

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 -

SciTech International Holdings Ltd. operating as
Knight & Day Restaurant
("SciTech")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE No.: 2000/321

DATE OF HEARING: July 20, 2000

DATE OF DECISION: August 14, 2000

DECISION

OVERVIEW

SciTech International Holdings Ltd. operating as Knight & Day Restaurant (“SciTech”, also, “the employer”), pursuant to section 112 of the *Employment Standards Act* (the “Act”), has appealed a Determination by a delegate of the Director of Employment Standards (the “Director”). In that Determination, dated April 27, 2000, SciTech is ordered to pay Tracey Trusz compensation for length of service with vacation pay and interest over and above that.

SciTech, on appeal, claims no payment is necessary as there was just cause for dismissal. On that, the employer claims that the Director’s delegate has found a difference in the observations of witnesses when none exists. The employer also claims that the delegate has failed to consider all of the factors that led to Trusz’s termination.

APPEARANCES

Yan Su	Speaking for SciTech
Souzan Zawahery	Witness for the employer
Sidney McLeod	Witness for the employer
Stefan Linke	Witness for the employer
Tracey Trusz	On her own behalf

ISSUES TO BE DECIDED

The facts are disputed in this case. And the matter of whether the employer did or did not have just cause is at issue. According to the employer, there were three instances of misconduct involving Trusz. She used foul language in front of customers. She left early one day without permission. And, it is alleged that the Determination is wrong: Trusz did deliberately push an employee. What I must ultimately decide is whether the employee has or has not shown that the Determination ought to be varied or cancelled for reason of an error or errors in fact or law.

FACTS

Tracey Trusz worked as a waitress in a Knight & Day restaurant. She began the employment on June 6, 1997. Her last day of work was the 20th of June 1999.

On the 11th of June 1999, Trusz got into a heated argument with Souzan Zawahery and the two started swearing at each other in front of customers. Trusz and Zawahery were

both warned by Stephan Linke, General Manager, that their conduct was completely unacceptable.

A few days later, Trusz left work early after complaining about what she said was the less than lucrative nature of the customers that she was receiving. She just up and left without permission.

Linke terminated Trusz on hearing that she had, on the 20th, run into Zawahery and shoved her aside. First, Syd McLeod, his Kitchen Manager, told him that he had seen Trusz push Zawahery. He then confirmed, on speaking to Zawahery, that Trusz “ran right into her and pushed her to the side”.

The delegate interviewed Trusz, McLeod and Zawahery. Trusz denied pushing, and even bumping into, Zawahery. McLeod said that Trusz “pushed (Zawahery) and it did look like she did it on purpose”. Zawahery said she was not pushed, that Trusz had hit her, hard, with a drawer on opening it, causing a bruise on her hip. While Zawahery claimed that it was on purpose, the delegate found that there was not clear evidence of physical assault.

I am satisfied that on the 20th, McLeod and Zawahery were cleaning a large counter in the kitchen when Trusz came into the kitchen and, on reaching for a drawer, bumped into Zawahery, pushing her aside. Then, on pulling out the drawer, Trusz hit Zawahery with the drawer. Beyond that, I am satisfied that Trusz neither hit Zawahery all that hard, nor did she mean to strike Zawahery. There is not clear evidence of an intent to injure. No one fell down. No one required medical attention. Indeed, nothing of a particularly exceptional nature happened on the 20th. As even Zawahery says, Trusz was always pushing her and hitting her with drawers. Moreover, I believe, as it is so very likely, that had Trusz really clobbered Zawahery, that she would now have a fairly clear memory of the point in her shift that the event happened. She does not. The event does not stand out in her mind.

ANALYSIS

Trusz was employed for two years. As such, the employer’s liability for compensation for length of service is two weeks’ pay [section 63 (2) of the *Act*].

Subsection 3 of section 63 states that the liability to pay length of service compensation is discharged if the employee is terminated for cause.

63 (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 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**. (my emphasis)*

The Tribunal recognizes that a single act of misconduct may be of such a serious nature that the employee's immediate dismissal is justified. It also recognizes that an employer may be justified in terminating an employee for reason of minor misconduct where the misconduct is repeated, or for reason of an employee's chronic inability to meet the requirements of a job. But in cases where just cause is alleged for reason of repeated misconduct of a less serious nature, or generally unsatisfactory work, the Tribunal has said (through decisions like *Randy Chamberlin and Sandy Chamberlin operating as Super Save Gas*, BCEST #D374/97) that just cause will be found to exist only where the following is shown:

- (a) That reasonable standards of performance were established and communicated to the employee;
- (b) the employee was plainly and clearly warned that his or her employment was in jeopardy unless such standards were met;
- (c) the employee was given sufficient time to improve; and
- (d) the employee did not meet those standards.

In this case, I am not shown that Trusz is guilty of an act so serious as to justify immediate dismissal. I agree with the delegate. There is not evidence of a physical assault. Trusz may have been rude and careless but there is not clear evidence of an intent to injure, nor is there any evidence that Zawahery suffered, or could have suffered, significant injury.

I am fully prepared to accept that Linke, on hearing from McLeod and Zawahery on the 21st, decided that he had had quite enough of Trusz. I am, furthermore, satisfied that Trusz is guilty of minor misconduct, at least the use of foul language in front of customers and leaving work without permission, although she may also have been unacceptably rude and careless as well. But, for all I know of matters, SciTech, or at least

the restaurant, may have condoned such behaviour. It has not shown me that it was in the circumstances justified in terminating Trusz. SciTech, for example, has not shown me that there was a second instance of misconduct even though Trusz had been plainly and clearly warned that she faced termination if there was any further instance of that misconduct. All I am shown is that Trusz received some sort of warning about swearing in front of customers and that was the end of her use of foul language in front of the customers.

I find that the delegate is correct in awarding compensation for length of service.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated April 27, 2000, be confirmed in the amount of \$404.69 and to that I add whatever further interest has accrued pursuant to section 88 of the *Act*.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal