

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, c.113

-by-

Johnny's Other Kitchen Ltd. Operating John's Other Place
("John's")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR:	C. L. Roberts
FILE NO.:	97/161
DATE OF HEARING:	June 17, 1997
DATE OF DECISION:	June 17, 1997

DECISION

APPEARANCES

Wayne Martinek For John's Other Place

Angela Wormald On her own behalf

OVERVIEW

This is an appeal by Johnny's Other Kitchen Ltd. Operating John's Other Place ("John's") , pursuant to Section 112 of the *Employment Standards Act* ("the Act"), against a Determination of the Director of Employment Standards (the "Director") issued March 5, 1997 . The Director found that John's contravened Sections 17, 34, 46, 58 and 63 of the *Act* in failing to pay wages, and in terminating Angela Wormald ("Wormald") without proper notice or payment in lieu of notice. John's was ordered to pay \$561.02 (as varied on March 20, 1997) to the Director on behalf of Wormald.

John's claims that Wormald was terminated with proper notice, and that payment in lieu of notice is not owed. John's also argues that Wormald should not be paid the minimum of four hours for those days on which she worked fewer hours.

ISSUES TO BE DECIDED

Whether the Director correctly determined that Wormald was owed wages, and whether she was terminated from employment without proper notice.

FACTS

Wormald worked as a waitress at John's from May 2, 1995 until October 20, 1996.

Upon receipt of Wormald's complaint, John's provided the Director with payroll records along with the daily time records and schedules for Wormald. From these records, the Director determined that Wormald was entitled to minimum daily pay for those days on which she worked less than four hours.

John's told the Director that Wormald had been warned on a number of occasions about her performance, and issued one written warning letter on February 23, 1996, prior to terminating her employment.

Although Warmold acknowledged that Martinek had spoken to her about his concerns regarding her performance, she claimed she did not understand that to be a warning about her continued employment, as he spoke to other staff in the same fashion.

The Director placed the onus of proof on the employer to establish just cause, and concluded that, as Wormald had only been warned in writing on one occasion, and John's could provide no other proof of warnings, Wormald was owed compensation for length of service.

ANALYSIS

I shall deal with the two issues separately.

Minimum daily pay

John's argued that it should not be responsible for paying wages on those days when Wormald left early. Although Martinek claimed in his letters of appeal that Wormald worked a minimum hours per day at her own request in order that the earnings would not be deducted from her social assistance cheque, he acknowledged in the hearing that he asked Wormald to leave prior to the completion of her four hour shift on a number of occasions. The onus is on the employer to establish that the employee asked to leave early.

John's provided no evidence that Wormald asked to leave early. In the absence of any contrary evidence, and in light of Martinek's admissions, I am unable to conclude that the Director's determination is incorrect in this respect.

Dismissal for cause

John's also claims that Wormald was dismissed for cause. Martinek argued that the warning letter, which was sent to Wormald in February, referred to prior verbal warnings. He contended that as no dispute was taken to this statement at the time, the verbal warnings had been acknowledged.

The letter also states that any further complaints will result in dismissal. John's contends that this constitutes sufficient notice to dismiss Warmold in October when she made a significant number of errors.

In determining whether just cause exists to terminate an employee where unsatisfactory performance is concerned, the employer must show that progressive discipline was applied. Progressive discipline involves attempts by employers to correct unsatisfactory performance by setting reasonable standards of performance and enforcing those standards consistently with all employees, communicating the standards to employees, telling employees when they are not meeting the standards, and telling employees the failure to meet the standards is serious and will result in termination.

I accept that John's warned Warmold about her performance both verbally and in writing. However, I am not satisfied that John's set objective standards, nor that they were clearly and effectively communicated. In addition, there was no evidence that John's assisted Wormald in attaining those standards.

The Director found that Wormold did not understand the warnings to indicate that her job was in jeopardy. Based on evidence presented at the hearing, I am satisfied that Wormald did not understand that the warnings were serious, nor that they were applied consistently to all employees.

Consequently, based on all of the evidence, I am not satisfied that the Determination was incorrect.

ORDER

I order, pursuant to Section 115 of the *Act*, that Determination #0578967 dated March 5, 1997, as varied, be confirmed.

C. L. Roberts
Adjudicator
Employment Standards Tribunal