An appeal

\- by -

Van J Holdings Ltd. op/as the Wellington Hotel
(“Wellington” or “Employer”)

\- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR:	Paul E. Love
FILE No.:	2002/450
DATE OF HEARING:	November 8, 2002
DATE OF DECISION:	November 13, 2002

DECISION

APPEARANCES:

Ralph Van Gerven, for the Employer

OVERVIEW

This is an appeal by an employer, Van J. Holdings Ltd. dba Wellington Hotel, from a Determination dated August 2, 2002 (the "Determination") issued by a Delegate of the Director of Employment Standards ("*Delegate*") pursuant to the *Employment Standards Act, R.S.B.C. 1996, c. 113* (the "*Act*"). The issue in this case was whether the Employer had just cause to dismiss the Employee, Gino Tironese for theft. A theft was observed by an employee on January 23, 2002. The Employer had earlier suspicions that Mr. Tironese had stolen tips, but the Employer did not discharge Mr. Tironese at an earlier time because there was no clear evidence. At the time of the employer's investigation the Employee denied the theft. At a later time during the Delegate's investigation and also at the time of an Employment Insurance Appeal, he advanced an innocent explanation for having his hand in his pocket after dealing with the cash register. The Delegate found that the Employer had not warned the Employee on the earlier occasions, and relied on the Employment Insurance decision in rendering her decision.

The Delegate erred in approaching this matter, as a matter which required a warning or warnings prior to discharge. There was clear evidence of a theft on January 23, 2002. A single incident of theft is cause for termination of an employee. It was an error to rely on a determination of credibility or finding of fact in an Employment Insurance investigation. This was not an appropriate case for the application of the doctrine of issue estoppel.

ISSUES:

Did the Delegate err in determining that the Employer did not have just cause to terminate Gino Tironese?

FACTS

I held an oral hearing and decided this case after considering the package of materials filed by the Employer and the Delegate with the Tribunal and also after hearing the evidence of Ralph van Gerven, Lucille Mighton, and Owen Secord and the submissions of the Employer. The Delegate did not attend the hearing, but did file a written submission, which I have also reviewed and considered.

The Employee did not attend at the hearing or file a written submission.

Mr. Ralph van Gerven gave evidence concerning the hiring of Mr. Tironese. Mr. Tironese was hired in September of 1998 by this Employer to manage the café, and work as a chef at the Wellington Hotel in Nanaimo. Mr. Tironese had been an employee of an earlier lessee of the café, and had been terminated by the former owners for stealing cash from the café. He applied for employment with the present owners, and promised that he "wouldn't do it again" and the employer could rely on him.

In approximately April of 2000, Mr. Tironese was relieved of his management responsibilities, however, he remained with the Employer as a chef. Mr. Owen Secord was hired as a manager in October of 2001. Mr. Owen had a staff meeting on October 23, 2001 with the café staff. One of the subjects discussed at the meeting was the sharing of tips between the employees and the kitchen staff. Mr. Tironese was not at that meeting. Prior to that meeting, Mr. Tironese had insisted on a 50 % share of the tips on Friday, Saturday and Sunday when he was working as a cook at the restaurant. He was paid about $3.50 more per hour than the servers. Mr. Secord testified that he had never heard of such a sharing scheme in his 27 years in the business. At the meeting an agreement was reached that the kitchen staff, including Mr. Tironese, would be paid a 20 % share of the tips received by a server. Mr. Secord informed Mr. Tironese of the new arrangement on October 24, 2001, and Mr. Tironese did not object to the new arrangement. Mr. Tironese accepted the tip sharing scheme on the new basis until the date of termination.

Ms. Mighton indicated that tips collected from the table were to be placed in a jar under the till. At the end of her shift she would count the tips and pay Mr. Tironese 20 % of the amount. Ms. Mighton testified that following the staff meeting an event occurred which caused her to watch Mr. Tironese and how he handled cash, particularly tips. She would generally be working as a waitress by herself, and occasionally Mr. Tironese would assist in the clearing of the tables when she was busy. Mr. Tironese started before her in the morning, and when she came on shift he would cash in his tips, exchanging change for bills. One day after this cashing out had occurred, she noticed that he had change in his pocket, and she was suspicious that he had been taking her tips.

