

An appeal

- by -

586440 B.C. Ltd., operating as Travelodge Motel
("Travelodge")

- 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.: 2001/399

DATE OF HEARING: August 30, 2001

DATE OF DECISION: September 12, 2001

DECISION

APPEARANCES:

Anatalia Abesamis	representing herself
Alice Hung	representing 586440 B.C. Ltd., op. as Travelodge Motel

OVERVIEW

This is an appeal by 586440 B.C. Ltd., operating as Travelodge Motel (“Travelodge” 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 27, 2001. Anatalia Abesamis (“Abesamis”) was terminated for insubordinate behaviour and lack of acknowledgement of job duties. The Determination found Abesamis had been terminated without just cause or advance written notice of termination.

Abesamis was awarded compensation in lieu of notice, vacation pay on that amount and interest in the amount of \$3,336.24.

The Travelodge was assessed a penalty of \$0.00 for a violation of Part 8, Section 63 of the *Act*.

The Employer, in their appeal received by the Tribunal May 22, 2001, stated their first ground of appeal is an error in fact submitted by the delegate of the employer’s position. They stated:

It was not the position of the employer that the room had not been properly cleaned, but rather that the room had not been cleaned at all.

The second ground of appeal is an error in interpreting the law that just cause did not exist in the termination of Ms. Abesamis’ employment. It is argued that by falsifying to her employer that she completed her tasks when no attempt was made to clean the room constituted dishonest conduct.

The Travelodge also appealed the penalty of \$0.00 on the grounds they were within their right to terminate Abesamis. They also stated this was the first offence they had encountered and had been fourteen years in the hospitality business.

The appeal was heard by way of an oral hearing on August 30, 2001.

The witnesses who testified were:

- Grace Hung, General Manager, Travelodge
- Michaela Lehmer, employee of the Employer

Evidence was taken from all parties under oath.

At the hearing Abesamis raised an issue in respect to the payment of vacation pay she received that was not part of her original complaint. She claimed the Travelodge owed her additional money for vacation pay. The Travelodge indicated they believed Abesamis had been paid all monies owed but agreed to investigate the matter and advise.

An undated fax received by the Tribunal on August 31, 2001 from Alice Hung indicated their bookkeeper had made an error in calculating the vacation pay for Abesamis and were forwarding a cheque in the amount of \$595.55 to her immediately. I am assuming the cheque has been sent and on receipt of confirmation by Abesamis I will consider the matter closed.

ISSUE

Did the Travelodge have just cause to terminate Abesamis? Should the penalty of \$0.00 be cancelled?

THE FACTS AND ARGUMENT

Abesamis worked as a night auditor from May 8, 1994 to January 30, 2001. The Travelodge Motel purchased the business on March 16, 1999. Her hours were from 11:00 pm until 07:00 am Tuesday to Saturday each week. Her rate of pay was \$10.65 per hour.

The night auditor's primary duties were to do the bookkeeping for the previous day. Other duties normally performed included cleaning the pool area, vacuuming the pool, checking and correcting the chemical levels. Also included were; vacuuming the hallways, breakfast area and setting up the continental breakfast at 6:30 am.

Business at the motel was slow in January and the management decided to do the spring cleaning of the rooms. Michaela Lehmer ("Lehmer") who worked as housekeeper, front desk clerk and night auditor was assigned as the "spring cleaning" leader for the work.

The Travelodge indicated they divided the motel into two sections to allow for the spring cleaning to take place without disturbing the guests. Guests were to be accommodated in one section while the cleaning took place in the other. They claimed this was to avoid the guests being disturbed by running water and flushing toilets etc.

On January 14, 2001 a meeting was held with Alice Hung, Grace Hung ("Hung") and Abesamis at 6:30 am. The meeting took place in the breakfast area located close to the front desk. The employer wanted to know if Abesamis would be prepared to assist with the spring cleaning. The unsigned note supplied by Hung dated January 14, 2001 included with the Determination stated:

She will help spring cleaning during the nite shift such as turning beds, wiping the furnitures, (sic) stripping beds, making beds, hanging/unhanging curtains, ironing curtains, dusting lamp shades, pictures & TV and etc.

This appears to be a memo made after the meeting outlining the items discussed with Abesamis.

Hung claims Abesamis agreed to assist in general cleaning and Lehmer, who was working on the front desk, overheard their conversation. Abesamis admits she agreed to help however claimed one of the regular housekeeping staff was to be assigned to work nights on cleaning. She also understood she was to assist, Nathalie, who was one of the housekeepers, in doing the heavy work like moving furniture and turning mattresses etc. The Travelodge disputed the claim they would not have regular housekeeping staff working at night doing spring cleaning.

Abesamis argued Lehmer was not on duty at the desk the day of the January 14th meeting and could not have heard the discussion between her and management. She claims that Alice Hung was watching the desk. Alice Hung stated she could not have been working on the front desk that morning, as she was to be in Duncan at 8:30 am.

