

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996 C. 113

by

Michael Anthony's Restaurants Limited, operating
As A & W – Capri Centre
("MA")

and

Brenda Carter

("Carter")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR:	Alfred C. Kempf
FILE NO.:	98/545 and 98/554
HEARING DATE:	December 7, 1998
DATE OF DECISION:	January 13, 1999

DECISION

APPEARANCES

Marilynn Jenner appeared for MA and Carter appeared on her own behalf at the oral hearing held in Kelowna on the above-noted date.

OVERVIEW

There are appeals made by both MA and Carter under section 112 of the *Employment Standards Act* (the "Act") of a Determination of a delegate of the Director of Employment Standards (the "Director") made on July 28, 1998.

ISSUES TO BE DECIDED

Is Carter entitled to severance pay in lieu of notice from MA?
Is Carter entitled to pay for working during certain meal breaks?

FACTS

The Determination found that MA did not have just cause for the dismissal of Carter. The Determination also disallowed Carter's claim for unpaid meal breaks during which she alleges she worked. MA appeals the former finding and Carter appeals the latter.

MA operates an A&W restaurant in Kelowna. Carter was a shift supervisor. At the time of her dismissal on June 13 1997 she had worked for MA for approximately 23 months.

Just Cause

The MA takes the position that Carter was dismissed because of five incidents of breach of company rules and policies going back to February of 1996. I am satisfied that Carter was appropriately warned after each one of these incidents. As was pointed by the Director in the Determination none of the infractions Carter was warned about were repeated.

The first incident involved her leaving her shift early. Carter testified it was because of an illness. While MA does not dispute the illness it is contended that she should have made arrangements for other employees to cover her before she left. Carter says she tried to arrange replacements without success.

The second incident involved Carter missing work to attend a funeral of a family friend. Carter does not dispute missing time but testified that she thought she had approval to leave

if she arranged for replacement coverage. As it turns out the replacement arrangements were unsatisfactory to MA.

The third incident involved her using the washroom and not washing her hands prior to returning to her food handling duties. Carter does not deny she did this and acknowledges her error but explained that it was an oversight brought on by the busyness of the restaurant at the time.

The fourth incident was just a few days before June 13, 1997, the date of termination. Carter and another staff member entered the basement area of the restaurant while not on duty without the shift supervisor's permission. Carter testified that she had asked the shift supervisor to use the phone in the basement area and that she had obtained his permission.

The fifth or culminating incident on June 13, 1997 involved a late opening of the store caused by Carter's tardiness. She slept in on a day that she was responsible for opening the restaurant at 5:30 a.m. While there is some dispute in the evidence about whether the manager, Marilyn Jenner, arrived before or after Carter it is clear that Carter was seriously late and that customers as well as other staff were inconvenienced.

Carter testified, and it was not seriously disputed by MA, that just prior to her termination she had been offered a raise. Despite these performance problems she held the position of shift supervisor and had not been demoted.

Meal Breaks

The Director concluded that Carter did not have sufficient evidence of having to work during meal breaks. It was concluded that there was not enough evidence to prove the complaint as required under Section 2(2) of the Act.

At the hearing no significant new evidence was adduced on this issue.

The best that can be said about this evidence on this issue is that from time to time Carter chose to have meal breaks in the restaurant and felt compelled to help out if a situation of need arose. She would not necessarily work through her entire break and I am satisfied that she was not required to spend her meal breaks in the restaurant or even help out if things got busy.

Carter was not able to indicate the number of days she worked through breaks or the amount of time worked during these breaks.

ANALYSIS

Carter has not satisfied the onus on her to show that the Director's decision on the meal break issue more likely than not was wrong. I deny her appeal of this issue.

On the severance pay issue I am not satisfied that the Director erred. I am satisfied that Ms. Jenner was justifiably most frustrated with Carter on the morning of June 13, 1998. I also accept that Carter was not a perfect employee and had received several warnings although some of her explanations for the breaches of company policy may well have merit. Even if they do not, taking all of the evidence into consideration (including the offer of a raise and Carter maintaining her supervisory position), I do not accept that the incidents complained were sufficiently serious to warrant a dismissal for cause.

The Supreme Court of British Columbia said the following about these types of cases:

The Court must be alert to a danger inherent in the setting up of cumulative failings to establish a cause for dismissal where, as here, it is admitted that none would alone have amounted to such cause. Inadequacies and error of judgment which a close review of the records may disclose in most employees must not in this way be put together accepted as grounds for termination.

I therefore deny the appeal on the issue of liability for severance pay.

ORDER

In summary, I order under Section 115 of the Act, that the Determinations dated July 28, 1998 be confirmed together with whatever further interest that may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

Alfred C. Kempf
Adjudicator
Employment Standards Tribunal

ACK/cef