

An appeal

- by -

Aji Taro Japanese Bistro Ltd.
(“Aji Taro”)

- 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: James Wolfgang

FILE No.: 2002/238

DATE OF DECISION: August 12, 2002

DECISION

OVERVIEW

This is an appeal by Aji Taro Japanese Bistro Ltd. (“Aji Taro”) or the (“Employer”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) of a Determination issued by the Director of Employment Standards (the “Director”) dated April 10, 2002. The Determination found Aji Taro owed Chung Yin Fan (“Fan”) \$829.36 as compensation for length of service and interest. Aji Taro claim Fan was discharged for just cause and no compensation for length of service is payable.

Aji Taro requested an extension of time as they were attempting to reach former employees who may be able to give evidence as to the events of May 21, 2001. They do not appear to have been successful, as no supplementary information has been forwarded to the Tribunal.

No penalty has been assessed against Aji Taro.

ISSUE

Was Fan terminated for just cause? If not, is compensation for length of service payable?

THE FACTS AND ARGUMENT

Aji Taro employed Chung Yin Fan as a Sushi Chef Assistant from April 18, 2000 until May 21, 2001.

According to the Employer, Fan disobeyed a direct order from the manager, David Wong (“Wong”), to assist in the kitchen cooking rice. They claim they were short handed in the kitchen that day and Wong spoke to Sean (Jin Qian), Head Sushi Chef, to have someone assist in the kitchen from the sushi department. They claim Fan had no orders to prepare and it would only take a few minutes to cook the rice with an automatic cooker.

Wong claims Fan interrupted his conversation with Sean in a very rude manner and refused to work in the kitchen when instructed to do so. Fan further refused to stop talking when requested to do so by Wong. There were customers present and Wong felt his authority had been undermined by Fan therefore he terminated him.

The Determination found different versions of the events of May 21, 2001. A Chinese-speaking delegate of the Director, Michael Fu, (“Fu”) spoke with the witnesses, Jin Qian (Sean) on December 10, 2001 and Zhen Bo Luo on December 08, 2001. The delegate spoke with Jacob Zhu on the telephone.

The Determination states:

Sean states Fan did not obey Wong to help in the kitchen and got into an argument with him. However, Sean could not remember the details because it happened a long time ago.

Luo states that he knew there was an argument between David Wong and Chung Yin Fan in front of the sushi bar. Since Luo worked in the kitchen, he did not know the details nor heard what was said between them.

Jacob said he worked in the kitchen so did not hear what happened out at the sushi bar. He knew that there was an argument between David Wong and Fan. Jacob said on that day before the last incident happened, he asked Fan to help cook rice, but Fan refused.

On the day when Fan was terminated, Fan knew the kitchen staff needed help because he was asked by Jacob to cook rice. He had refused. However, his superiors (the head chef and the manager) had not required him to help. They were in (a) discussion of deciding who should help in the kitchen. His termination was therefore not a matter of disobeying an order to cook rice, which is a reasonable order by the Management if he was told to do so. Fan was terminated because of his attitude and he was disrespectful to the manager when he (was) told not to join in the conversation between the manager and Sean.

Further in the Determination it states, in part:

Sean, the chief chef who was present at the conversation said he did not remember the incident too well. It could only be deduced that if Fan had made a scene in front of the customers, Sean would be able to remember how Fan had behaved, even if he did not remember exactly what was said.

In his appeal to the Tribunal received May 01, 2002, Patrick Chen (“Chen”), President of Aji Taro, stated Fan “behaved grossly insubordinate when he got dismissed”. A letter dated November 25, 2001 was included with the appeal. It was signed by the two employees interviewed by Fu indicating Fan was disrespectful of his superiors and interfered in other areas.

Chen claims this is not the first incident of insubordination. He claims there were other similar incidents. Fan was given verbal warnings that if he did not correct his working behaviour his employment was in jeopardy. There are no copies of letters of reprimand or warnings provided to the Tribunal regarding Fan.

The appeal contained a letter from Sean who was Fan’s supervisor on the day he was terminated. The letter states Fan was interfering in other areas of the business and had made a scene in front of customers. It does not mention Fan refused a direct order from Wong, which is contrary to the evidence provided in the Determination.

According to the Determination, management wrote these letters, as the employees did not have a sufficient command of English to write them.

There was also a letter from Wong that states there was an incident in April 2001 in which Fan and two other employees were warned about speaking too loud to each other in Chinese and getting the orders wrong.

