Employment Standards TRIBUNAL

An appeal

- by -

Carol F. Anderson
("Anderson")

- 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

ADJUDICATOR: James Wolfgang

FILE No.: 2001/8

DATE OF DECISION: April 11, 2001

DECISION

OVERVIEW

This is an appeal by Carol Anderson ("Anderson") under Section 112 of the *Employment Standards Act* (the "*Act*") from a Determination dated November 30, 2000 issued by the Director of the Employment Standards Branch.

Anderson's appeal, received by the Tribunal on December 28, 2000, states she was not paid for all hours worked; specifically for starting early without pay, working through meal breaks, cashing out on her own time, and being terminated without notice or compensation in lieu, or in her terms "wrongful dismissal". She further claims the Branch did not respond to her complaint properly and failed to investigate her case.

Anderson received a letter dated June 19, 2000 confirming receipt of her complaint. No copy of her original complaint was included in the material received.

The first written response from the delegate to Anderson is in a letter dated August 1, 2000. The letter stated, in part, that Denny's had agreed to pay her:

> "$42.05 gross, representing payment of 4.0 hrs for your last shift (June 9), and 1.5 hours to restore payment for breaks you did not take and 4% vacation pay on the total."

The delegate further states: "On the severance matter, I must side with the company, that it had just cause for your dismissal."

Finally the delegate stated: "Based on the forgoing, including the pending payment by Denny's of the $42.05 amount, I have closed your file. If you disagree, please contact me within 10 days."

Anderson disagreed and notified the delegate accordingly. She claims she contacted the Branch District Manager to complain that she had not received any material from the employer's submission to the Branch. According to Anderson, the District Manager agreed that all the information had not been forwarded and the District Manager would take care of it.

The material was forwarded to Anderson with a letter from the delegate dated September 6, 2000 asking her to review the employer's submission and reply to him. Anderson responded in an undated four-page letter to the delegate.

Anderson waited some time without a response from the delegate and contacted the Branch's Head Office in Victoria. They agreed to contact the District Manager and advise Anderson of the results. They called Anderson back informing her the District Manager was overseeing the investigation and a Determination would be forwarded that week. She claims after nearly a three-

month wait she called the District Manager again and felt no progress had been made in the investigation. She again contacted the Head Office who, in her words, was shocked the Determination had not been forwarded. According to Anderson she was then contacted by the delegate who said, "I guess we'll have to grind this out".

The Determination, dated November 30, 2000, found Dencan Restaurants Inc. operating as Denny's ("Denny's") had not contravened the *Act* and did not owe Anderson any money for regular wages, compensation for length of service or for not paying for special clothing costs.

In a letter to the Tribunal dated February 13, 2001 Anderson states she was offered a settlement, which included severance pay, which she rejected

ISSUES TO BE DECIDED

Is Anderson entitled to any compensation for work she performed and for which she was not paid?

Is Anderson entitled to any compensation in lieu of notice for termination?

FACTS

Anderson was employed as a server by Denny's from March 25, 1999 until June 9, 2000 when she was terminated. At the time of termination she was paid $7.35 per hour.

The restaurant at this location had problems with customer satisfaction and profitability and the owners brought in a new manager. Anderson had been working at the restaurant for three months when the new General Manager, Carol McKay ("McKay") took control on June 21, 1999.

According to Anderson, Denny's had a policy covering employee reviews. Employees were to receive a review every 3 months of employment. Anderson did not receive her first review until after 9 months in December 1999. Her second review was given April 25, 2000. She was given a raise after each review and had been told she was improving, in fact she was told she had improved 100% on her last review. Anderson claims the objectives of the reviews were to acknowledge the good things the employee was doing and to point out what was needed to improve.

Anderson claims during her last review by Mr. Quesnel, ("Quesnel") the Restaurant Manager she was reprimanded for not starting early. Both Anderson and Quesnel signed the review. That review is not included in any of the information supplied to the Tribunal and Anderson indicates it was not supplied to her.

