BC EST # D409/98

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 -

Brigantine Inn Ventures Ltd.
("Brigantine")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	Paul E. Love
FILE NO.:	98/346
DATE OF HEARING:	September 2, 1998
DATE OF DECISION:	September 17, 1998

Appearances:

Dorothy Alexander, for Brigantine Inn Ventures Ltd.
Elan Mackenzie

DECISION

OVERVIEW

This is an appeal by Brigantine of a Director's Determination imposing liability for compensation of lieu in notice. The Director's delegate determined that Elan Mackenzie was not dismissed for just cause. In this case it appears that the investigation of the Director's delegate was inadequate in failing to interview 3 material witnesses for the employer, whose evidence was in direct contradiction to that of the employee. Reviewing the whole of the evidence tendered, and making findings with regard to the credibility of the witnesses, I was satisfied that the employee left the workplace, without the employer's consent, in a wilful or deliberate manner knowing that there would be disciplinary consequences flowing from that absence. She was not, however, made aware that such conduct would result in dismissal. I therefore find that the employer has not established just cause for the dismissal, although the conduct did warrant some form of discipline.

ISSUES TO BE DECIDED

In the circumstances of this case did a schedule change without notice by the employee, in contravention of an employer's policy or rule and an unauthorized absence by the employee give just cause for dismissal?

FACTS

The Determination in this matter held that Ms. Elan Mackenzie was dismissed without notice, and was entitled to 8 weeks pay or $1,086.00 plus vacation pay and interest, for her length of service.

On September 6, 1997, Ms. Elan Mckenzie was scheduled to work as a bar tender from 11:30 am to 6:00 pm at the Brigantine Inn, a pub situate on the waterfront in Maple Bay. It was beautiful sunny day, and generally on sunny days in the summer and fall the pub could be expected to busy. In particular an owner, Brian Leckie expected the pub to be busy that day because he had sponsored a golf tournament. Golfers were expected to arrive back at the pub in the later afternoon.

Ms. Mackenzie was an experienced bar tender and would be in charge of the cash and the pub while on duty. She had worked for the employer for 4 years. The evidence appears to be that she had become disenchanted with her job in the last 6 months before the termination.

Employee's Version:

Ms. McKenzie alleges that on Friday September 5, 1997, she secured permission from Brian Leckie to "leave early to attend a funeral" on Saturday September 6, 1998 if it was not busy.

Employer's Version:

Mr. Leckie testified that Ms. McKenzie had secured permission to take Sunday September 7, 1997 off work to attend a funeral. At the hearing the work schedule was tendered as an exhibit. The schedule shows that Ms. McKenzie was given Sunday off. The evidence of Mr. Leckie was that in no circumstances would he have given Ms. McKenzie permission to leave early on Saturday as he expected the pub to be busy. If Ms. McKenzie had asked for permission to leave early he would have denied the permission, or alternatively have scheduled another person for the entire shift.

This case turns largely on the findings of fact, and credibility of the witnesses.
I reject the evidence of Ms. McKenzie that she had permission to leave early if it was not busy. This does not fit in with the facts tendered at the hearing. According to Ms. Kristie Loewen (and denied by Ms. McKenzie), Ms. McKenzie asked Ms.

Loewen to work in the afternoon so that Ms. Mackenzie could leave for a wake. Ms. Loewen was unable to work early as she had other plans for the afternoon. Ms. Kelly Russell testified, (and this also was denied by Ms. McKenzie) that Ms. McKenzie had phoned a number of other people during the early part of her shift to secure a replacement, and was not able to do so. Had Ms. McKenzie believed that she had permission to leave if it was not busy, or that it was not bound to be busy, she would not have attempted to find a replacement worker in the early part of her shift.

