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 -

Sentinel Peak Holdings Ltd. operating as No. 5 Orange Hotel
("Sentinel")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Norma Edelman

FILE NO.: 98/283

DATE OF DECISION: August 14, 1998

DECISION

APPEARANCES

Mark Tweedy	on behalf of Sentinel Peak Holdings Ltd. Operating as No. 5 Orange Hotel
Wendy Jones	on behalf of the Director of Employment Standards

OVERVIEW

This is an appeal by Sentinel Peak Holdings Ltd. operating as No. 5 Orange Hotel ("Sentinel") pursuant to Section 112 of the Employment Standards Act (the "Act") of a Determination issued by a delegate of the Director of Employment Standards (the "Director's delegate") on March 23, l998.

The Director's delegate found that Sentinel owed Kelly Mrus ("Mrus") vacation pay, statutory holiday pay, overtime pay, and compensation for length of service. Sentinel disputes the amount awarded as compensation for length of service.

A hearing was held at the Tribunal's offices on July 23, l998 at which time evidence was given under oath. Although duly notified of the time and place of the hearing, Mrus did not attend and offered no explanation for her failure to attend. The Hearing Notice sent to the parties advised them that the Tribunal would decide the appeal despite a party's failure to attend.

ISSUE IN DISPUTE

Does Sentinel owe Mrus 8 weeks wages as compensation for length of service?

FACTS AND ARGUMENTS

Mrus commenced employment as a cocktail waitress at the No. 5 Orange Hotel in l989.

On September 1, l997, David Mortimer ("Mortimer") commenced employment at the Hotel as the Night Manager. He was hired by Chuck Choo ("Choo"), one of the owners of Sentinel.

Mortimer, who is no longer employed at the Hotel, testified that when he started his job he advised all the staff at the beginning of their shifts that he was the Night Manager. He had been a customer at the bar for many years and he wanted to ensure that everyone knew that

he had a different role. He told Mrus he was the Night Manager on his first or second day on the job. Another waitress, Lolita, was present at the time.

Mortimer further testified that Mrus was dismissed due to her conduct on September 8, l997. Mortimer said that he observed Mrus sitting at a table and not working on September 8, l997. He walked over to Mrus and politely asked her to return to work in her section. She got up and went back to her section and then a few minutes later she returned to the table. Mortimer said he went back to the table and told Mrus to return to work in her section. Mrus became upset and returned to her section but she did no work. A short time later she returned to the table and had a cigarette. Mortimer said he did not want to go over to the table again so he waited for Mrus to return to her section. When she did, he told her that she had been told twice to return to her station and go back to work. He said he was not mad nor was he loud. Mrus, on the other hand, "exploded" and started screaming obscenities ("who the fuck do you think you are" and "do not tell me what the fuck to do") in front of the staff and customers. Mortimer said he made no response. He waited until the end of the shift, which was a few hours later, to speak to Mrus at which time he asked her if she wanted to talk about the matter. Mrus replied by screaming at him and telling him "where to go". She then left the worksite. Mortimer said he talked to Choo the next day about the incidents and as a result Choo dismissed Mrus.

Choo testified that he was aware that Mortimer had told the staff, shortly after he started his job, that he was the Night Manager. He further said he was told by Mortimer on September 9, l977 that the night before Mrus had not been in her section and had "blown up" and told him to "f off". Choo said he phoned Mrus on the following day and told her that she was suspended until he could find out more about the incident. During their conversation Mrus said nothing about being unaware that Mortimer was the Night Manager. Choo said that he decided the incidents with Mortimer were too much and he couldn't tolerate it anymore as Mrus thought she ran the Hotel. Consequently, on September 14, l997 he phoned Mrus and told her she was dismissed. Again, she never said anything about being unaware that Mortimer was the Night Manager. Choo stated that Mrus had been suspended three times prior to her dismissal with the most recent suspension being in l996. The suspensions were related to her frequent unexplained absences from work. She was never given any written warnings.

Michael Sweeney ("Sweeney") has worked at the Hotel as the Day Manager and as a Bartender for 8 years. Sweeney testified that Mrus worked both the day and night shifts and he was her boss on both shifts until Mortimer started as the Night Manager on September 1, l997. He said that Mrus had been suspended on a number of occasions for not showing up to work.

