EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act S.B.C. 1995, C.38

- by -

Broadway Entertainment Corporation
operating as
Wharfside Eatery
("Wharfside")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Genevieve Eden

FILE NO: 96/166

DATE OF DECISION: August 12, 1996

DECISION

OVERVIEW

This is an appeal by Broadway Entertainment Corporation operating as Wharfside Eatery ("Wharfside") pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") against Determination No. CDET 000815 issued by the Director of Employment Standards on February 8, 1996. The Determination dealt with issues relating to three former employees, Gordon Trenaman ("Trenaman"), Robin Walraven ("Walraven"), and Sarah Beeston ("Beeston").

A hearing was held in Victoria on July 9, 1996. A decision pertaining to the appeal concerning Trenaman and Walraven was issued on July 26, 1996. This decision pertains to the appeal concerning Beeston. Beeston did not attend the hearing on July 9th. She had been out of the country for some time and would not be returning in the near future. I informed the Employer that it could proceed in Beeston's absence. The Employer advised that it was not prepared to proceed on that basis and agreed to proceed on the basis of written submissions. Final written submissions were received from the Employer on August 9, 1996.

The Director found that Sarah Beeston ("Beeston") was owed two weeks severance pay as well as wages for time required to be available for work prior to commencing shifts, reporting for work but not placed on shift, and a shortage on her final pay cheque. The Determination showed a total amount owing of $705.32 including vacation pay and interest. The Determination was appealed on March 4, 1996.

Consideration of this appeal falls under section 128, the transitional provisions of the *Act.* Beeston's employment was terminated prior to the repeal of the former *Act.* The former *Act* entitles the employee to the longer notice period after 6 consecutive months of employment. The new *Act* cannot be interpreted retrospectively to take away an entitlement that existed at the time of termination. Thus, the relevant statute for purposes of determining the employer's liability for severance pay is the *Employment Standards Act* (S.B.C. Chapter 10) (the "former *Act*"). The relevant parts of sections 42 and 43 of the former *Act* state:

> *Notice required*
> *42. (1) An employer shall not terminate an employee without giving the employee, in writing, at least*
> *(a) 2 weeks' notice where the employee has completed a period of employment of at least 6 consecutive months, and ...*
>
> *(3) When an employer terminates an employee and fails to comply with subsection (1) the employer shall pay the employee severance pay equal to the period of notice required ...*
>
> *Notice not required*
> *43. Section 42 does not apply to*

(a) an employee discharged for just cause...

For purposes of determining whether wages are owing, the relevant statute is the new *Act.*

ISSUE TO BE DECIDED

The issues to be decided in this appeal are the following:

1. Has Wharfside discharged its liability to pay severance pay under sections 42 and 43 of the former *Act*? That is, has Wharfside demonstrated, on the balance of probabilities, that Beeston was dismissed for just cause?

2. What wages, if any, are owing to Beeston?

Extensive written submissions were made by the parties with respect to each issue. I will deal with each in turn.

SEVERANCE PAY

FACTS

Sarah Beeston was employed by Wharfside as a Server from September 11, 1994 to August 29, 1995. She was dismissed without notice or compensation. She filed a complaint on September 5, 1995 claiming severance pay and unpaid wages.

The Determination includes the following statements:

> *Mrs. Maria Morrison, representing the employer, advises that Ms. Beeston gave her notice of termination prior to Ms. Beeston's last day of employment as the complainant was planning to go to Scotland.*
>
> *Initially, Mrs. Morrison advised that Ms. Beeston had given her notice in writing but she did not produce the alleged letter.*
>
> *Ms. Beeston reports that she met with Mrs. Morrison on August 29, 1995 to discuss wage discrepancies and Mrs. Morrison summarily terminated her employment because the complainant refused to pay for cash shortages from the nightly cashouts.*
> ...
> *Mrs. Morrison initially committed to pay the severance pay but subsequently advised that Ms. Beeston had returned from Scotland over the Christmas holidays and contacted some employees of this employer. Morrison now refuses to pay the severance and advised that the employer wishes to dispute all claims submitted by the complainant.*

The Director, Ray Stea ("Stea"), concluded that Beeston was terminated without just cause. The appeal of the Determination on March 4, 1996 states that Beeston was dismissed for cause; it also states that Beeston gave verbal notice of quitting her job.

