ill. He did not see a doctor.*

The Director's delegate, Ray Stea ("Stea") determined that the situation required some form of progressive discipline as opposed to the ultimate penalty of dismissal and concluded that two weeks severance pay was owed to Walraven.

The Determination was appealed on March 4, 1996. The Reasons for Appeal state that Walraven was dismissed for just cause when he did not show up for work stating that he had a hangover and refused to report despite instructions to do so. An affidavit submitted to the Tribunal prior to the hearing by Maria Morrison ("Morrison"), General Manager at Wharfside, states that Walraven was terminated for not following established policy and for not reporting to work on September 12 and 13, 1995. The position taken by the employer at the hearing was that Walraven breached company policy and had not shown up for work on Sunday, September 10, 1995 and Monday, September 11, 1995 which constituted abandonment of his job.

Failure to follow policy

Wharfside has a policy requiring employees to bring in a doctor's note the day after any absence due to illness. This policy is common knowledge among the staff. It is distributed at orientation and discussed at general staff meetings. A policy was submitted in evidence reflecting the requirement for a doctor's note. Although the policy had been updated since Walraven's dismissal, evidence substantiated that the following language was virtually identical to that in effect during Walraven's employ:

> *Should you be sick and not be able to cover your shift you must provide a doctor's note the following day.*

On Saturday, September 9, 1995 Walraven attended a party which many or most of the Wharfside staff also attended. Walraven admits he was intoxicated at this party.

In recounting the circumstances of his absence, Walraven testified that he first started feeling sick when he came to work on Saturday, September 9, 1995. He did not communicate this to anyone at the time. He went to the party that night where he became intoxicated. He got home around 5.00 a.m. and by this time his cold had worsened and he had difficulty swallowing. His shift was scheduled to start at 11.00 a.m. His intent was to sleep and try to rest and go to work.

About an hour before his scheduled shift on Sunday, September 10, 1995, Walraven called Lorill Fraser, a sous chef at Wharfside, and said he would not be in. Shortly thereafter, he received a call from Andrea Jackson ("Jackson"), a manager, who queried his absence.

Walraven's version of the phone call with Jackson is that he advised her he would be absent because he was sick. Walraven readily acknowledged he was also hungover but denied this was the reason for his absence. His evidence is that "from the conversation she seemed to fire me". Excerpts from his transcript of the telephone conversation read:

> *...*
> *AJ: Reuben? You have to get your ass down here.*
> *RW: I'm not getting my ass down there because I'm totally sick.*
> *AJ: You were out last night...*
> *RW: So what? I was sick too. I was sick at the time. And now I'm totally sick.*
> *...*
> *AJ: ... it's Sunday. You're fucking us over here. Everybody's hung over but they've come in. I realize you're sick and not hung over, but Jesus...*
> *RW: I'm hung over and I'm sick. That means that I can't swallow and I've got a cold. (pause)*
> *AJ: Uh, ok, you've got a choice.*
> *RW: What?*
> *AJ: Either come in or don't come in.*
> *RW: What do you mean?*
> *AJ: Either come in today or don't come in.*
> *RW: At all?*
> *AJ: Hmhm. (pause) It'll only be for a couple of hours here.*
> *RW: Couple of hours?*
> *AJ: It's Sunday, we're just gonna get screwed. Shane is not in today either.*
> *RW: Ok.*
> *AJ: Which...what's it gonna be? We do need you.*
> *RW: Ok.*

> *AJ: If you come in, it'll only be for the time that we do need you. Other than that, I can keep my runners on. And then we can just send you home. Through that rush, Sunday rush.*
> *RW: Forget it, like I'm sick. I'm not coming in there.*
> *...*

In a sworn affidavit submitted to the Tribunal prior to the hearing, Jackson stated that, in this telephone conversation with Walraven, she reminded him of the restaurant policy requiring a doctor's note for all missed shifts. However, on cross examination she stated she could not remember whether she had reminded Walraven of the policy. She ultimately acknowledged that she now realized the statement in her affidavit was not correct and that Walraven's transcript of the telephone conversation was accurate.