The afternoon did become reasonably busy towards 4:00 pm. It is unnecessary for me to make a finding concerning how busy because I am satisfied that the employer's consent, as alleged by Ms. McKenzie, was not given. Kelly Turner testified that it was "chaotic" when she came on shift. Brian Leckie referred to the waitress on duty, Kelly Russell, as being in tears. Kelly Russell was relieved when Kristy Loewen arrived early for her shift and helped out. It appears, however, that no customer complaints were received about the service during the period from 4:00 to 6:00 pm.

The employer alleged that Ms. McKenzie had a past history of making schedule changes without the consent of the employer, often securing less skilled workers as replacements. There were 11 instances of shift changes made by Ms. McKenzie prior to a staff meeting. The employer testified that a staff meeting was held in the summer of 1997 to address the issue of schedule changes. This meeting was prompted largely by the conduct of Ms. McKenzie. She failed to attend the meeting but she sent another staff member with a complaint of her own. At that meeting Brian Leckie made it clear to the employees present that any employee making a schedule change without consent would be terminated.

Shortly after the meeting, Dorothy Alexander met with Elan McKenzie. Ms. McKenzie denies that this meeting occurred. Ms. Alexander indicates that she related to Ms. Mckenzie the substance of the what occurred at the staff meeting. Ms. Alexander did not mention that any employee making a schedule change would be terminated. I am, satisfied, however, that this meeting did occur and that Ms. McKenzie was made aware that schedule changes without consent were not permitted. Ms. McKenzie does not deny that the staff meeting occurred, and that she sent a staff member to make some representations on her behalf.

The employer did not have a program in place to provide written warnings to employees. It operated a work place that was cooperative, respectful and accommodating to employees. Staff meetings were held on a regular basis when matters of concern arose.

Ms. McKenzie apparently advised the Director's delegate that she left the work place at 2:30 pm and the next employee was scheduled to come on shift at 5:00 pm. Ms. McKenzie did not fill in a time card for the date in question. The time records for Kelly Russell, indicate that Ms. Russell started on the floor as a waitress at 11:30 am and then changed to bar tender at 1:30 pm. The schedule tendered in evidence in this case as Exhibit "1" demonstrated that the next employee was scheduled to work at 6:00 pm.. Brian Leckie testified that the next employee was scheduled to work at 6:00 pm and not 5:00 pm. This practice was followed to avoid the payment of overtime hours. The employee scheduled to work, Kristie Loewen testified that she was scheduled to work at 6:00 pm. It appears that a "mistake" was made by someone, either the Director's delegate or Ms. McKenzie with regard to the next employee's scheduled start time.

At this hearing the employer called the following witnesses who were subject to cross-examination: Kelly Turner, Kelly Russell, Kristie Loewen, and Dorothy Alexander. In the materials provided by Ms. McKenzie I was given witness statements from Helen Murray, Scott Dieckbrader, Dianne Becker. I note that none of these witnesses were produced for cross-examination. Some of the statements are "double hearsay". Various reasons were tendered by Ms. Mckenzie for the non-production of the witnesses. There was a conflict between the *viva voce* evidence tendered and some of the statements. I place no weight on these statements. I prefer the evidence from the employer's witnesses, who appeared and were cross-examined on the material facts. At the hearing Ms. McKenzie testified that a number of these witnesses were not prepared to come because they were afraid of Brian Leckie and had a fear of losing their jobs. I cannot accept that assertion. Ms. McKenzie made similar allegations concerning a witness Kelly Russell, who did appear for the employer, and who denied any such suggestion.

At the hearing Ms. McKenzie gave evidence, and presented Karen Getz and Lisa Bonke as witnesses. Ms. Getz's evidence is contradicted by the time card of Ms. Russell, and I prefer the business records created at the time as the most cogent evidence of the time Ms. Mckenzie ceased work. I place little reliance on any of the other testimony given as it appears that she was a close friend of Ms. McKenzie and

the evidence was in the nature of "oath helping" or confirming what Ms. McKenzie told her about events. Ms. Lisa Bonke was called for the purpose of establishing that the bar was not busy. I note that she had attended the golf tournament, and appears to have imbibed some liquor at the tournament. I am not satisfied that her evidence is to be preferred for the purpose of establishing how busy the pub was at the time that she attended. There was a cash register tape which established, from the cash sales and sales rung in, that the pub was reasonably busy.