On April 1, 2000 Anderson received a "Secret Shopper" report, which rated her at 96%. This, according to her, was very high for that location. McKay told her if she did more "upselling" it would bring up that score.

Later in that same week the swing shift hours, which Anderson worked, were cut to 5 hours per shift. Anderson complained that she had been working there a year and was still only getting 25 hours per week. The day shifts were not cut and Anderson had been trying to get more day shifts without success. With the other cutbacks that were taking place Anderson was often left to serve 15 tables alone. She claims this caused friction, as the cleanup could not be done during peak times like the "church rush". Anderson further claims she was told she was a strong server and that was why she was left working alone.

Sometime later Anderson received a second "Secret Shopper" report of 100%. This was considered excellent and the Restaurant Manager congratulated her. She claims McKay never said anything to her. Shortly after this, McKay started watching her closely and she was given a verbal warning for slow cleanup time. She was told to do her cleanup in 15 minutes or get a performance write-up.

Anderson claims cash out was to be done with a manager present but when it was busy it was not always possible to have the manager there. She admits to being short on occasions with her cash. This shortage was always made up later.

Anderson recalls being called into McKay's office and being told she had deliberately submitted another server's debit receipt as her own. She was told if it happened one more time she would be written up. Anderson claims this happened when she returned from her break and asked the hostess if there had been any payment from one of her tables. The hostess had a debit receipt that none of the other servers felt were theirs and gave it to Anderson. When Anderson tried to explain this to McKay she would not accept the story.

On June 4, 2000 Anderson was "written up" for failing to do a clean up on day shift with 4 servers on duty. She refused to sign the write up on the basis it was not her area. This was later established to have been another server at fault however Anderson did not get an apology. Anderson claims she spoke to Quesnel telling him she felt McKay was trying to get rid of her. She claimed she had no write ups in her file and McKay was trying to get three so she could get rid of her. She claims Quesnel said: "Don't worry Carol your (sic) not the only one she has singled out to get rid of".

Three days later McKay accused her of the same thing and again it was the responsibility of another server. We have no evidence if the other server or servers were written up for this problem, but believe the first server was given a verbal warning only.

One of the problems McKay identified was some of the servers serving "beverage only" tables and not ringing in sales and keeping the money.

An unsigned memo dated 11-26-99 addressed to "All Servers" from "Management", over the heading "Possible Theft", stated:

> Over the past few days there have been a number of beverage only tables not rung into the computer, however there has been money collected from them. This is considered theft and is grounds for immediate dismissal.
>
> Cheques will be audited on a daily basis. **Anyone** caught doing this will have his or her employment terminated immediately. **No exceptions.**
>
> This is a reminder to all, about the proper steps to be taken for beverage only guests.
>
> 1. Take the beverage order.
> 2. **Ring in the beverage**
> 3. Bring the beverage to the guest.
>
> cc/. Graham Classen

The servers, including Anderson, were all required to print their name on the memo and sign it, which she did.

On June 8, 2000, McKay closely monitored Anderson. When Anderson reported for work the following day she was terminated for failing to input beverage sales into the computer and keeping the money.

Anderson claims she had worked the 11 am to 7 pm shift the previous day and was alone for the two hour period when the restaurant was quite busy and she simply had no time to serve the customers and ring beverage sales into the computer. Anderson claimed it was an oversight as she had been busy and was behind in her service with 15 tables to serve. She offered to pay for the shortage and work out something so it would not happen again. This was rejected by McKay, saying theft is theft and we will not tolerate it.

In a "**MEMO TO RECORD"** to Carol Anderson from Management dated 06/20/00 re: THEFT it was identified that on Thursday, June 08, 2000 Anderson was monitored, by McKay, and over a 2 ½ hour period there were 3 tables and 2 counter sales in which beverages were served and no bill was made. The memo states, in part:

> With just these tables monitored a total of $17.36 was collected by Carol and bills were not made. Carol left her shift and the restaurant at approximately 6pm on June 8, 2000 with these funds in her possession

Anderson claims to have worked in the service industry for 27 years and never had a problem like this. She claims she was wrongfully dismissed and wants to have her otherwise perfect work

record rectified. She states it was "obvious there was no investigation beyond Mr. Turner making a few phone calls and deciding against me".

