Employment Standards TRIBUNAL

An appeal

- by -

Lombardo's Ristorante & Pizzeria Ltd.
(the "Appellant")

- 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: W. Grant Sheard

FILE No.: 2002/124

DATE OF DECISION: June 4, 2002

British Columbia

DECISION

APPEARANCES:

Patricia Lombardo on behalf of the Appellant

Kulwinder Sall on behalf of the Director

No one appearing on behalf of the Employee, Naser Ghaffari

OVERVIEW

This is an appeal based on written submissions by Lombardo's Ristorante & Pizzeria Ltd. ("the Appellant"), pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), of a Determination issued by the Director of Employment Standards (the "Director") on February 19, 2002 wherein the Director's Delegate found that the Appellant Employer did not have just cause for dismissing the Employee without compensation or notice in lieu of compensation and ordering the Appellant to pay to the Employee two weeks wages in lieu of notice as compensation for length of service ($960.00), overtime ($57.21), vacation pay ($40.69) and interest ($146.77) for a total due of $1,204.67.

ISSUE

Was the Director's Delegate correct in ruling that the Appellant did not have just cause for the dismissal of the Employee without compensation for length of service or notice in lieu of such compensation as required by Section 63 of the *Act*?

ARGUMENT

The Appellant's Position

In an appeal form and letter dated March 13, 2002 filed with the Tribunal on March 14, 2002 the Appellant submits that there are other facts that weren't considered during the investigation, that the Appellant was denied the opportunity to respond to the investigation, and that the Appellant did follow "the government guidelines". The Appellant submits that the Determination ought to be set aside.

In the written submission the Appellant says that a letter sent to it by the Delegate prior to the Determination on December 20, 2001 did not clearly set out the Appellant's options. Further, the Appellant says that it was not given an opportunity to contact a potential witness. The Appellant submits further written notes regarding problems with the Employee which support the claim of just cause for dismissal.

The Respondent's Position

The Respondent Employee did not file a submission.

The Director's Position

In a written submission dated April 10, 2002 and filed with the Tribunal on April 11, 2002 the Delegate of the Director says that, in response to the assertions that the Appellant was not given an opportunity to contact the relevant parties, that the Delegate did not consider all documents for relevance and did not set out the Appellant's options, the Delegate attached a letter of December 20, 2001 which was earlier sent to the Appellant by the Delegate. The Director's Delegate notes that on December 20, 2001 the Appellant was advised to "Please provide to me in writing the particulars of the misconduct on January 10, 2000 that led you to terminate Ghaffari's employment without written notice or compensation in lieu of notice." Further, the Director's Delegate concluded that letter saying "If I have not heard from you by Friday, January 4, 2002. Your time and attention into this matter are appreciated." (sic) The Delegate says that the Appellant was given a clear opportunity to contact relevant parties and provide any additional information by January 4, 2002 which the Appellant failed to do. The Director's Delegate further submits that the notes which were provided by the Appellant relating to the assertion of just cause were considered by the Delegate before rendering the Determination.

The Director's Delegate says that the Appellant was unable to give reasons for the Employee's dismissal and the Appellant did not request an extension of the time period to provide such information prior to the Determination. The Director's Delegate further notes that the Appellant has not provided any additional information on this appeal and has still not provided details about the final incident that the Appellant alleges supports the claim of just cause.

The Director's Delegate concludes her submission stating that the Appellant has not shown any error in the facts found or law applied and as such, requests the appeal be dismissed.

THE FACTS

The Appellant operates a restaurant where the Employee worked as a cook from September 1, 1998 to January 11, 2000 at the rate of $12.00 per hour. In the Employee's complaint he claimed overtime for the months of July to September 1999 and compensation for length of service. He submitted a record of hours that he stated he kept contemporaneously with having worked the hours. The Appellant also submitted payroll records during the investigation which were consistent with the record of hours kept by the Employee. The Delegate conducted a payroll audit and found that $57.21 was owing for overtime. This was not contested by the Appellant.

The Appellant provided hand written notes from the Employee's personnel file dated September 15, 1999 and October 9, 1999 and a typewritten note dated October 18, 1999. In addition, there is a further note which is undated but appears to be written in January 2000. These notes indicate as the Appellant suggests that the Employee had a poor attitude, poor people skills, and refused to do as he was told. In the copy of the typewritten note of October 18, 1999 the Appellant indicates that the Employee was advised "If this persists I will put you on probation". In the note apparently written January 2000 the Appellant notes that the Employee was advised "Conflict with servers. Will not do as I ask. Can't get along in kitchen, lots of attitude. Complaints from staff. Told last time - one more he was gone."