Counsel for Sentinel argues that Mrus was dismissed for just cause. Her conduct on September 8, l997 constituted an act of insubordination against her employer. The law is clear that a "violent outburst" by an employee against the employer is cause for summary dismissal without notice or compensation. (see *Clare v. Moore Corp. Ltd.* (l989), 29

C.C.E.L. 41, *Stein v. British Columbia (Housing Management Commission)* (l992), 36 D.L.R. (2nd) 181 (B.C.C.A.) and *Candy v. C.H.C. Pharmacy Inc*. (l997) 65 B.C.L.R. (2d) 181 (B.C.C.A.) In this case, as in the *Clare* case, Mrus' behavior was "intentional, spontaneous, unprovoked, insulting, abusive, insubordinate and unacceptable by any standard" (p. 49) and constituted grounds for summary dismissal. In *Stein* and *Candy* Madame Justice Southin writing for the court emphasized that a single act of disobedience or insolence would provide just cause provided that it was "of a nature which goes to show (in effect) that the servant is repudiating a contract, or one of its essential conditions...". Mrus knew that Mortimer was her superior and in a position of authority. Given Mortimer was new to the job, Mrus' attempts to undermine him was all the more reprehensible and insubordinate. Counsel for Sentinel submits that written warnings are not required to be given to an employee who swears at her superior in front of staff and customers.

The Director's delegate said that she issued the March 23, l998 Determination based on the evidence and information that was provided to her at the time. Sentinel alleged it had just cause to dismiss Mrus because of her outburst against Mortimer. However, despite numerous requests from her, it did not provide any statements from Mortimer or make him available for questioning; it did not indicate what attempts were made, if any, to clearly advise Mrus of Mortimer's role in the workplace or provide proof that Mrus was aware he was the Night Manager; and it did not provide any proof that Mrus had been previously warned about her conduct. Mrus claimed that the first time she was advised Mortimer was the new Night Manager and had the authority to order her around was after they had a verbal disagreement. Mrus said that Mortimer, who was a regular customer at the Hotel, was rude and verbally abusive to her in front of customers, and she did not understand why he was acting this way, so they ended up in a verbal confrontation. Mrus further claimed that she never received any warnings prior to her dismissal and the only suspension she received was a one day suspension for failure to attend a staff meeting.

The Director's delegate said that she determined Sentinel did not have just cause to dismiss Mrus because: "-there was a lack of evidence of previous warnings or disciplinary action - the single incident of a verbal dispute between Mrus and Mortimer was not serious enough to constitute cause to dismiss Mrus, an 8 year employee - there has been no evidence presented to show that Mrus was advised of Mortimer's role and authority over her".

The Director's delegate takes the position that since the Appellant, during the investigation stage, withheld information from her concerning warnings and suspensions, and did not provide her with any statements from Mortimer or make him available to her for questioning, it should not be permitted to present this information and evidence during the appeal stage.

Counsel for Sentinel denies that information and evidence was withheld from the Director's delegate. He responded to the Director's delegate in a letter dated January 8, l998 stating that Mrus was dismissed for cause given the incident with Mortimer and she had received three suspensions in l996 due to unexplained absences and an insolent

attitude. He enclosed Mrus' employment records for January l995 to September l997. The Director's delegate replied in a letter dated February 12, l998 stating that Mrus did not recollect the three suspensions (only the one day suspension for not attending a staff meeting) and that it appeared Sentinel dismissed Mrus after she had a disagreement with the new Night Manager and, unless it could provide evidence Mrus was warned, she was entitled to compensation. There was no mention in this letter that Mrus was unaware of Mortimer's status. On February 24, l998, counsel for Sentinel sent a letter to the Director's delegate stating Mrus' conduct constituted cause for summary dismissal. Counsel also stated "As I have stated, I am still unaware of whether Ms. Mrus accepts (Sentinel's) version of events giving rise to her termination on September 8, l997. If she does, in my opinion, statements as to those events from Mr. Mortimer and other co-workers of her are redundant. If she does not, same will be provided upon request." Counsel said he never received a request from the Director's delegate, nor was he advised of Mrus' position. Consequently, he was unable to reply further to the Director's delegate prior to the issuance of the Determination. The Director's delegate failed to provide him with sufficient details of Mrus' allegations in order for him to respond to the allegations.