On January 25, 2001 Abesamis claims she was given a checklist by Hung for Room #233 when she arrived at work. This was the first and only room assigned to her to clean. She was to perform the duties listed on the sheet and when finished check off that they were completed.

Lehmer claims she went over the checklist with Abesamis and carefully pointed out which cleaner to use on each task. Lehmer said Abesamis told her she knew how to clean.

Abesamis denies that Lehmer reviewed the checklist with her. Abesamis claims she did clean Room 233 except for the coffee machine.

Lehmer, as “spring cleaning” leader, inspected Room #233 on January 26th and advised Hung the room had not been cleaned. Hung then inspected the room and confirmed the work had not been done. Abesamis had checked off each of the tasks she had been assigned. There were two hand written notes on file identified as having been written by Hung and Lehmer outlining the work that had not been done by Abesamis.

Abesamis worked on January 25, 2001. On January 26 Abesamis phoned in sick. Lehmer claims she received the telephone call about 8 or 9 pm from Abesamis indicating she would not be in to work. Lehmer then called Hung to inform her she would have to work Abesamis’ 11:00 pm to 07:00 am shift. Abesamis called in sick on January 27th. January 28 and 29 were Abesamis’ scheduled days off. According to Hung, she telephoned Abesamis on January 29 to see if she was able to work January 30. Hung stated Abesamis indicated she was unable to work and would bring a doctor’s note on January 30th. Hung claimed she told Abesamis she wished to discuss Abesamis’ work of January 25th with her when she came in.

According to Abesamis, she telephoned in sick on January 26, 2001 however Hung answered the telephone. When she told Hung she would not be coming to work that night, Hung told her to bring a doctor’s note when she came back to work. Abesamis went to see her doctor on January 29th and he gave her a note indicating she should take three weeks stress leave. When Hung telephoned Abesamis on the 29th asking when she would be returning to work, Abesamis told her

she would be returning in three weeks. Hung asked her what the doctor's note contained and told her to bring it in which Abesamis agreed to do the next day. Abesamis denies Hung told her she wanted to talk to her about her last night's work.

Abesamis went to the motel about 10:00 am the following day, January 30th. She spoke to the desk clerk and Hung came out of the office. Hung took the doctor's note from Abesamis and read it. According to Abesamis, Hung became agitated and told Abesamis she was not "thrilled" with her work. Hung went back to the office and brought out the checklist for Room 233 and asked Abesamis if she understood the checklist. Abesamis indicated she did and Hung asked if she had completed the work checked off. Abesamis indicated she had with the exception of the coffee machine for which she apologized for not cleaning. Abesamis claimed Hung continued to criticize her work and the discussion became heated. When Hung told Abesamis she was being insubordinate Abesamis asked what insubordinate meant. Hung replied she could terminate Abesamis for insubordination to which Abesamis said "if you don't like it, fire me then". Abesamis took her regular pay cheque and left the motel.

Hung disputes the Determination's position on the sequence of events that followed. According to Hung, she did not say she was not thrilled with Abesamis work nor did she reprimand her for not cleaning the room. She showed Abesamis the checklist for Room #233 and asked if the initials alongside each item were Abesamis'. Abesamis answered in the affirmative. She then asked Abesamis if she understood the work on the checklist and Abesamis answered "yes". Hung then asked if all the work on the checklist had been done and Abesamis answered "yes".

Hung claims Abesamis became very agitated and loud. She refused to lower her voice when requested by Hung as a guest was in the lobby area. Hung moved to a different area of the lobby and Abesamis continued to speak very loudly. Abesamis then stated: "cleaning was not in my job description".

According to the Travelodge, Abesamis was terminated for failing to clean the room she was assigned and when confronted by management, lied about doing the work, became agitated and insubordinate. Abesamis then invited the Employer to fire her and left the motel. Abesamis was terminated in writing the following day.

Hung claims she was unaware of the content of the doctor's note prior to Abesamis bringing it to the motel. She was of the opinion Abesamis was providing the note in explanation of the three days work she had missed following January 25th. She claim the doctor's note was not considered in their decision to terminate Abesamis for insubordination and dishonesty. The Travelodge consider the position of night auditor requires a high degree of honesty and therefore they terminated Abesamis when she lied about cleaning room #233.

On January 31, 2001 Abesamis was sent a letter terminating her. On February 02, 2001 Abesamis filed a complaint with Employment Standards.

ANALYSIS

The parties are significantly apart on the facts of what transpired from January 14th to January 30th. They only agree that a meeting took place on January 14, 2001 and that Hung and Abesamis had a heated discussion on January 30, 2001. The remainder of what and how it happened is in dispute. The parties do not agree who reviewed the checklist with Abesamis or if it was reviewed, they do not agree who the telephone conversations were with on January 26, 2001 nor do they agree on the content. They further do not agree on the content of the January 29th telephone call(s) between Hung and Abesamis.

