Employment Standards TRIBUNAL

An appeal

- by -

Gary T's Pub and Restaurant 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.: 2003A/158

DATE OF DECISION: August 6, 2003

DECISION

OVERVIEW

This is an appeal based on written submissions by Gary T's Pub & Restaurant 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 April 29, 2003 wherein the Director's Delegate (the "Delegate") found that the Respondent was entitled to compensation for length of service, annual vacation pay and interest for a total amount payable of $315.15.

ISSUES

1. Did the Director observe the principles of natural justice in making the Determination?

2. Did the Appellant have just cause for terminating the Respondent without notice or compensation for length of service in lieu of notice?

3. Were the Delegate's calculations regarding the Respondent's normal or average hours of work and the amount due thereon accurate?

ARGUMENT

The Appellant's Position

In an appeal form and supplementary letter attached dated June 6, 2003 and filed with the Tribunal on June 9, 2003 the Appellant says that the Director failed to observe the principles of natural justice in making the Determination and seeks to change or vary the Determination.

It its supplementary letter elaborating on the appeal form, the Appellant says that it ought only be responsible to the Respondent for pay for the day that the Respondent was called at home and asked not to come in to work. The Appellant says that its records show that one weeks average pay would result in an amount of $209.47, not $280.00 as determined. Further, the Appellant says that the Respondent did not follow the rules of the Appellant and made no effort to improve when this was discussed with her.

The Respondent's Position

In a written response dated June 13, 2003 and filed with the Tribunal June 16, 2003 the Respondent seeks to uphold the Determination. The Respondent notes that she was hired as a hostess, with no "Serving it Right" certificate required. She reiterates the evidence she gave at the hearing that she was never verbally spoken to about her conduct at work except for dress (regarding wearing black pants or skirts and white tops). The Respondent says that she always followed the rules of the Employer and was only late for work once and then only 12 minutes late. She says that her conduct was never brought to her attention until the day she was terminated yet she notes she was promoted to waitress just a couple of months before that.

The Respondent submitted copies of three of her payroll account pay stubs for the periods March 31, April 15, and July 15, 2002. Which show regular pay of $430.00, $478.00 and $458.00 respectively. Further, those pay stubs show regular hours at 53.75, 59.75, and 57.25 respectively.

The Director's Position

In a written submission dated June 27, 2003 and filed with the Tribunal the same date the Director says, "the Delegate has no further submissions and will rely on the information and decision as stated in the Determination issued April 29, 2003".

THE FACTS

The Appellant operates a restaurant and neighbourhood pub where the Respondent was employed as a server from February 6, 2002 to August 22, 2002 at the rate of pay of $8.00 per hour. In the hearing before the Delegate on March 11, 2003 both the Appellant and Respondent attended and presented evidence and made submissions to the Delegate. Cindy Todoruk represented the Appellant and gave evidence that she was the Respondent's supervisor. She gave evidence that she terminated the Respondent for gross willful misconduct on August 22, 2002. She says that the Respondent was spoken to on May 9, 2002 regarding lateness and personal calls at work and that customers had complained that the Respondent was not performing her duties. She also noted that the Respondent did not have her "Serving it Right" certificate as requested. Ms. Todoruk gave evidence that on the final day of the Respondent's employment she was observed crying after receiving a phone call during her shift at work. Ms. Todoruk approached her and asked her if everything was okay and enquired whether she needed to leave. Ms. Todoruk said that the Respondent indicated she did not need to leave and returned to work. Ms. Todoruk gave evidence that the Respondent then received a second call that same day which upset the Respondent and Ms. Todoruk decided to dismiss her for the rest of the day. Ms. Todoruk then decided after this incident to terminate the Respondent's employment due to an accumulation of events.

The Respondent gave evidence to the Delegate that on August 23, 2003 she received a call from a co-worker who asked if she was working because she had received a request from the Employer to cover the Respondent's shift. The Respondent said that she had expected to work and so she called Ms. Todoruk and enquired into what was transpiring and that Ms. Todoruk told her that "things were not working out". The Respondent said that she had received no indication prior to this that her employment was in jeopardy or that a problem existed with her performance. She says that she was only spoken to in May of 2002 regarding proper dress code.