ANALYSIS

The burden is on the employer to demonstrate that there was an error in the Determination which should cause me to vary or cancel the Determination.

In this case it is clear that the Director's delegate did not interview the witnesses who were called by the employer. These were the staff members on duty at that time, and would have been most knowledgeable of the facts concerning Ms. McKenzie's departure from the work place. The Director's delegate, in my view, did not conduct a proper investigation concerning the facts of the case or alternatively was mislead as to the true facts by Ms. Mckenzie. Had the Director's delegate conducted a proper investigation she would have found that Elan McKenzie left work, knowing that she did not have permission from the employer. She would have found that Ms. McKenzie deliberately minimized the time that she was away from the work place, without reinforcement staff being on duty. This was for the period between 1:30 to 6:00 pm not between 2:30 pm and 5:00 pm as suggested by Ms. McKenzie. The Director's delegate would have discovered that the employer did have a policy that staff working on the floor, waiting on tables, could leave early, if the pub was not busy. The Delegate would also have discovered that under no circumstances would a bar tender leave early as the bar tender was "in charge" of the pub while Brian Leckie or Dorothy Alexander were absent. The "leaving early"policy applied only to waiting not bartending staff. The Director's delegate would have found that it was "improbable" that Brian Leckie would have given consent under any circumstances for an absence on this particular day as there was the pub had sponsored a golf tournament and he was expecting business to arrive at the pub from that source.

The employer's evidence concerning the time off and scheduling policy was confirmed by employees Kelly Turner, Kelly Russell. Christie Loewen.

The question in this case really is whether the employee knew or ought to have known that her job was in jeopardy if she left the workplace without the employer's consent. The employee testified that she was not aware that her job was in jeopardy. She did, however, phone in the afternoon of September 6th at about 3:30 to 4:00 pm, to determine the state of business of the restaurant. I am persuaded that the reason that she phoned was that she was guilty about leaving early without consent, and wished some reassurance that she had done the "right thing" in leaving early. I am persuaded that this evidence is that of a person who knew that there would be consequences attached to her leaving without the employer's knowledge or consent. I am satisfied that a reasonable person in the situation of Ms. McKenzie would have appreciated some disciplinary consequence of leaving the workplace without consent. On the basis of the employer's evidence given by Dorothy Alexander, however, it is clear that the employee was not told that her job would be in jeopardy if she made a shift change without the employer's consent.

The test for just cause has been set out in a number of cases including:

Martinson, BCEST D #282/97;
Ravens Agri-Services & Products Ltd, BCEST D# 396/96;
International Plastics Ltd, BCEST D# 243/97;

The employer must bring to the attention of the employee that the continued conduct or breach of a policy can result in serious disciplinary consequences including dismissal.

In my view the absence from work was serious, wilful and deliberate: Elliot v. Parksville (City) (1990), 66 D.L.R. (4d) 107 (B.C.C.A). I am concerned with the candour of Ms. McKenzie. I do not believe that Ms. McKenzie honestly believed that she was acting within permissible limits: Petit v. Insurance Corporation of British Columbia (1995), 13 CCEL 62 (BCSC). But I also find that the employee was not aware that the conduct could result in dismissal. Although I have found that the facts as alleged by Ms. Mckenzie and the Directors delegate, were incorrect, I conclude that there was no just cause for dismissal because the employee was not

made aware that the conduct could result in dismissal. I do not believe that the conduct was so extreme that it could be said to be incompatible with a continuation of the employment relationship. The conduct was serious and deserving of some discipline, but not deserving of termination.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination in this matter, dated May 11, 1998 be confirmed.

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Paul E. Love
Adjudicator
Employment Standards Tribunal