In her submission to the Branch dated June 8, 2000, Anderson states, in part:

> As Employees we are required to start our shift 10-15 minutes early every day and servers are required to book off before doing our cash out which means we donate up to half an hour every day.

In response to the submission of Anderson to the Branch, McKay claims she was brought into the restaurant to bring food costs and labour cost in line and she had done that. She states: "The only employees that have felt stress in these working conditions have been employees with performance issues that have been dealt with verbally, written etc".

McKay advises that Denny's do performance reviews at 3 months, 6 months and annually. She claims she delayed giving Anderson her review until after she had been at the restaurant some time and got to know the staff better. She agreed the 96% "Secret Shoppers" was a good report and it was posted for all the staff to see. When Anderson received the 100% "Secret Shopper" report it was also posted and a notation of "Great Job" added to the bottom. She does not recall if she congratulated Anderson.

She claims she and Quesnel did both interviews for Anderson. McKay claims she was the only manager qualified to deal with performance issues. Quesnel admits he told Anderson she had made "some major improvements" but this did not mean she was doing great. He denies saying Anderson was one of their stronger servers.

McKay stated scheduling was not done on a seniority basis but with customer service in mind. In answer to the question of cutting shifts and shift times, McKay indicates this was done for budget reasons and she was aware of the complaints of overload and believes she made some schedule adjustments.

McKay states "Inexperienced" managers brought the complaints about Anderson doing slow cleanups to her attention. However, she admits she started watching Anderson and spoke to her about this. She informed Anderson she must meet both the restaurant's cleanliness and time requirements or "she would be dealt with accordingly".

McKay stated Anderson's cash shortages would usually occur on the day before her days off. When she returned to work and would be advised of the shortage she would pay them back over several days. After dealing with this issue many times McKay gave her a verbal warning, indicating if it happened again she would receive a written warning. After that she claims the practise stopped.

Quesnel indicated Anderson was being looked at for theft for a while before her dismissal. He cited two cases where Anderson had submitted debit slips in her cash out that belonged to other servers, one belonging to him.

McKay claims Anderson was not particularly busy on June 8 and when she took her break she only had 5 or 6 bills on her screen and those were customers still in the restaurant. She had taken payment on all of her other bills from the lunch period.

ANALYSIS

There are two separate issues raised by Anderson, not being paid for time worked and her dismissal. The first deals with early starts, cash out and missed meals?

The Determination, quoting the Employer's position, states, in part:

> Denny's does not require employees to arrive at the restaurant and start early without paying them, according to Larry Quesnel, restaurant manager for the last year or so of Anderson's employment. An employee would simply mark his or her timecard if asked to start early or even if starting early on his or her own say-so. Anderson rarely arrived early at the restaurant, according to Quesnel, and she was usually just ready to start work, as her scheduled shift was to start.

In the reply to Anderson's submission to the Director, McKay, as General Manager, states:

> 24. Required to start early. we(sic) do not require our staff to start early without pay. We request them to start early to ensure a smoother shift change for everyone. At anytime, any employee may start at their scheduled time rather than 10 minutes early. (emphasis added)
>
> 26. Statement. This made me realize that all the days I started early as had been "requested" to… request being the key word. Not forced.

In response, Anderson, in an undated letter to the delegate, stated:

> I was reprimanded verbally at my review by Mr. Quesnel for not starting early everyday. When we did start early our time card shows that we did but the company deducts this time and we are not paid for it. Whether this is requested or demanded does not matter, if our time cards reflect that early start we should be paid for it. To donate this time for a smoother shift change is not our responsibility.

This suggests the employees were under some pressure to begin work early without pay although nothing appears in writing. The line between "requesting" an employee and "requiring" them to

start early is a fine one indeed and, to most employees, either word would be considered an order.

