

An appeal

- by -

Coast Deli "O" Inc.
(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: Kim Polowek

FILE No.: 2001/43

DATE OF DECISION: June 14, 2001

DECISION

OVERVIEW

This is an appeal by the Employer ("Coast Deli") pursuant to Section 112 of the Employment Standards Act (the "Act"), against a Determination dated March 15, 2000 issued by a delegate of the Director of Employment Standards (the "Director") which determined that:

- (1) Tina Argenti ("Argenti") was not dismissed for just cause; and:
- (2) Coast Deli "O" Inc. had contravened Sections 40 (overtime) and 63 (termination) of the Act and Tina Argenti ("Argenti") was owed \$482.67 on account of wages, vacation pay, regular wages and termination pay;

The Employer appeals the Determination. Coast Deli says the Determination is wrong in that Argenti is not owed any money as she did not work overtime hours and was not terminated from her employment. Coast Deli says Argenti took a meal break every single working day and night shift.

ISSUE(S) TO BE DECIDED

Whether Coast Deli "O" has shown any parts of the Determination dated March 15, 2000 to be wrong in law or in fact.

PRELIMINARY MATTERS

The Employment Standards Tribunal convened a hearing relating to this appeal on July 17, 2000. At the outset of this hearing and during the process of explaining the hearing process, it became evident that matters related to both document disclosure and the availability of documents required further investigation.

Specifically, Sue Kim ("Kim") of Coast Deli stated that she telephoned the Director to request the return of the original payroll records and timesheets that she had forwarded to the Director as these were her only copies of this documentation. Kim indicated that she was not aware of the date of her telephone call to the Director but believed it to be shortly after receiving a letter from the Tribunal (dated April 11, 2000) instructing her that she must include a copy of all records and documents in support of her own Appeal to the Tribunal. Kim stated that the Director informed her that he would be present at the Tribunal hearing and would bring her requested documentation to the hearing. The delegate of the Director of Employment Standards was not present at the hearing. Kim indicated that the payroll records and timesheets held by the Director were necessary documents to facilitate her ability to present her case before the Tribunal. Kim

also expressed concern that other documentation provided to the delegate of the Director was not shared with her.

In view of the above and in the interest of the rules of natural justice and procedural fairness, the Adjudicator made the decision to refer the matter back to the delegate for further investigation of the complaint and document disclosure (payroll records).

Section 115(1) of the Employment Standards Act provides that after considering an appeal, the Employment Standards Tribunal may make an order to refer the matter back to the Director of Employment Standards. A referral back to the Director means there is a need for further investigation.

The Director completed a further investigation which culminated in a January 10, 2001 report to the Employment Standards Tribunal on January 10, 2001. In this report, the Director advised that the originals of the payroll records were returned to the employer (Coast Deli). The employer did not respond.

ANALYSIS

In an appeal before the Tribunal, the burden rests with the appellant to demonstrate that an error was made such that I should vary, or cancel the Determination.

The Determination concluded, after examining all of Argenti's payroll records and timesheets for the audit period and computing regular wages and overtime earnings, that Argenti was owed overtime. The Determination also concluded that there was evidence that Argenti had not been dismissed for just cause and was, therefore, entitled to compensation for length of service. The Determination also concluded that she was owed vacation pay.

In the original appeal to the Tribunal, Coast Deli stated that the Determination was wrong in that Argenti was not owed any money as she did not work overtime hours and was not terminated from her employment. Following the Tribunal's referral back to the delegate of the Director for further investigation, Coast Deli changed their position and now believes the conclusions of the Determination to be accurate.

A letter dated March 12, 2001 was received from Sue Kim, owner of Coast Deli. In that letter to the Tribunal she makes the following statements:

Ms. Argenti states that she is still in disagreement over Mr. Victor Lee's investigative results. At this time I would like to make clear that I have provided Mr. Lee with any and all of the relevant information he requested, and to the best of my integrity and knowledge, believe his findings to be clear, concise and true.

In addition to this recent written submission from Coast Deli in which the findings of the Determination appear to now be accepted as "clear, concise and true", I note that Coast Deli

failed to respond during the Director's further investigation of this Appeal. Accordingly, both Coast Deli's written acknowledgment of the accuracy of the original Determination and the failure to respond during the further investigation conducted by the delegate for the Director, could be taken as evidence that the grounds upon which this Appeal were based have ceased to exist and deserve no further consideration by this Tribunal. The credibility of the submissions of Coast Deli are also in question. Nevertheless, I will deal with each of the issues raised by Coast Deli in their original appeal.

Dismissal for Just Cause

In the Determination, the delegate of the Director under the section "Employer's Position" clearly documents that Coast Deli stated that they terminated Argenti's employment after alleging that she failed to cook the lasagna and fill up the butter containers the night before. The employer contended to the delegate of the Director that it had just cause to terminate the complainant's employment. Coast Deli's November 23, 1999 submission to the delegate of the Director outlines the difficulties allegedly experienced with respect to Argenti's work performance and disruptive behaviour.

Coast Deli's submission to the Tribunal dated April 30, 2000 outlines a different version of events. Specifically Coast Deli now alleges that Argenti was not terminated. Coast Deli stated it was understood that Argenti had left her position as she did not show up for her final wages or for subsequent shifts. Coast Deli points to the statement of another employee who reports that without any notice Argenti did not return to work.

The Determination is clear in reporting that the position of the employer, Coast Deli, was that there existed just cause to terminate Argenti's employment. There is no mention in the Determination of the allegation now before the Tribunal that Argenti had voluntarily left her position. If Coast Deli believed this to be the true version of events it should have been disclosed to the delegate for full investigation at that time. An Appeal is not the arena for conducting a new investigation based on information which for whatever reason was not shared with the delegate of the Director.

