

An appeal

- by -

Y.N.R. Holdings Ltd.  
(“Romeos”)

- 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:** April D. Katz

**FILE No.:** 2001/625

**DATE OF HEARING:** September 28 and October 18, 2001

**DATE OF DECISION:** November 20, 2001

## DECISION

### APPEARANCES:

Leigh Gagnon on behalf of Y. N. R. Holdings Ltd.

Warren EGGLESTON on behalf of Heather Watkins

### OVERVIEW

Y.N.R. Holdings Ltd. (“Romeo’s”), operates two restaurants in Victoria and employed Heather Watkins (“Watkins”) for 6 years. Watkins’ employment was terminated on December 6, 2000 based on her “poor attitude”. Watkins filed a claim with the Director of Employment Standards claiming compensation for length of service. A Determination dated May 30, 2001 found that Romeo’s did not have cause to end Watkins’ employment and that Romeo’s owed Watkins \$2361.34 in compensation for length of service. Romeo’s appealed the Determination.

### ISSUE

Did Romeo’s have ‘cause’ within the meaning of the *Employment Standards Act* (“Act”) to terminate Watkins’ employment?

### ARGUMENT

Romeo’s argues that it had just cause to end Watkins’ employment based on her ongoing conflict with her supervisor and the owner. Romeo’s argues that Watkins was reluctant to take direction and was not a happy person and had a negative attitude at work and in particular with colleagues working in the kitchen. Romeo’s argues that it had taken steps to correct Watkins’ performance by giving her a written warning in September. Romeo’s argues that Watkins attitude and subsequent conduct was sufficient to meet the Supreme Court of Canada’s test for ‘just cause’ in *McKinley v B. C. Tel* [2001] S.C.J. No. 40 show an “incompatibility with the employment relationship”

Watkins argues that Romeo’s has endeavoured to use this Appeal as a trial de novo and has failed to meet the onus on it to show an error of fact or law in the Determination. The evidence shows that Romeo’s complaints were not supported by the facts. “Unhappiness” at work is not a basis for terminating employment. “Unwillingness” to volunteer time in advance of a paid shift is not a basis for terminating employment and “attitude” is not a grounds for dismissal for “just cause”. Watkins argues *McKinley* was a situation where the employee was alleged to have been dishonest. There is no suggestion in the evidence here of any misconduct by Watkins. There was no evidence of a negative impact on the business of the employer. The employer may end an employee’s employment under the *Act* but if no cause is proven the employer must pay for

length of service. Watkins submits that there was no just cause for her employment ending and she is entitled to compensation for length of service.

## **THE FACTS**

I heard oral evidence from both parties and their 5 witnesses and oral arguments from their representatives. The evidence was relatively consistent and I will deal with it generally where it does not appear to be in dispute and more particularly where the parties differ. The evidence differs primarily on the impact on the significance of the events.

Watkins and her twin sister worked at Romeo's from the time they were 16 years old. Their father is the kitchen manager. Watkins was well liked by her fellow workers and worked her way up from phone person (3 years) to bus person (1 year) to server (2 years). The restaurant has an "open kitchen" so that the customers can see the cooks working on the line and the servers interact directly with the kitchen staff. Sound carries from the kitchen to the restaurant and back.

The restaurant is very busy with especially busy peaks from 11 AM over the noon hour and over the dinner hour. The manager has worked in the restaurant since it opened in November 1993. The manager wants staff to work as a positive pleasant team to give the restaurant a "fun" atmosphere. There is a lot of pressure on the servers. Tables are filled as soon as they become vacant. There is a range of customers from seniors, families and business people. Many customers come with a short time frame. Staff is expected to interact quickly and calmly with all customers.

Watkins had a very good rapport with customers and many were reported to ask for her after she left. Watkins had high standards about what a plate should have and how it would look before she took it to a customer. There was a significant turn over in the kitchen from time to time and Watkins would complain to the kitchen staff if an order was not properly done. The kitchen staff considered Watkins demanding and some of them had complained to their supervisor who complained to the manager.

Several Romeo's witnesses alleged that on one occasion Watkins had lifted "food off the plate" and thrown it at staff. None of the witnesses could recall the date or were present during this alleged conduct. Watkins' evidence was that she had no idea where the story came from. She remembered one night three prime rib orders were returned because the meat was not done as ordered. Watkins lifted the meat to show the kitchen supervisor the problem with the meat and returned it to the plate. Watkins denied ever throwing any food. I did not find this allegation to be credible.

