Civil Resolution Tribunal

Date Issued: November 19, 2019

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Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Toledo v. Coast Restaurants Ltd.*, 2019 BCCRT 1309

B E T W E E N :

JOCELYN TOLEDO

APPLICANT

A N D :

COAST RESTAURANTS LTD.

RESPONDENT

REASONS FOR DECISION

Tribunal Member: Julie K. Gibson

INTRODUCTION

1. This dispute is about the alleged wrongful dismissal of a restaurant server.

2. The applicant Jocelyn Toledo says the respondent Coast Restaurants Ltd. dismissed her from employment at its Coast restaurant without just cause.

3. The applicant claims $5,000 in damages for wrongful dismissal.

4. The respondent says that it terminated the applicant's employment for cause, because she failed to pay an $86.81 bill while a guest at its restaurant on May 16, 2017, and otherwise acted in way that could result in "loss of business".

5. The respondent asks that the dispute be dismissed.

6. The applicant is self-represented. The respondent is represented by business contact Jack Lamont.

JURISDICTION AND PROCEDURE

7. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act* (CRTA). The tribunal's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the tribunal must apply principles of law and fairness, and recognize any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.

8. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. I decided to hear this dispute through written submissions, because I find that there are no significant issues of credibility or other reasons that might require an oral hearing.

9. I find that this dispute does not fall within the jurisdiction of the Employment Standards Branch, as it is not about the respondent's entitlements under the *Employment Standards Act* (ESA). Rather, this wrongful dismissal dispute involves whether the respondent breached an implied obligation in the employment contract to give the applicant reasonable notice of its intention to terminate the employment

relationship, absent just cause (see *Honda Canada Inc.* v*. Keays*, [2008] 2 S.C.R. 362, 2008 SCC 39 at paragraph 50).

10. I find the tribunal has jurisdiction to decide the applicant's claims up to the $5,000 monetary limit.

11. Neither party raised the issue of the limitation period. The *Limitation Act* provides that this type of claim must be brought within 2 years of when it was discovered. The applicant was dismissed on May 17, 2017. The applicant submitted her application for dispute resolution on May 17, 2019. The application filing date stops the running of the limitation period for tribunal disputes (see section 13.1 of the CRTA). Therefore, I find that the applicant's claim was brought within the 2-year time limit.

12. The tribunal may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law. The tribunal may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.

13. Under tribunal rule 9.3(2), in resolving this dispute the tribunal may make one or more of the following orders, where permitted under section 118 of the CRTA:

    a. order a party to do or stop doing something;

    b. order a party to pay money;

    c. order any other terms or conditions the tribunal considers appropriate.

ISSUES

14. The issues in this dispute are:

    a. whether the respondent had just cause to dismiss the applicant from employment without notice and,

b. if not, what remedy is appropriate?

EVIDENCE AND ANALYSIS

15. In this civil claim, the applicant bears the burden of proof on a balance of probabilities. I have reviewed all of the evidence but only refer to the evidence and submissions as I find necessary to provide context for my decision.

16. Having said that, where an employer seeks to rely on just cause for dismissing an employee, the onus of proof of misconduct lies on the employer (see *Acumen Law Corporation* v*. Ojanen*, 2019 BCSC 1352 at paragraph 34). In this dispute, the respondent says it had cause to dismiss the applicant due to (a) failure to pay her bill, and (2) inappropriate off-duty conduct, namely being drunk around a patron, and telling stories to apply pressure for him to pay her bill.

17. In August 2015, the applicant was hired as a server at the respondent's Coast Restaurant (restaurant). She worked part-time.

18. On the evening of May 16, 2017, the applicant and her friend AM attended at the restaurant. It is uncontested, and I find, that the applicant was off duty from her employment as a server that evening.

19. That evening, the applicant and AM had several drinks. They were joined by a regular restaurant patron, PB. Two bartenders, DT and OG, were serving the drinks.

20. At some point, the applicant had a "heated argument" with bartender DT. DT admits that he called the applicant out about her conversation topic, sugar daddies. DT admits he told the applicant that what she was discussing was "complete bullshit", and that he used those words.

