

An appeal

- by -

Woodfire Restaurant Ltd. operating as Woodfire Restaurant
("Woodfire Restaurant")

- 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: Cindy J. Lombard

FILE No.: 2001/621

DATE OF HEARING: November 16, 2001

DATE OF DECISION: December 6, 2001

DECISION

APPEARANCES:

The Appellant/Employer, Woodfire Restaurant Ltd. operating as Woodfire Restaurant (“Woodfire Restaurant”), was represented by its principal owners, Hans and Ruth Schroth.

The Respondent, Christophe Mingaud (“Mingaud”) appeared together with his wife, Nancy Mingaud.

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Woodfire Restaurant of a Determination that was issued August 7, 2001, by a Delegate of the Director of Employment Standards (the “Director”) finding that Mingaud have been dismissed from the employ of the Woodfire Restaurant without just cause or notice in lieu of just cause, was therefore in contravention of the *Act* and was due the following:

One week’s wages	\$426.00
Vacation pay 4% of \$426.00	\$17.04
Interest pursuant to Section 88 of the <i>Act</i>	<u>\$21.55</u>
	\$464.59

(the “Determination”)

ISSUE TO BE DECIDED

Is the employer, Woodfire Restaurant, liable to pay compensation in lieu of reasonable notice or is the employer excused from liability pursuant to Section 63(3)(c) on the grounds that the employer had just cause for terminating the employment of Mingaud.

The onus is on the appellant, Woodfire Restaurant, to show that the Determination was wrong.

FACTS AND ANALYSIS

Mingaud was employed by Woodfire Restaurant as a cook between July 25, 2000, and November 28, 2000, at a wage of \$12.00 per hour.

According to the Appellant

Mr. Schroth’s evidence is that after two months of employment, that is in approximately September, 2000, Mingaud began going into the pub located next to the restaurant and on the

same hotel premises two to three times per week before starting work. Mr. Schroth states that he warned Mingaud to stop doing so but he persisted for several weeks prior to this dismissal.

Mr. Schroth says that on the day prior to his dismissal (i.e. a Sunday) Mingaud came into work drunk and threatened him in the kitchen and shouted obscenities at him.

Mrs. Schroth also says that Mingaud often appeared at work with liquor on his breath but not appearing intoxicated. Furthermore, Mrs. Schroth says that on a few days prior to his dismissal, she witnessed Mingaud grab hold of Mr. Schroth and shout negative words at him.

According to Mingaud

Mingaud adamantly denies going to work intoxicated. He does admit to having a beer on the odd occasion prior to work as many staff members of the hotel and restaurant do. On at least one occasion he had a beer with Mr. Schroth. Mingaud furthermore denies Mrs. Schroth's allegation of a physical assault or any threatening behavior towards Mr. Schroth.

Rather, Mingaud says that on November 29, 2000, he was called to a meeting with Mr. Schroth, Randy Carter, the banquet manager and Tim Buckley and told that he was going to be laid off. Mr. Schroth made no allegation at that time that he was unhappy with Mingaud's work or conduct.

The onus is on the employer Woodfire Restaurant to establish on a balance of probabilities that the employee's conduct justified dismissal without notice or compensation in lieu of as required by Section 63 of the *Act*

Furthermore, a single act of misconduct or insubordination can constitute just cause only where the act is willfully deliberate and of such consequence as to repudiate the employer/employee relationship. In the absence of such a fundamental breach of the employment relationship, just cause is proved only where:

1. reasonable standards of performance have been set and communicated to the employee;
2. the employee was clearly warned that his or her continued employment was in jeopardy if such standards are not met;
3. a reasonable period of time was given to the employee to meet those standards.

The Woodfire Restaurant has not discharged its onus.

The evidence of Mingaud is preferred where it contradicts that of the Schroths for the following reasons:

1. The Record of Employment dated December 1, 2000, and signed by Mrs. Schroth indicates that Mingaud was “laid off”.
2. Tim Buckley who was Executive Chef was in charge of Mingaud at the time of his dismissal and during the term of his employment states in his letter dated September 15, 2001:
 - a) at no time did Mingaud appear at work in an intoxicated state. Many hotel and restaurant employees would pass time in the pub prior to work but not become intoxicated;
 - b) Mingaud was a reliable capable employee;
 - c) Mingaud was laid off at the November meeting and given no opportunity to speak.
3. No written warning was ever given to Mingaud that he was conducting himself in a manner which threatened his continued employment.

In summary, the appeal is therefore dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of \$464.59 plus whatever further interest may have accrued.

Cindy J. Lombard
Adjudicator
Employment Standards Tribunal