

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 -

Melisa Noseworthy

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Norma Edelman

FILE NO.: 98/590

DATE OF HEARING: November 17, 1998

DATE OF DECISION: November 30, 1998

DECISION

APPEARANCES

Mario Facchin for Crossroads Restaurant Ltd.

Melisa Noseworthy on her own behalf

OVERVIEW

This is an appeal by Melisa Noseworthy pursuant to Section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by the Director of Employment Standards (the “Director”) on August 20, 1998.

The Director determined that Crossroads Restaurant Ltd. (“Crossroads”) had just cause to dismiss Mrs. Noseworthy. In her appeal, Mrs. Noseworthy claims that Crossroad owes her compensation for length of service as it did not have just cause to terminate her employment.

ISSUE TO BE DECIDED

The issue to be decided is whether or not Crossroads had just cause to terminate the employment of Noseworthy.

FACTS

Mario Facchin is the President/owner of Crossroads.

Mrs. Noseworthy commenced employment at Crossroads as a waitress on April 9, 1995. Her rate of pay was \$7.50 per hour and she worked 35 hours per week.

Mrs. Noseworthy was dismissed by Mr. Facchin on June 12, 1998. The reason for her dismissal concerns events which took place on June 11, 1998.

Mrs. Noseworthy testified that she commenced her shift on June 11, 1998 at approximately 4:30 p.m. The restaurant was busy and Elena Facchin, the hostess and wife of Mr. Facchin, was in the office with a friend and not doing her job. At approximately 6:45 p.m., Mrs Noseworthy asked Mrs. Facchin for help. Mrs. Facchin replied that she should mind her own business. Approximately 15 minutes later, Mrs. Noseworthy again asked Mrs. Facchin for help. She also asked her if she liked working at the restaurant. Mrs. Facchin reiterated that she should mind her own business. Mrs. Noseworthy said she told Mrs. Facchin that they needed to be a team, and then as it appeared Mrs. Facchin was not going

to help her, she remarked “kiss my ass” and walked away. About 5 minutes later, Mr. Facchin approached Mrs. Noseworthy and, after they discussed what had happened, he asked her to apologize to his wife for the remark. Mrs. Noseworthy said she did not want to apologize at first, but then, as she realized she had been wrong to make the remark, she told Mr. Facchin that she would apologize to his wife. She said she called Mrs. Facchin over to her, but Mrs. Facchin ignored her and she was unable to make the apology. Mrs. Noseworthy said that Mr. Facchin then told her to go home. She replied that she wanted to finish her shift because she did not want to leave the restaurant short of staff. She worked for another hour and then she went home at the end of her shift. The following day, Mr. Facchin called her and told her not to come back to work.

Mrs. Noseworthy states that it was wrong for Mr. Facchin to fire her for making the remark to Mrs. Facchin. She was a good waitress, worked very hard for three years, and there were no prior incidents. She said that other employees had told Mr. Facchin “where to go” and they were not dismissed. Moreover, prior to her making the remark, Mr. Facchin was also mad at his wife for not doing her job. She believes that Mrs. Facchin told her husband that either she was leaving or he would have to dismiss Mrs. Noseworthy and, as a result, Mr. Facchin chose to get rid of her rather than lose “yet another wife”. She said she regrets what she said in the heat of the moment and believes she may have deserved a warning or a suspension but not a dismissal. She further said that Mrs. Facchin had only worked in the restaurant for 6 months and she was the hostess and not the boss. The boss was Mr. Facchin.

Steven Noseworthy, the husband of Mrs. Noseworthy, worked at Crossroads as the Kitchen Supervisor until June 14, 1998. He testified that he was sitting with Mr. Facchin on June 11, 1998 and just prior to the incident between their respective wives Mr. Facchin told him he was mad at his wife (Mrs. Facchin) because she was not doing her job. Mr. Noseworthy said that Mr. Facchin told him on the following day that he dismissed Mrs. Noseworthy because he couldn't lose another wife.

