

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 -

Sambuca Restaurant Ltd.
("Sambuca")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton
FILE NO.: 97/208
DATE OF HEARING: July 9, 1997
DATE OF DECISION: July 24, 1997

DECISION

APPEARANCES

Suzanne Kopas
Melvyn Felt on behalf of Sambuca Restaurant Ltd.

Janice Jehn on behalf of Richard J. Dawe

OVERVIEW

This is an appeal by Sambuca Restaurant Ltd. (“Sambuca”), under Section 112 of the *Employment Standards Act* (the “Act”), against a Determination which was issued by a delegate of the Director of Employment Standards (the “Director”) on March 12, 1997. The Determination required Sambuca to pay \$1,036.05 (including interest) to Richard J. Dawe (“Dawe”) on account of unpaid statutory holiday pay and compensation for length of service. The amount found to be owing was reduced due to an overpayment of vacation pay.

Sambuca’s appeal alleges that there was just cause to terminate Dawe’s employment and, therefore, that it does not owe compensation for length of service. The appeal also argues that because Dawe held a management position he was not entitled to overtime wages or statutory holiday pay.

A hearing was held in Penticton, B.C. on July 9, 1997 at which time evidence was given under oath by Suzanne Kopas, Melvyn Felt, Tracy Bella, and Richard Blewaska. Richard Dawe did not attend the hearing.

ISSUES TO BE DECIDED

There are two issues to decide in this appeal:

- Was Richard J. Dawe a manager for purposes of the *Act* and *Regulation*? and
- Was Richard J. Dawe’s employment terminated for just cause?

FACTS

Mr. Dawe was employed by Sambuca as a chef from February 2, 1996 to September 21, 1996. His salary was \$1,215.00 bi-weekly. There was no written contract of employment. Suzanne Kopas testified that her normal practice is to include vacation pay on each employee’s bi-weekly paycheque. However, she acknowledged in her evidence that it was “... possibly an oversight not to tell Richard [Dawe] about how vacation pay is paid.” Ms. Kopas also testified that she hired Dawe to “run the kitchen” for the restaurant. As the chef, she testified, Dawe was “totally in charge of the kitchen” and was “responsible for

all aspects of the kitchen.” Dawe’s typical duties included: hiring, supervising, disciplining staff; scheduling kitchen staff; ordering food supplies; food cost control; preparing menus; and inventory control. In addition, he prepared meals and supervised the preparation of food by other kitchen staff. The maximum number of kitchen staff employed at any one time by Sambuca was four.

At page 2 of the Determination, the Director’s delegate summarizes the grounds on which the Employer concluded that it had just cause to terminate Dawe’s employment, as follows:

The employer claims that they spoke with Mr. Dawe many times regarding his attitude, his temper, and his inability to get along with other employees. The employer has provided evidence that Mr. Dawe seemed to have ongoing problems. This evidence was provided from the employer’s diary, but no evidence could be provided to show that Mr. Dawe received written letters of reprimand. The employer alleges that some vodka was missing and the evidence indicated that Mr. Dawe had removed the vodka from the premises. The employer’s notes indicate that the missing vodka occurred on September 13, 1996 and Mr. Dawe was not terminated until September 21, 1996.

The evidence given by Ms. Kopas concerning ongoing problems with Mr. Dawe’s attitude, temper, and inability to get along with other employees was corroborated by Mel Felt, Tracy Bella, and Richard Blewaska. Prior to September 13, 1996 Ms. Kopas spoke with Mr. Dawe “many times” to advise him that there was to be “no drinking on the job” and that the way he treated employees was unacceptable. The events which occurred on September 13, 1996 are central to this appeal. Prior to September 13, 1996 there is no evidence of Dawe having received a warning that his employment was in jeopardy.

Suzanne Kopas testified that Richard Dawe “confronted” her in her office at approximately 3:00 p.m. on September 13, 1996 and demanded a payroll advance. When she declined, she testified, Dawe became “really obnoxious” and went from the restaurant to the parking lot where he and his landlady began “yelling and screaming.” According to Kopas’s evidence, she called Dawe into the kitchen and told him:

“This can’t go on. I’ve had it. I’ve had enough. I want you out, now. I want your keys.”