A subsequent letter to the Tribunal dated April 9, 1996 from Bruce B. Jordan ("Jordan"), Counsel for the Employer, states that the Director erred in his finding that Beeston did not resign from her position at Wharfide; two affidavits dated March 12, 1996 were submitted which the Employer maintained supported its' position. There was no reference in this communication that Beeston had been dismissed. In a subsequent submission to the Tribunal on July 16, 1996, the Employer took the position that Beeston was dismissed for just cause for insubordination and breach of a lawful and reasonable restaurant policy.

The Employer submitted a sworn affidavit dated July 15, 1996 from Elizabeth Bryan ("Bryan"), an employee at Wharfside, which states that cash shortages at Wharfside were a common problem that became increasingly serious over the winter of 1994 and spring of 1995. These cash shortages were caused by careless calculations in any one of three areas: a shortage on Visa and/or other credit card slips, a shortage of cash owed on sales, or a shortage of cash owed on the tip pool, most commonly the latter where the servers had been consistently careless.

The Employer's evidence refers to both "cash shortages" and "tip pool shortages" in their allegations against Beeston.

There is no dispute that a tip pool policy existed and was known to employees at Wharfside. A sworn affidavit dated July 16, 1996 from Justine Till ("Till"), a former manager at Wharfside, described the tip pool policy in effect at the material time. This policy required serving staff to pledge a percentage of their gross sales for a shift to specific support staff members such as bussers, runners and bartenders. There was also a general tip pool to which servers were required to contribute. At the end of a shift, each server was provided with a cash register receipt which indicated the amount owed by that server to the tip pool for that shift. The procedure for distribution of tips required an employee to place the amount owing to various individuals and the tip pool into separate envelopes at the end of each shift. The calculations done by an employee in determining the amount to be paid to support staff and tip pool would be verified the next day by the bookkeeper who would inform a manager of any shortages. Till's practice was to advise employees of shortages by placing a note in their bi-weekly pay packet.

Attached to Till's affidavit was a 'TIPPOOL GUIDE" which elaborated upon the arrangement for calculating tips from cash register receipts. This included the statement "You will now be assgned (sic) a busser, runner, host and bartender to tip out so the total amount calculated goes to that individual in an envelope marked with the date, their full name and your full name". No further information was provided regarding the "general tip pool".

Bryan's evidence is that, on an average summer night at Wharfside, a server would make between $100 to $150 on tips, and would be required to tip between $30 to $40 to the tip pool.

Till's evidence is that she spoke to Beeston over the summer of 1995 on several occasions concerning "mounting shortages to her tip pool contributions". Till maintains that, by mid August, Beeston "had an outstanding cash shortage of approximately $50.00". Till issued written warnings

to all employees with shortages on or about August 20, 1995. Three such warnings were submitted in evidence but Till was unable to locate a copy of the warning issued to Beeston. The warning forms for the three employees showed a "1st" warning on what appears to be an escalating scale of "2nd", "suspension", and "termination". One employee was warned for "consistent failure to pay back cash shortages tot: $40.82" another showed a "cash short of $82.18", while the third showed "consistent failure to pay cash shortages" in the amount of $104.27.

Till met with Beeston near the end of August; her affidavit states:

> *I met with Sarah near the end of August concerning her shortages. The majority of this amount, if not all, was an accumulation of shortages in contributions to the tip pool. Sarah asked me to indicate to her exactly when and where these shortages arose. I had kept the slips from the bookkeeper indicating shortages only back as far as June, 1995 and was therefore unable to do this for all of them as Sarah's shortages had been outstanding for so long. I told Sarah that the slips I had included with her bi-weekly pay cheques would have indicated to her when she was short. Sarah did not offer to pay her shortages at our meeting and to the best of my knowledge she still owes money to the tip pool.*