21. Based on his own evidence, I find that DT was confrontational and provoked the applicant during their conversation. The applicant became upset. The applicant agrees that she was drunk and crying. She asked for her bill.

22. The parties disagree about what happened next.

23. AM says she took out her credit card to try to pay, but that PB said he would pay it.

24. In the Dispute Notice, the applicant says she paid the bill in cash, but then suggests that the bill may have been forgotten. In a statement given at the time of her dismissal, the applicant admitted leaving the bill unpaid by accident. That is, the applicant expressed confusion about whether the bill had been paid, saying that PB would not let her see the bill. She thought she might have paid in cash but was confused upon learning that the bill had been left unpaid. The applicant was drunk and upset. I find that she was unclear about whether the bill had been paid or not. I find the evidence does not establish intentional dishonesty on her part.

25. The applicant says she told DT she would not tip him, presumably because they were fighting.

26. The bartender, DT, wrote an email to Coast general manager SG that the applicant refused to pay the bill. DT then paid the bill himself, writing he "took the bill to just get her [the applicant] out of the restaurant." In the same email, DT said he did not like to see the applicant applying pressure to "regulars", to pay a bill.

27. There was no statement from general manager SG in evidence.

28. The statements of AM and the applicant are consistent in terms of the understanding that PB would likely pay the bill. OG, the second bartender, did not provide a statement to corroborate DT's evidence. For this reason, I find that the applicant and AM left the restaurant thinking the bill had been paid. They were mistaken. Having said that, I find that it was unreasonable for the applicant to assume that a patron would cover her bill, given her employment.

29. AM and the applicant both stated that PB found them a cab and paid for their cab fare home.

30. DT paid the bill. Given his evidence, I find there was no unpaid bill owing to the respondent by the next day.

31. On May 17, 2017, a hostess at Coast, CM, texted the applicant to say that SG wanted the applicant to pay her bill from the previous night "lol". The applicant returned the text saying "Lol ok". Based on this text exchange, I find that the respondent did not always fire employees who overlooked their bills while visiting the restaurant off-duty.

32. The respondent's submissions imply that it asked CM to send the text to the applicant. However, no statement from CM was filed to this effect. As well, the tone of CM's text, ending with "lol", suggests that that request was made in a less than serious manner.

33. I find that this the text exchange proves that employees were sometimes presented their bills for payment the next day and were not invariably dismissed for forgetting to pay them.

34. On May 17, 2017, the applicant attended and met with SG. SG said that the respondent had committed theft by not paying her bill. SG ended the applicant's employment. SG asked the applicant to sign a document titled Termination Notice. The applicant says she objected to signing the document but did so after SG told her she was required to sign. As SG provided no evidence in this proceeding, I accept the applicant's evidence.

35. The Termination Notice listed reasons for termination as:

    a. the applicant not paying her bill the previous night and,

    b. acting in a way that could result in a loss of business.

36. I find that the applicant's signature was an acknowledgement of having received the Termination Notice. I find that her signature was not an acknowledgement that the reasons in the Termination Notice were accurate or were just cause for dismissal.

37. On May 19, 2017, another employee, BP, texted the applicant asking what happened. The applicant replied the following day, describing that she understood PB would pay the bill. The applicant also wrote that she was not given an opportunity to pay it before being terminated for theft. I mention this text chain because it was written close in time to the relevant events and is consistent with my findings above.

38. I turn then to the law that applies to employment termination. In *Ogden* v*. Canadian Imperial Bank of Commerce*, 2015 BCCA 175, the British Columbia Court of Appeal distinguished between termination for a single major incident versus cumulative cause, where an employee may many commit minor infractions or perform their job poorly over time.

39. To terminate an employee for cumulative cause requires the employer to set reasonable standards, communicate those standards, warn an employee that their job is in jeopardy, and then only terminate after a demonstrated failure to correct the conduct or performance.