The manager's evidence was that Watkins' attitude shifted from being a team player about 2 years before her employment ended. The manager described Watkins as having mood swings and being bossy and rude. The manager's evidence was that she kept notes in a day planner for

about a year before Watkins was terminated. The manager's evidence was the instances of Watkins problems were more frequent. The manager did not produce the record of her entries.

The manager's evidence was that she had a 'no conflict' rule. If someone yelled in the restaurant everyone could hear so the manager did not want voices raised. On December 31, 1999 the manager noted that she could hear Watkins. In January 2000 the manager noted that she told Watkins to comply with a dress code by putting on a tie she had forgotten. She would not wear the one offered by the manager on the basis that it was ugly. The manager noted that Watkins objected loudly to the timing of a staff meeting. In late January a customer complained about not getting a coffee refill.

In February the manager noted that Watkins complained to the cook that food was not properly presented and the manager spoke to her about her voice level with this complaint. On May 30, 2000 the manager noted that Watkins was spoken to about shortness with staff and customers. Watkins agreed that she could use a holiday but she could not afford it at the time. On June 3, 2000 the manager noted that Watkins was spoken to about her attitude affecting other staff. Watkins conduct would deteriorate during a shift as pressure built.

Over the summer Watkins complained about changes in policy. She was not consistent in pouring wine to the level set by management. Several witnesses gave evidence about a carafe that had been marked to set the new wine levels. The evidence was clear that the carafe was present for less than two weeks with the mark on it to measure. The wine containers were at an awkward level to see how much wine was poured and servers had to eyeball the carafe as they were pouring. All the servers had difficulty being accurate pouring the correct amount. There was no evidence that Watkins made any more errors than any other staff.

There was a morale problem in the restaurant with staff generally over the summer. There was significant turnover of staff. A lot of staff in the kitchen were new and the quality of the food presentation varied. Watkins was frustrated when her orders were not done well.

Romeo's had several staff give evidence that the line cooks considered Watkins to be demanding.

The manager asked Watkins to act as hostess on several shifts. She opened the restaurant but did not do the closing. In October 2000 the manager asked her to learn how to close as the main closing hostess was going on maternity leave. Watkins had to learn how to do the balancing, floats for the next day, VISA entries, cash, delivery entries, get the cars back and generally carry more responsibility. The job paid \$2 more per hour.

Watkins volunteered to keep the plants on the patio during the summer working after her shift to keep them in good shape. She was criticized for not doing something with these plants on one occasion when she had other plans for the balance of her day.

Watkins did not agree to give money into a ‘voluntary’ fund for Santa’s Anonymous arranged by management. Management felt her reluctance to participate contributed to others not participating. She appears to have been a natural leader.

Watkins socialized with a number of the kitchen staff and the servers outside of work. She was well liked. The non-management staff witnesses for the employer and the employee all indicated that they liked Watkins. She had trained servers and supported them during busy shifts. She frequently volunteered to stand in for staff who needed to change a shift. She was universally reported to work hard and to please her customers.

On December 1, 2000 Watkins arrived just on time for her serving shift, not the regular 15 minutes early she normally did. Staff was expected to arrive early and the manager was worried Watkins would not arrive and it was busy. Watkins punched in at the beginning of her shift. Watkins had not been late before. December 1, 2000 was the first day of the Christmas season and the staff could not park on the lot. Watkins had difficulty find a parking spot and had to walk further to work. After the shift the manager spoke to Watkins about being ‘late’. The manager questioned Watkins about her being present on December 4, 2000 when she covered for another employee.

On December 6, 2000 Watkins was called into the office after her shift and her employment was terminated. Watkins was shocked but did not show it. There were no meetings in the office between September and December 6, 2000.

## ANALYSIS

In an appeal the evidentiary burden is on the appellant to show that the Director’s Determination was in error. The Determination found that Romeo’s had not provided enough evidence to support the conclusion that Watkins’s employment was terminated for just cause.

An employer is free to end an employee’s employment for any reason under the *Act*. There is no power in the Director or the Tribunal to reinstate an employee where just cause is not proven. The *Act* provides for compensation for length of service to allow the employee to adjust to their sudden change of status from an employee with an income stream to a person without income.

Counsel for both parties argued *McKinley v B. C. Tel* [2001] S.C.J. No. 40 in which the employee’s honesty with the employer was in question. I do not find this case to be helpful in view of the fact that there is no issue of misconduct of sufficient weight in the evidence that would meet the test of being incompatible with the employment relationship. All of the evidence supports the fact that Watkins was a conscientious server who worked under a lot of pressure and strove to please her customers. She set high standards for the presentation of the food she served which could only improve the reputation of the employer. She volunteered to do extra work in the restaurant to have it look good. She assisted other employees by filling in on shifts they could not work so that the needs of the employer were met seamlessly.