In a sworn affidavit dated July 16, 1996, Maria Morrison ("Morrison"), General Manager of Wharfside, stated she was aware that Beeston "had accumulated a significant tip pool shortage" dating back to the spring of 1995. Morrison maintained she had mentioned the outstanding amount to Beeston on several occasions and that her reply was always that she would pay the outstanding debt soon. Morrison felt obliged to take a firm position on the tip pool policy in that it grew out of consultation with all staff and was intended for the benefit of staff who worked hard "behind the scenes". She felt it particularly important to enforce the policy in Beeston's case given that Beeston was leaving Wharfside to go to Scotland in mid September and that it was important to enforce the policy on behalf of the staff members to preserve staff relations and respect for the policy.

Both Morrison and Beeston provided an account of a meeting between them on August 29, 1995. Morrison's evidence is that she met with Beeston to discuss her "accumulative cash shortages". Morrison's statement on July 16, 1966 regarding this meeting is:

> *Ms. Beeston then stated to my face that she did not believe that management would distribute her outstanding tip pool amount to the proper employees. She stated that she believed that the restaurant would use the money for its own purposes and that for that reason she would not be paying her tip pool shortages. I then asked Ms. Beeston if she was refusing to pay her tip pool shortages to which she replied "yes". I was outraged at her allegation and terminated her at that point for insubordination and breach of policy.*

> *Ms. Beeston would have been made aware of her shortages in every bi-weekly pay package. She could therefore keep her own running total of when her shortages arose.*
>
> *The staff pay cheques have never been withheld by me because of cash shortages.*

In a letter dated September 1, 1995, Beeston describes the discussion on August 29, 1995 as dealing with the issue of "paying cash shorts from the nightly cashouts back to the restaurant". Beeston's refusal to pay these cash shorts was twofold. First, it was a breach of Employment Standards regulations to withhold paychecks and require that cash shortages be paid. Second, the restaurant could provide no documentation to show from where these cash shortages originated. "As an aside", Beeston maintained it was made clear to her that the money from these shortages would go directly to the restaurant rather than the support staff tipouts. In a sworn statement dated July 24, 1996, Beeston stated:

> *... If it wasn't every paycheck, then it was most definitely every other paycheck that the amount was incorrect ... As I kept meticulous record of my hours I was able to go back and point out that I was shorted. I was paid back, in cash, never with a record of these payment (sic), which meant that I would not receive holiday pay on that sum. The fact that they were incorrect more often than not, made me doubt the accuracy of their bookkeeping and their honesty. Therefore, when I was informed about these cash shortages, as I doubted very much that I would have been short, I asked them to point out where and on what date. The Wharfside had no record whatsoever of where I had been short and were only able to produce a figure. This combined with the fact that I aways had to go back to get my money showed me that the accounting and distribution of money was far from accurate. As well, the Wharfside is claiming that this money was owed not to the restaurant, but rather to my support staff. If this is the case and they are most concerned that these people be paid their tips, they have no way to do this because they have no record of dates, amounts, staff working, etc. Therefore it is impossible that the money would be distributed to the workers...*
>
> *... Maria Morrison called me into her office to talk about the cash shortages and this is when I asked her about how my support staff would be paid if they had no record, as well, how they could be sure that I was short when they were wrong so often, not holding a record of any of this. When she was unable to justify this, it was apparent to me that this practice was highly immoral and I told her that I would not pay them back, at which point my employment was terminated...*

Bryan's affidavit states: "Sarah mentioned prior to her termination that she intended to refuse to pay the shortages on her tip pool contribution based on the concern that any money she paid back would not actually be distributed among the people (her support team) she owed it to". Beeston's sworn statement states that she never had a problem with tipping at Wharfside and that she felt it crucial to the workings of the restaurant. Her evidence is that she would give her support staff extra amounts on most occasions to show her appreciation and was told several times that she and another employee were the best tippers in the restaurant.

ARGUMENTS

Jordan, Counsel for the Employer, made arguments and submissions on its behalf. The Employer maintains that the events of the meeting between Morrison and Beeston on
August 29, 1995 and the surrounding circumstances, justified immediate dismissal.

