

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 -

Siegel's Bagels Ltd.
("Siegel's")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE NO.: 96/446

DATE OF DECISION: September 19, 1996

DECISION

OVERVIEW

The appeal is by Siegel's Bagels Ltd. ("Siegel's") pursuant to Section 112 of the *Employment Standards Act* ("the Act") against Determination # CDET 003126 issued by the Director of Employment Standards (the "Director") on July 4, 1996. The Determination, issued as a result of a complaint by Shawn P. Hamonic ("Hamonic"), a former employee of Siegel's, is a finding that wages, compensation for length of service and interest are owed Hamonic in the amount of \$705.22. Siegel's argues that the Determination is in error, that it does not owe Hamonic what is said to be wages and that it was justified in terminating his employment.

FACTS

Hamonic was employed as a Chef/Kitchen Manager from August 8, 1995 until January 20, 1996.

A document, a "Memorandum" dated September 21, 1995, confirms that the parties had an agreement on the paying for London Life group benefits for Hamonic. That document states, and I quote, *"the company agrees to completely pay for these benefits until such time as we grant you the extra \$200.00 in salary. At that time you will begin paying for the benefits at the rate of 50% which is the normal rate for all employees."*

In a letter to London Life dated September 21, 1995, Siegel's applied for Hamonic's London Life benefits. The letter states, *"we have elected to waive the usual three month period We did, however, want to have a one month waiting period"*

Siegel's applied a second time for Hamonic's addition to the group benefit plan, by letter dated December 6, 1995. The letter indicates that the first application might have been lost. The new letter goes on to refer to the original request for a one month waiting period and states, *"However, as I understand from Bob Hague of your office, this cannot be done. We have, therefore, elected to waive the whole waiting period."*

A London Life brochure refers to the waiting period for group benefits for newly hired employees. They are said to be *"subject to a waiting period of usually three to six months"* (my emphasis).

The December 6, 1995 application led to Hamonic gaining group benefit plan coverage effective November 7, 1995.

Siegel's argues that it was prevented from paying for Hamonic's group benefits by the waiting period, which it says is three months, and because London Life lost the first application for Hamonic's benefits. Siegel's argues further that Hamonic knew of that and accepted it.

Hamonic was terminated on January 20, 1996.

The employer argues that it had just cause in dismissing Hamonic. In that regard Siegel's says that Hamonic was guilty of repeated sexual harassment, that he was often hostile to management, that he was late, that he was told to punch a time clock but did not and that he failed to take instructions in other ways, that he prepared meals for himself and others without paying for them, that he took food without paying for it, that he did not supervise others as he was expected to do and, that in terms of his work as chef, that he amended menus without permission, failed to produce new ideas, was messy, wasteful and served foods that were inappropriate for a Jewish restaurant. The employer goes on to say that it offered Hamonic constructive criticism and that it gave clear instructions, verbal warnings and, when the matter of the unpaid for food arose, a written warning which stated, *"any more complaints related to the ones listed above may result in immediate termination of your employment"*.

ISSUES TO BE DECIDED

The first issue to be decided is, Does Siegel's owe Hamonic wages as a result of its not paying for Hamonic's London Life benefits for a period?

The second issue to be decided is, Did Siegel's have just cause in terminating the employment of Hamonic?

ANALYSIS

In the Determination Siegel's is found to have agreed to pay 100% of Hamonic's group benefit premiums beginning September 21, 1995 but did not, and that as such Hamonic is owed wages. I agree, the employer submitting nothing which leads to a different conclusion.

I am not satisfied that Siegel's was prevented from carrying out the terms of the September 21, 1995 agreement, the evidence indicating as it does that waiting periods can be waived and that Siegel's did not make much of an effort to obtain benefits for Hamonic. But of primary importance is the agreement. The matter of whether Hamonic is owed wages turns on the requirements of that agreement.

The agreement clearly requires Siegel's to pay for the London Life benefits. And given the wording of that agreement and Siegel's two applications for Hamonic's benefits, in particular its attempts at having waiting periods waived, I conclude on the balance of probabilities that the benefits, and the paying for them, were to begin September 21, 1995. That was the deal between the parties and I am presented with nothing that leads me to conclude that it was ever amended through agreement.

The employer did not follow through on the deal. Coverage had still not been extended to Hamonic by December and that, I conclude, was in large part because of Siegel's failure to act so

as to secure coverage for Hamonic. And Siegel's did not pay for benefits as the agreement requires. That is clear.

In not paying for the benefits Siegel's violated section 26 of the *Act*, "*An employer who agrees under an employment contract to pay an amount on behalf of an employee to a fund, insurer or other person must pay the amount in accordance with the contract*". And the moneys that were not paid are properly viewed as wages owing, the agreement being a part of Hamonic's contract of employment and section 1 (e) of the *Act* defining wages as it does, namely as including, for the purposes of complaints, investigations, determinations and enforcement of the *Act*, "*money required under a contract of employment to be paid, for an employee's benefit, to a fund, insurer or other person*" (my emphasis). In summary, Siegel's entered into an agreement which required it to pay certain moneys as a term of the employment contract, it did not, and as such it now owes Hamonic wages given the *Act*.

I now turn to the second issue before me, the matter of whether the employer had just cause in terminating Hamonic.

The Director's Delegate found that Hamonic was not given any oral or written warnings in respect to his job performance, was not made aware that his job was in jeopardy, and had no job description on which to base his performance. The Delegate went on to find that the employer did not properly discharge Hamonic under section 63 of the *Act* and that he is owed one week's compensation for service as a result.

The employer states that Hamonic failed as an employee in a great many respects. The evidence before me supports a conclusion that Hamonic was not a model employee. It also indicates that Hamonic was terminated, not as a result of one particularly serious breach of the employment relationship, but as a result of a series of infractions of a more minor nature.

Relatively minor infractions, when repeated, may amount to just cause but the employer must show that its rules are clear and reasonable, that they have been made known to the employee, that they have been applied in a consistent fashion, that the employee broke a rule despite having been clearly warned that the consequence of any further breaking of the rules would be termination, and despite having been given an opportunity to improve. In deciding whether an employer has made it clear to an employee that his or her job is in jeopardy, Adjudicators will look for the application of progressive discipline and clear written warnings.

In this case the submissions lead me to conclude that the employer has clear and reasonable rules, that it made them known to Hamonic, and that it applies them consistently. The employer did not, however, apply progressive discipline despite its many complaints with Hamonic and his work, did not clearly warn Hamonic that his job was in jeopardy unless he improved and then give him an opportunity to improve, the warning on the taking of food without paying excepted. In the latter regard, Hamonic was warned that his job was in jeopardy if he continued to take food without paying, but that warning was specific to the taking of food and the evidence is that he stopped taking food without paying.

Siegel's has failed to show that it had just cause in terminating Hamonic's employment. In the absence of just cause, 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. None was given.

I agree with the Determination, wages, compensation for service and interest is owed Hamonic.

ORDER

I order, pursuant to Section 115 of the *Act*, that Determination # CDET 003126 be confirmed.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal

LDC:jel