

IN THE MATTER OF A LABOUR DISPUTE UNDER THE EMPLOYMENT ACT 2000 BEFORE THE
EMPLOYMENT AND LABOUR RELATIONS TRIBUNAL ("the Tribunal")

BETWEEN

LESA DILL

Claimant

and

(trading as ..

Respondents

AWARD

Summary

1. This matter was referred to the Tribunal on 17 November 2023 in accordance with section 37(4) of the Employment Act 2000.
2. For the reasons set out herein, the Tribunal finds for the Claimant and makes an award for payment of:
 - a. 26-weeks' pay, and
 - b. 1 week pay in respect of the period she was suspended without pay.

Background & Procedural History

3. The Claimant was employed as a bartender at the [redacted] for 7 years until July 24, 2023, when her employment was terminated, purportedly for misconduct.

4. Ms. Dill complained that her termination was unfair, and that the decision to suspend her without pay prior to her termination was also unfair.
5. Before setting out the substance of the Tribunal's decision, it may be helpful to summarize the procedural steps taken in relation to this matter.
6. Following the referral, a preliminary hearing was held before the Tribunal February 12, 2024, at which time the Tribunal issued a procedural order directing the parties to submit statements of case and supporting evidence. The content of the procedural order was unremarkable, and the parties complied with its terms.
7. A hearing in relation to the dispute was held on May 20, 2024, and lasted half a day. At the hearing, the Claimant and Respondents appeared in person, without legal representation. Two members of the Tribunal (Mr. Foley and Ms. Outerbridge) participated in person; whilst Mr. Burgess attended the session via WebEx.
8. In reaching its decision, the Tribunal has considered:
 - a. The written summary prepared by Ms. Dill dated February 21, 2024 and submitted to the Tribunal on about February 23, 2024;
 - b. The evidence presented by the Claimant at the May 20, 2024 hearing;
 - c. The written summary and supporting evidence submitted by the Respondents on about March 8, 2024; and
 - d. The evidence presented by the Respondents at the May 20, 2024 hearing.
9. The Respondents contend that they were entitled to suspend Ms. Dill without pay and ultimately terminated her for:
 - a. Failing to put all customer orders into the POS (Point of Sale) system,
 - b. Failing to put money from customers into the till and instead putting the money into the tip jar,
 - c. Allowing customers to leave the bar without paying for their drinks, and

- d. Failing to serve customers in a timely manner resulting in lost revenue for the bar.

10. Evidence presented by the Respondents indicates that some of the issues now complained of had been ongoing for some time. However, they were only ever documented in writing almost 4 years ago, in a warning letter dated July 20, 2020. In summary, that letter complained that Ms. Dill had

- a. Given away free drinks including by failing to accurately record customer orders,
- b. Taken alcohol for herself without paying for the same,
- c. Overcharged customers, and
- d. Demonstrated poor customer service.

11. In anticipation of the final hearing the Respondents submitted statements from

_____ , and _____ . These statements raised the following complaints in relation to Ms. Dill:

- a. Failing to serve customers in a timely manner, particularly when she was focused on talking to friends at the bar,
- b. Taking money from customers without putting the cash into the POS,
- c. Failing to record orders with the effect that uncertainty was created about the change owed to customers,
- d. Giving away drinks for free, and
- e. Putting cash into her tip jar and not the till.

12. We observe that these written statements were not produced at the same time of the conduct that was observed and they do not identify the date on which the conduct was observed. Instead, the statements were prepared after the fact to support the Respondents' in making their case before the Tribunal.

The Law

13. Section 38 of the Act provides that the employer has the burden of proving the reason for an employee's dismissal. Where the employer fails to show the termination was permitted by the Act, the Tribunal must conclude that the employee's dismissal was unfair.

14. Relevant to this case, the Act permits an employer to terminate an employee's contract of employment where there is valid reason to do so by reason of the employee's performance or conduct. The Act reads:

Termination of employment

18 (1) An employee's contract of employment shall not be terminated by an employer unless there is a valid reason for termination connected with –

(a) the ability, performance or conduct of the employee ...

(1A) An employee's contract of employment shall not be terminated by an employer –

(a) Pursuant to subsection (1)(a), unless the notice requirements under section 20 [notice periods] and the provisions under section 26 [repeated misconduct] and 27 [unsatisfactory performance] have been complied with

...

15. Relevant to understanding the employer's ability to terminate an employee under section 18 is section 26 of the Act, which reads:

Termination for repeated misconduct

26 (1) Where an employee is guilty of misconduct which is directly related to the employment relationship but which does not fall within section 25 [serious misconduct], the employer may give him a written warning setting out the misconduct complained of and appropriate instructions as to how to improve his conduct.

(2) If, within a six-month period, an employee is guilty on two separate occasions of misconduct falling within subsection (1) and receives (in respect of the first occasion of misconduct) a written warning in accordance with subsection (1), the employer may, after the second further occasion of misconduct, terminate the employee's contract of employment without notice or the payment of any severance allowance.