The Appellant submitted a timeline to the Delegate that indicated on January 10, 2000 there was "No change. Met with him and Tamara and told him it was his last shift." During a meeting with the Delegate on November 22, 2001, the Appellant advised the Delegate that she had dismissed the Employee for ongoing problems with his work performance since September 15, 1999. When the Delegate asked the

Appellant about the final incident that led to the Employee's termination on January 10, 2000, the Appellant did not provide any specific details. The Appellant stated that she would speak to "Tamara" to refresh her memory. The Appellant was contacted by the Delegate in writing on December 20, 2001 for information regarding the particulars of the Employee's conduct on January 10, 2000 that led to the termination of his employment without written notice or compensation in lieu of notice. No response was received from the Appellant nor any request for an extension of time to provide such information by the date of the Determination, February 19, 2002.

ANALYSIS

The onus is on the Appellant to establish on a balance of probabilities an error in the finding of the Delegate.

Section 63 of the *Act* provides for liability resulting from length of service. Section 63 provides as follows:

> Section 63
>
> (1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.
>
> (2) The employer's liability for compensation for length of service increases as follows:
>
> a) After 12 consecutive months of employment, to an amount equal to 2 weeks' wages;
>
> b) After 3 consecutive years of employment, to an amount equal to 3 weeks' wages plus 1 additional week's wages for each additional year of employment, to a maximum of 8 week's wages.
>
> (3) The liability is deemed to be discharged if the employee
>
> a) is given written notice of termination as follows:
>
> i) one week's notice after 3 consecutive months of employment;
>
> ii) two weeks' notice after 12 consecutive months of employment;
>
> iii) 3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice;
>
> b) is given a combination of notice and money equivalent to the amount the Employer is liable to pay, or
>
> c) terminates the employment, retires from employment, or is dismissed for just cause.

Thus, section 63 (3)(c) provides that an Employer may avoid liability for compensation or notice for length of service if the Employee is dismissed for just cause.

In the case of *Silverline Security Locksmith Ltd.*, BC EST #D207/96, this Tribunal delineated a four part test for determining whether just cause exists or not. In that case it was said as follows:

> Paragraph 11. The burden of proof for establishing that there is "just cause" to terminate Davis' employment rests with Silverline. "Just cause" can include fundamental breaches of the employment relationship such as criminal acts, gross incompetence, wilful misconduct or a significant breach of the workplace policy.
>
> Paragraph 12. It can also include minor infractions of workplace rules or unsatisfactory conduct that is repeated despite clear warnings to the contrary and progressive disciplinary measures. In the absence of a fundamental breach of the employment relationship, an Employer must be able to demonstrate "just cause" by proving that:
>
> 1) reasonable standards of performance have been set and communicated to the Employee;
>
> 2) the Employee was warned clearly that his/her continued employment was in jeopardy if such standards were not met;
>
> 3) a reasonable period of time was given to the Employee to meet such standards; and
>
> 4) the Employee did not meet those standards.
>
> Paragraph 15. The concept of "just cause" requires the Employer to inform an Employee clearly and unequivocally that his or her performance is unacceptable and that failure to meet the Employer's standards will result in their dismissal. The principal reason for requiring a clear and unequivocal warning is to avoid any misunderstanding, thereby giving an Employee a false sense of security that their work performance is acceptable to the Employer.

While it is preferable (because it is easier to prove) that a warning be in writing, it is not required: Re: *Beaver Landscapes Ltd.*, BC EST # D035/98 (Peterson, Adjudicator). As stated in Employment Standards in British Columbia Annotated Legislation and Commentary, the Continuing Legal Education Society of British Columbia, 2000, at page 8-31 "*The Act does not require that warnings be in writing. Nevertheless, from an evidentiary standpoint, if the warnings are in writing it is obviously easier for an employer to prove the circumstances of the warning and the consequences of repeating the conduct.*": Re: *Paul Creek Slicing Ltd.*, BC EST # D132/99 (Peterson, Adjudicator).

In the present case, the Appellant has not demonstrated that reasonable standards of performance were set and communicated to the Employee and that, if those standards were not met, the Employee was warned clearly that his continued employment was in jeopardy. The Employee denied that such a clear and unequivocal warning was given to him and I cannot find an error in the Determination in the finding that no such warning was given. There is no evidence as to exactly what occurred in the culminating event of January 10, 2000 when the Employee was dismissed so I cannot find that it , in itself, amounted to just cause. Nor can I find that the Appellant was not given an opportunity to fully respond to the complaint. The Appellant has failed to meet the onus upon it to demonstrate an error in the facts found or law applied.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination of this matter, dated December 3, 2001 and filed under number 024-737, be confirmed.

W. Grant Sheard
Adjudicator
Employment Standards Tribunal