

**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 -

Wickaninnish Inn

(“the Inn”)

- of a Determination issued by -

The Director Of Employment Standards  
(the “Director”)

**ADJUDICATOR:** James Wolfgang

**FILE No.:** 1999/762

**DATE OF HEARING:** February 9, 2000

**DATE OF DECISION:** February 19, 2000

**DECISION**

**APPEARANCES**

Donna Gunness	for herself
Christine Stocker	for Wickaninnish Inn
Matthew Phillips	by conference call

No one represented the Director.

**OVERVIEW**

This is an appeal by Wickaninnish Inn (“the Inn”) pursuant to Section 112 of the *Employment Standards Act (the “Act”)* from a Determination issued by the Director of Employment Standards on November 29, 1999. The Determination found Wickaninnish Inn had violated Part 3, Section 25 of the *Act* for both Donna Gunness (Gunness) and Matthew Phillips (Phillips) and Part 8, Section 63 in the case of Gunness. The Determination ordered Wickaninnish Inn to pay Gunness \$1,023.72 and Phillips \$269.05 which included interest. The Determination also assessed a penalty of \$0.00.

The Inn is seeking to have both awards cancelled. They claim the Inn had contacted the Employment Standards Branch and were advised the Branch did not consider the dress code established by the Inn to be “special clothing” under Section 25 of the *Act*. They further indicate no one from the Branch contacted them regarding the termination of Gunness therefore they have not had an opportunity to explain their action. The Inn no longer employs the person who terminated Gunness and the Tribunal did not have an opportunity to question her. The Determination indicated Sections 25 & 63 of the *Act* were attached. The Inn claims they have not received the sections referred to above.

A hearing was held and I took evidence from all parties. Phillips participated at the hearing by telephone conference call.

**ISSUES TO BE DECIDED**

Does the Inn owe either Gunness or Phillips any money for special clothing and, if so, how much? Does the Inn owe any money to Gunness for pay in lieu of notice and, if so, how much?

## FACTS

The Branch has dealt with both complaints in one Determination, however the circumstances are different for each complainant, therefore I will deal with them separately. I will address the appeal of the Inn in respect to special clothing under Section 25 (1) first.

The Inn employed Matthew Phillips as a night auditor from July 26, 1998 to May 7, 1999. His normal hours were from 11:00 pm until 07:30 am. Phillips also worked occasionally as a Valet and a Guest Service Representative (GSR). The Valet duties would normally be for part of a shift while the GRS position was a full day shift position.

The Inn requires all employees to wear a specific dress code, which varies, depending on the department where the employee works. The Inn offers clothing to the employees at cost or they can purchase similar clothing, if available, from any retail store. The Inn has quite specific requirements if the employee chose not to purchase clothes from them. Items must comply in colour, fabric and design. Phillips indicated the dress code for the night auditor was a long sleeved blue denim shirt with the Inn logo on the pocket and the pants were to be beige or khaki with front pleats and no rear pockets. The shoes were to be brown leather dress shoes. Phillips indicated he brought various items of clothing to the Inn for approval, believing them to be similar to the ones offered by the Inn. They were rejected by management as not being in compliance with their dress code.

The Inn claims the employees are not required to have the Inn logo on their shirt but it is suggested. They gave an example of an employee who purchased a shirt from a retail outlet and chose not to have the logo applied. He later changed his mind and the Inn paid for applying the logo to his shirt.

The Determination ruled the clothing was “special clothing” under Section 25 (1) and considered to be a uniform and awarded Phillips \$250.00. Phillips contends this was the actual cost of the clothes he purchased from the Inn. The Inn indicates their records only show the purchase of \$112.00 in clothing by Phillips which was deducted from his pay.

The Determination also calculated vacation pay of 4% on the amount awarded. The Inn argues: “Vacation pay accumulation is calculated strictly on wages earned, not uniform payments, deductions or allowances”.

