

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1996, C. 38

- by -

LIANNE MONIQUE DWORNIK
("DWORNIK")

- of a Determination issued by -

The Director Employment Standards
(the "Director")

ADJUDICATOR:	Alfred C. Kempf
FILE NO:	96/285
HEARING DATE:	August 19, 1996
DATE OF DECISION:	May 6, 2001

DECISION

OVERVIEW

This is an appeal by Dwornik, pursuant to Section 112 of the Employment Standards Act (the "Act"), against Determination of the Director of Employment Standards (the "Director") issued on April 17, 1996. In this appeal the employee claims that wages and severance pay are owed to her by Shuswap Lake Estates Ltd. ("Estates").

A hearing was held in Salmon Arm, British Columbia on August 19, 1996. Dwornik appeared on her own behalf. Appearing on behalf of the employer, Estates was Glenn Perran ("Perran"). Earl Thompson ("Thompson") appeared on behalf of the Director.

FACTS

A. Cause for Dismissal

Dwornik was employed by Estates from 1993 to and including January 6, 1996 as a server in a lounge operated by it. She was terminated on the latter date "for cause". The cause alleged consisted of various incidents which are detailed below..

There was conflicting evidence from the two witnesses on behalf of Estates as to the incidents which were being relied upon to justify the termination of Dwornik's employment. It is clear that the underlying reason for the termination was a loss of trust in her by Estates.

Perran (on behalf of Estates) testified that the reasons for the dismissal were:

(a) that Dwornik was observed in December, 1995, consuming a drink she had prepared for herself without it having been rung into the till or paid for. He did not personally witness this incident but his co-manager Sean Coward ("Coward") had;

(b) in the first few days of January, 1996 he observed Dwornik taking a two dollar bill from a customer for a one dollar bag of chips and providing the customer with one dollar change from her tray. Ten minutes later she had still not "rung in" the chip transaction; and

(c) she had discounted drinks to a favourite patron of the lounge in which she worked.

Coward said the reasons for the dismissal were:

- (a) the drink poured for herself;
- (b) she sometimes allowed her husband to use her staff discount on meals;
- (c) the bag of chips; and
- (d) an abundance of "voids" and "refunds" occurring on her shift.

In documents filed with the Director in response to the complaint and subsequent appeal, Estates also referred to other concerns including a relationship between Dwornik and the favourite patron referred to above. However, at the hearing the employer admitted that this would not constitute grounds for dismissal since any relationship with the patron was an open and reciprocal relationship described as a "flirtation".

It is necessary to examine each of the allegations in greater detail.

1. Voids and Refunds

While there was some suspicion that Dwornik was responsible for an inordinate number of voids and refunds there was no evidence substantiating any wrongdoing on her part. After Dwornik was warned of this issue in the fall of 1995 the problem was corrected to the satisfaction of Estates.

2. Abuse of Staff Discounts

Sometime in the fall of 1995 Dwornik's husband would occasionally visit the lounge and eat food ordered by Dwornik on a staff discount basis. However, Dwornik would also eat food from the same plate and save excess food to be eaten on her breaks. There was further evidence that after she was cautioned to cease this practise she did so.

3. Discounted Drinks

The Director found that this allegation was unsubstantiated and I must concur. There was a written statement from the "favourite patron" on the file, however, given Dwornik's direct evidence that she did not discount drinks I cannot give any weight to the unsworn statement. She testified that on one occasion she provided the customer with more change than he was entitled to but this was at no cost to Estates. Estates' representative testified that this would not be of any great concern.

4. Drink Not Rung In

The employer was not able to establish precisely when this incident occurred. Coward indicated that on the day in question he came into the bar late in Dwornik's shift. He first said that when he came in to the lounge she had a drink in hand but later said that he observed her make the drink and then start consuming it. The issue was not the consumption of alcohol but rather whether she had rung in the drink so that she would be required to account for the drink at the end of her shift. Coward testified that when he confronted Dwornik about not ringing in the drink she said "are you going to fire me?"