40. The respondent terminated the applicant for failing to pay her bill and for behavior that could result in a loss of business. I find that these two reasons arose from the same incident on the late evening of May 16, 2017. The respondent refers to "several factors" in addition to these two reasons but did not itemize these other factors. Therefore, I find that the respondent cannot rely on cumulative cause for dismissal.

41. An excerpt from the respondent's employee handbook states that "Category 1" "minor offences", including disorderly or inappropriate conduct on the premises, are subject to progressive discipline.

42. "Category 2" offences include intentional loss of the respondent's property or theft. Theft implies an element of intention in removing product or money. The handbook says that either a suspension or termination will apply for these offences.

43. While the handbook content is instructive, it is not definitive as to whether a single major incident is just cause for dismissal. In *McKinley* v*. BCTel*, [2001] 2 SCR 161, 2001 SCC 38, the Supreme Court of Canada determined that whether just cause for dismissal exists involves determining whether the misconduct violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer.

44. The test is also expressed as:

    a. whether the evidence proves the alleged misconduct on a balance of probabilities; and

    b. if so, whether the nature and degree of the dishonesty or deceitful conduct warranted dismissal.

45. While I find that the evidence proves misconduct on the applicant's part, it does not establish any intentional or deceitful conduct, on a balance of probabilities. The nonpayment was not theft from the respondent's till. Rather, the applicant was inebriated due to being served alcohol by another Coast employee, and she became upset at DT's confrontation and was confused about whether the bill had been paid.

46. Along the same line as *McKinley*, in *Ojanen*, the British Columbia Supreme Court looked at the law surrounding "just cause" for ending an employment agreement. The Court wrote that just cause requires a finding that the worker was guilty of misconduct which made it so the employment relationship could no longer continue. The Court said that there must be proof of misconduct that amounts to a fundamental breach of the contract and that it is up to the employer to prove this. The Court indicated that one needs to consider how minor or serious the misconduct was when deciding whether the firing was justified.

47. Reviewed against the *Ojanen* analysis, for the respondent to rely upon DT's evidence terminating the applicant's employment is problematic, given his admitted role in the service of alcohol and his argument with the applicant.

48. I also find that the applicant's conduct, in becoming tearful, vocal and argumentative before leaving for the evening, is not misconduct of the kind warranting immediate dismissal. The respondent says the applicant spoke loudly about the practice of "deliberately" flirting with patrons to try to get free drinks. On the evidence, the applicant became drunk only after being served by the respondent's employees, and was only overhead by two bartenders, her own friend and one other patron. As well, there is no evidence to suggest that this incident was the last in a string of incidents of minor misconduct or poor performance.

49. It is important to note that the misconduct arose when the applicant was off-duty. In *Klonteig v. West Kelowna (District)*, 2018 BCSC 124), a career firefighter was arrested for impaired driving while off-duty. The British Columbia Supreme Court held that the arrest was not just cause for his dismissal.

50. The Court wrote that the conduct may amount to cause where it is or is likely to be prejudicial to the interests or the reputation of the employer, and where there is a certain level of moral reprehensibility. The Court held that Mr. Klonteig's conduct was off-duty and was not the type of conduct where the public at large would have been offended by discipline in the form of a lengthy suspension without pay.

51. Applying *Klonteig*, I find that this one off-duty incident does not provide just cause for the applicant's dismissal. While the applicant's conduct was somewhat prejudicial to the respondent in terms of her interaction with PB, she was off-duty, and interaction with patrons was limited. I find that the level of prejudice does not justify a firing.

52. I do not consider the applicant's single episode of misbehavior with associated confusion about the bill to be conduct incompatible with continued employment. While failing to pay a bar bill at the employer's restaurant is inappropriate, it is not the same as intentionally removing product or money, given the context.

53. I find that the applicant's misbehavior is a Category 1 offence, which the handbook says is the subject of progressive discipline. Progressive discipline involves setting standards, providing warnings, imposing discipline if those standards are not met, and only proceeding to dismissal if the conduct continues. Firing an employee for the first incident is not progressive discipline. Even if the missed bill were considered theft, the respondent's own handbook suggests that a suspension could apply.