Jackson testified that Walraven stated at the party that he wasn't going to be showing up for work the next day and that these comments could be heard by others present. Walraven denied making the statement.

On Monday, September 11, 1995, Walraven called Morrison, General Manager at Wharfside. Morrison's sworn affidavit submitted to the Tribunal prior to the hearing includes the following statements:

> *On or about September 12, 1995 I was contacted by telephone by Robin Walraven who asked me if he still had a job at the Wharfside Eatery.*
>
> *I informed Mr. Walraven that he still had a job provided that he could comply with restaurant policy and provide me with a doctor's note explaining his absence the previous day.*

Morrison's evidence regarding the date of this conversation was that "I spoke to him, I believe the next day", that is, the day after the telephone conversation with Jackson on Sunday. This would fix the date of the telephone conversation as Monday, September 11, 1995 according to Morrison's evidence.

Walraven's letter to the Tribunal regarding his telephone conversation with Morrison includes the following statements:

> *Later (I don't recall whether it was Sunday or Monday, but according to Ms. Morrison's statement it was Monday), I called and talked with Ms. Morrison on the phone. She advised me to get a doctor's certificate and "work it out" with Andrea.*

Walraven's letter then describes what happened subsequently:

> *On Tuesday afternoon (September 12th), I went into the Wharfside Eatery to check my status. When I looked at my work schedule, I noticed that my shifts had been*

*crossed out and overwritten with the word "**FIRED.**" I then talked with the General Manager, Justine Till, and she informed me that I had indeed been fired.*

Walraven acknowledged he was aware of Wharfside policy requiring a doctor's note for absences and that he did not make an effort to get one. His reason for not obtaining a doctor's note was "because I had a cold and I don't see a doctor just for a cold" and "as far as I was concerned I was already fired". Walraven initially thought he was fired in his telephone conversation with Jackson and this was later confirmed by Till.

Evidence was also heard regarding enforcement of the policy. Morrison testified that, in applying the policy requiring a doctor's note, an employee can either bring in a doctor's note or "come in and show me how sick they are"; the choice is left to the employee. She said she was hard line on the policy and that she abided by it; if there were exceptions it was because employees had come in and she had made a judgement call about how sick they were. She would then send them home, if necessary in a cab, or "make them go to a doctor". In any event, she could not recall any exceptions made to the requirement to do one or the other and the consequences of not doing so was, without exception, dismissal.

Elizabeth Bryan, a Server at Wharfside for the last five years, testifed that "in five years I've seen both suspensions and automatic dismissals for no shows". "No shows" were absences where a doctor's note had not been submitted. Melissa Nagelbach ("Nagelbach"), an employee at Wharfside, testified that, on one occasion, she called in sick and didn't have to bring in a doctor's note. In reply evidence, Morrison stated that the manager who had not required a doctor's note from Nagelbach was no longer with the company and she had not applied the policy properly.

Walraven had been previously warned for "drinking on duty" on September 2, 1994. The employer's version of this incident is that he had been seen drinking a beer of an off duty employee who was sitting at the bar. Walraven's comments on the warning form are "I am sorry. I was thirsty so I took one sip. Next time won't be an issue. Won't happen again." At the hearing he admitted it was "a stupid thing to do". There were no other reprimands or transgressions during his employ.

Failure to Report for Work & Abandonment of Job

In dispute is whether Walraven was scheduled to work Monday, September 11, 1995. Morrison testified "I believe so" when queried whether Walraven was scheduled to work Monday. Her later evidence was that Walraven's shifts were definitely Sunday and Monday. Her sworn affidavit submitted to the Tribunal prior to the hearing stated Walraven was terminated for not following policy and for not reporting to work on September 12 and 13, 1995; this would be Tuesday and Wednesday. At the hearing, Morrison stated she could have mixed up the dates. She thought his termination date was Monday or Tuesday but she was "not too clear about that" and wasn't sure what the records showed.