Gunness was employed by the Inn as an Assistant to the Manager of Housekeeping from August 1, 1996 to January 31, 1998. The Determination shows her to be employed from August 1, 1997 until January 31, 1998. This is in error and was corrected at the hearing.

The appeal by the Inn for the Gunness award has two parts.

The first part is in respect to the award of recovery of the cost of uniforms. The Determination gives Gunness \$220.00 plus 4% vacation pay. This was for 20 uniforms.

Gunness claims that she needed that many shirts as they were damaged by bleach in the laundry over the eighteen months she worked there. The evidence at the hearing was there were three shirts purchased from the Inn at \$22.00 each. The Inn claims they had no record of Gunness purchasing any shirts from them. Gunness presented pay stubs showing the purchase of one shirt on August 15, 1996 pay period and one shirt on the September 15, 1996 pay period. She indicates she was unable to locate the other pay stub. Gunness stated she purchased the remainder of the shirts directly from former employees who were leaving and did not want the shirts.

The second part of the appeal by the Inn relates to the award of compensation in lieu of notice to Gunness.

At the time of the investigation by the delegate of the Director there appears to have been some missed communications. The Front Office Manager for the Inn was under the impression someone at the Branch would be contacting Naomi Banks, the Administrator, in respect to the termination of Gunness. The delegate was under the impression the Administrator was going to contact him. As a result of the misunderstanding the Inn did not make any representation to the delegate before the Determination was issued.

The Inn took the position Gunness was discharged for cause. They claim Gunness had been warned verbally, issued one Progressive Corrective Action Form and had received two warning letters. The two letters were written by Susan Tutt (Tutt), the Housekeeping Supervisor. The first letter was dated July 4, 1997 and the second dated January 6, 1998. They both dealt with what Tutt outlined were shortcomings in Gunness' performance as a supervisor.

Tutt indicated on the July 4<sup>th</sup> letter that on June 23/24 a short list of extra tasks was left incomplete, plus a list of six items on the regular task list was left incomplete. They are:

1. Read duty managers' logbook
2. Retrieve mail from housekeeping mailbox
3. Set up room for children, pets etc.
4. Calculate and record payroll
5. Check rooms as cleaned.
6. If mistakes have been made, bring R/A back to the room, point out mistakes and have the R/A make the correction.

Tutt further stated:

I am aware that there are always exceptions and that sometimes it is simply necessary to prioritize. The reason these items are being mentioned is that they have been consistently left incomplete in the past few weeks and that fact causes one concern.

Gunness supplied her responses to those letters at the hearing, as copies were not included in the appeal by the Inn. The Inn stated those letters were not in the Gunness file. The first, dated July 9, 1997 was in response to the July 4<sup>th</sup> letter from Tutt.

Gunness answered each point raised by Tutt and gave examples of why items on the task list would be late or left incomplete. For example, Gunness said:

6. As for room checks..I feel very strongly that meticulously clean rooms are the ultimate standard of the Wickaninnish Inn and that we must strive for it at all times. As the Inn has a 3PM deadline and often with “priorities” as guests check in throughout the day, I do my utmost to meet that deadline. Because of this I find myself in a “catch 22) (sic) situation with rooms not cleaned properly and do I a)take an (sic) R/A away from the room she is presently working on to rectify the problem or b) do I “clean up the problem” then know I can safely release the room to Front Desk (sic). I understand this is a problem and have discussed this with you. Your answer to this is non-committal and I am left frustrated. When I have asked you how you find the rooms when you check them, your answer to me was “I never have time to do more than a quick check. ”

The second was a handwritten draft in answer to the January 6, 1998 letter. Gunness indicated she could not find the typed copy. Both letters were directed to Tutt. The Inn did not respond to either of the letters from Gunness.

The Inn uses a “Progressive Corrective Action Form” (the Form) to write up problems with employees. There is a space at the bottom of the form for the employee to sign acknowledging the receipt of the notice. Gunness did not sign the Form dated June 28/97 or the one issued January 28, 1998 when she was discharged. Gunness claims she was not shown her forms and did not receive copies.

