

An appeal

- by -

Fernidler Holdings Ltd. Operating Foodteller Restaurant
(“Fernidler” or “Employer”)

- 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: Paul E. Love

FILE No.: 2001/688

DATE OF DECISION: December 13, 2001

DECISION

OVERVIEW

This is an appeal by an employer, Fernidler Holdings Ltd. operating as Foodteller Restaurant. (“Fernidler ” or “Employer ”), from a Determination dated September 7, 2001 (the “Determination”) issued by a Delegate of the Director of Employment Standards (“Delegate”) pursuant to the *Employment Standards Act*, R.S.B.C. 1996, c. 113 (the “Act”). The Delegate determined that Ms. Nita Thompson (the “Employee”) was entitled to the sum of \$97.62 for compensation for length of service (1 week), vacation pay and interest . The principle issue in this case is whether the Delegate erred in determining that the Employer failed to establish just cause for the termination of Ms. Thompson.

The Delegate determined that there were three consecutive days of unauthorized absence by Ms. Thompson, which proceeded after one day of absence where Ms. Thompson phoned in sick. The Delegate investigated the Employer’s theory that Ms. Thompson was not sick but was at a two day training session, for Moxie’s, another restaurant. The Delegate’s investigation confirmed the Employee’s version, that she was registered to attend the training session, but did not attend due to illness. The Employer did not warn Ms. Thompson after her return to work, but proceeded to terminate her. I confirmed the Determination as it was apparent that the Employer did not have just cause to terminate Ms. Thompson.

ISSUE

Did the Delegate err in finding that the Employer did not have just or reasonable cause to terminate Ms. Khan?

EMPLOYER’S ARGUMENT

The Employer argued that it had cause to terminate Ms. Thompson on the basis of misconduct, breach of duty and conflict of interest. The Employer argues that Ms. Thompson was absent from the workplace on April 27, 28, 29th, 2000. The Employer says that Ms. Thompson was scheduled to work. ON Thursday April 27th, the Employee phoned wo hours before her shift to work, and advised she was sick. She indicated that she would be able to return to work on the 28th, but she missed the 28th and 29th. The Employer left messages on the Employee’s answering machine. The Employer says that it received information that Ms. Thompson had not been sick but she had attended a training session at the PG Golf and Curling Club Hosted by Moxie’s restaurant. The Employer says that it confronted Ms. Thompson about this, and after “several contradictions” she confirmed that she had been to the training. The Employer viewed this as a serious matter, as wilful misconduct, which caused stress for another staff, caused the loss of a table of four customers, and was a “clear conflict of interest”.

EMPLOYER'S ARGUMENT

The Delegate argued that the Determination dealt with the issues in a comprehensive manner, that there was no error in the application of the applicable law, and that the Employer had not established cause where there was one incident of misconduct.

FACTS

I decided this case after considering the written submission of the Employer and the Delegate. The employee, Nita Thompson, did not file a submission.

Ms. Thompson was a server at Foodteller Restaurant, operated by Fernidler Holdings Ltd., in Prince George, British Columbia. She was paid minimum wage, which at the time was \$7.60 per hour. Ms. Thompson commenced her employment on October 23, 2000, and worked until April 24, 2000. She was terminated by the Employer on April 29, 2000, after missing four shifts. Prior to the termination the Employee had not received any warnings for any employment misconduct. The Employer had a policy in place, that employees had to notify the employer of absences due to illness, prior to the shift commencing.

The Delegate found that Ms. Thompson had missed shifts on April 27, 28, 29, without giving the Employer any reason for the absence. Mr. Thompson also missed her shift on April 26, 1990, but phoned in sick, two hours prior to the commencement of her shift. The Employer made attempts to verify her whereabouts by leaving messages, and the Employer heard from "other employees" that Ms. Thompson missed April 27th and 28th due to attending at another Employer training and orientation session.

I note that it is apparent that the Delegate considered the Employer's theory as outlined in the Employer's letter to the Delegate dated June 26, 2001. The Delegate did investigate particularly the Employer's allegation that Ms. Thompson had attended a training session held at another restaurant. The Delegate interviewed the personnel manager at the other restaurant and was advised that Ms. Thompson was invited to attend the training session but did not attend.

