

An appeal

- by -

Dusty Rose Pub Ltd.  
("Dusty Rose Pub")

- 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

**TRIBUNAL MEMBER:** David B. Stevenson

**FILE No.:** 2011A/62

**DATE OF DECISION:** July 13, 2011

## DECISION

### SUBMISSIONS

Angel F. Charbonneau

on behalf of Dusty Rose Pub Ltd.

Tyler Siegmann

on behalf of the Director of Employment Standards

### OVERVIEW

1. This decision addresses an appeal filed under Section 112 of the *Employment Standards Act* (the “*Act*”) by Dusty Rose Pub Ltd. (“Dusty Rose Pub”) of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on April 27, 2011.
2. The Determination was made in respect of a complaint filed by Shelly A. McKeown (“McKeown”), who alleged Dusty Rose Pub had contravened the *Act* by terminating her employment without notice and without payment of compensation for length of service.
3. The Determination found that Dusty Rose Pub had contravened Part 8, section 63 of the *Act* and ordered Dusty Rose Pub to pay McKeown an amount of \$4,419.02, an amount which included wages and interest.
4. The Director also imposed an administrative penalty on Dusty Rose Pub under Section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) in the amount of \$500.00.
5. The total amount of the Determination is \$4,919.02.
6. In this appeal, Dusty Rose Pub says the Director failed to observe principles of natural justice in making the Determination and seeks to have the Determination cancelled.
7. The Tribunal has discretion whether to hold an oral hearing on an appeal. None of the parties has sought an oral hearing before the Tribunal and we have decided an oral hearing is not necessary in this case. The issues involved in this appeal can be decided from the submissions and the material on the section 112(5) Record.

### ISSUE

8. The issues in this appeal are whether Dusty Rose Pub has demonstrated the Director failed to observe principles of natural justice in making the Determination and, if so, whether the Determination ought to be cancelled.

### THE FACTS

9. Dusty Rose Pub is an enterprise operating in the Cariboo region of British Columbia. The principals of Dusty Rose Pub are Angel F. Charbonneau and Mel Wiebe. Based on the material in the Determination and the Record, Ms. Charbonneau purchased the shares of Dusty Rose Pub and took over the operation of the business as a going concern on, or about, October 1, 2010. McKeown was working for the business as a cook when it was acquired and had been working for the business since March 15, 2003.

10. Before October 1, 2010, McKeown was earning \$14.00 an hour, plus 50% of tips and 5% profit sharing a month. Her compensation package changed on October 1, 2010, and, at the time of her termination, she was earning \$16.00 an hour, plus 10% tips and 5% profit sharing a month. She was terminated November 8, 2010. A complaint was filed with the Director in early January 2011, claiming compensation for length of service.
11. In response to the complaint from McKeown, Dusty Rose Pub took the position that McKeown was terminated for cause and, accordingly, no compensation for length of service was payable. There was an unsuccessful attempt by the Director to mediate a resolution and the matter was assigned for adjudication through the Director's complaint hearing process.
12. The Director conducted the complaint hearing by telephone. The Determination outlines evidence received at the complaint hearing. The evidence included oral statements from Ms. Charbonneau, Mr. Wiebe, one employee of Dusty Rose Pub and McKeown. Ms. Charbonneau, who spoke for Dusty Rose Pub during the complaint process, including at the complaint hearing, had provided written statements from three other witnesses but none of those persons appeared during the complaint hearing to orally confirm their written statements and the Director refused to enter those written statements as evidence.
13. The Director found McKeown was terminated without notice and without cause, that she was entitled to 7 weeks' compensation for length of service and the amount of that compensation, based on an average weekly wage over an eight week period, was \$4,111.10.
14. There is no dispute in the appeal about either the length of the entitlement or the calculations.

## **ARGUMENT**

15. The appeal raises concerns about the finding of the Director on the issue of just cause. Ms. Charbonneau, on behalf of Dusty Rose Pub, says the Director's interpretation of the circumstances facing her at the time is "very poor". She refers to several matters in support of her position: the fact that McKeown had quit on October 11, 2010; that Ms. Charbonneau had to plead with her to return and promise to increase her compensation package; that McKeown's work performance was unsatisfactory; and that McKeown had made no mention of possible medical issues, calling Ms. Charbonneau without warning in early November to announce she was taking an immediate medical leave. She also says she received information from an employee at Service Canada while she was preparing McKeown's ROE indicating she had cause to terminate her.
16. Ms. Charbonneau disagrees with the Director's characterization of the events surrounding the termination as "a series of minor infractions". Rather, she says, the conduct of McKeown left Dusty Rose Pub in a terrible position and involved a breach of duty, described as a failure by McKeown to do the job she was hired to do, which was run the kitchen, harassment of co-workers, conflict of interest and unsatisfactory work performance. She says all of those matters, considered together, justified the decision to terminate her employment without the requirement of notice or compensation for length of service in lieu of notice.
17. Ms. Charbonneau says the Director was wrong not to have accepted the written statements of other employees who did not attend the complaint hearing. She says they show what she was up against and support her decision to terminate McKeown.
18. In response to the appeal, the Director has provided the section 112(5) Record. The Director says Dusty Rose Pub attempted to have one of the employees orally confirm her written statement, but when efforts to

have her join the complaint hearing were not successful, Dusty Rose Pub chose to proceed without her statement.

19. The Director characterizes the appeal as an attempt by Dusty Rose Pub to re-argue its case and have the Tribunal reach a different conclusion on it than what the Director did.