Fan claims he had worked for Aji Taro for over one year and during that time he was transferred to another restaurant and promoted to Sushi Chef until the closure of that sushi bar. He was then transferred back to the Aji Taro in Richmond and returned to work as an assistant to the Sushi Chef.

On May 21, 2001, Fan claims he had just started work in the sushi bar when one of the kitchen staff came and requested he go to the kitchen to cook rice. As he felt he was busy preparing for work in the sushi bar he refused to work in the kitchen. The kitchen employee raised the matter with Wong who approached the Sushi Chef. While they were discussing this Fan joined the conversation indicating it was not his job to work in the kitchen and he had duties to perform in the sushi bar. Wong became angry and ordered him to leave the restaurant immediately.

Fan argues there were no other employees present that could have heard the exchange between Wong and himself except for Sean, the Sushi Chef. He claims there is no evidence detailing his argument with Wong.

ANALYSIS

I will first deal with the incident of April 2001. In the report by Wong to Chen dated November 5, 2001, Wong stated Fan and two other employees were warned about speaking too loudly in Chinese while customers were present. He indicated as a result they prepared the wrong order. The Determination states Fan was in charge that day as Sean was off work. It claims Fan swore at Wong during that argument however Wong did not report that to Chen.

Fan admits he answered Wong during the April incident involving the loud talking. He claims he told Wong they were not talking loud and he did not swear at Wong. The Determination states, according to Fan, Wong walked away and appeared unhappy. Fan admits he did not get along very well with Wong.

It should be noted the report from Wong to Chen was not written until November 5, 2001 while the incident took place in April 2001 nearly seven months earlier and after Fan had been terminated. There appears to be no other incidents involving Fan until May 2001.

I will now deal with the incident of May 21, 2001. The evidence of Sean as reported in the Determination, states "Fan did not obey Wong to help in the kitchen and got into an argument with him". However, the undated letter contained in the appeal signed by Sean (I believe it was written by Management) does not make any reference to Fan refusing an order but refers to Fan interfering in other parts of the business and making a scene in front of customers.

The appeal by Chen states Fan refused a direct order from Wong to cook rice. Without corroborating evidence to support that statement we must consider that as hearsay.

Further in the report by Wong to Mr. P. Chen dated November 5, 2001 it states, in part:

On May 21/01 kitchen staff were shorthanded. I have ask(sic) Sean (the sushi chef) to have someone to help to cook rice, during our discussion Bobby (Fan) had joined in uninvited to our conversation in a very rude manner. I tried to contain him from further making a scene in dining area which is just the same at (sic) sushi bar. Bobby is very uncooperative, then I warned him not to make further commotion or he will be fired. At the end I have no choice but to fire him on the spot.

In the submission to the Tribunal dated May 22, 2002, the delegate states that "David Wong emphasized to me in our telephone conversation that he had not ordered Fan to cook rice, he was only discussing with Sean to decide who should help cook rice".

The majority of evidence points to Wong discussing with Sean who should work in the kitchen when Fan joined into that discussion. By refusing to leave that discussion or stop talking may have been an act of insubordination however it must be weighed as to whether it warranted discharge.

There has been such conflicting evidence from the Employer there is reasonable doubt a serious act of insubordination took place. I accept that Fan may have been disrespectful of his supervisors however, without a remedial effort to allow him to correct his mistakes, it does not justify termination.

A single act of insubordination may be so serious as to justify the termination of employment, as may misconduct of a minor sort, when it is repeated. In all cases the onus for showing just cause lies with the employer. Chen writes that Fan had been verbally warned about his work performance on other occasions. However, we have no evidence of any discipline or written warnings putting Fan on notice if he did not improve his job was in jeopardy.

In that regard, it is the well-established view of the Tribunal [*Randy Chamberlin and Sandy Chamberlin operating as Super Save Gas*, BCEST No. D374/97] that the employer has just cause only where the employer shows the following:

- a) That reasonable standards of performance were established and communicated to the employee;
- b) the employee was clearly and unequivocally 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.

Section 63 of the *Act* states that an employer is liable to pay an employee an amount equal to two week's wages as compensation for length for service. Section 63(3)(c) of the *Act* states that an employer can discharge this liability if the employee is "dismissed for just cause."

I am inclined to believe that the Employer has not provided sufficient evidence to overturn the Determination. The evidence to support the contention that Fan refused a direct order from Management to work in another area of the restaurant is lacking and the Determination is upheld.

ORDER

In accordance with Section 115 of the *Act* I confirm the Determination by the Director dated April 10, 2002. Additional interest is to be calculated in accordance with Section 88 of the *Act*.

James Wolfgang
Adjudicator
Employment Standards Tribunal