(3) If, within a 12-month period, an employee is guilty on four separate occasions of misconduct falling within subsection (1) and receives (in respect of the first three occasions of misconduct) written warning in accordance with subsection (1), the employer may, after the fourth further occasion of misconduct, terminate the employee's contract of employment without notice or the payment of any severance allowance.

(4) An employer shall be deemed to have waived his right to terminate under subsection (2) or (3) if he does not do so within 14 days after having knowledge of-

(a) the second further occasion of misconduct referred to in subsection (2); or

(b) the further occasion of misconduct referred to in subsection (3)

16. Also relevant to understanding an employer's right to terminate an employee under section 18 of the Act is section 27, which reads:

Termination for unsatisfactory performance

27 (1) Where an employee is not performing his duties in a satisfactory manner, the employer may give him a written warning setting out the unsatisfactory performance complained of and appropriate instructions as to how to improve his performance.

(2) If the employee does not, during the period of six months beginning with the date of the written warning, demonstrate that he is able to perform his duties in a satisfactory manner and is in fact doing so, the employer may terminate his contract of employment without notice or the payment of any severance allowance.

(3) An employer shall be deemed to have waived his right to terminate under subsection (2) if he does not do so within 14 days after the expiry of the six-month period referred to in that subsection.

Discussion on termination

17. It is obvious to the Tribunal that during Ms. Dill's employment she engaged in conduct from time to time that frustrated the Respondents. We do not believe this conduct rose to the level of serious misconduct.

18. We find that the only time Ms. Dill received a written warning was July 20th, 2020. No other written warnings were subsequently issued to Ms. Dill after that date.

19. The progressive disciplinary process created by the Act gives the employer and employee an ability to clarify expectations of the employee to ensure the employee understands what is being required of them and how their performance and/or conduct needs to improve to meet the employer's expectations.
20. The Respondents did not follow the progressive disciplinary process with the effect that they are not able to satisfy us that Ms. Dill was fairly terminated.
21. There is no contemporaneous evidence demonstrating ongoing misconduct within 12 months following the July 20th, 2020 warning letter being issued. Even if the Respondents had provided contemporaneous evidence of continued misconduct during that period, they have now waived their right to terminate Ms. Dill for repeated misconduct given their delay in doing so.
22. Similarly, there is no contemporaneous evidence showing that Ms. Dill's performance remained unsatisfactory after issuance of the July 20th, 2020 warning letter. Even if such contemporaneous evidence was available, the Respondents have likewise waived their right to terminate her based on the July 2020 letter given the delay in doing so.
23. While complaints may have been raised by the bar's patrons and owners about Ms. Dill after July 2020, as evidenced by the statements submitted to the Tribunal in advance of the hearing, if these complaints related to recent conduct the Respondents should have reengaged the progressive disciplinary process by issuing a fresh warning letter. Their failure to do so is fatal to their defense.
24. We do not believe an order for reinstatement is appropriate in the circumstances. She is entitled to receive four weeks wages for each completed year of continuous employment up to a maximum of 26 weeks. We do not regard the period the bar was closed because of the Covid-19 pandemic as sufficient to disrupt Ms. Dill period of continuous employment.

Discussion on unpaid suspension

25. Ms. Dill complains that she was placed on unpaid leave in July 2023. The letter informing her of the suspension cited issues similar to those raised previously, namely: failing to record orders in the POS, failing to put money from customers directly into the till, giving away free drinks, and failing to serve customers in a timely manner.

26. For avoidance of doubt, we do not believe the letter informing Ms. Dill of the suspension amounts to a warning letter as envisioned by the Act. It does not purport to be such a letter and its contents lack the usual elements typical of such correspondence.

27. The suspension was originally for a period of one week but was extended for two weeks to allow the Respondents to meet and decide on next steps. Ultimately, the decision was taken to terminate Ms. Dill's employment and as we have found that decision was premature given the Respondents had not followed the progressive disciplinary process.

28. While we believe it was reasonable to suspend Ms. Dill for one week to investigate concerns raised about her conduct and/or performance, the decision to extend the suspension for a second week was not reasonable. As a result, we believe Ms. Dill should be paid for the second week of suspension.

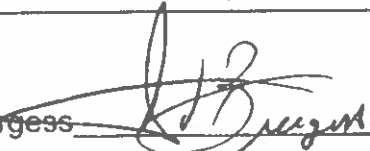
29. Pursuant to **section 440**, both party aggrieved by this decision has the right to appeal to the Supreme Court on a point of law within 21 days of receipt of the award and the Decision is binding.

Conclusion

30. Ms. Dill is entitled to receive her award by August 29th, 2024

- a. 26-weeks' pay for unfair dismissal and
- b. 1 week pay for the second week she was suspended without pay.

Chairman Chen Foley 

Deputy Chairman Dereck Burgess 

Tribunal Member Yolanda Outerbridge 

Date: 29th July 2024

