**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 -

Port Browning Marina Resort Ltd

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

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| **ADJUDICATOR:** | John M. Orr |
| **FILE NO:** | 1999/501 |
| **DATE OF HEARING:** | November 3, 1999 |
| **DATE OF DECISION:** | November 9, 1999 |

## DECISION

### APPEARANCES:

Lucille Henshaw On behalf of Port Browning Marina Resort Ltd.

### OVERVIEW

This is an appeal by Port Browning Marina Resort Ltd ("the Marina") pursuant to Section 112 of the Employment Standards Act (the *"Act"*) from a Determination (File No. 017377) dated July 30, 1999 by the Director of Employment Standards (the "Director").

The Marina (also referred to herein as the "employer") operates a pub/restaurant on Pender Island. The Marina employed Willow Polis ("Polis" or the "employee") as a bartender for approximately 15 months until her employment was terminated on January 14, 1999. Polis claimed that there was not just cause for the termination and that she was entitled to compensation for length of service. She also claimed that $21.00 was improperly deducted from her final paycheque. The Marina claimed that Polis was dismissed for theft and therefore was not entitled to compensation and that the $21.00 was money stolen from the employer by Polis and was therefore rightly deducted.

The Director determined that the Marina had not established that theft occurred and that the deduction was prohibited by section 21(1) and (2) of the *Act*. The Marina appeals on the grounds that the Director's delegate misread or misinterpreted the employer's business records and that there was substantial evidence to find that Polis had stolen funds from the employer and that theft is just cause for dismissal.

### ISSUE TO BE DECIDED

The issues to be decided in this case are whether there was just cause for dismissal and whether the Marina was entitled to deduct the money stolen from the employee's final cheque.

### FACTS

At the Marina bartenders were required to enter all sales into the "Squirrel" sales computer and to deposit all payments into a secure location. Each bartender had an identity card which allowed them access to the Squirrel system. At the end of each shift the Squirrel total should match the cash on hand (together with credit card amounts). In a perfect world, if all sales were rung in accurately and all change made exactly, there should be perfect balance, whether or not the staff were aware of the Squirrel totals. However, if mistakes are made in ringing in the sales or in making change there will be "shortages" or "overages" in the cash.

Shortages would also occur if a bartender were dishonest and pocketed the cash after ringing in a sale but this would not be a very clever way of stealing because it would show up as a "shortage" in the cash. The other type of shortage which is directly the result of dishonesty is where a sale is simply not recorded in the Squirrel system and the cash is pocketed by the employee. This activity results in a shortage in "inventory" and not in cash. To avoid any confusion between the two types of shortage I will refer to these as "inventory shortages". Inventory shortages are only going to be discovered by direct observation and/or very good inventory controls.

Cash shortages, i.e. differences in the Squirrel total and the cash total, are a concern to management because they indicate an issue of competence. They occur when sales are recorded inaccurately or change is made improperly. Ms Henshaw testified that incompetence was not an issue in this case as Polis was a very capable and experienced bartender. Employees were not required to pay-back or make-up "cash shortages" but management encouraged employees to be careful and to try to avoid either overages or shortages in cash.

Inventory shortages are of greater concern because they result directly from dishonesty i.e. the failure to enter a sale in the system and the pocketing of the cash. In the few months before Polis's dismissal Ms Henshaw was concerned about the level of inventory shortages. This was highlighted to her as a result of two incidents in particular.

On New Year's Eve, 1998, a very credible guest, when provided with his restaurant bill, noticed that his drinks were not itemized on the bill and he became concerned enough to discuss the matter with Ms Henshaw. Ms Henshaw discussed the matter with her daughter who also confirmed that there were a lot of "free" drinks being served that evening.

Early in January Ms Henshaw held a staff meeting and cautioned all the staff about the problem of inventory shortages and made it clear that such shortages would not be acceptable. Ms Henshaw also talked to Polis personally and confronted her about the inventory shortages. Ms Polis said that she was not the only person on shift and that Ms Henshaw better check on her when she was on duty alone.

