

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 -

C.N.K. Holdings Ltd. Operating as Romeo's Place
(“ Romeo's ”)

- of a Determination issued by -

The Director of Employment Standards
(the “Director”)

ADJUDICATOR: James Wolfgang

FILE No.: 2000/477

DATE OF HEARING: September 14, 2000

DATE OF DECISION: October 30, 2000

DECISION

APPEARANCES:

Nick Kamaretsos	on behalf of Romeo's Place
Nick Tsahsarlis	on behalf of Romeo's Place
Dustin South	for himself
Earl South	for Dustin South

OVERVIEW

This is an appeal by C.N.K. Holdings Ltd. Operating as Romeo's Place ("Romeo's") or ("the employer") pursuant to Section 112 of the *Employment Standards Act (the "Act")* from a Determination dated June 30, 2000 by the Branch.

The Determination found Romeo's had terminated Dustin South ("South") without just cause in violation of Section 63(2) of the *Employment Standards Act*. Romeo's was ordered to pay South \$454.90 in accordance with Section 18(1) and Section 58(3) of the *Act*.

A hearing was held on September 14, 2000 and I heard evidence from both parties. An offer to mediate the dispute was rejected by the employer.

ISSUE

Did South abandon his position or did Romeo's terminate his employment? If Romeo's terminated South was it for just cause?

FACTS AND ARGUMENT

South was employed by Romeo's as a pizza delivery driver from June 1997 to January 23, 1999 at the rate of \$7.15 per hour. On January 23, 1999 an altercation occurred between South and Nick Tsahsarlis ("Tsahsarlis"), his supervisor. There are conflicting renditions of precisely what happened but South left work at approximately 9:00 pm.

In a written submission to the Branch, dated January 24, 2000, Tsahsarlis, manager of Romeo's, claims South was asked to take some deliveries on January 23, 1999, which was a busy night. South ignored Tsahsarlis and walked away. South returned in about 5 minutes and said he had to go to the bathroom. Tsahsarlis told him he was finished for the day and to come back tomorrow. Tsahsarlis claims they tried to contact South by telephone over the next two days without success. When he showed up on the third day the employer assumed he had quit.

When interviewed by the delegate for the Director, Tsahtsarlis said he had 5 deliveries to get out and told South to take them. When he came back 5 minutes later the deliveries were still there. When he asked South why they were still there South swore at him. Tsahtsarlis sent South home, as he was too busy to deal with the issue then. He said South did not come to work the next day although he was scheduled to work. South did not report for work until Thursday, January 28th.

Tsahtsarlis denies he was in the restaurant on Tuesday when South claims he talked to Kamaretsos. He insists this was his day off and he never came to the restaurant on that day.

In a letter to the Tribunal dated July 5, 2000, Nick Kamaretsos (“Kamaretsos”), one of the owners of Romeo’s, indicates some of the evidence of the delegate is incorrect. He claims South did not come in to see him on Monday as stated in the Determination. He claims South did not show up for his scheduled shift on Sunday and did not return to the restaurant until Thursday, January 28th to pick up his cheque. He claims the payroll was faxed to the head office and South’s final pay cheque and Record of Employment were made up on Tuesday, January 26, 1999. Copies of the final cheque and ROE were attached to the letter and show the date of January 26, 1999. Also attached to the letter was a document headed CNK Holdings Ltd., EI History, Selected Employees. It is the record of earnings for Dustin South for the previous year. It shows the hire date of 97/06/25 and the Termination Date as 99/01/23.(emphasis added) Kamaretsos stated: “I believe that Dustin South quit. It was very clear to us by our inability to contact him after he didn’t show up for his Sunday January 25 shift. We had to replace his position quickly, as our restaurant depends on the pizza delivery for a great portion of our revenues”. The letter identifies the Sunday shift was January 25th not January 24th, the correct date, however I believe this was just an error.