Watkins's representative cited several cases about the jurisdiction of the Tribunal in this situation. I do not believe any of this law is in dispute. This appeal is driven primarily by the facts.

No one disputes that Watkins needed a holiday and had attitude. The sole issue is whether her attitude constituted just cause.

An employer is free to end an employee's employment and to decide when that will occur. It is not open to the Director or the Tribunal to change that decision or make a finding of wrongful dismissal.

When an employer decides to end the employment the employer is obligated to comply with the *Act*. Section 63 of the *Act* sets out an employer's obligations.

#### Liability resulting from length of service

- 63 (1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.
- (2) **The employer's liability for compensation for length of service increases as follows:**
- (a) after 12 consecutive months of employment, to an amount equal to 2 weeks' wages;
  - (b) **after 3 consecutive years of employment, to an amount equal to 3 weeks' wages plus one additional week's wages for each additional year of employment, to a maximum of 8 weeks' wages.**
- (3) **The liability is deemed to be discharged if the employee**
- (a) is given written notice of termination as follows:
    - (i) one week's notice after 3 consecutive months of employment;
    - (ii) 2 weeks' notice after 12 consecutive months of employment;
    - (iii) 3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice;
  - (b) is given a combination of notice and money equivalent to the amount the employer is liable to pay, or
  - (c) **terminates the employment, retires from employment, or is dismissed for just cause.**
- (4) The amount the employer is liable to pay becomes payable on termination of the employment and is calculated by
- (a) totalling all the employee's weekly wages, at the regular wage, during the last 8 weeks in which the employee worked normal or average hours of work,
  - (b) dividing the total by 8, and

- (c) multiplying the result by the number of weeks' wages the employer is liable to pay.
- (5) For the purpose of determining the termination date, the employment of an employee who is laid off for more than a temporary layoff is deemed to have been terminated at the beginning of the layoff.

The appeal does not dispute the length of Watkins employment. The sole issue is whether Romeo's had just cause to end Watkins employment. The major problem with Romeo's allegation that Watkins' employment was terminated for just cause is that there was no culminating incident that resulted in her employment ending on December 6, 2000. In addition there is no pattern of continuing or escalating misconduct that would warrant ending Watkins' employment.

The manager's notes of concerns appear to dissipate in June 2000. The evidence supports Watkins contention that there was a general malaise in the restaurant all summer 2000. Watkins' conduct from September was rewarded with offers of more responsibility. This is not consistent with an employer planning to end an employee's employment for cause.

The evidence about December 1, 2000 does not support the conclusion that there was any misconduct on Watkins' part. The stress on the manager is evident but that supports Watkins position that the work was stressful and everyone became 'short' and 'abrupt' in busy times.

Romeo's has employed many people for a long period of time it is a family owned business and it has long term relationships with many of its staff. Watkins was one of three family members employed with the employer. She 'grew up' there having started her employment at 15 years of age. During her growing up period she started to take stronger positions about what was happening at the restaurant with a sense of ownership and pride in the product that was produced, the meals and the look of the place, the patio. Her positions were not always ad idem with the manager. Watkins appeared to get along with everyone in the restaurant except the manager. When the manager corrected Watkins, she resented it.

On several issues Watkins did not agree with the manager. She did not believe she owed the restaurant free time in advance of her shift. She did not believe she needed to change her plans to work on the patio plants on her voluntary time. She did not believe she had to voluntarily pay into the Santa's Anonymous Fund. Management concluded that these positions meant Watkins was not a team player. The evidence supports a conclusion that there was a personality or style clash between the manager and Watkins.

Unhappiness at work is not just cause for termination of employment. The need for a holiday and a refusal to take one is not just cause for termination of employment. A great many people could lose their jobs for cause if this were not the law.

Management is free to draw any conclusions it wishes and to end employee's employment. The fact that there is a personality clash or style clash that leads to the employment ending does not

mean the employee must remain. In order not to pay an employee compensation for length of service at the end of that employment the employer must show just cause or that the employee was retired or quit.

Based on the evidence provided I find that Romeo's has failed to meet the onus of proof that an error was made in the Determination. I find on the merits of the issue that there was no evidence of just cause for ending Watkins' employment.

### **CONCLUSION**

Based on the evidence presented I find no basis on which to vary or cancel the Determination. Romeo's has not discharged the onus on it to demonstrate an error in the Determination. I deny the appeal and confirm the Determination

### **ORDER**

Pursuant to section 115 (1)(a) the Determination dated May 30, 2001 is confirmed.

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**April D. Katz**  
**Adjudicator**  
**Employment Standards Tribunal**