Anderson also claims she cashed out after she finished her shift. The delegate reviewed that with Denny's and they gave her pay for 5 minutes a day for each shift she worked. In that same review she received pay for two early starts and two missed meal breaks in her last pay period.

In a letter from Graham Rennie ("Rennie"), V.P. Human Resources for Northland Properties Ltd., the parent company of Denny's, dated January 18, 2001 Rennie states, in part:

> It is not our policy for employees to cash out on their own time. In the case of the Appellant, the Delegate found that "some" cash outs were done after the shift ended.

The Determination, quoting the Employer's position, states, in part:

> Denny's did not have a written policy or a consistent approach at the North Kamloops location where Anderson worked about a server cashing out before or after punching out. Quesnel said he noticed some servers cashed out and then punched out, while others punched out and then cashed out. The former were thereby paid for the time, the latter were not. Nothing was done to address the anomaly. Anderson was one of the servers who punched out before cashing out.

The Determination, quoting the Complainant's position, states, in part:

> When Anderson began, she used to cash out at shift's end before punching out, but was told by a former manager that that was not company policy.

According to the Determination Denny's admit they were aware some employees cashed out before they punched out and others signed out and then did their cash out meaning they did not get paid for cashing out. The Determination states: "Nothing was done to address the anomaly". The delegate does not address that violation in any of the correspondence supplied to the Tribunal or indicate the practice has been corrected.

I might agree with the delegate in respect to the cash-out time for Anderson although if he were to have interviewed the other staff members he could establish the amount of time they took, on average, to cash out. While this would not necessarily coincide with the time Anderson might take to cash-out it should give some indication if the company's claim cash-out took 5 minutes could be verified.

The delegate, in a letter to the Tribunal dated March 1, 2001, states, in part:

> Finally, I must reiterate that Ms. Anderson's claim of unpaid time worked before and after her posted shift schedule failed per Section 76(2)(d) of the *Act* that

> "there is not enough evidence to prove the complaint." She provided evidence in the form of Time Card (sic) about her last week of work that allowed me to inform the employer that it owed her $42.05, which was promptly paid. She had no other evidence to offer, and she admitted she did not keep personal records.

In the above letter to the Tribunal the delegate indicates Anderson's complaint failed because Anderson "had no other evidence to offer, and she admitted that she did not keep personal records". It is beneficial for the employee to provide evidence however the responsibility for keeping records rests with the employer and not on the employee.

Section 28 of the *Act* requires an employer to keep payroll records for all employees. Anderson claims those records would show the times she had started early and missed break periods.

In the reply to Andersons's submission to the Director, McKay, as General Manager, states:

> Half hour deductions. staff(sic) are required to put on their punch slips if they have had a ½ hour break or not. If the employee does not do this, there is room for error. Our computers automatically deduct ½ hour off a shift over 5 hours. The managers make the adjustments as the employees put their times on the punch slips.

The delegate, in his March 1, 2001 letter, further states, in part:

> For the record, the Time Card she supplied for her last week illustrated only problems over unpaid meal breaks; otherwise she was paid in full. One shift she started at 9:45 a.m. and she had marked it "early start no break". She was paid in full from the instant of the early start. I am enclosing a copy of the time card.

The Determination, at page 2, under the heading "Note" states, in part:

> Note: the employer settled the matter of some <u>minor irregularities</u> in Anderson's pay over her last week of employment….(emphasis added)

If Anderson completed her time cards showing start times and identifying when she did not take a break it would seem a fairly simple exercise to review those records and calculate any time when those records differ from the payroll. The delegate indicates he was able to do that for the last week Anderson worked because Anderson supplied the time card. The delegate stated in the Determination, in part, that:

> Anderson contends she started early many mornings, and that cash outs took 10 minutes on average. Section 76(2)(f) of the Act allows a complaint to be dismissed on the fact (sic) of insufficient evidence. Given the employer's voluntary admission on cash-outs, certain wages are owed and being paid. But

> Anderson's allegation that a higher amount is owed must fail given Anderson's lack of evidence to the contrary.
>
> Anderson's claim for regular wages for starting early must fail for the same reason, lack of evidence.