When Dawe gave Kopas his keys to the restaurant, she began to “pack his things.” It was at this point that Mel Felt intervened in an attempt to diffuse the situation. According to Mel Felt’s evidence, Dawe was “very, very abusive” to Ms. Kopas to the point where Felt was “scared for Kopas’s safety.” Felt also testified that Dawe was “very heated,” “off the wall” or “over the top” such that he told Dawe more than twice that he would call the RCMP. Soon thereafter, Felt told Dawe that he “... should not return, ever... and your cheque will be mailed to you.” Dawe asked Felt and Kopas for another chance. When the situation was calm, Kopas told Dawe: “I can’t take this anymore. You have one more chance.” This was corroborated by Tracy Bella’s evidence.

On September 21, 1996 Dawe reported for work at approximately 4:00 p.m. and, according to Suzanne Kopas, he “smelled of alcohol.” Kopas also testified that that was a very busy day in the restaurant. When Dawe completed his shift, Felt and Kopas spoke with Dawe in the office and terminated his employment.

ANALYSIS

Was Dawe a manager?

Section 1 of the *Employment Standards Regulation* (the “*Regulation*”) defines a manager as:

- a) a person whose **primary employment duties** consist of supervising and directing other employees, or
- b) a person employed in an executive capacity. (emphasis added)

In this appeal, Sambuca does not argue that Dawe was employed in an executive capacity. Therefore, the issue which I must decide is whether Dawe’s **primary** employment duties consist of supervising and directing other employees. The title given to a position is not relevant in determining whether the incumbent is a “manager” or an “employee” for purposes of the *Act*. Dawe’s employment duties must determine whether he was a manager or not.

The evidence establishes that part of Dawe’s responsibilities included supervising kitchen staff.

I am unable to conclude that supervising and directing other employees was Dawe’s primary employment duty.

The evidence supports a finding made by the Director’s delegate that Dawe’s primary duties “... were those of a chef - cooking and preparing meals.” I concur with that finding. Thus Sambuca is required to pay statutory holiday pay as set out in Part 5 of the *Act*.

Was there just cause to terminate Dawe's employment?

Section 63 of the *Act* establishes a statutory liability on an employer to pay length of service compensation to an employee upon termination of employment. That statutory liability may be discharged by the employer giving appropriate notice to the employee, by providing a combination of notice and payment in lieu of notice to the employee or by paying the employee wages equivalent to the period of notice to which the employee is entitled under the *Act*.

The employer may be discharged from this statutory liability by the conduct of the employee where the employee terminates the employment, retires or is dismissed for just cause.

The Tribunal has addressed the question of dismissal for just cause in many previous decisions (see, for example, *Kenneth Kruger* BC EST No. D003/97) and has consistently applied the following principles:

1. The burden of proving the conduct of the employee justifies dismissal is on the employer;
2. Most employment offenses 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 instances of minor 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 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 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.

The analysis made by the Director's delegate at page 3 of the Determination does not include any reference to and does not address the common law test for just cause, namely: was there "willful disobedience" on Dawe's part which would connote a "deliberate flouting of the essential contractual conditions of employment?" This is a significant omission, in my opinion.

The Director's delegate makes note in her analysis that Dawe was not given a written warning and that his employer condoned his behaviour for several months. While the Tribunal has consistently held that in the absence of a fundamental breach of the employment contract, an employer is required to give a "clear and unequivocal warning" of unsatisfactory performance to avoid the liability to pay compensation resulting from length of service under Section 63 of the *Act*. A "clear and unequivocal warning" may be given verbally or in writing. While it is preferable (because it is easier to prove) that a warning be given in writing, it is not required. In the facts of this appeal, I find there is clear evidence (by way of sworn testimony) that Dawe was warned clearly and unequivocally on September 13, 1996 that his employment was in jeopardy. Kopas actually terminated his employment on that date, and reinstated him on the clear understanding that he had "one more chance" to meet his employer's reasonable standards of performance.

On the evidence before me I find that there was just cause to terminate Dawe's employment on September 21, 1996. Sambuca has shown that: a reasonable standard of performance was established and communicated to Dawe; he was warned on September 13, 1996 that he had "one more chance"; and he demonstrated on September 21, 1996 his inability to meet the reasonable standard set by his employer.

ORDER

I order, under Section 115 of the *Act*, that the Determination be varied to show that Dawe's employment was terminated for just cause and, therefore, Sambuca Restaurant Ltd. did not contravene Section 63 of the *Act*.

I order that Sambuca Restaurant Ltd. pay the sum of \$404.25 to Richard J. Dawe for unpaid statutory holiday pay (net of vacation pay overpayment).

Geoffrey Crampton
Chair
Employment Standards Tribunal