

**EMPLOYMENT STANDARDS TRIBUNAL**

In the matter of an appeal pursuant to Section 112 of the  
*Employment Standards Act*

- by -

Rumrunner Pub Ltd.  
("Rumrunner")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**Adjudicator:** Hans Suhr

**File No.:** 96/380

**Date of Decision:** September 11, 1996

## DECISION

### OVERVIEW

This is an appeal by Rumrunner Pub Ltd. ("Rumrunner"), pursuant to Section 112 of the *Employment Standards Act* (the "Act"), against Determination No. CDET 003060 issued by a delegate of the Director of Employment Standards ("Director") on June 26, 1996. In this appeal Rumrunner claims that no compensation for length of service is owed to Pamela Taylor ("Taylor") as she was terminated for "just cause".

I have completed my review of the written submission made by Rumrunner and the information provided by the Director.

### FACTS

Taylor was employed by Rumrunner as a bartender/server from May 24, 1995 to November 9, 1995.

Taylor participated in the early closing of the pub a few weeks prior to her termination.

The Record of Employment ("ROE") issued by Rumrunner indicates that the reason for issuing the ROE was "M" which is the code for "Dismissed".

Taylor filed a complaint dated March 5, 1996 alleging that she had been terminated without cause and was entitled to termination pay.

The delegate of the Director investigated the complaint and subsequently Determination No. CDET 002506 was issued in the amount of \$303.66. This Determination was then cancelled and replaced by Determination No. CDET 003060 in the amount of \$272.59 dated June 26, 1996.

### ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether Rumrunner owes compensation for length of service to Taylor.

### ARGUMENT

Rumrunner argues that Taylor was terminated for "just cause" as she had closed up the pub 1/2 hour early without any permission to do so.

Rumrunner further argues that the quantum of the Determination is wrongly calculated.

Taylor argues that after consultation with her co-worker, the floor manager, they decided that as there had been no customers in the pub for more than 3 1/2 hours, it would be appropriate to close 1/2 hour early.

The delegate of the Director contends that as Rumrunner took no action against Taylor for the early closing until a “few weeks” had passed and, in the absence of any documented evidence of either progressive discipline or previous warnings, that Rumrunner had not discharged the onus of burden of proof respecting ‘just cause’.

## **ANALYSIS**

The burden of proof for establishing that an employee has been dismissed for “just cause” rests with the employer.

It is widely accepted that in order to sustain a dismissal for just cause, the employer must establish that:

1. Reasonable standards of performance have been set and communicated to the employee;
2. Discipline has been given to the employee for failure to meet such standards, which includes ensuring that the employee has been made clearly aware that their continued employment is in jeopardy if such standards are breached.
3. A reasonable period of time has been given to the employee to meet such standards;
4. The employee did not meet those standards.

In this case, Rumrunner has not established that it has complied with any of these four standards.

Specifically, there is no credible evidence to support Rumrunner’s contention that Taylor was terminated for “just cause” with respect to the early closing incident. The fact that Rumrunner continued to employ Taylor for a few weeks after this incident would indicate that Rumrunner either condoned the action or did not consider it serious enough to warrant any discipline. Furthermore, there was no evidence provided to indicate what disciplinary action, if any, was taken with respect to Taylor’s co-worker the floor manager, who apparently participated in the joint decision to close early.

The concept of “just cause” obliges an employer to inform an employee clearly, unequivocally and in a timely manner that their standard of performance or behaviour is unacceptable and that discipline is to be imposed for such misconduct. Furthermore, an employer is obliged to inform an employee that failure to meet the employer’s standards will result in dismissal. The main reason for issuing such a warning is to avoid any

possibility of misunderstanding and to ensure that the employee is not under any false sense of security that their performance or behaviour is acceptable to the employer.

There is no evidence that Rumrunner ever communicated the standards expected to Taylor at any time during her period of employment.

The incident of the early closing is certainly misconduct by an employee that is worthy of some form of discipline, however, in the absence of any prior discipline and due to the fact that the termination by Rumrunner took place some weeks after the incident of misconduct, dismissal is not appropriate.

For these reasons, I conclude, on the balance of probabilities, that Rumrunner has not established that Taylor's employment was terminated for just cause.

Section 63 of the *Act* provides that an employer becomes liable for compensation for length of service of an employee. Section 63 states:

**Liability resulting from length of service**

- 63.** (1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages 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 week's wages;
  - (b) after 3 consecutive years of employment, to an amount equal to 3 week's wages plus one 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) 2 week's notice after 12 consecutive months of employment;
    - (iii) 3 week's notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 week's 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.
- (4) The amount the employer is liable to pay becomes payable on termination of the employment and is calculated by

- (a) totaling all the employee's weekly wages, at the regular wage, during the last 8 weeks in 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.
- (5) For the purpose of determining the termination date, the employment of an employee who is laid off for more than a temporary layoff is deemed to have been terminated at the beginning of the layoff.

With respect to the issue of quantum, I am satisfied that the calculations performed by the delegate to the Director are correct.

The appeal by Rumrunner is therefore dismissed.

**ORDER**

Pursuant to Section 115 of the *Act*, I order that Determination No. CDET 003060 be confirmed.

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**Hans Suhr**  
**Adjudicator**  
**Employment Standards Tribunal**

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