Dwornik's evidence was different. She testified that she had poured a drink for herself and intended to ring it in later. She indicated that she addressed Coward somewhat defiantly since she felt unfairly accused of wrongdoing whereas Coward interpreted her remarks of "are you going to fire me", as being an admission of guilt. Coward warned Dwornik never to "do it again". There was no evidence of any subsequent problem.

5. Chips Incident

This incident is described above. Dwornik says that she did ring in the sale of the chips. She says that she was confronted by Perran about the chips. He claimed that she had not rung in the chips. She responded that she had but nevertheless Perran rang them in again. Dwornik's evidence is that she in effect paid twice for the chips.

Perran said that he and his wife and her sister were seated close to the till at the time of the incident. He said that it was not a busy day. He was watching Dwornik due to his suspicion about her "stealing" from Estates. The two other witnesses to the chip incident did not give evidence. Perran said that it would have been obvious to Dwornik that he was close enough to her to observe her activities. Even though Perran confronted Dwornik about the chip incident she was not disciplined. She worked at least a few more shifts after this incident prior to the time that she was suspended on or about January 7, 1996.

On January 7, 1996 when Dwornik was suspended by Perran he made specific reference to the chips incident and to the free drink incident. Perran felt that he needed to suspend Dwornik to determine whether there were any other areas of concern. Approximately 5 days later Dwornik contacted Perran and asked what her status was. Dwornik testified that Perran told her that he was satisfied with the inquiries that he had made and she could have shifts starting the following week. Perran admitted that he possibly said that he was satisfied with his inquiries but denies saying that she could come back to work the following week.

Dwornik then checked the schedule for the next week. She found that she was only scheduled for

approximately one half the shifts that she normally worked as the most senior server. She commented to Perran that she would inquire with the "Ministry of Labour". She testified that this suggestion was one of the reasons subsequently given for her dismissal.

Estates apparently changed its mind between the date that Perran advised Dwornik that he was satisfied with his investigation and the following Tuesday, January 16, 1996, when Dwornik was dismissed.

The only evidence of any change in circumstances between approximately January 12, 1996 (the date of the discussion regarding the reinstatement) and the date of dismissal was a complaint by the favourite patron to the effect that his well being had been threatened by an unknown male telephone caller and that he was uncomfortable in attending the lounge with his new friend due to the presence of Dwornik as an employee.

B. Overpayment

The Determination deducted from any amounts owing to Dwornik for overtime pay a sum representing overpayment of wages for Boxing Day in 1994 and 1995. I am not satisfied on all the evidence that Dwornik was overpaid for Boxing Days. If she was overpaid, it seems that the overpayment would have been for December 26, 1994 and in the circumstances it is difficult to justify deduction of this amount over one year later.

C. Overtime

There is an issue of entitlement to overtime pay. The Determination indicated that Dwornik had not been paid at overtime rates for 53 hours of overtime. Dwornik had a slightly different calculation of hours but I prefer the Director's calculation. The Director determined that while Dwornik should be paid at time and a half for this overtime he also determined that since the employer paid a \$25.00 bonus to Dwornik on each occasion that she closed the lounge, that she should not be entitled to overtime in addition.

The evidence disclosed that there were additional management responsibilities involved in closing the lounge including securing the cash, as well as locking the doors and securing the premises. These are functions normally performed by management but would occasionally be delegated to senior employees like Dwornik who would in turn receive a premium of \$25.00. This premium was not based on the length of time taken to close the lounge and would be paid whether or not the employee worked overtime in order to close the lounge. In that sense the payment had nothing to do with overtime at all. Dwornik's evidence was that she always concluded her time as submitted to the employer for payment prior to commencing any management duties to close the lounge. Perran disputed this and said that he thought time taken to close was included in the hours

submitted by the employees.

D. Statutory Holidays

The other issue was payment for statutory holidays. The employer tended not to pay the wages due for statutory holidays until the month following the holiday. The audit of the employer's records was difficult according to Thompson. While Dwornik's calculation of the number of statutory holidays was different than that determined by Thompson, I am not satisfied that the Determination is inaccurate.

