

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 -

South Town Holdings Inc.
(the "Employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Mark Thompson

FILE No.: 2000/355

DATE OF DECISION: October 18, 2000

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *Act* by South Town Holdings Inc. (the “Employer”) against a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on April 27, 2000. The Determination found that the Employer owed a former employee, Janet Sutherland (“Sutherland”) \$655.02 for compensation for length of service, vacation pay and interest pursuant to Section 66(2) of the *Act*.

The Employer appealed the Determination on the grounds that it had just cause to terminate Sutherland’s employment, so that she was not entitled to compensation for length of service.

The Director’s delegate stated that the Employer had failed to provide information to support its allegation that it had grounds to terminate Sutherland for cause.

ISSUE TO BE DECIDED

The principal issue to be decided in this case is whether the Employer has met its onus to demonstrate that the Determination was wrong in law or in fact.

FACTS

The Employer operates a pub and restaurant in South Hazelton, B.C. Sutherland worked as a cook from May 1998 through July 11, 1999. In her complaint, Sutherland stated that she was fired. She told the Director’s delegate that she had received no warning that her employment was in jeopardy. During the investigation, the Employer stated that there were numerous problems with Sutherland’s performance, and that management had warned her about deficiencies in personal hygiene, food presentation and food safety. The Employer also stated that it suspected Sutherland of stealing food. At the time the delegate issued the Determination, the only evidence the Employer had presented on that point was that losses of food stopped after Sutherland’s termination.

The delegate requested evidence to support the Employer’s statements that Sutherland had been warned about her performance and that she had stolen food from the restaurant. The delegate wrote to the Employer on November 9, 1999 asking for written reasons if they believed that Sutherland should not receive compensation for length of service. Laura Wilson (“Wilson”), general manager of the Employer replied on November 18, stating that Sutherland was a part-time casual employee and that she had warned Sutherland about the presentation of food and the presence of hair or other matter in the dishes Sutherland had prepared. Wilson further stated that inventory shortages had ceased after Sutherland’s termination. On December 7, 1999, the delegate replied,

pointing out that Sutherland's employment did not fall under Section 65(1) of the *Act* to disqualify Sutherland from compensation for length of service. He asked for additional evidence by December 20, 1999 that Sutherland had been informed of her failure to meet the Employer's standards of performance and that she was notified that failure to meet these standards within a reasonable time would result in termination. When Wilson did not reply, the delegate telephoned her and granted her request for an extension of the deadline until early January 2000. When the Employer did not provide any additional evidence, the delegate issued the Determination on April 27, 2000. The Determination found that Sutherland was entitled to two weeks' compensation for length of service on the grounds that the Employer had failed to demonstrate that it had just cause to terminate Sutherland.

In the Employer's appeal, William Ross Walker, president of the Employer, stated that Sutherland was dismissed for theft based on inventory shortages and "rumours around town" that Sutherland had "put on some pretty good barbeques." In a letter to the Tribunal, Wilson stated that Sutherland had been warned about her performance, attaching copies of customer receipts from which items had been deducted because of the poor quality of the food. She also provided a copy of a letter from an employee alleging that Sutherland had unnecessarily gone to the bar while at work two weeks before her dismissal. Later the employee discovered that a \$50 bill was missing from her float. Wilson confronted Sutherland, asking her if she had taken the money. Sutherland denied the allegation.

In her reply to the Employer's appeal, Sutherland stated that she was dismissed because of lack of work and had been recommended to another restaurant as a good worker by Wilson. She described problems with security in the Employer's establishment and denied stealing any food or money. Sutherland also stated that she had taken steps to ensure that foreign matter was not in the food, but did admit to occasionally burning or under cooking food.

ANALYSIS

The law establishes that an employer bears the burden of proof for establishing that there was just cause to terminate an employee. To meet this obligation, the employer must inform an employee clearly and unequivocally, that her performance is unacceptable and that continued failure to meet the standard of performance will result in dismissal. See *Veeken's Poultry Farm Ltd.*, BC EST #D165/97. The Employer in this case did not meet its burden during the delegate's investigation. It offered unsubstantiated statements about Sutherland's performance, but no evidence about any warning to her that her performance was so unsatisfactory that she could be terminated. Nor did it present any evidence to support allegations that Sutherland had stolen Employer property.

In its appeal, the Employer offered only a statement from an employee expressing her suspicions that Sutherland had taken money from the bar till.

The Tribunal has long held that an Employer cannot withhold evidence from the Director's delegate during an investigation and then present it in support of an appeal. *Syncron Investments Ltd.* BC EST #D094/97. Further, the party launching the appeal must show on the balance of probabilities that a determination must be varied or cancelled. *World Project Management Inc.*, BC EST #D134/97.

The Employer in this case failed in the first instance to provide sufficient evidence to the Director's delegate to meet the burden of proof that it had just cause to terminate Sutherland. It was not entitled to introduce evidence in support of its appeal that it could have provided to the delegate during his investigation. Even if that evidence were accepted, it would have been insufficient to establish adequate grounds for terminating Sutherland.

The Employer has failed to meet its burden to demonstrate that the Determination contained errors of law or fact.

ORDER

For these reasons, pursuant to Section 115 of the *Act*, the Determination dated April 27, 2000 is confirmed. The Employer owes Sutherland \$655.02, plus interest accruing since the date of the Determination pursuant to Section 88 of the *Act*.

Mark Thompson

**Mark Thompson
Adjudicator
Employment Standards Tribunal**