The reference to Section 76(2)(f) in the Determination is, I believe in error. The Section dealing with lack of evidence is Section 76(2)(d) which the delegate properly identified in his letter to the Tribunal dated March 1, 2001.

According to the Time Card for Anderson's last pay period from June 01 to June 15, 2000, (she last worked June 8 and was terminated June 9 when she reported for work.) she worked 6 shifts for a total of 38 hours and of those 2 were early starts and 2 had no breaks. She was paid for 35 hours, which, as a result of the computer automatically deducting ½ hour from each shift of over 5 hours, indicates she was shorted 1 ½ hours pay. The delegate corrected that with Denny's however that gives me grounds for some concern. The delegate characterizes that as "some minor irregularities".

Section 32(1) of the *Act* states:

> An employer must ensure (emphasis added)
>
> (a) that no employee works more than 5 consecutive hours without a meal break, and
> (b) that each meal break last at least a ½ hour.

The delegate was aware of that; at least for the last pay period Anderson worked; yet there is no reference in any of the correspondence to the fact Denny's were in violation of the Act.

According to McKay, the servers are supposed to indicate on their Time Card whether or not they had a break in their shift. If the last pay period for Anderson is any indication of the general conditions surrounding early starts and missed breaks the system in place at that restaurant is, at best, questionable.

The delegate has not presented any evidence to indicate whether an investigation of Anderson's time cards, other than the one she submitted, was undertaken. In her complaint she has made reference to the many times she started early and worked through a break. The employees were expected to note an early start or a missed break on their time card. As the company's computers automatically deducted a ½ hour from any shift of over 5 hours any employee who did not identify working through would lose pay for that shift. If Anderson did identify an early start or a missed break on shifts of over 5 hours and was not paid that is a violation of the *Act.*

There is a responsibility under Section 76(1) for the Director to investigate a complaint unless it is refused, stopped or postponed under Section 76(2). The delegate has access to information not available to the employees.

The issues of early starts, working through break periods and cash-out is still before the Tribunal. I believe there is sufficient evidence to refer the matter back to the Branch for a more thorough investigation. If Anderson had time cards showing early starts and did mark her time cards with missed break notations she should be paid for that time if she has not been paid. The Branch should determine if Denny's is violating Section 32(1) and, if so, make corrections to their policy. The matter of employees generally cashing out on their own time should be corrected, if Denny's is still in violation of the *Act.*

The delegate, in a letter to the Tribunal dated January 11, 2001, indicates Anderson has limited her appeal to the question of early starts and cash outs. I do not find that to be the case. Anderson, in her letter to the Tribunal dated February 13, 2001, has continued to seek resolution of the matter of her "wrongful dismissal".

I agree with the delegate there is no reference in the *Act* dealing with "wrongful dismissal". That is a matter for the courts. The *Act* deals with notice of termination or pay in lieu unless the termination is with cause. Anderson is claiming a case of "wrongful dismissal" but the Tribunal is limited as what relief, if any, can be offered. The *Act* deals with compensation in lieu of notice where just cause is not established and that is the extent to which the Tribunal is bound.

We must now deal with the question of whether Denny's had just cause for Anderson's termination.

Denny's terminated Anderson for theft of $17.36, which they contended, was a violation of the November 26, 1999 memo.

In the report to Rennie July 5, 2000, McKay indicated:

> I explained to her if one table had not been punched in that I would consider that a "mistake". Five tables not punched in for a total of $17.36 is considered theft.

When Anderson offered to pay the money back McKay indicated that "theft is theft and we would not tolerate it".

The Determination stated:

> While Denny's characterized Anderson's transgression as theft, the issue for me is not whether Anderson is a thief or whether she stole, but more simply whether Anderson's alleged transgression gave Denny's just cause for her dismissal…..