Kamaretsos stated South came to the restaurant on Thursday to pick up his cheque. The cheques are prepared in the office in Victoria and brought to Duncan Thursday afternoon.

The employer admitted they never had any problems with South during his employment.

In his written report of the events dated January 25, 1999, South indicates he returned from a delivery and had just stepped through the door when Tsahtsarlis gave him another order to deliver. South needed to go to the bathroom badly and went upstairs. When he came back down Tsahtsarlis started to yell, “Where were you, the delivery’s been up for five minutes?” Tsahtsarlis grabbed the delivery and gave it to another driver. He told South to go home that he didn’t need him to work anymore. South said, “You gotta (sic) be joking”. South cashed out and then called his father. When Tsahtsarlis heard him he told him to get off the phone.

When South asked if he was to report in the morning Tsahtsarlis said; “Are you threatening me?” South replied: “No, I just want to know if I still work here”. He claims Tsahtsarlis turned and walked away without answering. South said, “If I’m not working tomorrow, I’m going to labour relations on Monday”. He said Tsahtsarlis again said: “Are you threatening me?” South said, “You can’t treat me this way, I could probably take you to court over this”. South then said, “This is fucking bullshit”. Tsahtsarlis turned to Teresa Nemeth and asked if she heard South say, “fuck you” to him. She did not answer. Tsahtsarlis told her she was a witness. South said Tsahtsarlis never made it clear if he was fired. He said he would write up a slip and that he should come in Monday and talk to the owner. South indicated in his report he would be missing work by waiting until Monday.

His evidence to the delegate varies slightly with his written submission. South claims he returned from a delivery at about 8:50 pm and there were no deliveries waiting so he started to wash some pasta boats, as it was a busy night. When a pizza order was ready for delivery Tsahsarlis came in and told South to deliver it. South said he had to go to the bathroom and went upstairs. When he came down he grabbed the pizza and started for the door. Tsahsarlis took the pizza away from him and gave it to another driver. The remainder of his evidence to the delegate is consistent with his written submission.

South claims he went to see Kamaretsos on Monday and he was not there. When he went in on Tuesday Kamaretsos and Tsahsarlis were sitting in the bar. They said he had quit and had his Record of Employment and cheque made out. When he asked for his job back he was refused. He claims he then went to the E.I. office after leaving the restaurant.

According to the Determination, South filed his complaint with the Employment Standards Branch on Tuesday morning. There was no copy of either Tsahsarlis's written submission to the Branch in the material supplied to the Tribunal nor was there a copy of South's complaint to the Branch. A copy of South's complaint was requested and received from the delegate. It clearly indicates the complaint form was completed and signed on January 25, 1999 and the date stamp from the Branch indicates it was received January 26, 1999. It does not indicate if South had his ROE and final cheque at that time.

The delegate spoke with several witnesses. According to the Determination, one of the cooks, Paul Beaudoin, was returning from the bathroom and as he was walking by South and Tsahsarlis heard Tsahsarlis tell South to come in to see the owner on Monday. The only witness who claims to have heard the argument was Teresa Nemeth (Nemeth). She is South's girlfriend and quit later that same night after an argument with Tsahsarlis.

South indicates other witnesses could give evidence as to what happened that night however they are still working at Romeo's and do not want to get involved.

South claimed there was additional evidence that he had given to the delegate who did not attend the hearing. He had given a written statement to the delegate and expected the delegate would be at the hearing. The hand written statement by South and a copy of the complaint filed by Nemeth was later supplied to the Tribunal at my request. The complaint filed by Nemeth with the Branch is dated January 25, 1999.

South lives with his parents. South's father, Earl attended the hearing and claimed there were people at the house both Sunday and Monday and no telephone calls were received from the restaurant for South.

ANALYSIS

Little new evidence was adduced at the hearing. Each side is firmly entrenched in their respective positions of what happened on January 23, 1999 and thereafter. There are several differences in the recollection of the facts by both sides. The fact South wrote down his understanding of what occurred on that night shortly after the incident is helpful to his case however, there are some

differences between his written and oral evidence. As the delegate did not attend the hearing some of the evidence could not be verified.

