

An appeal

- by -

631724 B.C. Ltd. operating as Patty-Jo's Family Restaurant  
(“Patty-Jo’s”)

- 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.:** 2003A/157

**DATE OF DECISION:** August 6, 2003

## DECISION

### OVERVIEW

This is an appeal by 631724 B.C. Ltd., operating as Patty-Jo's Family Restaurant Ltd. (the "Employer") or ("Patty-Jo's") pursuant to Section 112 of the *Employment Standards Act* (the "Act") of a Determination issued by the Delegate of the Director of Employment Standards (the "Director") dated April 30, 2003. The Determination found Patty-Jo's had contravened Sections 58.3 and 63 of the *Act* and owed Kristine Dawn Riley ("Riley") \$636.24 for compensation for length of service, annual vacation pay and interest.

No penalty was assessed. The delegate stated:

In this instance, I am not issuing a penalty because the contraventions noted in the Determination were committed prior to the new penalty provisions coming into effect. To Penalize (sic) the employer under the old provisions would have little or no effect.

Riley's complaint was received by the Employment Standards Branch on February 19, 2003. It was first dated December 1, 2002 which was then changed to January 6, 2003. Riley claimed severance pay as she alleged she had been terminated without just cause.

A hearing was held April 3, 2003. The operator of the restaurant did not attend the hearing. The restaurant manager came with her husband on behalf of the Employer. A Determination was issued April 30, 2003.

Patty-Jo's appeal dated May 4, 2003 was received by the *Employment Standards Tribunal* (the "Tribunal") on June 6, 2003. They appealed on the basis the Director failed to observe the principles of natural justice in making the Determination. They have requested the Determination be cancelled.

In the Director's submission to the *Tribunal* dated June 23, 2003 the Delegate stated:

The statements that were contained in the Appeal were not presented at the Hearing in a manner that could be accepted as evidence. As was indicated in the Determination, the employer sent their manager (name withheld) and her husband (name withheld) to present evidence for them at the Hearing. Neither of these individuals were employed by the Employer at the time these contraventions were alleged to have taken place.

### ISSUES TO BE DECIDED

Was Riley terminated from Patty-Jo's? If so, was there just cause for her termination or is she entitled to compensation in lieu of notice?

### FACTS AND ARGUMENT

Riley had been employed by Patty-Jo's from November 2000 until July 24, 2002. She worked regular full time graveyard shifts of 8.5 hours. On June 18, 2002 Riley was advised Patty-Jo's had been sold and the new owners would be taking over June 19, 2002. Riley claimed she had a good working relationship with the previous owners. She stated the relationship with the new owner quickly deteriorated when he started

yelling and swearing at the staff in front of customers. The staff requested a meeting with the owner to discuss a number of issues such as the Health Code, staffing, scheduling and seniority. She stated after the meeting the owner told them their concerns were petty and to not bother him with them.

On July 24, 2002 Riley informed the Employer she would be taking time off work as a result of a work related injury. She supplied the Employer with a note from her doctor to that effect. A Record of Employment was issued to Riley on July 30, 2002 indicating she was off work as a result of illness or injury.

Riley claimed she went to Patty-Jo's with her sister on October 20, 2002 to inform them she was able to return to work. She supplied a note from the doctor indicating she was able to return. She claims the owner photocopied the note and wrote on the top this was the first doctor's note received by him. She claims she was told there were no shifts for her. A dispute between the owner and Riley's sister caused the RCMP to be called. The officer met with the parties separately and told Riley the owners did not want her on the premises, either as a customer or staff. Riley claims she asked the RCMP officer if that meant she was fired and he stated he had no authority to tell her that. She claimed she said if she was banned from the premises she would assume she was fired, and she left.

At the hearing Riley presented a witnessed letter dated March 27, 2003 from a former employee of Patty-Jo's. The letter supported the claim by Riley that she gave the owner a doctor's note on July 24, 2002. The letter went on to state that at a meeting with the owner on July 21, 2002 the writer was instructed to fire Riley and another employee as "He said they were trouble makers".

Under cross examination at the hearing Riley admitted she was never told by the owner she was fired. She was told there were no shifts for her but she did not ask why.