54. I find that the respondent dismissed the applicant without just cause. I turn to the question of damages.

55. The applicant was a part-time server with no managerial responsibility. She had been employed for almost two years. She was in her twenties. The applicant says she did not even try to find employment again until August 2017, 3 months later, when she found employment in administrative role. It was 2019 before she found employment in a full-time server role.

56. The applicant is entitled to reasonable notice, based on factors such as her age, the type and length of her employment and the availability of similar employment (see *Bardal* v*. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.), at page 145)

57. The respondent submits that 4 weeks' wages ($658.54 at $164.66 per week, based on her average weekly income for the previous 12 month period) would be a fair payment for damages.

58. The applicant says she is entitled to 4 months' payment, at common law, which she estimates at $2,634.16.

59. In *Ram* v*. The Michael Lacombe Group Inc.*, 2017 BCSC 212 (CanLII) a burger restaurant server was dismissed without cause after employment of more than 5 years at the restaurant location, but much longer service to the company. A notice period of 12 months was found to be reasonable.

60. In *DeGuzman v. Marine Drive Golf Club*, 2003 BCPC 284, at paragraph 29, the Provincial Court referred to a rough "rule of thumb" that reasonable notice generally equates to 1 month per year of service. For the applicant, this would mean 1.5 months' or 6 weeks' notice, which I find reasonable. At her base salary of $164.66 per week, this would amount to $987.96.

61. The applicant submits that her experience with the respondent caused her to become depressed, resulting in a period where she was unable to work. Based on the medical evidence the applicant filed, I find that she had significant pre-existing and intervening medical issues that explain her absence from the workforce during this period. In *Ostrow* v*. Abacus Management Corp. Mergers & Acquisitions*, [2014] B.C.J. No. 1046 (BCSC), the Court held that the plaintiff's vulnerability, where the defendant employer had no knowledge of it, was not relevant to determining the reasonable notice period. However, it was relevant to a consideration of whether the plaintiff acted reasonably to mitigate his damages.

62. Here, the applicant admits that the respondent was unaware of these issues.

63. The applicant also gave evidence that she felt uncomfortable working with SG, which made other jobs as a server unpalatable. However, she provided no independent evidence to prove this assertion. I do not consider this a factor in her temporary loss of part-time employment. I find that the applicant had a duty to mitigate her losses by searching for employment immediately but was unable to do so for reasons unrelated to this dispute.

64. Having considered the medical evidence as well, I find that intervening factors after the dismissal were largely the cause of the longer period where the applicant was unemployed. I find that most of the period where she did not search for employment

is not attributable to the respondent's conduct. I find it likely that, had she applied, the applicant would have been able to find comparable part-time employment within 6 weeks. I find that her slightly longer absence form the workforce is a failure to mitigate on her part.

65. I find that 6 weeks' notice is a reasonable starting point for damages. The applicant was a server, so I must also consider the lost gratuities or tips that she could have expected to earn (see *Chapple* v. *Umberto Management Ltd.*, 2009 BCSC 724)

66. The applicant says that she earned $100 in tips per shift, on average. At 2 shifts per week, tips would be $200 per week. I have accepted a 6-week notice period as reasonable. The respondent says the applicant should have to produce income tax returns to support the claim for tips. The respondent did not argue that the $100 figure was inaccurate but called it "baseless".

67. In *Chapple*, at paragraph 82, the Court wrote about how cash gratuities may be assessed as part of a server's earnings, as follows:

> The authorities referred to by both parties do not support a conclusion that where the plaintiff's earnings are in part from cash gratuities, damages reflecting that lost income should be assessed as the amount that the plaintiff declares and pays taxes upon. To the contrary, the court in *Wells, Minns, and Patriquin* held otherwise. In *Cardenas* v. *Clock Tower Hotel Ltd. Partnership* (1993), 1993 CanLII 4666 (NS SC), 120 N.S.R. (2d) 49 (S.C.), the court found at ¶49:
>
> With respect to tips Mr. Cardenas' 1989 income tax return reports income for tips of $500 and for 1990, $400. The amount he reports is a matter between him and Revenue Canada. I am satisfied … that for the four and one half months he ought to have received notice, an amount of $400.00 per month for lost tips is appropriate, for a total recovery of $1,800.