There was a witness to the meeting on January 30th. The desk clerk overheard the discussion between Hung and Abesamis. She confirmed a guest was in the lobby at the time of the discussion, which Abesamis denied. The remainder of her written statement confirms Hung indicated to Abesamis that she could fire her for insubordination and that Abesamis told her “if you don’t like it fire me and I want my cheque”.

Abesamis claims Lehmer did not take her up to the room to show her how to do the work; in fact she denies Lehmer explained the checklist to her. Lehmer said she went over the list with Abesamis in detail for 10 to 15 minutes and Abesamis told her she knew how to clean. Lehmer does not recall giving Abesamis a copy of the checklist. It is the evidence of Abesamis that Hung gave her the checklist and we have no evidence as to what extent Hung explained the work that Abesamis was to perform.

According to the Travelodge, Abesamis lied about the coffee machine. Abesamis claimed she tried to apologize for not cleaning it saying she was going to do it later with baking soda. The Travelodge questioned how Abesamis planned to clean the coffee machines with baking soda when they had no baking soda on the premises and Abesamis had not requested they purchase any.

At the hearing Lehmer’s evidence was that not one thing on the checklist had been done. There were sixteen items on the checklist given to Abesamis. The copies of the two handwritten notes by Lehmer and Hung dealing with what had not been done are almost identical and reference only six items. As Lehmer was so careful to note the grime on the groove on the bottom of the coffee cup holder one might expect she would have made notes on all sixteen items. There appears to have been some changes made to the notes after they were originally written however the original notes were not entered as evidence at the hearing.

I will accept that the work, if any that was done by Abesamis on Room 233 was not acceptable to the Travelodge, however whatever cleaning Abesamis agreed to do was not part of her regular duties and was an attempt to assist the Travelodge when business was slow. This was the first room that had been assigned to Abesamis to clean. There was no supervision or assistance provided to Abesamis. It would seem reasonable to expect some form of progressive discipline would have been more appropriate than terminating her.

As per *Kruger*, B.C.E.S.T. No. D003/97:

1. The burden of proving that the conduct of the employee justified dismissal is on the employer.
2. Most employment offences are minor instances of misconduct, not sufficient to justify dismissal. Where the employer seeks to rely on such minor misconduct, it must show:
 - (a) A reasonable standard of performance was established and communicated to the employee;
 - (b) 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;
 - (c) The employee was adequately notified that their employment was in jeopardy by failure to meet the standard; and
 - (d) The employee continued to be unwilling to meet the standard.
3. In exceptional circumstances, a single act of misconduct by an employee may be sufficiently serious to justify summary dismissal without the requirement of notice.

The termination letter sent to Abesamis stated:

Your insubordinate behaviour and lack of acknowledgement of your job duties leave us with no alternative but to terminate your employment immediately.

However on page 3 of the appeal by the Travelodge it states:

In conclusion, Ms. Abesamis' dismissal has nothing to do with her medical leave of absence and was based solely on her dishonesty.

The question that must be considered is whether that was sufficient reason to terminate Abesamis?

They go on to state the position of night auditor demands the highest level of honesty. I understand the position of night auditor requires a considerable degree of honesty. The circumstances around the possibly of not telling the truth about the extent of the cleaning Abesamis may have performed does not, in my opinion, lessen her trust as night auditor.

In the nearly seven years she had been employed by the previous owners and the Travelodge there was no record of any warnings or reprimands on her personnel file nor any question of her honesty.

In *Monk McQueen's Fresh Seafood and Oyster Bars Inc* (B.C.E.S.T. D033/97) the adjudicator stated:

To find just cause on a single incident requires that the act be serious, wilful and deliberate.

I do not believe the single incident for which she was terminated is sufficiently serious to justify dismissal.

There have been a number of decisions by the Tribunal dealing with the question of whether the act of saying, “then fire me” or similar language in the heat of a confrontation constitutes cause to dismiss the person. In *Cost Less Express Ltd. V. British Columbia (Director of Employment Standards) D478/98 (B.C.E.S.T)*:

The act of resigning or quitting employment is a right personal to the employee. There must be clear and unequivocal evidence supporting a conclusion that this right has been voluntarily exercised by the employee. There is both a subjective and objective element to the act of quitting; forming the intention to quit and carrying out an act that is inconsistent with further employment.

There is a responsibility on the part of the appellant to convince the Tribunal the Determination erred in fact or in law to the extent it should be varied or cancelled. In this case the Travelodge has failed in that regard and the Determination is confirmed.

The Travelodge has appealed the penalty of \$0.00. I believe they do not require a disincentive to prevent them from contravening the *Act* in the future. I agree the fourteen years without incident speaks for itself and the penalty is cancelled.

ORDER

In accordance with Section 115 of the *Act* I confirm the Determination by the Director dated April 27, 2001 except for the penalty which I cancel. Additional interest is to be calculated in accordance with Section 88 of the *Act*.

James Wolfgang
Adjudicator
Employment Standards Tribunal