Mr. Noseworthy said that after his wife was dismissed he was mad and he would not talk to Mrs. Facchin. He said Mr. Facchin wanted to talk to him but he told him he would not talk about personal matters concerning his wife. On June 14, 1998, after again telling Mr. Facchin he was not prepared to talk about personal matters, Mr. Facchin laid him off with three weeks severance pay. Mr. Noseworthy said that if Mr. Facchin wanted to talk about his wife then he should have directly contacted Mrs. Noseworthy.

Mr. Noseworthy further said that Mr. Facchin was the boss at the restaurant and not Mrs. Facchin, who had only worked at the restaurant for 6 months. He said that he and his wife were good workers and he cannot understand why she was dismissed when other employees had told Mr. Facchin to “f...off” and they were still working at the restaurant. For example, on separate occasions, a cook and a waitress told Mr. Facchin to “f... off” and although they were off work for a period of time, they were both allowed to return to work.

Mr. Facchin testified that after his wife told him of the incident with Mrs. Noseworthy he told Mrs. Noseworthy to apologize for her remark. Mrs. Noseworthy initially refused but

then she agreed to make an apology. Mr. Facchin did not dispute Mrs. Noseworthy's evidence regarding her inability to make the apology. He said that even if she had apologized, it would have been of no value at the time. Mr. Facchin agreed that he allowed Mrs. Noseworthy to complete her shift on June 11, 1998 even though he had earlier told her to go home. He said his wife told him that Mrs. Noseworthy should be fired so he called Mrs. Noseworthy on June 12, 1998 and told her she was dismissed. Subsequently, Mr. Noseworthy insulted him and was rude to him at work. Mr. Facchin said he tried to tell Mr. Noseworthy that he wanted to work things out, referring he said, to both Mr. and Mrs. Noseworthy, but Mr. Noseworthy refused to talk, so he laid him off with three weeks severance pay.

Mr. Facchin said both he and his wife are in charge of the restaurant. He also said that if Mrs. Noseworthy had a problem with work on June 11, 1998 she should have asked him for help and not Mrs. Facchin. He concedes that a cook once told him to "f...off" and he allowed her to return to work but only after she agreed not to do it again. He further said that he told Mr. Noseworthy on June 12, 1998 that Mrs. Facchin had made the decision to fire Mrs. Noseworthy and he had to stand behind her decision. He also said that Mrs. Noseworthy had used the "f" word on occasion at the restaurant. This was not denied by Mrs. Noseworthy, nor did Mr. Facchin deny Mrs. Noseworthy's claim in reply tht Mr. Facchin once called her a "f...ing bitch".

Mrs. Facchin testified that she is the hostess and Assistant Manager/boss at the restaurant. Mrs. Facchin said she was in her office doing paperwork around dinner time on June 11, 1998. It was busy in the restaurant. Mrs. Noseworthy came over to her and asked "Are you going to work today or what?". She said she went out of the office and a customer said that Mrs. Noseworthy had forgotten to bring him a piece of pie. She asked Mrs. Noseworthy about the pie and told her to do her job. Mrs. Noseworthy replied "Who are you to tell me what to do?" Mrs. Facchin said she then told Mrs. Noseworthy to go home and cool down. At this point, Mrs. Noseworthy said "kiss my ass". Later, they had another argument. Mrs. Noseworthy was screaming at her that she was not the boss. Mrs. Facchin said she again told Mrs. Noseworthy to go home and then she told her husband about Mrs. Noseworthy's remark. After her husband said no one could make that kind of remark to her, she suggested that he fire Mrs. Noseworthy because of the remark. She said her husband asked Mrs. Noseworthy to leave, but she stayed at the restaurant for another 15 to 20 minutes and finished her shift. She said she was unaware that Mrs. Noseworthy wanted to apologize to her for the remark.