The Delegate found that, on the balance he accepted the Respondent's testimony and found that the events which had unfolded on August 22, 2002 would not constitute a reason for dismissal on their own. Further, the Delegate found that the Appellant had failed to establish that it had set reasonable standards and expectations, that these had been communicated to the Respondent, that the Respondent had failed to meet these standards and, that the Respondent was told she would be terminated for failure to meet the standards. The Delegate found that the Employer had failed to meet the onus upon it in this regard and ruled that the Respondent had not been dismissed for just cause. The Delegate provided an interest calculation sheet noting that the wages due were $291.20 with interest thereon at $8.95 for a total due of $300.15.

ANALYSIS

In an appeal under the *Act*, the burden rests with the Appellant, in this case, the Employer, to show that there is an error in the Determination such that the Determination should be cancelled or varied.

1. Did the Delegate fail to observe the principles of natural justice in making the Determination?

Although the Appellant asserts that the Director failed to observe the principles of natural justice in the appeal form filed, the Appellant does not make any submission specific to this assertion. Natural justice may require or consist of many things, but at a bare minimum the parties must be given an opportunity to present evidence, question the evidence of the opposing party litigant and make a submission to the adjudicating body with respect to what it ought to find (see *re Rudowski,* [2000] BCESTD #476 (QL), (9 November 2000), BCEST #D485/00 (Love, Adj.); reconsideration of BCEST #D316/00.). In this case there is no evidence offered that the parties were not given an opportunity to present their evidence, question that evidence or make a submission to the Delegate or any other failure to adhere to the principles of natural justice. Therefore, I find that the Appellant has failed to meet the onus upon it to demonstrate on a balance of probabilities that the Delegate failed to meet the principles of natural justice in investigating and arriving at the Determination.

2. Did the Appellant have just cause to dismiss the Employee without notice or compensation for length of service in lieu of notice?

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.*, BCEST #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.
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> 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.*, BCEST #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.,* BCEST #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 her continued employment was in jeopardy. The Employee denied that such a clear and unequivocal warning was given to her. The Delegate accepted her evidence after hearing from the parties in person. I cannot find an error in the Determination in the finding that no such warning was given.

3. Calculation of amount due.

Section 63(4) of the *Act* provides as follows:

> (4) The amount the employer is liable to pay becomes payable on termination of the employment and is calculated by
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> (a) totalling all the employee's weekly wages, at the regular wage, during the last 8 weeks during which the employee worked normal or average hours of work,
>
> (b) dividing the total by 8, and
>
> (c) multiplying the result by the number of weeks wages the employer is liable to pay.

In the Respondent's material filed on appeal with copies of pay stubs it appears that the Employee was paid twice per month. The Delegate has not provided any information regarding how his figure of $280.00 for one weeks regular pay was arrived at. In averaging the regular pay for the Respondent it appears that she made an average of $455.33 per pay period. Multiplying that figure by 24 pay periods in a year and dividing by 52 for her average pay for one week I arrive at a figure of $210.15. Using the Respondent's regular hours of employment I find that from the pay stubs provided she worked an average of 56.92 hours per pay period. Once again, multiplying this figure by 24 pay periods and dividing by 52 weeks I find that she worked an average of 26.27 hours per week. Multiplying that figure by $8.00 per hour I once again arrive at a figure of $210.15 for her average regular wage per week. Therefore, I find that the Appellant has demonstrated an error in the Delegates calculation of the weeks wage rate and direct that the Determination be varied accordingly.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination of this matter, dated April 29, 2003 and filed under number ER81894 be varied to provide that the Respondent is entitled to compensation for length of service of one weeks pay in the amount of $210.15 and that the matter be returned to the Delegate for the calculation of holiday pay and interest payable thereon.

W. Grant Sheard
Adjudicator
Employment Standards Tribunal