Jordan referred to the British Columbia Court of Appeal decision, *Stein v. British Columbia* (1992) 65 B.C.L.R. (2d) 181 (C.A.) in support of the employer's right to lay down procedures or policies (with certain provisos) and that it is not for the employee or Tribunal to consider the wisdom of the procedures.

The Employer submits that, given the objectives of the tip pool policy, that a higher duty of obedience and honesty is required of the employee. It was a policy of and for the employees, a policy common to the industry and well-known to employees.

The Employer submits there were aggravating circumstances which make Beeston's policy breach particularly egregious. First, Beeston's refusal to adhere to the policy had been ongoing for some time, despite warnings, resulting in "a significant sum owing to the tip pool". Second, Beeston was planning to leave Wharfside at the end of the summer and the Employer was concerned that she would leave town without paying her debt to the tip pool and thus to her fellow employees. Third, Beeston's accusation to the manager that she suspected management of improperly dealing with tip pool contributions was clearly an act of gross insubordination and on its own justified summary dismissal. Beeston's words and actions made it clear that she would not comply with the policy and that her reason was that she suspected the employer of dishonesty, according to the Employer. Further, such an inflammatory and defamatory statement could only serve to undermine the employer's trust and confidence of this employee. The Employer maintained that Beeston's actions were wilful and deliberate and revealed a trait of character and judgment inconsistent with the faithful discharge of her duties. In all of these circumstances, it was submitted that progressive discipline was not appropriate and that summary dismissal was justified.

Stea argued that the Employer failed to provide any records to substantiate its claim that Beeston had accumulated tip pool shortages. He submitted that the absence of records identifying the dates and amounts the alleged shortages occurred gives rise to Beeston's bona fide apprehension that any alleged shortages she paid, would not and could not be disbursed by the Employer to the rightful recipients, and draws an adverse inference.

Stea maintained that an employer requiring an employee to pay an unconfirmed debt cannot be held to be a lawful or reasonable order and that Beeston's refusal to comply with the employer's dictate

to pay for shortages in this matter does not constitute insubordination. Stea concluded that just cause for dismissal did not exist.

In reply argument, Jordan submitted that Beeston's continuing accusations that tip pool contributions would be "mis-appropriated" (in his words) are denied by the Employer, and that such allegations are false and unfounded. It was submitted that there was no evidence to substantiate such serious allegations and that such unfounded allegations which continue today clearly justify summary dismissal. Jordan maintained that neither Stea nor Beeston had produced any evidence to suggest that Beeston's accusation of "immoral" conduct by management was justified. According to Jordan, the general tip pool referred to in Till's affidavit is a pool which is distributed equitably to support staff.

Jordan also noted that Beeston received a record of her shortages every two weeks and the Employer cannot be faulted if Beeston chose not to honor her debts or failed to seek confirmation promptly.

In closing, the Employer submitted that the circumstances surrounding this complaint made it difficult for it to respond to the employee's serious and unsubstantiated allegations in that there was no opportunity to cross examine Beeston given that the matter had proceeded on the basis of written submissions. The Employer thus finds itself in a reverse onus situation whereby it must establish its innocence before guilt is proven and asserts that greater weight must be given to the affidavit material submitted by the Employer which it maintains is corroborative and refutes the unsubstantiated allegations of the employee concerning the Employer's policies.

ANALYSIS

Sections 42 and 43 of the former *Act* provide that when an employer terminates the employment of an employee, the employer is liable to pay severance pay. The liability is discharged, however, if written notice is given to the employee, or if the employee is dismissed for just cause.

The burden of proof for establishing that Beeston was dismissed for just cause rests with the appellant employer, Wharfside.