> I cannot accept Denny's conclusion that servers who violate the procedure are, in fact, necessarily and automatically thieves, and I have no evidence to suggest Anderson stole. But I do have sufficient evidence to conclude that she was dismissed for just cause, and so is not owed compensation……
>
> On reviewing the facts, I find the employer took the proper steps to establish the matter of ringing in beverages as a fundamental job criteria, and one which brought with it sufficient clarity and warning of the inevitable consequences, dismissal, for its violation, that a single act of misconduct thereon would bring about dismissal without further warning or chance.

This bears a closer examination. The Determination indicates Anderson was terminated for a procedural error, failing to input the order in the computer before serving the customer and not for theft. If that is the case the rules of just cause must be applied.

Kruger (BC EST #D003/97) clearly sets out the rules for just cause:

1. The burden of proving the conduct of the employee justifies dismissal is on the employer.

2. Most employment offences are minor instances of misconduct by the employee not sufficient on their own to justify dismissal.

    1. A reasonable standard of performance was established and communicated to the employee;
    2. The employee was given a sufficient period of time to meet the required standard of performance and had demonstrated they were unwilling to do so;
    3. The employee was adequately notified their employment was in jeopardy by the continued failure to meet the standards; and
    4. The employee continued to be unwilling to meet the standard.

3. In exceptional circumstances, a single act of misconduct by an employee may be sufficiently serious to justify summary dismissal without the requirement of notice.

I believe the delegate is relying on Item 3, that this was an exceptional case, which warranted dismissal on the first offence.

The Determination states, in part:

> …… The Notice did not allow for innocent mistakes as a defence for violating the policy. Intent was not a consideration. There is no evidence to suggest that Anderson did not understand the concern and the required procedure to prevent it,

> or have the training and experience to comprehend and follow it. Anderson's only defence was that of forgetfulness based on heavy workload.

In Monk McQueen's Fresh Seafood and Oyster Bars Inc (B.C.E.S.T. O33/97) the adjudicator stated:

> To find just cause on a single incident requires that the act be serious, wilful and deliberate.

In *L.J. B. Foods Ltd* (B.C.E.S.T. D133/98) the adjudicator found:

> The facts did not support a conclusion that the employee's action supported a wilful and deliberate flaunting of the essential conditions of the employment contract. There was insufficient evidence to prove that the employee's employment was terminated for "just cause" because the evidence did not establish, unequivocally, the element of wilfulness was present in the one act of misconduct to justify dismissal.

In *Tom's Custom Auto Body* (B.C.E.S.T. D174/98) the finding was:

> Dishonesty was a possibility, but so was poor memory or absentmindedness. The employee was guilty of an inadvertent error but not of a deliberate act to deceive and to defraud the employer of funds.

There is a responsibility placed on the employer when their action will cause the termination of the employment contract and it may permanently damage the reputation of the employee.

In Elliot (B.C.E.S.T. D191/97) the adjudicator stated:

> Theft was a serious allegation that could have seriously damaged the professional reputation of the employee and must therefore be investigated with the utmost care and vigilance. The degree of probability should be commensurate with the incident and in the case of an allegation as serious as theft, something more than a balance of probabilities is required. Only clear and cogent evidence will substantiate such a serious allegation.

McKay indicated she had all of the slips from the computer for the June 8, 2000 period however, we did not receive any information in respect to them. The number of orders Anderson had and the exact time she cleared those from the computer might have been helpful.

If, as Anderson indicates, she was alone during this period and the restaurant was busy it would be possible, in the interest of faster service, to shortcut the procedure and bring cups and coffee to the table before entering the order in the computer. We have no evidence this practice was not used by other servers when the restaurant was busy.

Anderson has claimed she was tired, behind in her service, and simply forgot to post the beverage orders before serving them. She offered to repay the restaurant for the money the next day and offered to see that it would not happen again. On the basis of probabilities, I do not believe Anderson committed a deliberate act to deceive and to defraud the employer of funds.

There is no evidence to indicate there was a serious, wilful and deliberate act on the part of Anderson for either theft or failure to follow procedure. If the dismissal does not succeed on a single incident we must rely on the rules of progressive discipline.

The pattern of discipline being exercised by McKay was in her words, progressive. However the action taken by McKay leading to the termination of Anderson June 9, 2000 was not, in my opinion, progressive discipline.