The Tribunal has addressed the question of dismissal for cause on many occasions. Kenneth Kruger, BC EST #D003/97 summarizes the principles which may be gleaned from those decisions:

1. The burden of proving the conduct of the employee justifies dismissal is on the employer;
2. Most employment offences are minor instances of misconduct by the employee not sufficient on their own to justify dismissal. Where the employer seeks to rely on what are in fact minor instances of misconduct, it must show:

1. A reasonable standard of performance was established and communicated to the employee;
 2. The employee was given a sufficient period of time to meet the required standard of performance and had demonstrated that they were unwilling to do so;
 3. The employee was adequately notified their employment was in jeopardy by a continuing failure to meet the standard; and
 4. The employee continued to be unwilling to meet the standard.
3. Where the dismissal is related to the inability of the employee to meet the requirements of the job, and not to any misconduct, the Tribunal will also look at the efforts made by the employer to train and instruct the employee and whether the employer has considered other options, such as transferring the available employee to another available position within the capabilities of the employee.
 4. In exceptional circumstances, a single act of misconduct by an employee may be sufficiently serious to justify summary dismissal without the requirement of a warning. The Tribunal has been guided by the common law on the question of whether the established facts justify such a dismissal.

I concur with the delegate of the Director in that I can not find any evidence that the employer discharged their obligation to Argenti regarding her work performance in the manner dictated by the Principles outlined above. Accordingly, I concur with the delegate for the Director that Argenti was not dismissed for just cause and is entitled to compensation for length of service as a result.

Meal breaks

The employer, in her submission dated November 23, 1999, indicates that she never withheld breaks from her employees as she viewed them as crucial to the well being of the staff and to group cohesion. She indicates that she always used 3 or 4 employees for the busy morning shifts and always at least 2 employees in the quieter evening shifts. In her appeal to the Tribunal dated April 7, 2000, Coast Deli states that Argenti took a meal break every single working day and night shift.

Two employees provided statements to the delegate for the Director to support the position of the employer regarding meal breaks. Both of these employees stated that there were at least two employees working together during the day and night shifts. Both advise that they were always given a meal break, especially so in the evening when it was quieter. One of the employees stated that this break was 1/2 hour in length but the other employee did not specifically state how long the meal break provided was.

One employee describes the manner in which meal breaks were permitted. Specifically, employee Jill Krowchuk advised that employees were required to remain on the work site or were permitted to sit outside the business premises for a cigarette during their breaks.

Argenti alleges she was required to remain in the work area and be available for work during her breaks. Specifically, she states that she was required to remain present during her breaks which were interrupted when customers would order from the kitchen or if busy, or if the other employee was in the stock room. She alleges that she could not and did not leave the premises for walks or for any other reason. She alleges that it was not possible to leave for a break on the night shift as there were only two people on shift. She also alleges that she was often over-worked and could not break at all.

The Director found that the employers' position that the employees were always given a meal break each shift was supported by the evidence of two other employees. The Director did not believe these employees were influenced or coerced by the employer into making those statements as alleged by Argenti. In the circumstance, the Director found that the complainant was given a meal break each shift and consequently, there were no wages owing to her in this respect. The Director, however, did not address in the Determination the issue of whether Argenti was required to be available for work during her meal breaks.

The issue, however, is not only whether or not Coast Deli provided the opportunity for Argenti to take a meal break as required under the Act, but also whether Coast Deli either directly or indirectly required her to be available for work throughout her meal break.

Section 32 of the Act mandates that an employer must ensure that employee receives at least a 1/2 hour meal break every 5 hours. Further Section 32 requires that an employee be paid for the meal break if the employer requires an employee to be available for work during that time.

There exists persuasive written evidence from another employee which corroborates Argenti's allegation that she could not leave the premises for meal breaks. I am unable to find a plausible explanation for why an employer would require employees to remain either at or close to the work site other than that there was an expectation that they might be required to work if the demands of the business so required it. The fact is that if an employer either directly or indirectly requires an employee to be available for work throughout his or her meal break, that break must be characterized as working time.

Accordingly, on the basis of the evidence I have before me, I have concluded that Argenti was required to be available for work during her meal breaks and is owed wages. This matter is referred back to the Director for calculation of wages owing.

Overtime

Coast Deli states that Argenti is not entitled to wages as she did not work overtime.

The audit of timesheets and payroll records provided by Coast Deli and conducted by the delegate for the Director indicated that there were 7 weeks where Argenti worked more than 40 hours a week for which overtime wages would have to be paid under Section 40(2) of the Act.

Coast Deli has not provided me with any evidence or documentation to back up their claim that Argenti did not work the overtime hours indicated by their own payroll and timesheet documentation. Accordingly, I have no evidence before me which would lead me to doubt the accuracy of the conclusion of the delegate with respect to owed overtime wages. I confirm the finding of the Determination with respect to overtime wages owed to Argenti.

One final matter with respect to the Determination requires attention. The delegate of the Director has acknowledged in his report of January 10, 2001 that the wages found owing to Argenti are incorrect. A cheque received by Argenti for her last day of work was not reflected in the Determination calculation as the payroll records in the possession of the delegate of the Director did not include this payment. Accordingly, the delegate of the Director has concluded that the amount of \$63.00 be deducted from the wages found owing to Argenti in the Determination. I accept the conclusion of the delegate of the Director in that this \$63.00 should be deducted from the wages found owing in the Determination.

ORDER

Pursuant to Section 115 of the Act, I order that the Determination be confirmed, with the exception of the issue of the amount of wages owing and wages for meal breaks which is referred back to the Director for recalculation. Interest will accrue on all amount payable in accordance with Section 88 of the Act.

Kim Polowek
Adjudicator
Employment Standards Tribunal