## ANALYSIS

20. As a result of amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are statutorily limited to those found in Subsection 112(1) of the *Act*, which says:

112. (1) *Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:*

- (a) *the director erred in law;*
- (b) *the director failed to observe the principles of natural justice in making the determination;*
- (c) *evidence has become available that was not available at the time the determination was made.*

21. The Tribunal has consistently indicated that the burden in an appeal is on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds.

22. An appeal to the Tribunal under Section 112 is not intended as an opportunity to resubmit the evidence and argument that was before the Director, hoping to have the Tribunal review and re-weigh the issues and reach different conclusions. An appeal under the *Act* is intended to be an error correction process, with the grounds of review identified in section 112 and the burden of persuasion being on the appellant to identify the error on one of those grounds.

23. Dusty Rose Pub has alleged a failure by the Director to observe principles of natural justice. Parties alleging a denial of natural justice must provide some evidence in support of that allegation (see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99).

24. The Tribunal recognizes persons without legal training do not always appreciate what “natural justice” means, and the concept can be confusing and complex to a lay person. Generally, the notion of “natural justice” requires a decision maker to provide all of the parties with a fair opportunity to be heard and to not interfere with that opportunity in an unfair or inappropriate way. As the Tribunal stated in *Imperial Limousine Service Ltd.*, BC EST # D014/05:

Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the *Act*, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party (see *BWT Business World Incorporated*, BC EST #D050/96).

25. There is no evidence in this case that Dusty Rose Pub was not provided an opportunity to know the claim being made by McKeown and an opportunity to present their position on that claim. There are no submissions in the appeal specific to the natural justice ground. I find, therefore, that Dusty Rose Pub has

failed to meet the onus of demonstrating on a balance of probabilities that the Director failed to observe principles of natural justice in making the Determination.

26. At its core, however, this appeal is not about principles of natural justice at all, but is about a disagreement by Dusty Rose Pub with the conclusion that just cause to terminate McKeown was not established. In that respect, I will make three points.
27. First, there is no doubt that Ms. Charbonneau, and Dusty Rose Pub, was faced with a difficult situation: caught between the needs of the business and an employee who very quickly after the acquisition of the business by Ms. Charbonneau, demonstrated a clear animosity toward the new owners and an antipathy toward the responsibilities she agreed to undertake on behalf of the business.
28. Second, and in any event of the first point, while a decision about whether there is just cause for dismissal does include questions of law, it is predominantly fact driven. That conclusion is apparent when reading the appeal submission and its substantial reliance on an analysis of the facts to support an argument for just cause. The Tribunal, however, has no authority to consider appeals based on alleged errors in findings and conclusions of fact unless such findings and conclusions amount to an error of law (see *Britco Structures Ltd.*, BC EST # D260/03). Dusty Rose Pub has not shown any error of law in respect of the findings and conclusions of fact made by the Director.
29. Third, as a matter of law, the Tribunal has identified and consistently applied several principles to questions of just cause for dismissal (see *Randy Chamberlin and Sandy Chamberlin operating as Super Save Gas*, BC EST # D374/97). Included in the *Chamberlin* decision is reference to the four part process which was applied by the Director to the facts as found in the Determination in deciding whether Dusty Rose Pub had met the burden of establishing just cause. The *Chamberlin* decision also makes it clear that a single act sufficient to justify summary dismissal will be an exceptional circumstance and has to be supported by cogent evidence. The Determination does not indicate that Dusty Rose Pub ever argued there was a single act of misconduct on McKeown's part sufficient to justify summary dismissal. The Director did find Dusty Rose Pub, on all the circumstances, had not established just cause.
30. The conclusion made in the Determination followed an analysis of the evidence presented by the parties during the complaint process and is rationally supported on the facts and the law. While I appreciate that Dusty Rose Pub disagrees with the ultimate conclusion, it is not shown that any of the factual findings and conclusions were made without any evidence at all or were perverse and inexplicable or that the Director misapplied the law of the *Act* relating to just cause.
31. I have reviewed the written statements that Dusty Rose Pub says ought to have been accepted and considered by the Director. Without deciding if the Director erred in not accepting those written statements (and there is some doubt whether there was any error in that regard), I do not find those statements, even if accepted and considered, could have changed the conclusion of the Director on just cause. None of those statements has the effect of establishing the actions of McKeown described in them justified her immediate and summary dismissal when considered against the principles used by the Tribunal in considering questions of just cause.
32. The evidence was clear, as the Director found, that Dusty Rose Pub did not set standards of performance for McKeown, did not warn her that she was not meeting those standards and that a continued failure to meet the standards would place her job in jeopardy. Dusty Rose Pub does not disagree with those findings, but disagrees those steps were required in the circumstances of this case. An employer may not summarily dismiss an employee for taking medical leave.

33. It was a difficult situation, made even more difficult by the apparent misinformation provided to Ms. Charbonneau by Service Canada, but the Tribunal cannot change the requirements of the *Act* to accommodate difficult situations or grant itself an authority under the *Act* which is not there. The *Act* exists for a purpose and must be consistently applied to both difficult situations and more obvious ones.
34. The appeal must be dismissed.

### **ORDER**

35. Pursuant to Section 115 of the *Act*, I order the Determination dated April 27, 2011, be confirmed in the total amount of \$4,919.02, together with any interest that has accrued under Section 88 of the *Act*.

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**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**