What is the record of discipline for Anderson? From the time she was hired there does not appear to be any written warnings on her file. She had 2 reviews, one after nine months and another four months later. They appear to indicate progress and she is given increases after each review. Both McKay and Quesnel indicate there is nothing seriously detrimental in her reviews. Quesnel does indicate Anderson was under scrutiny for theft but I think that relates to the debit receipt and, with the table number and other information stapled to the debit I do not believe that to be a deliberate attempt of theft.

Anderson received two good service awards, one 100%. She was given a couple of verbal warnings but nothing is put on her file, and in the case of the cash shortages, it stopped after being warned. This is over a 13-month period and then we get to the final month of her employment.

If we review that record we find Anderson was written up for failing to properly cleanup an area on June 4, 2000. This was later proven to not be Anderson's area and it was withdrawn and the person responsible was given a verbal warning. Three days later she is confronted on the same issue, which again is proven not to be Anderson's problem. McKay indicates she can't remember warning Anderson the second time. That was June 7th and on June 8, 2000 McKay begins closely monitoring Anderson. She finds Anderson is not reporting all beverage sales and she is terminated. The "memo to record" which identifies her termination is dated June 20, 2000, 11 days after the incident.

The Determination states, in part:

> Denny's was concerned about Anderson's adherence to the policy and procedure on ringing in the bills for beverage only customers, after the notice was posted and the employees had signed it.

I did not find any reference to Denny's having any more concern for Anderson failing to adhere to policy and procedure than any of the other servers.

The Determination further states, in part:

> Denny's had a growing concern that servers were serving "beverage only" tables and collecting the customer's money, but not ringing in the sales in the store computer to the employer's credit……(emphasis added)
>
> ……In this case, the employer had identified a serious problem of ongoing financial loss to itself based on the apparent practices of some servers…. The notice (of November 26, 1999) outlined the problem, that drinks were not being rung in on beverage only tables, and stated unequivocally that the problem was serious, so serious, in fact, that the employer said the problem was tantamount to theft….(emphasis added)

The question of money not being reported for the "beverage only tables" was not limited to Anderson. McKay indicates it was a general problem. The November 26, 1999 memo was posted to all servers. We have heard no evidence to indicate if any other employees were monitored and, if so, what was the outcome.

There is no evidence this matter was brought to Anderson's personal attention in the 6 ½ months following the posting of the general notice. To our knowledge, there were no written warnings of any kind on Anderson's file, much less ones dealing with failing to follow procedure.

The references in the employer's submission being short on cash out and the matter of the debit slips were addressed by Anderson and did not relate to the question of following procedure on serving "beverage only" customers.

The policy outlined in the November 26, 1999 memo was not fair and reasonable. The notice did not allow for innocent mistakes as a defence for violating the policy. Even McKay indicated if one table had not been entered she would consider that a mistake. The November memo did not allow for any flexibility, even one mistake.

At one point, according to Anderson, Denny's offered her a settlement of 2 week's severance pay, her 5 minute cash out and a good recommendation providing she dropped her wrongful dismissal claim, which she rejected.

For the above reasons I find Denny's has not established proper progressive discipline in dealing with Anderson's failure to follow their policy on posting orders on the computer before serving the customer.

Anderson is entitled to compensation in lieu of notice in respect to section 63 of the *Act*, and according to the information received, that would equal two weeks pay. The matter is referred back to the Branch for the calculation of the appropriate amount based on Anderson's earnings before she was terminated.

ORDER

In accordance with Section 115 of the *Act* I order the Determination dated November 29, 1999 be cancelled and the matter is referred back to the Branch for the calculation of the proper amounts to be paid Anderson for early starts, working through breaks and for cashing out on her own time. The matter of compensation in lieu of notice is also referred back to the Branch for calculation as indicated above. Interest is to be calculated in accordance with Section 88 of the *Act.*

JAMES WOLFGANG

James Wolfgang
Adjudicator
Employment Standards Tribunal