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 -

Ladysmith Inn (1986) Ltd.
("The Inn ")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE NO.: 96/389

DATE OF DECISION: September 6, 1996

DECISION

OVERVIEW

The appeal is by Ladysmith Inn (the "Inn") pursuant to Section 112 of the *Employment Standards Act* ("the *Act*") against Determination # 002602 issued by the Director of Employment Standards (the "Director") on June 21, 1996. The Determination, issued as a result of a complaint by Sophia Bertonia ("Bertonia"), a former employee of the Ladysmith Inn, awards compensation for length of service and related vacation pay and interest, a total of $250.29. The Inn claims that the Determination is in error because it had just cause in terminating Bertonia when it did.

FACTS

Bertonia was employed by Ladysmith Inn from August 27, 1995 until December 15, 1995 as bartender/waitress.

Bertonia gave notice of termination on December 4, 1995, to take effect December 19, 1995.

Bertonia's employment was terminated on the December 15, 1995. The employer says that it had good reason. Bertonia is said by the Inn to have made derogatory remarks to customers about the bar, some of its employees, and the owners of the Inn. The employer complains of Bertonia's dishevelled appearance on two occasions and that another bar interviewed Bertonia for a job while at the Inn and while she was supposed to be working. Beyond that the employer says, "if Sophia had not given her notice, she would have been asked to leave because she was getting into the habit of leaving the bar after her shift with a different customer each night".

ISSUES TO BE DECIDED

The issue is, Did the Ladysmith Inn have just cause in terminating Bertonia?

ANALYSIS

The employee tendered her resignation, giving two weeks notice. The Inn accepted her offer to end their relationship, it continuing to give Bertonia work as it did.

As Adjudicator Thornicroft in BC EST #D151/96 has remarked,

> If an employee gives notice of termination to the employer, and that notice is *accepted* by the employer, then a binding contract to terminate the underlying employment agreement is concluded. The same result holds if the employer initiates the giving of notice and concludes an agreement regarding notice with the employee (so long as the employer's notice meets or exceeds any applicable minimum statutory notice--see section 4 of the *Act*

> and *Machtinger v. HOJ Industries* [1992] 1 S.C.R. 986). Any failure on the part of either party to honour the 'notice agreement' amounts to a breach of contract and can be remedied by way of an action for damages.

Having entered into a notice agreement, or what might better be termed a 'termination' agreement, the parties must honour it. On the employer's part that includes provision of work for the remainder of the notice period, on the terms established. The employee's obligation will normally involve the performance of work in the period to the satisfaction of the employer. The question before me is, Did Bertonia fail in the latter regard, fail so completely that the employer had just cause to terminate her? I say that is the question because while the Inn says that her conduct was often not of an acceptable nature there is no evidence that it did much of anything about her conduct, as offensive as it is said to have been. Importantly there is no evidence of any sort of progressive discipline having been applied, that Bertonia was clearly warned that her job was in jeopardy if she continued doing what she is said by the Inn to have done, and that she was given an opportunity to improve. Given the lack of action on the part of the Inn, and of course given the termination agreement, I conclude that if the Inn has just cause it can only be as a result of a serious breach of the employment relationship.

The onus is on the employer to show just cause.

On reading the submissions of the parties, in particular the appeal submission by Ladysmith Inn, it is clear that the Inn was unhappy with Bertonia's work in many respects, it making the allegations that it does. What the Inn fails to do is provide any dates as it lists the offences that are said to have occurred. I also note that the Inn, after making the allegations that it does, then says that had not Bertonia beaten them to it, the Inn would have given notice. From that, on the balance of probabilities, I conclude that the alleged offences occurred in the weeks, if not the months, before Bertonia gave notice. Certainly none of the evidence before me establishes that there was a serious breach of the employment relationship on or about the time of the termination, December 15, 1995. I conclude that there was none and that the Inn did not have just cause for the termination.

In the absence of just cause, section 63 the *Act* provides that an employer is liable for compensation for service. That liability can be discharged if the employee is given written notice of termination but none was given. The employer's liability is also discharged where the employee terminates the employment, retires or is dismissed for just cause. On terminating Bertonia as it did, without just cause, the Inn became liable to pay Bertonia one week's pay as compensation for service, a liability that is in part discharged by the termination agreement.

The Director's Delegate found that the Inn did not have just cause in terminating the employment of Bertonia and that she is entitled to compensation for service in the amount of 4 days pay. I agree.

ORDER

I order, pursuant to Section 115 of the *Act*, that Determination # CDET 002602 be confirmed.

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Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal

LDC:jel