In November of 2001, a customer paid at the till. Ms. Mighton was in the back at the dishwashing area. She heard the customer say "give the tip to the waitress". The Employer filed as Exhibit 1 a photograph taken from the kitchen area, which depicted the view that Ms. Mighton would have had of the cash register and tip jar. She could not see Mr. Tironese's face, as his back was towards her. As soon as she saw his hand come out of the till, it went directly into his pocket. He did not place any of the tip into the tip jar, which was located on a shelf directly under the cash register.

As it was busy at the time, Ms. Mighton was unable to speak to Mr. Secord until later in the afternoon. As a result of Ms. Mighton's disclosure, Mr. Secord met with Mr. Tironese, and Mr. Tironese denied the theft.

She noticed that after Mr. Tironese was terminated she was averaging $10.00 to $20.00 more per day in tips. Ms. Mighton said that she found that it was unusual for Tironese to take the money and put it into his pocket, as it was her money until she shared it with him. I note that Ms. Mighton was a straightforward and credible witness.

Mr. Secord spoke to Mr. Tironese about talking the tips. Mr. Tironese denied it. Mr. Secord did not believe Mr. Tironese's denial, however, he decided to let the matter go as the evidence was not good enough to dismiss Mr. Tironese.

On another occasion, Mr. Secord is not sure of the date but it was a Sunday, a customer, Mike Rickerby, complained to Mr. Secord that he observed a customer pay his bill to Mr. Tironese at the register, and say, 'here is a tip for the waitress'. He also saw Mr. Tironese place the tip in his pocket. In the package of materials filed with the Tribunal, the Employer filed a statement of the customer, Mike Rickerby, which confirms the oral evidence given under oath by Mr. Secord. In the written statement Mr. Rickerby says that the incident occurred on October 19, 2001. Mr. Secord confronted Mr. Tironese about taking the tip, and Mr. Tironese said, " I only took what was given by the customer". The Employer was unable to

provide a written statement to the Delegate during the course of the investigation. The Delegate, however, was aware of this information from speaking to Mr. Secord. I note that Mr. Secord said that Mr. Tironese was not terminated for this event because it was based on "hearsay" evidence.

Mr. Tironese was terminated following an incident on January 23, 2002. Mr. Secord had noticed Ms. Mighton was upset. He asked her what was wrong, and was told " I saw Gino take my tips, I am sure I saw him". She explained to him exactly what she saw. She was in the back doing dishes. Mr. Tironese took payment of a bill at the cash register. The customer said 'give the tip to the waitress'. As soon as he took his hand out of the till it went into his pocket, and he went back into the kitchen. He did not put the tip into the tip jar.

After the disclosure of the theft by Ms. Mighton, Mr. Secord went to one of his supervisors Mr. Fred van Gerven and together they interviewed Ms. Mighton. Fred van Gerven indicated that he would have Mr. Ralph van Gerven deal with the matter the next day. Mr. Secord was present during the meeting between Mr. Ralph van Gerven and Mr. Tironese. Mr. Tironese denied taking the tip, and said that he put it in the tip jar. Mr. van Gerven did not believe Mr. Tironese. Mr. van Gerven terminated Mr. Tironese for theft.

Mr. van Gerven spoke to the Delegate during the investigation. The phone call caught him off guard, as he was not expecting to receive a phone call. The Delegate asked right away about separation pay, and said that the Employer should pay Mr. Tironese. The Delegate told him that the matter had been investigated by HRDC and they gave him employment insurance, and she said that "they were going to be coming up with the same result".