The Employer alleges Beeston breached the tip pool policy at Wharfside. The Employer's evidence refers to both "cash shortages" and "tip pool shortages" in their allegations against Beeston. Bryan's evidence is that cash shortages can be caused by careless calculations in any one of three areas. The Employer alleges that there were cash shortages but has not provided clear and unequivocal evidence of the origins of the cash shortages, rather the employer's evidence is that "the majority of this amount, if not all, was an accumulation of shortages in contributions to the tip pool". The precise amount of the alleged shortages has not been confirmed. There is no evidence regarding the specific dates these alleged shortages occurred, nor amounts owing on each of the dates, nor records to substantiate these shortages. To allege an employee has accumulated cash shortages but not be able to provide the specifics of the alleged shortages is not persuasive.
I note that Beeston has not denied that shortages occurred, rather she stated that she "doubted very much that I would have been short" and asked the Employer to point out where and on what date. There is insuffucient evidence to establish that, even if cash shortages occurred, that they were caused by a refusal to adhere to the policy, rather they could have resulted from incorrect calculations.

While the Employer alleges that Beeston had accumulated a significant tip pool shortage dating back to the spring of 1995, the only specific amount referred to in evidence was "an outstanding cash shortage of approximately $50". The Employer's evidence is that, on an average summer night at Wharfside, a server would make between $100 to $150 on tips, and would be required to contribute between $30 to $40 to the tip pool. Thus, if Beeston was required to contribute, on average, $30 to $40 to the tip pool per shift, and her alleged shortage was $50 from the spring, it is not clear that Beeston refused to adhere to the policy as argued by the Employer. Beeston's records show a significant number of shifts worked from March 3, 1995 such that, even if a $50 shortage was attributed entirely to the tip pool, I consider this less supportive of a refusal to comply with the policy, rather more supportive of someone posing a legitimate query about specifics regarding the alleged shortage and not reimbursing the employer when the specifics were not provided.

While the Employer's evidence is that slips indicating the shortages were included in Beeston's bi-weekly pay cheques, no evidence was provided which would indicate if these slips included the origins of the shortages, specific dates, amounts owing on each date, and record of the calculations so that their accuracy or inaccuracy could be determined.

I have also considered Bryan's evidence that Beeston mentioned she refused to pay shortages on her tip pool contributions. Bryan's evidence is a brief statement, some 10 1/2 months after the fact, and I do not have the benefit of knowing the context in which Beeston's purported statement was made.

While the Employer submits that the circumstances have made it difficult to respond to Beeston's allegations, I find that an employer's lack of specifics and records to substantiate alleged shortages would make it difficult for an employee to respond to the employer's allegations. Allegations of cash shortages are a serious matter. It would require much more compelling evidence than has been provided by the Employer to support such allegations.

I find that the evidence is more supportive that Beeston did not reimburse the Employer for the alleged shortages because 1) she was not given specifics regarding where the alleged shortages originated, as well as dates and amounts corresponding to each date, and 2) she was concerned that, if there were shortages, given the Employer's lack of records, she could not be assured that the shortages would be paid back to her own support staff. Again, I note that if specifics were not provided, there would not be an opportunity to determine whether the calculations were indeed inaccurate. I am unable to conclude that any alleged shortages that may have occurred constituted a breach of policy on Beeston's part, or that her refusal to pay the alleged shortages, constituted a breach of policy or gross insubordination on her part.

The Employer also alleges that Beeston's "accusation to the manager" at the meeting on August 29, 1995 on its own constituted gross insubordination which justified summary dismissal. The issue before me is what was actually said at this meeting such as to lead the employer to this conclusion. I am troubled by a lack evidence in this regard.

Recapping briefly what evidence there is:

- The evidence establishes that Beeston did query Morrison about the lack of records to substantiate the alleged shortages.
- It is common ground that Beeston said she would not pay the alleged shortages.
- It is also common ground that Beeston expressed concern that the monies would not be distributed to the proper employees. For Beeston this was her support staff. Till's evidence confirms that the tip pool arrangement includes a percentage of gross sales that was distributed to "specific support staff members" and the "TIPPOOL GUIDE" makes it clear that tips are distributed to individuals in envelopes marked with their names. It is unclear from the evidence of the nature of the "general tip pool".