The Director's delegate in a submission to the Tribunal dated June 11, l998 said that she reminded Sentinel's counsel during a telephone conversation on February 26, l998 that Mrus alleged she did not know Mortimer was her Manager. She requested that he make Mortimer available to her for questioning, but he never did, and because she never heard further from the employer or its counsel she issued the Determination. In a further submission to the Tribunal, the Director's delegate states that Mrus clearly explained to her that she was unaware of Mortimer's status and that Mrus indicated she had a manager and knew who she reported to, but it was not Mortimer. The Director's delegate also stated that the records submitted by the employer indicated that Mrus was suspended three times in l995 (not l996). She included copies of the records which do not indicate what the suspensions were for, but according to the delegate, Mrus said these absences were for times she took off work with Choo's approval to visit her boyfriend and once she had the flu.

ANALYSIS

The Tribunal has previously decided that it will not allow an appellant to bring forward evidence at an appeal which was not disclosed to the Director's delegate at the time of the investigation (*Tri-West Tractor Ltd.* BCEST D268/96 and *Kaiser Stable Ltd.* BCEST D058/97).

The Director's delegate claims that Sentinel withheld information on warnings and suspensions during her investigation. I am not satisfied that this is the case, however, as the information and evidence provided by Sentinel to the Tribunal concerning warnings and suspensions is essentially the same as what it provided to the Director's delegate prior to the issuance of the Determination. Moreover, the Director's delegate is inconsistent in her position on the alleged failure of Sentinel to provide information on suspensions. In her June 11, l998 submission, the Director's delegate said she examined Sentinel's records

and found no evidence of previous suspensions and although Sentinel was asked to provide documentation on suspensions it did not do so. In her July 16, l998 submission, however, the Director's delegate acknowledges that Sentinel's records show Mrus was suspended on three occasions in l995 but there was no documentation to show the suspensions were for insubordination.

The Director's delegate further claims that Sentinel refused to provide her with any statements from Mortimer or make him available to her for questioning prior to the issuance of the Determination. However, I am not persuaded that Sentinel failed or refused to cooperate with the Director's delegate with respect to providing evidence from Mortimer.

In his February 24, l998 letter to the Director's delegate, Sentinel's counsel requested information as to whether Mrus accepted Sentinel's version of events which gave rise to her dismissal and, if she did not, then statements would, upon request, be provided from Mortimer. This is not an unreasonable request. If Mrus accepted Sentinel's position then Mortimer's evidence, as well as Choo's evidence, may not have been necessary as the only issue may have been a question of law. Although, the Director's delegate stated that she verbally replied to this letter, there is no evidence to confirm that she advised anyone, prior to the issuance of the Determination, of the particulars of Mrus' position as to what took place on September 8, l997 including her claims that she was unaware that Mortimer was her Manager on that day and that Mortimer had been abusive to her which resulted in the confrontation. Nor is there any evidence to confirm that the Director's delegate ever specifically requested statements from Mortimer or requested that he be made available to her for questioning prior to the issuance of the Determination. Further, it is not until the Director's delegate files her July 16, l998 submission that the Tribunal is made aware that Mrus believed someone other than Mortimer was her Manager at the time of the incidents on September 8, l997, and even then the Director's delegate does not identify that person. Given the foregoing, I do not accept, on the balance of probabilities, that information from Mortimer was deliberately withheld by Sentinel or withheld through negligence or lack of diligence. I accept Sentinel's explanation on this issue and I will allow Mortimer's evidence to be admitted on the appeal.

When an employer terminates the employment of an employee, the employee is entitled to notice or pay in lieu to a maximum of 8 weeks (see Section 63 of the Act). However, an employee is not entitled to notice or pay in lieu, if among others, the employee is dismissed for "just cause" (Section 63(3)(c)).

The Tribunal has had occasion to deal with the issue of just cause in a number of previous decisions (see for example *Kruger* BCEST #D003/97) and has held that 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.

In *Stein v. British Columbia Housing Management Commission* [(l992) 65 BCLR (2d) l8l] the B.C. Court of Appeal described the common law test for just cause in the following terms at page. 183:

> Did the plaintiff conduct himself in a manner inconsistent with the continuation of the contract of employment?

