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 -

Judy Harvey and Melvin Martin
operating as The Sportsman Country Inn
(the "Employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR:	Ib S. Petersen
FILE No.:	2000/380
DATE OF HEARING:	October 10, 2000
DATE OF DECISION:	November 29, 2000

DECISION

APPEARANCES/SUBMISSIONS

Mr. Tom Scott	on behalf of the Employer
Mr. William Ragan	on behalf of Ms. Ann Glenn-Ragan
Ms. Jeanette Burns	on behalf of herself

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") of a Determination of the Director of Employment Standards (the "Director") issued on May 10, 2000. The Determination concluded that Burns and Glenn-Ragan were owed a total of $10,694.09 on account of regular wages and compensation for length of service.

The Employer operates the Sportsman Inn, a motel. According to the Determination, Burns worked from May 18, 1999 to September 21, 1999, managing the day-to-day operation of the motel at the rate of $1,000 per month plus a suite, for a total remuneration of $1,700. Glen-Ragan occupied the same position from August 1, 1998 to June 14, 1999, at the rate of $1,200 per month plus a suite, for a total of $1,800 per month.

According to the Determination, Burns was terminated for giving an unauthorized discount to a guest at the motel. The employer was of the view this provided just cause for termination. According to the Determination, Glen-Ragan was to be paid by taking her salary from the cash received at the motel. The Employer also asserted that there was just cause for termination because Glen-Ragan failed to account for expenses and receipts at the motel. The Employer stated that this shortfall amounted to some $55,000.

ANALYSIS

The Appellant, in this case the Employer, has the burden to persuade me that the Determination is wrong. For the reasons set out below, I am of the view that the Employer has not discharged that burden.

At the hearing Tom Scott, Judy Harvey and Mel Martin testified for the Employer. William Ragan and Glen-Ragan testified as well. Burns participated via telephone. It was clear to me at the hearing that neither Harvey nor Martin had much direct knowledge of the circumstances, either with respect to the terms and conditions of employment or, as it happened, with respect to the termination of employment of Glen-Ragan or, indeed, Burns.

I turn first to the issues arising with respect to Burns. At the hearing, the Employer explained that she was terminated because she gave a large discount to a tenant at the Inn. Other reasons for the termination, set out in the appeal submission, were not addressed at the hearing. The Employer suggested that this was not within her authority. Burns explained, on the other hand that she had never been told that this was unacceptable. She said that she did not know it was a problem until she was fired. The Employer's Scott terminated Burns on September 21, 1999 by

letter dated that date. The letter simply stated that the Employer considered it "necessary to terminate [Burns'] employment effective immediately ... as [her] recent conduct is unacceptable."

The Tribunal has had occasion to deal with the issue of just cause in a number of previous decisions. The principles consistently applied by the Tribunal has been summarized as follows (*Kruger ,* BC EST #D003/97):

1. "The burden of proving the conduct of the employee justifies dismissal is on the employer;

2. Most employment offenses are minor instances of misconduct by the employee not sufficient on their own to justify dismissal. Where the employer seeks to rely on what are instances of minor misconduct, it must show:

    1. A reasonable standard of performance was established and communicated to the employee;

    2. The employee was given a sufficient period of time to meet the required standard of performance and demonstrated they were unwilling to do so;

    3. The employee was adequately notified their employment was in jeopardy by a continuing failure to meet the standard; and

    4. The employee continued to be unwilling to meet the standard.

3. Where the dismissal is related to the inability of the employee to meet the requirements of the job, and not to any misconduct, the Tribunal will also look at the efforts made by the employer to train and instruct the employee and whether the employer has considered other options, such as transferring the employee to another available position within the capabilities of the employee.

4. In exceptional circumstances, a single act of misconduct by an employee may be sufficiently serious to justify summary dismissal without the requirement of a warning. The tribunal has been guided by the common law on the question of whether the established facts justify such a dismissal."

This, in my view, was not a single act of misconduct sufficiently serious to justify dismissal. In the absence of a fundamental breach of the employment contract, a warning must inform the employee, clearly and unequivocally, that his or her performance is unacceptable and that failure to meet the standard will result in dismissal. In my view, there is nothing that would sustain the termination. If, in fact, the Employer has a policy against discounts in the manner complained of, it would be entirely appropriate to bring such a policy to the attention of the Employee before acting on it. It was clear that the Employer did not do that. I uphold the determination with respect to Burns on this point.

The Employer raised another issue with the Determination, namely Burns' start date. Scott stated that he did not hire Burns until June 15, 1999. Burns did not agree. She explained that Scott

hired her on June 9, but that the Glen-Ragans hired her on May 18, 1999, as per the determination. In view of Burns' testimony, and the burden on appeal, I am not convinced that the delegate erred when he determined that her start date was May 18. In the result, I am not prepared to disturb his finding in that regard.

I now turn to Glen-Ragan's situation. The Employer also asserts that it had cause for her termination. The Employer says that Glen-Ragan, and (in particular) her husband, who was not employed by the Employer, but did some work around the Inn, engaged in unauthorized construction work which resulted in substantial costs to the Employer. The Employer says that there is a $55,000--or $37,000--"shortfall." This was done with the motivation of the Glen-Ragans buying the Inn at some point in the future. The Employer also says that Glen-Ragan was to take her pay out of the receivables, in cash, and that it was only to pay if there was not sufficient funds there.

Not surprisingly, Ragan and Glen-Ragan's versions of the events are different. There is no dispute that work was undertaken at the Inn. However, they say that the Employer's previous property manager, a Mr. Brooke Styba, was aware of the work being done. He also received much of the documentation generated by the work done at the Inn. Ragan and Glen-Ragan do not dispute that they were interested in purchasing the Inn and that negotiations were conducted to that end. The Employer's evidence falls far short of proving that the work was done without authority and that it was otherwise done improperly. Scott did not have much direct knowledge of the circumstances of the work being undertaken. Styba did not testify at the hearing. Neither did, for that matter, other witnesses the Employer had indicated would testify at the hearing. From the standpoint of proving that the delegate erred in finding that the Employer did not have cause for termination that, in my view, is fatal. The evidence, as well, in my opinion, fell far short of showing that Ragan and Glen-Ragan acted in a dishonest manner. The principles set out in *Kruger*, above, are applicable to Glen-Ragan's situation as well. In my view, the Employer did not have cause for termination.

She denied that she was authorized to take money for her wages out of the Inn's receivables. She also explained that she was paid by cheque for the fist few months. She received a cheque for $600 on August 14, 1998 for the period August 1-15, 1998. Similarly, she received a cheque twice a month until December 16, 1998. In my view, this is not consistent with the Employer's version of how Glen-Ragan was to be paid. In the circumstances, I accept Glen-Ragan's version of the events.

The Employer expressed a concern that Ragan and Glen-Ragan had misappropriated records belonging to the Employer--when they were terminated--and had refused to return these records. These records dealt with the work performed at the Inn. I do not wish to be taken as condoning this conduct. Ragan and Glen-Ragan, in turn, explained that the Employer had refused to return certain property belonging to them, including furniture. These matters may well give rise to civil actions and are outside my jurisdiction.

In short, the Employer has not met the burden to show that the Determination is wrong and I dismiss the appeal.

ORDER

I order that the Determination in this matter, dated May 10, 2000 be confirmed.

Ib Skov Petersen

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal

ISP/bls