- Morrison's evidence is that Beeston stated she believed the restaurant would use the money for its own purposes. Beeston's evidence is that, at the time, it was made clear to her the money would go to the restaurant. In a subsequent submission, Beeston notes that the Employer's written submission was that the money was owed not to the restaurant but the support staff.

Where the evidence differs is what was said by both parties about disbursement of the monies alleged owing if Beeston did pay them. What is lacking in evidence is what Morrison said regarding the disbursement of the alleged shortages. According to Beeston, when she asked Morrison how her support staff would be paid, Morrison was unable to justify this. Beeston's evidence is that it was apparent to her that this practice was highly immoral, but neither her evidence, nor the Employer's, is that she actually stated this. Again, it is what was actually said that is the issue as this is what led to the dismissal.

I find that the details of what was said by both parties at this meeting to be sketchy. I note that Morrison's statement regarding the cash shortage discussion refers primarily to statements allegedly made by Beeston. Even if I accepted Morrison's version of Beeston's statement, I do not have the benefit of knowing the context in which it occurred. There is nothing in Morrison's statement to indicate what she said about the shortages preceding Beeston's statements. Given the Employer's submission that what transpired at this meeting constituted gross insubordination such as to justify summary dismissal, a fuller account of what was said by both parties would have been helpful. I also note that Morrison's statement regarding what transpired at the meeting is some 10 1/2 months after the fact. There is no evidence of notes recorded by the Employer contemporaneous to the meeting. Beeston's initial account of the meeting is just 3 days later.

I am puzzled that there is no evidence from the Employer regarding discussion at the meeting as to how the amounts alleged owing would be distributed. The Employer's evidence is that this policy grew out of consultation with staff and was for the staff. I find Beeston's query was a legitimate one.

From the evidence, there appears to be a lack of communication and/or misunderstanding which led to a breakdown of the meeting. An obvious problem was the lack of records and specifics regarding the alleged shortages. Another problem in communication is how indeed the monies alleged owing would be distributed. The lack of specifics and lack of explanation regarding the disbursement appears to have led Beeston to believe that the monies could not and would not be appropriately distributed. Beeston's conclusion could have resulted from insufficient information provided to her, that is, there is no evidence that her concerns were addressed by the Employer.

In the absence of specifics and records identifying when the alleged shortages occurred, I find that Beeston's concern that the monies could not be disbursed to the proper employees to be a bona fide one. In essence, based on the evidence, the Employer is not able to provide records and dates regarding the alleged shortages, takes issue with Beeston then questioning the distribution of the alleged shortages, does not respond how the distribution would be accomplished, and then takes issue with Beeston's conclusion that it would not be possible to distribute the alleged shortages to the proper employees. If the Employer had been able to show that the shortages had indeed occurred, and the accuracy of the calculations had been determined, it may well be that a discussion could have ensued between Morrison and Beeston to work out an arrangement for

disbursement. Again, the evidence is not supportive of a refusal by Beeston to comply with the policy.

Given the lack of specifics with respect to the alleged shortages, the lack of evidence with respect to exactly what was said by both parties at the meeting, and what may be a misunderstanding on Beeston's part due to a problem in communication, I am unable to conclude that Beeston should bear the blame in this matter such as to characterize any statements made by her as gross insubordination.

In summary, based on the whole of the evidence before me, I am not satisfied that Beeston breached a Wharfside policy, nor am I persuaded that statements were made by her such as to constitute gross insubordination warranting summary dismissal without notice.

While it is not necessary for me to do so, I would parenthetically add that, even if Beeston had breached the policy, I am not satisfied that a dismissal without notice would have been warranted in the circumstances. I note three other employees were given first warnings for cash shortages and two of these warnings were for "consistent failure" to pay such shortages, and two for amounts exceeding that alleged owed by Beeston. There is insufficient evidence to satisy me that, even if Beeston had breached the policy, that she should have been treated differently in this regard. Further, there is no evidence of a policy that indicates breach of the tip pool arrangement would result in dismissal.

On the balance of probabilities, I conclude that Wharfside has not met the onus of proving that Beeston was dismissed for just cause.

