

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 -

3 Sees Holdings Limited
operating as Jonathan's Restaurant

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: John M. Orr

FILE No: 98/420

DATE OF DECISION: September 9, 1998

DECISION

OVERVIEW

This is an appeal by 3 Sees Holdings Ltd operating as Jonathan's Restaurant ("3 Sees") pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") from a Determination (File No. 074347) dated June 15, 1998 by the Director of Employment Standards (the "Director").

The Director's Delegate found that 3 Sees owed wages as compensation for length of service to an employee, Corinna Rose ("Rose") which, together with vacation pay and interest, amounted to \$1153.01. 3 Sees claimed that Rose was dismissed for just cause and that therefore no compensation was payable. The Director's Delegate found no basis to substantiate a claim for dismissal for cause and rejected the employer's position.

3 Sees has appealed on the grounds that there was just cause.

ISSUE TO BE DECIDED

The issue to be decided in this case is whether there was any error in law or fact made by the Director's Delegate that would justify the Tribunal in cancelling the Determination or referring it back to the Director.

FACTS

The facts are set out succinctly in the Determination and briefly are that Ms Rose was employed by 3 Sees at Jonathan's restaurant (and its predecessor) from April 1992 until her employment was terminated on June 30, 1997 without notice. 3 Sees claims there was just cause.

The Director's Delegate reviewed the employee's personnel file and noted that there were several performance evaluations on the file, all of which indicated that her performance was generally satisfactory. There was nothing to indicate that Ms Rose had been informed about unsatisfactory work performance or specific warnings about possible termination of her employment.

The allegations by the employer were that:

- In early 1997 Ms Rose once came to work without her uniform and with alcohol on her breath;
- Her work started to deteriorate when she didn't get the shift considerations she asked for;
- There were complaints about her work performance from co-workers;

- There were complaints from customers;
- She was warned on June 23, 1997 that she would be dismissed if her work did not improve;
- She was observed working slowly and was again warned. She allegedly said she "really didn't give a _____!";
- As a result she was dismissed.

The Delegate discussed these allegations with Ms Rose who denied that she had been warned and denied talking to her employer on the day of her dismissal.

ANALYSIS

The Delegate considered all the allegations of the employer including a review of the personnel file and could not find a single act of misconduct that was sufficiently serious to warrant dismissal. I would agree. The Delegate in particular reviewed the allegations made by the employer about recent poor performance and complaints from customers and the Delegate applied the correct legal test for dismissal under the circumstances alleged by the employer.

The appeal by 3 Sees raises no new issues of fact or law but simply disagrees with the conclusion of the Director's Delegate. The appeal complains that the Delegate seemed to prefer the evidence given by Ms Rose to the evidence put forward by 3 Sees. However, in my opinion, the Delegate was correct in saying that the onus is on the employer to establish just cause for dismissal.

In my opinion the Delegate correctly weighed the evidence and applied the proper legal test in coming to his conclusion. Even accepting all of the evidence of the employer I would have come to the same conclusion.

As the onus is on the appellant to show that the Determination is in error I am not satisfied that there are any grounds to interfere with the Determination.

ORDER

I order, under Section 115 of the *Act*, that the Determination is confirmed.

John M. Orr
Adjudicator,
Employment Standards Tribunal