Joseph Bergstom ("Bergstom"), Chief Kitchen Manager at Wharfside, testified that Walraven missed a shift on Monday, September 11th. When asked "How do you know Walraven was scheduled that shift?", Bergstom replied "On my days off we schedule a full time expediter, I was off Sunday and Monday, those were my days off." When queried on cross exam by Walraven "Were you aware that I had to go to school on Monday?", Bergstom replied "Yes, but not your schedule".

Walraven's evidence was that he was not scheduled to work on Monday as he returned to school that week and was not scheduled until Saturday.

ARGUMENTS

Jordan, on behalf of the employer, argued that a clear policy had been communicated to the employee and a clear breach of the policy had been admitted. The issue is whether progressive discipline should have been applied.

Jordan referred to the BC Court of Appeal case *Stein v. British Columbia Housing Management Commission* [(1992) 65 B.C.L.R. (2d) 181] wherein Madame Justice Southin stated at page 185:

> *I begin with the proposition that an employer has a right to determine how his business should be conducted. He may lay down any procedures he thinks advisable so long as they are neither contrary to law nor dishonest nor dangerous to the health of the employees and are within the ambit of the job for which any particular employee was hired. It is not for the employee nor for the court to consider the wisdom of the procedures. The employer is the boss and it is an essential implied term of every employment contract that, subject to the limitations I have expressed, the employee must obey the orders given to him.*
>
> *It is not an answer for the employee to say: "I know you have laid down a rule about this, that or the other, but I did not think that it was important so I ignored it."*

Jordan argued that there were also aggravating circumstances in this case. Walraven had been previously disciplined with a written warning. Second, Walraven missed two shifts, the Sunday and Monday shifts. Bergstom had testified that when he was not scheduled to work, an expediter was required to be there. His usual days off were Sunday and Monday which meant Walraven was scheduled to work those days. This was consistent with Morrison's testimony that Walraven was scheduled to work on Monday. Jordan argued that where an employee has missed two days of work, it is clear that he's abandoned his job. One day in particular Walraven left his employer scrambling to cover his shifts.

Jordan argued it's a fundamental implied term of the employee/employer arrangement that an employee show up for work and breach of this is grounds for dismissal.

Jordan argued that the evidence revealed Walraven called in but the circumstances were that he knew the night before he was not feeling well; nevertheless he went out and got into a state of intoxication and was drinking until 5.00 a.m. He submitted that drinking to intoxication and staying up to 5.00 a.m. are not the actions of someone intending to show up for work that day. Moreover, Jackson's evidence revealed that he stated he would not be showing up for work the next day.

A significant issue, according to Jordan, was the public nature of the incident. Walraven had been intoxicated at a party where many if not most Wharfside employees were present. However, Walraven's transcript revealed that the other employees showed up for work the next day. A large number of employees knew Walraven had been intoxicated. Jordan maintained that, when an employee lets fellow employees down, it's unreasonable to expect the employer to merely issue a reprimand. A mere reprimand would create resentment among other employees and would create contempt among other employees for both the policy and for management according to Jordan. The evidence revealed that management took the policy seriously and enforced it strictly.

Jordan asserted that Walraven not only breached company policy and an implied condition of employment, but that he also demonstrated contempt for the policy, management, and fellow staff. He concluded that no other conclusion could be reached but that just cause for dismissal had been established.

Walraven argued that the evidence revealed that he had called in sick; he was hungover, but he was also sick. He stated it was the first time he had called in sick in 14 months; he could not understand getting fired for calling in sick once. He believed that the previous warning was irrelevant to this case. He felt that the circumstances justified a warning, but he did not think that dismissal was right for what he did. He added that he had liked working at Wharfside and couldn't believe he was in this situation.

Stea argued that there was no evidence that Walraven abandoned his job as asserted by the employer. In fact the evidence clearly refuted that assertion in that someone had written "fired" on Walraven's schedule and Till confirmed that he had been fired.