Mrs Facchin said no other staff has ever swore at her at the restuarant. Initially, she said that she had never heard any staff used "bad language" but then she agreed a cook once said "f... this", in front of her, regarding his shedule.

Gina Chard has been a waitress, on and off, for 18 years at the restaurant. She testified that she heard Mrs. Facchin and Mrs. Noseworthy yelling at each other on June 11, 1998. Mrs. Noseworthy wanted to know if Mrs. Facchin was in the office "f...ing the dog". She did not hear Mrs. Facchin's rely. She then heard Mrs. Noseworthy tell Mrs. Facchin that she could "kiss her ass" and that she wasn't the boss. Mrs. Fachin replied that she could go

home. At that point, Mr. Facchin arrived and told them other people could hear them and “enough”. Ms. Chard said Mrs. Noseworthy completed her shift on June 11, 1998 which was about 15 to 20 minutes after incident with Mrs. Facchin. According to Ms. Chard, both Mr. and Mrs. Facchin were the in charge of the restaurant and when Mr. Facchin was not at the restaurant, his wife was the boss. She said that she was not surprised Mrs. Noseworthy was fired given what she said in front of all the customers. In reply, Mrs. Noseworthy said Ms. Chard cheered her on when she made the remark to Mrs. Facchin.

ANALYSIS

The principles applied by the Tribunal where the issue is termination of employment for “just cause” have been summarized in the following excerpt from *Kenneth Kruger*, BC EST #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; and
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.

Crossroads argues that this is a case where a single act of misconduct (the remark made by Mrs. Noseworthy to Mrs. Facchin) was sufficiently serious to justify summary dismissal. I do not agree. I offer the following reasons.

First, I am not satisfied that Mrs. Noseworthy was clearly aware that Mrs. Facchin was in a position of authority. Mr. and Mrs. Noseworthy claim that Mrs. Facchin was not their boss. This position is supported by Mr. Facchin's statement that Mrs. Noseworthy should have asked him for help, and not his wife, if she had a problem on June 11, 1998. It is further supported by Ms Chard's evidence that Mrs. Facchin was the boss when Mr. Facchin was not at the restaurant. On June 11, 1998 Mr. Facchin was at the restaurant.

Second, Mrs. Noseworthy agreed to apologize to Mrs. Facchin for the remark. Her evidence that she was unable to do so given Mrs. Facchin's conduct was not contradicted by Mr. Facchin.

Third, Mrs. Noseworthy was not immediately dismissed following her remark. If Mrs. Noseworthy's misconduct had so undermined the ability of the employer to manage and had so damaged the employment relationship, I would not have expected her to be allowed to complete her shift on June 11, 1998.

Fourth, another employee was not dismissed for making a similar type of remark to Mr. Facchin. This inconsistency does not support Crossroad's position that it was justified in summarily dismissing Mrs. Noseworthy. Moreover, Mrs. Noseworthy was aware of this case which would suggest to an employee that Mr. Facchin did not view this kind of misconduct to be grounds for discharge.

Fifth, I am satisfied that the remark made by Mrs. Noseworthy and other similar types of remarks were not unusual in this workplace.

Finally, Mrs. Noseworthy worked for three years at the restaurant with no prior misconduct of this nature and the Facchins never challenged the Noseworthy's evidence that Mrs. Noseworthy was a good worker.

For the above reasons, I do not find the misconduct of Mrs. Noseworthy to be sufficiently serious to justify summary dismissal. The remark made by Mrs. Noseworthy may have justified some minor discipline, but it does not constitute or support just cause for summary dismissal in the circumstances of this case.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated August 20, 1998 be varied to indicate that Mrs. Noseworthy is owed \$787.50 which represents 3 weeks compensation for length of service, plus 4 % vacation pay on that amount for a total of

\$819.00, plus whatever interest that may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance of the Determination.

Norma Edelman
Registrar
Employment Standards Tribunal

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