

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 -

375123 BC Ltd. Operating as
Ted's Place Restaurant

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 97/441

DATE OF HEARING: October 28, 1997

DATE OF DECISION: November 19, 1997

DECISION

APPEARANCES

Matthew Asfar	on behalf of 375123 BC Ltd.
Athanasia Asfar	operating as Ted's Place Restaurant
Jennifer Saben	on her own behalf

OVERVIEW OF FACTS

This is an appeal by 375123 BC Ltd. Operating as Ted's Place Restaurant ("Ted's Place"), under Section 112 of the *Employment Standards Act* (the "Act"), against a Determination which was issued on May 12, 1997 by a delegate of the Director of Employment Standards. The Determination required Ted's Place to pay \$408.32 to a former employee, Jennifer Saben, as compensation for length of service (plus vacation pay plus interest) because it did not have "just cause" to terminate Ms. Saben's employment. This amount was reduced subsequently to \$325.93 due to a clerical error which was made by the Director's delegate in the "Calculation" portion of the Determination.

Ted's Place gives the following reasons for its appeal:

- there was just cause to dismiss Ms. Saben because "...she was not doing her job properly";
- Ms. Saben was "...searching through payroll records in the office"; and
- Ms. Saben was "...fired because she was in the office smoking while on shift ... drinking coffee and reading the newspaper."

Ms. Saben denies the allegations and states that prior to her dismissal her former employer never expressed dissatisfaction with her work performance.

The Director's delegate gave the following reasons for determining that Ted's Place did not have just cause to terminate Ms. Saben's employment:

REASONS

I have completed my investigation into these allegations. The investigation revealed that there had had been an N.S.F. cheque, but that the Employer's response to reasons for dismissal were for other reasons which included alleged smoking in the workplace, contrary to a city bylaw, and alleged failure to open the business when asked to do so by the owner. Further, the Employer relies upon a statement by another employee, a Ms. Whitman, who was allegedly told of wrong doing pertaining to reviewing or taking records, belonging to the Employer, by the Complainant. This allegedly was told to Ms. Whitman after the Complainant had already been dismissed.

These issues were considered by me individually and together for purposes of a 'Just Cause' claim by the Employer regarding Ms. Saben's dismissal.

The Director's delegate also referred in the Determination to a letter he had written to Ted's Place on April 17, 1997 in which he had explained why there was not just cause to terminate Ms. Saben's employment.

A hearing was held at the Tribunal's offices on October 28, 1997 at which time evidence was given under oath or affirmation by Ted Bakopanos, Matthew Asfar, Athanasia Asfar, Jessica Wittman, Jennifer Saben and Agata Bienias.

ANALYSIS

In my view, the appeal by Ted's Place does not allege any particular fact-finding error made by the Director's delegate. Instead, its appeal restates the case made out to the Director's delegate. The appeal process under the *Act* should not be used as a second opportunity to present evidence which could and should have been presented to the Director's delegate, and the Tribunal will not conduct its own investigation with a view to substituting its findings for those of the Director's delegate. Ted's Place has also failed to establish that the Director's delegate made any error in law.

My view is supported by the sworn testimony given by Matthew Asfar, one of the principals of Ted's Place who stated that he told Doug King to open the restaurant at 11:00 a.m. on December 29, 1996. There was, therefore, no evidence to suggest that Ms. Saben had refused to carry out an instruction given to her by her employer. Also, Ms. Bienias' evidence that the restaurant as "set-up" at 10:30 a.m. on December 29th was uncontroverted. Her evidence concerning the owners' and the employee's smoking habits was also uncontroverted, as was her evidence that "...a lot of people were in and out of the office."

The Tribunal has addressed the question of dismissal for just cause on many occasions. The following principles may be gleaned from those decisions (see, for example, *Kenneth Kruger* BCEST #D003/97):

1. The burden of proving the conduct of the employee justifies dismissal is on the employer;
2. Most employment offences are minor instances of misconduct by the employee not sufficient on their own to justify dismissal. Where the employer seeks to rely on what are in fact instances of minor misconduct, it must show:
 1. A reasonable standard of performance was established and communicated to the employee;
 2. 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;
 3. The employee was adequately notified their employment was in jeopardy by a continuing failure to meet the standard; and

4. The employee continued to be unwilling to meet the standard.
3. Where the dismissal is related to the inability of the employee to meet the requirements of the job, and not to any misconduct, the Tribunal will also look at the efforts made by the employer to train and instruct the employee and whether the employer has considered other options, such as transferring the employee to another available position within the capabilities of the employee.
4. 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 summary, I find that Ted's Place has not met the onus (which it bears as the appellant) of establishing that it had just cause to terminate Ms. Saben's employment.

ORDER

I order, under Section 115 of the *Act*, that the Determination be varied to show that Ted's Place owes Ms. Saben \$320.32 plus interest as required by Section 88 of the *Act*.

Geoffrey Crampton
Chair
Employment Standards Tribunal

GC:bls