I believe there are several points on which most, if not all, of the people can agree on:

1. Tsahtsarlis sent South home early on January 23rd following an altercation.
2. South was scheduled to work on Sunday but did not report.
3. South went to see Kamaretsos after going to the Branch. It may have been Tuesday or Thursday, but he did go. Romeo's had his final cheque and ROE, both dated January 26, 1999, ready and gave it to South at that time.
4. There had been no prior warnings or discipline of South by Romeo's.

What may have happened on January 23rd could have been a gross misunderstanding between South and Tsahtsarlis. Tsahtsarlis was upset with South for the delay in leaving with the delivery and decided to send him home. At that point I think South was suspended, not fired. South thought he had been fired, as he did not get an answer from Tsahtsarlis about working Sunday. His phone call home and the threat of taking Tsahtsarlis to the labour board or court only made matters worse. When Tsahtsarlis thought South had sworn at him I think the suspension changed. He said he would write up a slip and South could go see Kamaretsos on Monday, possibly to plead for his job back. We don't know if the "slip" Tsahtsarlis was referring to was a warning slip or a termination slip. The evidence of Beaudoin and Nemeth both support the statement South was to come in Monday to see Kamaretsos.

According to the Determination, in a written submission to the delegate, Tsahtsarlis indicated he told South he was finished for the day and to come back tomorrow. He claims South did not report for work the next day, Sunday, and when they called his home there was no answer. South did not show up for his shift the day following and they were unable to contact him. Tsahtsarlis said South showed up the third day and he was told they assumed he had quit. (emphasis added)

The facts, as presented by the Determination, are somewhat different in respect to the dates on which certain events occurred however I do not believe that changes the outcome.

South had no reason not to do the job he had been hired for, delivering pizzas. There should not have been any reason for South to swear at Tsahtsarlis before the incident. I believe Tsahtsarlis may have become impatient with South and that triggered the exchange. In his statement to the delegate he said Tsahtsarlis told him to go home and that he didn't need him to work anymore. When South asked if he was to come to work the next day he did not get an answer. If South had quit what reason would he have to go and see the owner on Monday or any other day for that matter? His paycheque would be available on Friday, the regular payday according to South.

The question before the Tribunal is whether South abandoned his position or was terminated. From all accounts, this was the first time Romeo's had any problem with South. I am also recognizing the fact Romeo's had employed South for nearly 18 months without any reprimands which indicates a good employee record. South said he wanted to keep his job and I believe him.

On the basis of probabilities, I believe Romeo's decided to terminate South over the incident on January 23, 1999.

It is obvious from the submission of Kamaretsos the final cheque and ROE were dated January 26, 1999, and, unless they were post-dated, could not have been given to South on Monday, January 25th as indicated in the Determination. That may be significant as Section 18(1) of the *Act* states:

An employer must pay all wages owing to an employee within 48 hours after the employer terminates an employee. (emphasis added)

If South was terminated on Sunday evening 48 hours ends Tuesday. I believe that is why South's ROE and paycheque were ready on Tuesday. If South had quit or abandoned his position the employer has 6 days to pay his wages. I do not know if the regular payroll is made up on Tuesday. Kamaretsos indicated the payroll is prepared at the head office in Victoria and brought to Duncan on Thursday.

In an appeal before the Tribunal, the burden is on the appellant to demonstrate an error such that I should vary or cancel the Determination. Romeo's has failed to do so in this instance and the Determination is confirmed.

ORDER

In accordance with Section 115 of the *Act* I confirm the Determination by the Branch dated June 30, 2000. Additional interest is to be calculated in accordance with Section 88 of the *Act*.

James Wolfgang

James Wolfgang

Adjudicator

Employment Standards Tribunal