WAGES

FACTS

The Determination includes the following statements:

> *Ms. Beeston also complains that she reported for work at the scheduled time but was not permitted to commence working until later, on several occasions. She has kept a record of the time spent on the employer's premises while waiting to go on shift.*
> *Ms. Beeston reports that on six occasions she reported for work but was not placed on shift by the employer. Again, she has maintained a record of these days.*
>
> *As the definition of 'work' contained in the Employment Standards Act includes time an employee is required to be available for employment, I have determined that 24-1/4 hours are owing to the complainant for time spent before commencing shifts...*
>
> *I have also found that Ms. Beeston did not receive two hours pay on those days that she has identified in her summary and daily records as days when*

> *she reported for work and no work was available to her as required by section 34 of the former Employment Standards Act.*

Another issue dealt with on the Determination is a final pay shortage amounting to $39.00. The employer concedes that this may have occurred inadvertently and is prepared to pay the amount alleged owing.

Beeston's evidence is that on many occasions she reported for work but the option to start working at the scheduled time was denied; on other occasions she claims she was sent home without pay. Her evidence is that "We were supposed to sit down stairs in the smoking room (most unpleasant for a non-smoker) and were called when enough people came into the restaurant." Submitted in evidence were her diary entries and a summary of her scheduled and actual start times, as well as days she reported to work but was not placed on shift.

Till's evidence is:

> *As manager, I was in charge of informing employees arriving for work whether or not there were enough patrons for them to begin serving. I and the staff were aware that if there were not enough patrons to begin serving then the employee could begin working for his or her wage by preparing the area where they would be serving for that shift. This work included things such as cleaning and ensuring that condiment containers were full.*
>
> *I have never denied an employee the opportunity to do this type of work. In my experience it was a rare occasion that an employee would choose to do the preparatory work. In my experience as a server it was preferable to socialize with other staff members while waiting to begin serving as opposed to doing the preparatory work for minimum wage. I and most other staff preferred to wait until we had the opportunity to earn tips while serving.*

Morrison's evidence is essentially in accord with Till's in this regard. She added that Stea had never expressed concerns regarding this policy during his investigation of this issue and interviews with employees, and that given the popularity of Wharfside, it was rare that a server would be unable to begin serving at the scheduled start time.

Bryan's evidence is that servers were not unaware that they were legally entitled to do other work until business picked up, or for the duration of the shift, if necessary but "the servers have never forced this issue, and therefore the managers have never encouraged it". Two other employees, Theresa Duke ("Duke") and Vrana Jaroslava signed statements that they were aware they had the option of working at other tasks when there were not enough patrons to serve. Duke stated she usually chose to wait until she could serve because then she could earn tips; but on one occasion she washed floors until there were enough patrons.

ARGUMENTS

The Employer's position is that Beeston, and all other serving staff, always had the option of doing other tasks for which they would paid before commencing shifts and when never starting shifts. According to the Employer, this option was well-known but rarely exercised in that serving staff chose to wait for the opportunity to earn tips on top of an hourly wage. It was submitted that every alleged instance where Beeston waited, is an instance where she chose not to earn her wage. The Employer also submitted that Stea had investigated Wharfside practices in this regard and found the employees to be aware of and satisfied with the options available. Moreover, the Employer asserted that Stea had not adduced evidence to rebut the evidence of the Employer concerning its policy and that his previous investigation did not reveal a contravention of the *Act*; therefore a finding must be made that the Employer has similarly not contravened the *Act* in this instance.

It was submitted that the nature of the restaurant industry makes it almost impossible to determine how many patrons will be in an establishment at a given time, and accordingly, how many serving staff will be required at a given time.

The Employer urged the Tribunal to consider the motive behind Beeston's claim in that she appears to have kept meticulous records which clearly indicate she considered herself to be "exploited" at least as early as March 1995 but her complaint arose only after she was terminated for cause in August 1995. Further, it was submitted that Beeston conveniently left out of her summary the seven occasions recorded in her diary when she was able to start before her scheduled start time.