The Progressive Corrective Action Form issued when Gunness was terminated indicates the reason for termination was leaving before her shift was complete without permission. Gunness stated she had a headache and admits leaving early. She assigned her duties to two other qualified employees but did not contact her supervisor, Tutt. The form has boxes to indicate if the employee had been warned of this or a similar problem. The “No” box had an “X” in it.

## **ANALYSIS**

There were at least four different dress requirements at the Inn. The requirement for persons like the night auditor is outlined above. From the report given by the Inn, the serving staff in the dining room was told to wear khaki pants, white shirt and any kind of vest, the more colourful the better. Both white and blue uniforms are supplied by the Inn to the kitchen staff. The room attendants and the laundry staff were to wear a standard colour long or short-sleeved shirt like a golf shirt, as long as it had a collar. Gunness and Phillips both indicated they believed the employees must have the Inn logo on their shirt. According to the Inn, they had called the Employment Standards Branch on at least three occasions, to check whether their dress code requirements were considered to be special clothing within the meaning of Section 25 (1) of the *Act*. They claim they were told on

each occasion, based on their explanation of the dress code, it was not considered special clothing. We have no record of the specific questions asked the Branch. If employees are required to wear denim shirts and khaki pants in a department does this constitute special clothing? I would think not. When the requirement is expanded to include the type of material, the colour, the style of pants and shirt, the presence of pleats, the type of pockets, buttons and type of footwear, it takes on a different meaning.

Based on his investigation, the delegate for the Director found that both Phillips and Gunness were required to wear special clothing within the meaning of the *Act*. I will favour the finding of the delegate over that of the telephone inquiries to the Branch without a list of the questions posed. The fact the Inn contacted the Branch three times in respect to their dress code indicates this must have been an ongoing problem.

In the letter from Tutt to Gunness dated January 6, 1998 at point 2 she states, in part:

The same holds true for uniforms: while it is acceptable to wear “civilian” clothing while acting as a Supervisor, while working a regular shift it is not. It is extremely difficult to enforce either of these two regulations with the regular employees when they see you, their supervisor, blatantly disregarding them.

This leads me to believe; at least in the mind of Tutt, these were uniforms or “special clothing” and must be worn by all regular employees.

Section 25 (1) of the *Act* states:

An employer who requires an employee to wear special clothing must, without charge to the employee,

- (a) provide the special clothing, and
- (b) clean and maintain it in a good state of repair, unless the employee is bound by an agreement made under subsection (2)

The Inn has an obligation to convince the Tribunal the Determination is in error. In respect to the special clothing, they have failed to do so.

I cannot find support for the amount claimed by Phillips for clothing of \$250.00 as no evidence was presented. In the letter dated May 4, 1999 from Melody, Front Office Manager, and Charles, Inn Manager, they indicate Phillips had purchased shirts (no number) and two pair of pants. In the submission to the Tribunal dated December 20, 1999, Charles McDairmid, Manager, states: “Matthew chose to purchase 2 shirts and 1 pair of pants totalling \$112.00”. The letter of May 4<sup>th</sup> indicates 2 pair of pants and shirts were purchased from the Inn. That makes the amount of \$112.00 incorrect. This matter is referred back to the Branch for further investigation to determine the correct amount.

The Determination awarded Guinness \$220.00 plus 4% vacation pay for 20 uniforms. Guinness admits she only purchased 3 uniforms directly from the Inn and she should be reimbursed in full for those. The remainder were purchased from former employees who did not want to keep them. We have no evidence of the amount paid by Guinness for the 17 uniforms, if that were the correct amount. I accept that she would have needed more than three uniforms over an 18-month period however I have nothing to establish a proper amount. I do not believe it is reasonable to have the Inn reimburse Guinness for more than she paid for the uniforms. This matter is referred back to the Branch for investigation and determination of a reasonable amount to be awarded for the uniforms purchased from the former employees.

Section 25 (1) (b) was not addressed in the Determination and must be considered. The cost of cleaning or maintaining the uniforms is referred back to the Branch to determine a reasonable amount to be reimbursed to Phillips and Guinness.

