

Employment Standards Tribunal
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C. 113

- by -

Sea to Sky Restaurants Ltd.
(the “Employer”)

- of a Determination issued by -

The Director Of Employment Standards
(the “Director”)

ADJUDICATOR: Mark Thompson

FILE No.: 98/244

DATE OF DECISION: July 2, 1998

DECISION

OVERVIEW

Employment Standards on March 30, 1998. The Determination found that the Employer had terminated the complainant, Danielle Dobson (“Dobson”) without cause and ordered that she receive a total of \$485.04 as compensation for length of service. The Employer appealed on the grounds that it had cause to terminate Dobson. It also challenged the calculation of Dobson’s average weekly compensation in the Determination and asserted that Dobson had been overpaid for banked statutory holiday pay prior to her termination.

ISSUES TO BE DECIDED

The issues to be decided in this case are: was Dobson terminated for just cause? Was the calculation of weekly pay correct? Should the alleged overpayment of holiday pay be taken into account for Dobson’s entitlement?

FACTS

Dobson was employed from July 24, 1996 to through December 11, 1997 as a server in the Employer’s restaurant. All parties agreed that her hourly rate of pay was \$7.65.

In support of its appeal, the Employer introduced evidence to show that Dobson had been warned about her deficiencies prior to her termination. Her May 3, 1997 performance appraisal contained criticisms of her work. She met with the manager, Allan Cook (“Cook”) on July 4, 1997 and was reminded that she should make only positive comments in the presence of customers. Furthermore, the Employer stated that Cook spoke to Dobson on July 25, 1997. He told her that she was socializing and standing around while on shift, which was detrimental to staff morale. According to the Employer, Cook and Dobson met on October 9, 1997, when Cook told Dobson that she had been going off shift without confirming that all of her clean up duties were finished. As a result, “service coaches,” employees who provided guidance to servers, were required to compete her work. This theme was repeated in a performance appraisal of November 12, 1997. All staff were told at a meeting on November 25, 1997 that the service coaches should be regarded as a manager and must be given appropriate respect. The Employer also presented a copy of its harassment policy, on which it relied in its decision to terminate Dobson.

The Employer’s performance appraisal form contained 14 items on which an employee was rated. Ratings were within a range of “unacceptable” to “superior.” “Meets standards” was the mid-point on the scale. Dobson’s ratings on May 3, 1997 were at or above the “Meets standards” point on all items on the scale, although there were additional comments about inconsistency in her performance.

The Employer introduced notes Cook made of meetings with Dobson. The notes for the July 4, 1997 meeting stated that Dobson had agreed that a number of factors were important, and she believed that she was “maintaining excellent performance.” A similar note dated July 25, 1997 stated that Dobson was undermining the goal of guest satisfaction. Cook also reminded Dobson that she was considered a senior employee and thus should set a good example for new employees. Cook’s note from a meeting on October 9, 1997 noted that Dobson had failed to complete all required cleanup duties before leaving work at the end of her shift. He interpreted this behaviour as showing a “lack of hustle.”

Dobson stated that she had never been called to discuss any problems or complaints with Cook, in particular not on July 4, July 25 or October 9. She called attention to the lack of her signature on the notes or any other acknowledgement that she had attended the meetings.

The Employer presented a copy of a performance appraisal on November 12, 1998. Dobson was rated at or near “unacceptable “ on 4 categories of performance, and below the mid-point on one. The review concluded with a statement that she was “below White Spot standards.” Dobson did not sign the appraisal, although the form contained a position for the rated employee’s signature. She also stated that she was unaware the appraisal had been completed and that Cook had not discussed it with her.

A staff meeting on November 25, 1997 included a discussion of the managerial status of service coaches, including responding to their instructions to come back from breaks and cleaning up in work areas. The Employer received a letter from a customer dated November 24, 1997 complaining about Dobson’s service, although it was not clear from the record if this was discussed with her or at the staff meeting the following day.

There was no dispute between the parties about the events immediately prior to Dobson’s termination. On December 7, 1997, Dobson was on her break. A service coach told her that she had been on her break too long, and Dobson raised the middle finger of her hand in a rude gesture while the service coach’s back was turned. Mr. Gordon Stevenson (“Stevenson”), the assistance manager, evidently saw what happened. In any case, he sent Dobson home for the remainder of her shift. Dobson worked the following shift without incident.

Cook terminated Dobson on December 11. He cited an Employer harassment policy. The letter of termination referred to the December 7 incident, two formal performance appraisals, the service meeting and “informal” performance reviews. Cook also wrote a generally positive letter of reference for Dobson.

In addition to her comments on the Employer’s appeal, Dobson submitted a letter from a former co-worker in the restaurant. The letter praised her work, but acknowledged that she occasionally had an “off” day. The writer stated that Dobson was popular with other employees and guests. The owner of the restaurant met from time to time with a communications committee of employees to discuss problems with staff. The writer was a member of the committee and did not recall Dobson’s performance ever being discussed. She also noted high turnover among managers and staff.

The Employer submitted a copy of Dobson's payroll records for 1997. The calculation of length of service compensation in the Determination was based on an average of 30 hours per week worked, according to information Dobson provided to the Director's Delegate. The Employer's records do not indicate clearly her weekly hours including the week in which she was terminated. However, the records do show that Dobson had worked an average of 19.7 hours per week during the 8 full weeks prior to her termination.. In addition, the Employer noted that the payroll program had incorrectly overpaid employees their banked statutory holiday pay twice in December 1997, resulting in an apparent overpayment of \$395.82 to Dobson. Dobson did not comment on her hours worked or the alleged overpayment in her statement to the Tribunal.

ANALYSIS

The Employer in this case argued that it had just cause to terminate Dobson, so that she should not receive compensation for length of service. The Determination accurately stated the legal standards for termination for just cause. The most relevant criteria for this case would be a serious breach of employer rules or a failure to respond to progressive discipline. Neither standard was met in this case. Dobson behaved improperly on December 7, but the incident in itself did not justify termination. A record of prior discipline would be necessary. The Employer's evidence did not indicate that it had used progressive discipline for Dobson. The written notes of meetings did not contain any record that Dobson had accepted or even been informed of management's view of her performance. In particular, she did not sign the November 11 performance appraisal, although the form contained a space for the employee's signature. Even if the Cook's notes were accepted as an accurate account of meetings with Dobson, they fell short of giving her a signal that her performance had jeopardized her continued employment. Dobson's actions did not constitute harassment as defined in the Employer's policy, especially since the service coach's back was turned when she made the rude gesture. Therefore, Dobson is entitled to two weeks' compensation for her length of service.

The Employer's evidence regarding her average hours worked was persuasive. Dobson is entitled to a total of 39.3 hours at \$7.65 per hour, for a total of \$294.75, plus interest and 4 per cent vacation pay. The Employer claimed overpayment of Dobson's statutory holiday entitlement. The first payment was prior to her discharge, and the second was in her final pay cheque. The Act does not empower the Tribunal to collect overpayments by an Employer.

ORDER

For the reasons, stated, pursuant to Section 115 of the *Act*, I order that the Determination be varied to reflect an average of 39.3 hours worked, plus vacation pay and interest accrued since the date the Determination was issued.

**Mark Thompson
Adjudicator
Employment Standards Tribunal**