Stea referred to a passage entitled "Breach of Rules or Company Policies" from the first edition of Levitt's *The Law of Dismissal in Canada* at page 103 in support of the proposition that companies must establish the following factors for breach of company rules:

1. The rule must be distributed.
2. The rule must be known.
3. The rule must be consistently enforced by the company.
4. Employees must be warned that they will be terminated if a rule is breached.
5. The rule must be reasonable.
6. The breach must be sufficiently serious to justify termination.
7. If a reasonable excuse exists cause will less likely be found.

Applying the foregoing factors to the facts of the case Stea maintained that:

1. & 2. Walraven acknowledged he was aware of the company rule.
3. It was clear from the evidence that Morrison had not consistently enforced the policy. Such evidence came from Nagelbach. Morrison also acknowledged that at times she exercises her judgement.
4. Evidence was lacking that employees would be warned that termination would result from breach of the rule.
5. Morrison's evidence that she may require employees to come in so that she can determine whether they are sick is a highly questionable procedure performed by non medically qualified managers.
6. Walraven was sick and hungover; that could hardly be deemed to be contempt for management, policy, and staff. Walraven's demeanour at the hearing could in no way be characterized as contempt for the policy, management, nor other employees.
7. While Walraven had done a stupid thing, it was an isolated incident.

Stea argued that the prior verbal reprimand was totally irrelevant in that the incident took place a year ago and the passage of time had neutralized the incident.

Stea submitted that Walraven's behaviour represented a serious error in judgement, but that it did not justify taking away his livelihood. The employer had every opportunity to invoke progressive discipline and could have suspended him.

Stea concluded that I should be hard pressed to determine there was just cause for dismissal based on one incident.

ANALYSIS

The burden of proof for establishing that Walraven was dismissed for just cause rests with the appellant employer, Wharfside.

Failure to Report for Work & Abandonment of Job

There is an obvious confusion about the dates the employer was relying upon regarding its' allegation that Walraven had abandoned his job. Morrison's sworn affidavit states Walraven was terminated in part for not reporting to work on September 12 and 13, 1995. At the hearing, the employer took the position that Walraven had abandoned his job given that he missed two shifts, Sunday, September 10, 1995 and Monday, September 11, 1995.

While Morrison's evidence is that Walraven was scheduled to work on the Monday, she also testified that she talked to Walraven on the Monday and told him he still had a job provided he brought in a doctor's note. There was no evidence regarding the time of this phone call or what time Walraven's shift would have started if he had been scheduled to work that day. There was

no evidence of a discussion with Walraven during this telephone conversation, or any other, that he had missed a shift on Monday.

I do not find Bergstom's evidence helpful to this determination. While his evidence was that an expediter would have been scheduled to work on his days off, I am not satisfied from his evidence that the expediter scheduled was Walraven.

The employer advised Walraven on Monday, September 11, 1995 that he still had a job. It now seeks to argue that Walraven missed his shift on the day he was told he still had a job, and therefore abandoned his job. I do not comprehend the logic of this.

Moreover, the uncontradicted evidence is that Walraven came to the workplace to check his status on Tuesday, September 12, 1995 and saw that his shifts were crossed out and overwritten with the word "fired". Moreover, Till confirmed that he had been fired. Thus, the employer initiated the severing of the employment relationship just a day after telling Walraven that he still had a job.

Based on the evidence before me, I am not satisfied that Walraven was scheduled to work on Monday and I do not conclude that he abandoned his job. Rather I conclude that the employer initiated the severing of the employment relationship.