68. Given the tribunal's mandate that includes proportionality, I find that production of income tax returns is not required to prove the applicant's level of income from gratuities. I find that the applicant would have earned $1,200 in tips during the 6-week period.

69. The applicant says almost 7% of tips she earned were contributed to the house. The respondent did not contest her evidence. I deduct 7% of the $1,200 for the house percentage of tips gives $1,116.

70. I award $2,103.96, broken down as $987.96 in lost earnings and $1,116 in tips, as wrongful dismissal damages for the lack of reasonable notice.

71. Reasonable notice at common law differs from ESA statutory entitlements. The respondent did not argue set-off. There is no evidence here that the applicant has sought or received ESA entitlements. For these reasons, I have not made any determinations about set-off.

72. The applicant also claims aggravated damages. She says she was diagnosed with mental health issues caused by the termination of her employment. The applicant describes overall injury to her financial situation, reputation and dignity. The applicant says aggravated damages bring her total damages to over $5,000. She abandons the amount over $5,000 due to the tribunal's monetary jurisdiction limit.

73. Aggravated damages are only awarded where the dismissal is carried out in bad faith or unfair dealing, the resulting humiliation and damage to self-worth are found worthy of additional compensation (see *Wallace v. United Grain Growers Ltd.*, 1997 CanLII 332 (SCC)).

74. In *Honda Canada*, the Supreme Court of Canada noted that there can be a distinct award of damages where there are emotional or health consequences beyond normal hurt feelings, caused by the dismissal. However, the Court wrote, at paragraph 56, that "… normal distress and hurt feelings resulting from dismissal are not compensable."

75. While I agree that the applicant's medical evidence includes a physician comment that her mental health status was impacted by the dismissal, I find that her health would have been impacted equally by a termination with notice. I find that there was no new mental health diagnosis attributed to the manner of firing itself.

76. Beyond the understandable hurt feelings that accompany dismissal, I do not find that the respondent carried out the dismissal in an unfair or bad faith manner. I dismiss the applicant's claim for aggravated damages.

77. I order the respondent to pay the applicant $2,103.96, within 30 days of this decision.

78. The *Court Order Interest Act* applies to the tribunal. The applicant is entitled to pre-judgement interest on the $2,103.96 from May 17, 2017, the date of the dismissal to the date of this decision. This equals $69.85.

79. Under section 49 of the CRTA and tribunal rules, the tribunal will generally order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable dispute-related expenses. I see no reason in this case not to follow that general rule. I find the applicant is entitled to reimbursement of $175 in tribunal fees. The applicant did not claim dispute-related expenses.

ORDERS

80. Within 30 days of the date of this order, I order the respondent to pay the applicant a total of $2,348.81, broken down as follows:

    a. $2,103.96 as damages in lieu of reasonable notice,

    b. $69.85 in pre-judgment interest under the *Court Order Interest Act*, and

    c. $175 in tribunal fees.

81. The applicant is entitled to post-judgment interest, as applicable.

82. Under section 48 of the CRTA, the tribunal will not provide the parties with the Order giving final effect to this decision until the time for making a notice of objection under section 56.1(2) has expired and no notice of objection has been made. The time for filing a notice of objection is 28 days after the party receives notice of the tribunal's final decision.

83. Under section 58.1 of the CRTA, a validated copy of the tribunal's order can be enforced through the Provincial Court of British Columbia. A tribunal order can only be enforced if it is an approved consent resolution order, or, if no objection has been made and the time for filing a notice of objection has passed. Once filed, a tribunal order has the same force and effect as an order of the Provincial Court of British Columbia.

Julie K. Gibson, Tribunal Member