The Employer submitted that the employee has not established money is owing for time spent waiting to work and that any time spent waiting was the employee's choice. The Employer emphasized that signed statements and affidavit material had been presented setting out the policy in this regard, and that the policy is reasonable given the nature of the industry. The Employer noted that Beeston had not provided statements or affidavit material from fellow employees to substantiate her position notwithstanding that there had been ample time to gather such evidence by telephone, letter, or through her parents who attended the hearing.
The Employer maintained that the claim for time spent waiting or not starting has no merit and in light of all the circumstances is vexatious.

The Employer's closing submission that it did not have the opportunity to cross examine Beeston is referred to under its *Severance Pay* argument; I assume the Employer meant the submission to apply also to this issue.

Beeston argues that it is "ludicrous" that Wharfside is unable to provide documentation for her hours and schedule and that her diary entries have to be used as evidence.

In response to the argument questioning Beeston's motive behind her claim, Beeston argues this should have nothing to with the case, but responds that "I think the fact that when I did stand up for what I believed in and consequently was fired proves why I was not willing to say anything during my time at the Wharfside".

ANALYSIS

The onus of proof for establishing that the Determination was wrong with respect to wages owing rests with the appellant employer, Wharfside.

Section 1 of the *Act* defines work as the labour or services an employee performs for an employer, and an employee is deemed to be at work while on call at a location designated by the employer unless the location is the employee's residence.

Under section 34 of the *Act*, an employee who reports for work on any day as required by an employer, is entitled to the greater of two hours pay or pay for **the entire period the employee is required to be at the workplace.**

Section 21 of the *Act* prohibits an employer from withholding wages from an employee for any reason including unauthorized deductions. No deductions can be made without the employee's written authorization, except for income tax, CPP, UIC and a court order to garnishee an employee's wages.

Section 4 of the *Act* provides that employers or employees cannot make any agreement or contract to waive any of its requirements.

The *Act* requires that employees who make themselves available for work at the employer's request must receive compensation for reporting to work, whether or not work is available. Where employees are required to be available for work and must remain at a specific location, they must be paid wages because they are still under the employer's direction and not free to pursue their own interests. In general, employees' time that is controlled by the employer is paid time. The exception is when employees are required to remain on call at home. Further, the requirements of the *Act* are minimum requirements and an agreement to waive any of those requirements is of no effect.

Wharfside has not adduced evidence to persuade me that Beeston was not required to be at the workplace and available for work on the dates and times she claims. Rather, the Employer's

evidence and arguments focus on Wharfside policy that employees could either work on other tasks or wait to commence their shifts until such time as they could also earn tips. No records have been submitted to persuade me that Beeston's diary entries are inaccurate.

The time Beeston spent at the workplace being available for work is work within the meaning of the *Act* and therefore wages have to be paid for this time. Wharfside cannot withhold these wages from Beeston except for the reasons outlined above under section 21 of the *Act*.

Based on the evidence before me, and the requirements of the *Act*, I find that Beeston is owed wages for time she was required to be available for work prior to commencing shifts as well as two hours pay for each date she reported to work but was not placed on shift. In the absence of scheduled hours of work records from the Employer, and insufficient evidence to disprove the accuracy of Beeston's diary records, it was appropriate for Stea to consider Beeston's records in determining the amount outstanding.

While it is not necessary for the purposes of my decision, I note that there is insufficient evidence to conclude that job related duties were assigned specifically to Beeston, and that she declined to perform them during the material times in this dispute.

I reject the Employer's argument that I consider a motive exists behind Beeston's claim. Beeston is within the time limits for filing a complaint under the *Act* and is entitled to be paid in accordance with the *Act*. With respect to her not reporting dates where she began her shift before her regular start time, this was not the issue in dispute and there was no reason for her to do so.

For the above reasons, I am not persuaded, on the balance of probabilities, that Wharfside has shown that the Determination is in error. I conclude that Beeston is owed wages and vacation pay as calculated by the Director plus interest.

I therefore deny this appeal.

ORDER

Pursuant to Section 115 of the *Act*, I order that Determination # CDET 000815 be confirmed.

_____

Genevieve Eden
Adjudicator
Employment Standards Tribunal