Failure to follow policy

In *Stein v. British Columbia Housing Management Commission* [(1992) 65 B.C.L.R. (2d) 181] the BC Court of Appeal described the common law test for just cause in the following terms at p. 183:

> *Did the plaintiff conduct himself in a manner inconsistent with the continuation of the contract of employment?*

In the same case at page 184, the Court of Appeal adopted the following passage from *Laws v. London Chronicle Ltd.* [(1959) 2 All E.R. 285 (C.A.)] as a generally accepted statement of the law:

> *I think it is not right to say that one act of disobedience, to justify dismissal, must be of a grave and serious character. I do however, think (following the passages which I have already cited) that one act of disobedience or misconduct can justify dismissal only if it is of a nature which goes to show (in effect) that the servant is repudiating the contract, or one of its essential conditions; and for that reason, therefore, I think that one finds in the passages which I have read* ***that disobedience must at least have the quality that it is "wilful": it does (in other words) connote a deliberate flouting of the essential contractual conditions.*** (emphasis added)

Thus, for a single act to justify dismissal, it must **at least** have the quality that it is wilful, that is, that it connotes a deliberate flouting of the essential contractual conditions.

I do not consider Walraven's prior verbal reprimand to be relevant to my determination. The incident took place a year ago, involved taking a sip of beer on duty, and Walraven apologized at the time, and at the hearing, recognizing it was "a stupid thing to do". Further, there is no evidence that the employer relied upon Walraven's prior record when the dismissal occurred. Finally, I note there were no other transgressions or reprimands during his 13 months of employment.

I am not satisfied that the company has demonstrated that, a single incident, that is, Walraven's failure to follow company policy by not bringing in a doctor's note has the quality of "wilfulness".

In assessing the conflicting evidence from Jackson and Walraven regarding an alleged statement by Walraven that he wasn't going to work the next day, I prefer the evidence of Walraven. In the telephone conversation with Walraven, Jackson acknowledged that he was ill; her statement was: "I realize you're sick and not hung over..." This statement, if anything, supports that Walraven was indeed ill. Accordingly, it does not support the notion that Walraven had intended to not report for work for other than legitimate reasons. Moreover, I note that Jackson's evidence on her sworn affidavit was inconsistent with her evidence at the hearing and she acknowledged that under cross examination. I attach little, if any, weight to her evidence.

I find no credible evidence that there was *a deliberate flouting* of the essential contractual conditions required to constitute wilful misconduct such as to justify summary dismissal. Rather, I find Walraven's behaviour to be a serious error in judgment. An error in judgment does not make an employee guilty of wilful misconduct.

It is well established in law that seldom will any one incident constitute cause for discharge.
I find it significant that Walraven acknowledged that he had done wrong and felt that his behaviour justified a warning. His demeanour at the hearing in no way demonstrated a contempt for the company, the management or the policy. I also find it significant that he had not called in sick in over a year of employment.

In short, I am not satisfied that Walraven conducted himself in a manner inconsistent with the continuation of his contract of employment. Rather, I conclude that a severe warning would have had the desired effect of ensuring that his behaviour did not occur again.

It is generally accepted in law that employees must be warned that they will be terminated if a rule is breached.

I am not satisfied that employees at Wharfside were warned that failure to bring in a doctor's note would automatically result in dismissal. While Morrison's evidence is that the consequences for failing to bring a doctor's note were, without exception, dismissal, Bryan's evidence is that she had seen both suspensions and automatic dismissals. I prefer Bryan's evidence. She was the employer's own witness and the least interested party. Moreover,

Nagelbach's uncontradicted testimony is that, on one occasion, she was not required to bring in a doctor's note. Finally, I note that the language in the policy similar to that in effect at the time of Walraven's employment does not refer to automatic dismissals for failure to bring a doctor's note.

I conclude that Walraven's behaviour represented a serious error in judgement. However, I am not satisfied it warranted dismissal.

For the above reasons, I conclude on the balance of probabilities, that Wharfside has not met the onus of proving Walraven was dismissed for just cause.

ORDER

Pursuant to Section 115 of the *Act*, I order that Determination # CDET 000815 setting out the amount owing to Trenaman and Walraven for two weeks severance pay plus interest be confirmed.

An order with respect to the appeal of Determination # CDET 000815 concerning Beeston will be issued after written submissions are received.

_____

Genevieve Eden
Adjudicator
Employment Standards Tribunal