At the hearing Riley's witness, another waitress from the restaurant, testified there was a note placed at the cash register in late August 2002 instructing the staff that Riley, her sister and her sister's husband were not allowed on the premises.

At the hearing the manager of Patty-Jo's stated Riley had not been fired as she alleged, that her job was still available and the Employer was prepared to take her back. She claimed the owner asked Riley to leave the premises on October 20, 2002 because she was causing a disturbance.

The manager claimed she was told by the Employer that Riley advised she was ready to return from sick leave and wanted to be put on schedule. The schedule was already made up so Riley was advised she would get shifts that were available on the next schedule. Because of the disturbance he did not want Riley as a customer and posted a notice at the front counter advising staff that Riley be not served and would be asked to leave. The manager was told Riley had not contacted the restaurant since to see if she was on schedule nor requested an ROE.

In their appeal Patty-Jo's have cited four reasons for their request for the cancellation of the Determination.

1. The position for Ms. Riley was available and is still available.

2. Ms. Riley came in to see us on Sunday afternoon and wanted to start at 5:00 am Monday whereas the restaurant opens at 6:00 am. She was told that more notice was required as the schedules were already in effect.
3. Ms. Riley insisted on day shift whereas there is no position available in day shift. I am running this business during the daytime and don't need additional help during the day shift.
4. Fact confirmed by other people that Ms. Riley wants to move to Nanaimo and therefore does not want to work at this restaurant.

In the Delegate's response to the appeal he stated the first three points were raised at the hearing and were rejected by the Delegate as inadmissible hearsay evidence. According to the Delegate, the fourth point is new evidence and was not raised at the hearing and cannot now be accepted as it obviously would have been known at the time of the hearing and was not presented.

## ANALYSIS

The burden is on Patty-Jo's to show an error in the Determination. Their appeal is based on the claim the Director failed to observe the principles of natural justice in making the Determination. The appellant was, during the course of the oral hearing, given a full and fair opportunity to present their case and to challenge the contrary position advanced by Riley.

At issue is the fact the Employer, who dealt directly with Riley, did not attend the hearing, sending the manager who attended with her husband. Neither was employed by Patty-Jo's at the time the contraventions were alleged to have taken place. This places their evidence in jeopardy. The Delegate chose not to accept their evidence as it was hearsay and no witnesses were called by the Employer to establish their evidence.

The Employer did not call the RCMP constable as a witness or present a written statement from him outlining the events that occurred on October 20, 2002. I have heard no evidence as to the nature of the disturbance on that day.

The Employer did not challenge the evidence of one of the witnesses called by Riley who stated a note was placed at the front counter in late August stating Riley, her sister and her sister's husband were not allowed on the premises. This evidence was in conflict with the evidence of the manager who stated she had been told by the owner that "Because of the disturbance she caused (on October 20, 2002), Mr. Sarai decided that he did not want her in the restaurant as a customer and posted a notice at the front counter advising staff that if she came in she was not to be served and would be asked to leave". No copy of that note was presented as evidence if it still exists.

I have difficulty believing an Employer would bar a person from their establishment as a customer but would be prepared to allow them to work as staff.

The evidence of Riley was that she was told on October 20, 2002 by the owner "there were no shifts for her". We have no evidence if, as stated by the manager, there were no shifts on that schedule but she would get shifts on the next schedule or, as stated by Riley; there were no shifts for her. Riley assumed she was fired however she never confirmed this with owner later. That however is not the issue before me.

The information before me clearly shows Patty-Jo's was afforded every opportunity to respond to the allegations made in the complaint, to provide any relevant evidence and to fully state its position on the allegations made. The decision of the Director to reject the position of Patty-Jo's does not, in the circumstances, amount to a failure to observe natural justice or procedural fairness.

I recognize the Employer has some reservations as the Delegate accepted the evidence of Riley over that of the Employer. These are not issues of failure to observe natural justice. They go to the issue of credibility. Without some witnesses or substantial material evidence to solidly establish the Employer's case we must accept the position of the Director.

## **ORDER**

In accordance with Section 115 of the *Act* I confirm the Determination by the Director dated April 30, 2003. Additional interest is to be calculated in accordance with Section 88 of the *Act*.

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