On January 10, 1999, Ms Henshaw was having dinner at the restaurant and observed one of the employees leave with a six-pack of beer which did not appear to have been paid for. Shortly later she observed another person leave with two six-packs which did not appear to have been paid for. It was a quiet evening for sales and Polis was the only bartender on duty. Because of her "suspicions" Ms Henshaw arranged for the Squirrel records to be checked and a few days later it became clear that at least two of the beer sales were not entered into the system.

On further investigation it was discovered that an employee, "James", had purchased the two six-packs (valued at $21.00) by an advance chit on his wages. He had asked Polis to just ring the sale through as an advance but instead she put through a $25.00 advance, gave James the beer and $4.00 change, but did not enter the sale in the system. In addition there was a further $11.34 inventory shortage on that same shift.

The results of this investigation became fully known to Ms Henshaw on January 14, 1999 and when Polis showed-up for work she was dismissed. Ms Henshaw testified that this incident confirmed her earlier suspicions about inventory shortages amounting to $200.00 - $300.00 per week. She felt that she could no longer trust Polis anywhere near her cash and therefore there was no option but to terminate her employment.

**ANALYSIS**

Termination:

Dealing firstly with the issue of termination, the Delegate analyzed the evidence presented to him from the Squirrel records and concluded that he saw *"no conclusive evidence to establish that the cash was even short on the evening of January 10"*. Ms Polis states that her cash was not short that shift. However, both Ms Polis and the delegate missed the point that it was not the cash that was short but the inventory. The Squirrel records clearly show an inventory shortfall.

The delegate also makes a point that the records produced are dated January 14 and not January 10 but the 14th refers to the date they were printed and they are otherwise identified as being for the 10th. The records relating to January 10th show that Polis made the $25.00 advance but did not record the beer sale at all.

The delegate notes that *"it appears that Polis has some history of being present when errors were made in charging for drinks and food"* and goes on to say that these were simple errors. However there is no evidence or explanation for these "errors". Mistakes usually show up as cash shortages or overages and not inventory shortfalls. Inventory shortfalls occur when product is sold but no transaction is recorded.

The delegate does not distinguish between the two types of shortages. This distinction is significant. A cash shortage is indicative of a competency (or error) issue but an inventory shortfall indicates a deliberate failure to enter the transaction into the system at all.

Ms Henshaw was right to be suspicious with the pattern of inventory shortages and the specific incidents brought to her attention on New Year's Eve. The incident on January 10th was solely attributable to Polis and was clearly an outright theft by Polis from her employer. There is no other rational explanation.

The restaurant/pub business involves a high percentage of cash transactions and it is essential and fundamental to the business that the employer be able to trust the integrity and honesty of the employees. When an employee breaches that trust it is a repudiation of the employment relationship and just cause for dismissal.

I am satisfied that the Marina has met the onus on this appeal of demonstrating that the determination was in error and further that the Marina has met the onus of showing that there was just cause to dismiss Polis.

Deduction:

This Tribunal has addressed this point in many cases and I will not refer to them all in this decision but specifically on point are the decisions *Re: Park Hotel (Edmonton) Ltd (c.o.b. Dominion Hotel* [1999] BC EST #D539/98 and *Re: Vancast Investments Ltd* [1996] BCEST #D10/96. In both of these cases the Tribunal held that an employer is not permitted to deduct monies the employee stole from the employer. The employer's remedy is to proceed in the courts.

It may seem unfair to find that there is just cause for dismissal but to allow the thief to retain the stolen property. However, the legislation as drafted makes it clear that such deductions may not be made. In this case the $21.00 misappropriated by Ms Polis should not have been deducted from her final cheque and must be repaid to her.

## ORDER

I order, under Section 115 of the *Act*, that the Determination is varied to delete the reference to a contravention of section 63(1) of the *Act* and to vary the amount payable by Port Browning Marina Ltd to $21.00.

**John M. Orr**
**Adjudicator,**
**Employment Standards Tribunal**