In the same case, the Court of Appeal adopted the following passage from *Laws v. London Chronicle Ltd.* [(l959) 2 A11 E.R. 285 (C.A.)] as a generally accepted statement of the law on this point:

> It is, no doubt, therefore, generally true that willful disobedience of an order will justify summary dismissal, since willful disobedience of a lawful and reasonable order shows a disregard - a complete disregard - of a condition essential to the contract of service, namely, the condition that the servant must obey the proper orders of the master and that, unless he does so, the relationship is so to speak, struck at fundamentally...
>
> I think that it is not right to say that one act of disobedience, to justify dismissal, must be of a grave and serious character. I do, however, think (following the passages which I have already cited) that one act of disobedience or misconduct can justify dismissal only if it is of a nature which goes to show (in effect) that the servant is repudiating the contract or one of its essential conditions; and for that reason, therefore, I think that one finds in the passages which I have read that disobedience must at least have the quality that it is "willful: it does (in other words) connote a deliberate flouting of the essential contractual conditions

Madame Justice Southin, writing for the Court, in the *Stein* case, went on to state at page 185:

> I begin with the proposition that an employer has a right to determine how his business shall be conducted. He may lay down any procedures he thinks advisable so long as they are neither contrary to law nor dishonest nor dangerous to the health of the employees and are within the ambit of the job for which any particular employee was hired. It is not for the employee nor for the court to consider the wisdom of the procedures. The employer is the boss and it is an essential implied term of every employment contract that, subject to the limitations I have expressed, the employee must obey the orders given to him.
>
> It is not an answer for the employee to say: "I now you have laid down a rule about this, that or the other, but I did not think that it was important so I ignored it.".

In a subsequent judgment, *Candy v. C.H.E. Pharmacy Inc.* (l997) 65 B.C.L.R. (2d) 181 (B.C.C.A.), Madame Justice Southin writing for the B.C. Court of Appeal stated the following at page 157:

> Insubordination, like dishonesty, is grounds for termination of a contract of employment without notice, for both are inconsistent with the continuation of the employer/employee relationship.

Sentinel's counsel argued that Mrus' conduct on September 8, l997, as described by Mortimer, constituted grounds for summary dismissal. The Director's delegate states that Mrus says she was not aware of Mortimer's status when they ended up on a confrontation after Mortimer had been verbally abusive to her, and she believed someone else was her Manager. The Director's delegate, however, provided no statements directly from Mrus to that effect. Further, Mrus made no written submissions on the appeal, nor did she attend the hearing.

A recent decision of the Tribunal, *Director of Employment Standards* (BCEST #D051/98; Reconsideration of BC EST #D448/97) described the risks associated with non-attendance at a hearing as follows:

> The non-attendance of a party does not change the onus, which remains on the appellant to demonstrate error or a basis for the Tribunal to vary, cancel or confirm a Determination. As a matter of evidence, however, a non-attending party takes the risk that the attending party will tender sufficient and weighty evidence for the appellant to have met its tactical burden to persuade an Adjudicator to vary or cancel a Determination. A party who fails to appear at a hearing does take a risk that information or evidence helpful to Adjudicator may not be available to the Adjudicator. This proposition applies equally to an Employer, an Employee or the Director's delegate. In the case of an appellant, non-attendance is generally fatal to an appeal. In the case of any other party, the non-attendance may or may not be fatal, depending on the circumstances of the case, the issues on appeal and whether the appellant meets the persuasive or tactical burden.

My analysis of the evidence in this appeal leads me to conclude that Sentinel had just cause to terminate Mrus' employment. I find the uncontradicted testimony of Mortimer, Choo and Sweeny to be credible and persuasive. Mortimer's evidence establishes that Mrus' conduct on September 8, l997 constituted an act of misconduct sufficiently serious to justify summary dismissal. I conclude that Mrus's actions constituted a willful and deliberate flouting of the essential conditions of her employment contract and she conducted herself in a manner that was inconsistent with the continuation of her employment. Accordingly, she is not entitled to compensation for length of service.

ORDER

I order, under Section 115 of the *Act*, that the Determination dated March 23, l998 be varied by deleting the amount related to compensation for length of service.

Norma Edelman
Registrar
Employment Standards Tribunal