To answer the question of the Inn in respect to the application of vacation pay on special clothing I refer to Section 25 (3) of the *Act*.

Section 25(3) states:

(3) The following are deemed to be wages owing and this *Act* applies to their recovery:

(a) money received or deducted by an employer from an employee for providing, cleaning or maintaining special clothing;

The second part of the Determination found Guinness was entitled to pay in lieu of notice on termination. The amount calculated was based on Guinness working at the Inn for 6 months instead of the 18 months worked.

The two warning letters were six months apart and did not deal with the same subject matter. While some of the points raised by Tutt may have been legitimate, I believe they were more of an effort by Tutt to establish a case for progressive discipline.

There is reference in the July 4, 1997 letter to meetings with Guinness that were apparently held with Charles McDiarmid on April 1<sup>st</sup> and with Christine Stocker on April 5<sup>th</sup>. We have no indication of the subject of those meetings and are not sure Tutt was in attendance therefore no weight can be given to that reference as part of a disciplinary process.

The letter dated January 6<sup>th</sup> only had one paragraph that made reference to Guinness not completing her assigned tasks, however they were different items on the task list than those contained in the first letter. The letter states, in part at paragraph 3:

1. Completion of duties outlined on the Task List. The task lists were completed in April of 1997 and posted at the same time. These task lists apply to each employee in the department, regardless of whether or not the employee believes the task lists to be realistic or not. When

I asked you on December 28<sup>th</sup> whether or not you had checked the public washrooms and you replied in the negative, I was frustrated by your careless disregard of simple tasks. In order to facilitate a reminder I have added a “washroom checks” space at the bottom of the employee logbook. Furthermore, your response to my inquiry about incomplete guest laundry (you did not wash and dry it because there was no laundry form in the bag, even though the guest name and room number were clearly written on the outside of the bag) was not the response I would expect from an employee who had been with me for more than a year. Your negligence is unacceptable.

The remainder of the second letter dealt with breaks, uniforms and attitude.

Gunness responded to both letters in detail, answering each point raised by Tutt. We have no evidence of any follow-up on those responses.

Gunness stated she did not receive the copies of the Form and there is no indication she signed the Form or that the contents had been discussed with her. For such a progressive form of discipline to be effective, it must show the reason for the discipline was discussed with the employee and they were aware of the problem. They must be given a reasonable time to correct their behaviour and be made aware of the penalty for failure to improve. None of that appears to have been done with Gunness.

Both the letters from Tutt and Gunness dealt at considerable length with the problems they were having in what appears to be a personality conflict. I believe that was the motivation for Tutt to develop and implement a model of discipline, which she hoped, would meet the test of progressive discipline. Gunness was given a large number of tasks to perform and selected to do those, which she felt were the most important. That is the duty of a supervisor and Tutt had indicated to her there were times when one had to “prioritize”.

I support the Determination in finding Gunness was terminated without notice or compensation. The fact the Determination does not indicate an “Employer’s Position” on the termination of Gunness supports the contention of the Inn that, due to missed communications, they made no submission on the termination of Gunness to the delegate. This may have been unfortunate, however the submission by the Inn to the Tribunal does not provided sufficient reason to change the Determination.

The amount to be awarded Gunness is two weeks pay, not one week as in the Determination. This will amount to \$880.00 for pay in lieu of notice plus vacation pay.

The Inn had indicated copies of Section 25 and 63 were not sent with the Determination as had been indicated. If those sections have not been forwarded to the Inn they should now be sent.



**ORDER**

In accordance with Section 115 of the *Act* I order the Determination dated November 29, 1999 be confirmed except where amended and is referred back to the Branch for the calculation of the proper amounts for the special clothing purchased and their maintenance. Also, the amount of pay in lieu of notice for Gunness is to be corrected as above. Interest is to be calculated in accordance with Section 88 of the *Act*.

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**James Wolfgang**  
**Adjudicator**  
**Employment Standards Tribunal**