ISSUES TO BE DECIDED

1. Was there just cause for the dismissal of Dwornik?
2. Is Dwornik entitled to the payment of overtime, or is the overtime claim entirely offset by the "closing" payments?
3. Is there any additional entitlement to pay for statutory holidays and should there be any deduction from Dwornik's entitlement, if any, in respect to overpayment for Boxing Day in 1994 or 1995?

ANALYSIS

A. Cause for Dismissal

I am unable to conclude that there was cause for dismissal for the following reasons:

- a) The cause that is being alleged is very serious. During the course of the hearing the employer's witnesses made repeated reference to the fact that they believed Dwornik to have stolen from the employer. While the primary onus is on Dwornik in this appeal, there is also a onus on Estates to substantiate the serious allegations made against Dwornik. I am troubled by the fact that witnesses to various aspects of the misconduct or cause were not called in support of the employer's position.
- b) There are important differences between Coward's view of the reasons for dismissal and that of his partner, Perran.
- c) Coward said that he had never seen Dwornik discounting drinks and that this was not one

of the reasons that he considered the employer to have cause to dismiss her, yet in the Determination issued by the Director there is a reference to Coward advising Thompson that he observed her discounting drinks on December 31, 1995 and that this was part of the employer's reason for dismissing her. At the hearing Coward was not able to say whether he had told this to Thompson or not.

d) The employer's witnesses were vague in respect to the dates of most of the incidents and even though there is a reference in the Determination of incident documentation on the part of the employer, the employer was not able to produce any such documentation at the hearing other than a note dated in January confirming Dwornik's suspension.

e) I am troubled by the assertion that Dwornik would steal a one dollar bag of chips knowing that her employer was near by and able to observe her every move.

f) Despite the apparent seriousness of the chip incident, and the unpaid drink incident, Dwornik was allowed to continue to work in the lounge for several days following. On January 12, 1996 she was advised that the investigation of her conduct was satisfactory and that she could return to work the following week.

g) The "voids" and "refunds" and abuse of staff discount issues cannot be relied on as Dwornik had improved her performance in this regard after earlier warnings.

h) The "discounted drinks" allegation is unsubstantiated.

i) The employer's ultimate decision to dismiss Dwornik seems to have been based on the complaints and displeasure of the customer earlier referred to (including the alleged threat against him). The complaints of the customer do not constitute cause for dismissal.

I am unable to find that there was clearly established conduct on the part of Dwornik that could reasonably be considered to justify dismissal without notice. If Dwornik had or had intended to steal the chip money or if she had intended to steal a drink from Estates her dismissal would have been justified. I am not satisfied that she stole or intended to steal the chip money or intended to steal the drink. Given my finding that Estates allowed her to work after these incidents and advised her that the investigation was "satisfactory" I cannot help but conclude that the Estates was not certain that it's suspicions about Dwornik were valid.

It is apparent that Estates had suspicions about Dwornik but more than suspicion is required to justify dismissal.

My decision would have been different if it had been established by Estates that Dwornik had been

in breach of a clear, well known, consistently enforced policy in respect to the incident in which she poured a drink for herself.

B. Overtime

The "closing" payments were for extra responsibility, not just for extra time. While Estates may have considered the payment of the closing bonus to also compensate for overtime, the Act requires that actual overtime hours be compensated for at the enhanced rates provided for. Since that has not been done, Estates is in contravention of the Act.

C. Overpayment

I cannot on the evidence conclude that there was an overpayment for Boxing Day in either 1994 or 1995.

D. Statutory Holidays

I am satisfied that the Director's Determination regarding payment for statutory holidays is correct.

ORDER

In summary, I order under Section 115 of the *Act*, that the Determination #001979 be varied as follows:

1. Dwornik is entitled to severance pay in the amount to be determined by the Director.
2. The Determination is confirmed with respect to payment for statutory holidays.
3. There will be no deduction from the aforesaid amounts for "closing" payment or overpayment for Boxing Days.

Alfred C. Kempf
Adjudicator
Employment Standards Tribunal

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