The Delegate did not find that Ms. Thompson had attended other sessions, but appears to have determined that Ms. Thompson was ill. This is not an express finding in the Determination, but it is apparent that the Delegate relied on Ms. Thompson's statement, and the statement from the personnel manager at Moxie's, when the Delegate made the finding that "just cause for the termination was not established". The statement of Ms. Thompson was backed up by the statement from the personnel manager, that Ms. Thompson was scheduled to attend the training session, but did not attend due to illness.

The Delegate determined that the Employer had not given Ms. Thompson warnings and had not attempted to correct Ms. Thompson's behaviour. The Delegate found that Ms. Thompson was entitled to one weeks wages for compensation for length of service, plus vacation pay on that

amount at 4 %, plus interest. The Delegate determined that the sum of \$97.62, was due to the Employee and payable by the Employer. The Delegate also ordered that the Employer cease violating section 63 of the *Act*, and that the Employer comply with all the requirements of the *Act* and *Regulation*.

ANALYSIS

In an appeal under the *Act*, the burden rests with the appellant, in this case the Employer, to show that there was an error in the Determination such that I should vary or cancel the Determination.

The major issue in this case is whether the Employer has shown that it had cause to terminate Ms. Thompson. The burden for proving “just cause”, rests with the Employer in proceedings before the Delegate.

In certain circumstances the Employer can dismiss for one incident of misconduct. Conduct such as employee theft, for example, may be a sufficiently serious breach of the employment relationship, so that one can conclude the Employee engaged in conduct which was incompatible with the continuation of the relationship. In this case, however, it is apparent that the Delegate accepted that the Employer had proven absences from the workplace for 3 days. The dates were days on which the Employee was sick. The Employer alleged before the Delegate that on two of the dates Ms. Thompson was at a training program with another restaurant, Moxie’s. This is denied by Ms. Thompson, who says that she was registered to take the training but she did not attend due to illness. The Delegate checked with Moxie’s and determined that Ms. Thompson had not taken the training due to illness.

In my view, the facts found by the Delegate were that the Employee was absent from work due to illness. In order to discharge an employee for absenteeism, the law in this area, requires that the Employer set the standard, clearly communicate to the Employee that her job was in jeopardy if she failed to meet the standard, provide an opportunity to the Employee to meet the standard, and terminate when it is clear that the Employee is unable or unwilling to meet the standard despite being given an opportunity (including direction and training) to do so.

This case turns primarily on findings of fact, that there was unauthorized absence, and that the Employee was not warned or disciplined due to absence. If I accept the factual findings of the Delegate, the Employer had “some cause to discipline” Ms. Thompson because she failed to notify the Employer, in advance of all her absences. Unauthorized absences, can pose a serious problem for any Employer, particularly if the Employer is unable to schedule a replacement worker. There is evidence in this case that the Employer was inconvenienced, and may have suffered a monetary loss. There is, however, only three days of consecutive absence, proceeding after one day of authorized absence due to illness, and the Employer did not apply any corrective discipline in the nature of warnings, before proceeding to terminate Ms. Thompson, after she returned to work. The Employer must not only set a standard, but it must give warnings or guidance to an Employee before the Employer can proceed to terminate for absenteeism.

Before leaving this case, I note that this is not a case where the Delegate determined that Ms. Thompson was “dishonest” about her absences, as alleged by the Employer. Had the Delegate found as a fact that Ms. Thompson had missed the Employer’s work, without notice, to attend another employer’s training session, and then lied about that fact to the current Employer, I would have had no hesitation in finding cause for dismissal. The Delegate did consider and investigate the Employer’s theory. The Employer now asks me to second guess the finding of fact, which I am not prepared to do, given there was evidence before the Delegate to conclude that Ms. Thompson’s absence was due to illness, and not due to attending another Employer’s training program. The Employer provided no evidence in this process to demonstrate that the Delegate’s finding of “absent due to illness” was incorrect. The Employer has failed to establish any error in the Determination, and therefore I confirm the Determination.

ORDER

Pursuant to s. 115 of the *Act* I order that the Determination dated September 7 2001 related to compensation for length of service is confirmed.

Paul E. Love
Adjudicator
Employment Standards Tribunal