

**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 -

Persian Enterprises Ltd. Operating Robin's Donuts  
("Persian Enterprises Ltd.")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Geoffrey Crampton

**FILE NO.:** 96/619

**DATE OF DECISION:** December 9, 1996

**DECISION**

**OVERVIEW**

This is an appeal by Persian Enterprises Ltd., (operating as Robin's Donuts), under Section 112 of the *Employment Standards Act*, against Determination # CDET 004166 which was issued by a delegate of the Director of Employment Standards on October 11, 1996. The Determination shows wages owing to Rita Grunwald in the amount of \$1,217.63 due to unpaid overtime wages, statutory holiday pay, annual vacation pay and compensation due to length of service.

Shahrzad Massoudi (a.k.a. "Nader"), who submitted the appeal on behalf of Persian Enterprises Ltd., gave the following reasons for making the appeal:

"I did not accuse Rita Grunwald of theft. I advised her that all merchandise was for sale, not for free unless I authorize different. All staff members are aware of this rule. I did not specify any customer to have free donuts. All day-old donuts are counted and bagged in plastic, not boxes. No exceptions!"

**ISSUE TO BE DECIDED**

Is Rita Grunwald entitled to the wage amount set out in the Determination?

**FACTS**

Rita Grunwald was employed by Persian Enterprises Ltd. as a cashier/donut finisher at it's "Robin's Donuts" store in Delta, BC from September 3, 1995 to April 8, 1996 (i.e. for a period of approximately 7 months).

The Determination describes the employer's position concerning overtime wages and statutory holiday pay in the following way:

"Nader Salmany, representing Persian Enterprises, agrees that the hours were worked, but states that the complainant volunteered for the extra work, therefore overtime rates should not apply."

With respect to the disposal of “day-old” donuts the Determination describes the employer’s position as follows:

“...employees are allowed to give day old donuts to some, but not all, customers. Employees are not to use boxes to give away donuts and Nader had repeatedly told Grunwald not to use the boxes for the free donuts. He also states that Grunwald gave away donuts to her friends rather than those customers he approved.

Rita Grunwald’s statements to the Director’s delegate on this issue is described in the Determination thus:

“...during her orientation, she was told that “day old” donuts were first sold at half price and then given away. She states that the employer was aware of her giving away donuts and never warned her that he was unhappy with her performance.”

The Determination concludes that Persian Enterprises Ltd. contravened the following sections of the *Act*:

- Section 40 - overtime wages
- 45 - Statutory Holiday Pay
- 46 - If employee is required to work on statutory holiday
- 63 - Liability resulting from length of service

## **ANALYSIS**

### *Section 40 - Overtime Wages*

The only reason given by Persian Enterprises Ltd. for its appeal is the alleged breach of the employer’s rule concerning disposal of “day-old” donuts. That combined with the statements made by “Nader” to the Director’s delegate (as recorded in the Determination) concerning overtime hours worked by Grunwald lead me to conclude that I should not vary the Determination as it pertains to overtime.

### *Section 45/Section 46 - Statutory Holiday Pay*

The appeal makes no reference to the finding that Grunwald is owed statutory holiday pay. Therefore, there are no grounds on which to alter or vary the Determination.

*Section 63 - Liability resulting from length of service*

Section 63 states, in part:

63.(1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.

(2) The employer's liability for compensation for length of service increases as follows:

(a) after 12 consecutive months of employment, to an amount equal to 2 weeks' wages;

(b) after 3 consecutive years of employment, to an amount equal to 3 weeks' wages plus one additional week's wages for each additional year of employment, to a maximum of 8 weeks' wages.

(3) The liability is deemed to be discharged if the employee

(a) is given written notice of termination as follows:

(i) one week's notice after 3 consecutive months of employment;

(ii) 2 weeks' notice after 12 consecutive months of employment;

(iii) 3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice;

(b) is given a combination of notice and money equivalent to the amount the employer is liable to pay, or

(c) terminates the employment, retires from employment, or is dismissed for just cause.

While the appeal makes it clear that Grunwald is not accused of theft by her former employer, Persian Enterprises Ltd. alleges that it dismissed Grunwald for just cause. If there were just cause to dismiss Grunwald, Persian Enterprises Ltd. would not be required to pay wages to Grunwald under Section 63 of the *Act*.

An appeal under Section 112 of the *Act* is an appeal of a determination made by a delegate of the Director of Employment Standards. This means that the person making an appeal must show why the determination is wrong. It also means that the person making an appeal under Section 112 of the *Act* bears the onus of making its case to the Tribunal: see *John Ladd's Imported Motor Car Company* (1996) BCEST # D313/96.

The reason schedule attached to the Determination shows clearly that the Director's delegate considered and weighed the conflicting evidence adduced by Nader and Grunwald concerning the employer's rules about disposal of "day-old" donuts. The findings and the conclusion made by the Director's delegate were reasonable and

consistent with the facts disclosed during the investigation of Grunwald's complaint. As noted earlier, the burden of establishing that there is just cause to terminate Grunwald's employment rests with Persian Enterprises Ltd. Just cause can include a single act of misconduct if the act is willful, deliberate and of such a consequence as to repudiate the employment relationship. It can also include an infraction of workplace rules or unsatisfactory conduct that is repeated despite clear warnings to the contrary and discipline measures by the employer. In the absence of a fundamental breach of the employment relationship, an employer must be able to demonstrate just cause by proving that:

1. Reasonable standards of performance have been set and communicated to the employee:
2. The employee was warned clearly, and unequivocally that his or her continued employment was in jeopardy if such standards were not met:
3. A reasonable period of time was given to the employee to meet such standards: and
4. The employee did not meet those standards.

I am not satisfied that just cause has been established in this case. There is no evidence to support the view that Grunwald engaged in an act that fundamentally breached the employment contract. Similarly, there is no evidence to establish that she was warned clearly that her employment was in jeopardy due to a breach of employer rules.

**ORDER**

I order, under Section 115 of the *Act*, that Determination # CDET 004166 be confirmed.

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**Geoffrey Crampton**  
**Chair**  
**Employment Standards Tribunal**

GC:nc