The Delegate found as follows:

> A decision was rendered by the Board of Referees, Human Resources and Development Canada, finding the complainant not guilty of misconduct because of lack of evidence. The board was unable to conclude even on the balance of probabilities, that the Appellant was guilty of these allegations.
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> The employer did not have any written warnings to the complainant. They did not document verbal warnings they claim to have given to the complainant. They did not document the date of the general meeting wen they warned all the employees. The complainant denies that he was warned personally about taking the waitresses tips, but does acknowledge that he had a conversation with the employer after the general meeting.
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> The employer submitted three written statements. One was from Lucy Mighton who claims that she actually saw him take her tips on January 23, 2002. Another waitress submitted a statement, but she admits that she didn't see the complaint take anyone's tips, but suspected him. The third submission came from the hotel's long time customer, Bob Aldeson. Mr. Aldeson did not witness the complainant take tips on January 23, 2002, but claims he did witness the complainant 'pocketing' tips meant for the waitress in the past.
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> It is a serious allegation to accuse a person of a theft. The complainant worked for the establishment for almost four years without a problem. The onus is on the employer to establish that they have cause to terminate him without written notice or compensation. Based on the above, it does not appear that the employer has established just cause to terminate the complainant without payment of compensation.

In the Determination the Delegate set out the respective positions of the parties. In the section dealing with Mr. Tironese's position the Delegate set out the following:

> In an appeal statement submitted to the Board of Referees, subsequent to Human Resources Development Canada denying his claim to benefits, the complainant detailed how he loved his job, how he worked very hard, and made his own tips from his own customers, and had no need to steal waitress's tips. He claims that if any witness that thinks they saw him put a tip into his pocket was mistaken, because he was actually taking a herbal supplement out of his pocket.
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> In his submission, the complainant drew a diagram of the establishment, and stated that it would have been impossible for anyone to see through the counter and witness him taking a tip.

The Delegate determined that the Employer did not prove just cause for the termination. The Delegate found that Mr. Tironese was entitled to three weeks compensation for length of service in the amount of $1,350.00 and $54.00 vacation pay.

Employer's Argument:

The Employer submits that once it had clear evidence of a theft of employee tips it terminated Mr. Tironese. The Employer says that it did not get a fair hearing from the Delegate, and that the Delegate referred to the employment insurance appeal, and apparently had made up her mind on the basis of the employment insurance appeal finding.

Delegate's Argument

The Director's Delegate submitted that the Employer did not advise her that Mr. Tironese had been terminated by the former employer for theft. The Delegate says that she did not advise Mr. van Gerven to pay the compensation. The Delegate says that the Employer never made available to her the statement by Mr. Rickerby during the course of her investigation. She says that Mr. Secord did not document any warnings given to the employee.

ANALYSIS

In an appeal under the *Act*, the burden rests with the appellant, in this case, the Employer, to show that there is an error in the Determination, such that the Determination should be canceled or varied.

I note that given the length of service of Mr. Tironese, he is entitled to compensation for length of service, unless the Employer can establish that it gave notice to the Employee, or that it had just cause. It is apparent that the Delegate erred in the approach to this matter for the reasons set out below.

Proof of Theft:

I note that the Delegate did not come to any conclusion on whether or not a theft took place on January 23, 2002, she simply recounts the views of the parties, and comes to the conclusion the Employer has not established just cause for termination.

I agree that theft is a serious matter, and the Employer has the burden to proof theft on a balance of probabilities basis. The evidence of Ms. Mighton is clear and unequivocal. She saw Mr. Tironese take money from the cash register and put it into his pocket on January 23, 2002. She had a view of the back of Mr. Tironese from where she was standing, could see the cash register and the tip jar. Further, she was close enough to have heard money placed into the tip jar, if Mr. Tironese had placed money into the tip jar. This is apparent from her evidence as well as the photograph filed as Exhibit 1, depicting the view from the kitchen to the cash register. I am satisfied on the basis of her evidence that Mr. Tironese stole a tip on January 23, 2002.

I note that Mr. Tironese did not provide a submission to the Tribunal or appear at this hearing. I have considered the "innocent explanation" which appears to have been advanced by Mr. Tironese to the Board of Referees after his employment insurance claim was rejected. Mr. Secord's evidence was that this explanation was not advanced at the time of the termination. Further there was evidence before me from Mr. Mighton that Mr. Tironese kept his herbal supplements in a jar in the kitchen. While I have considered the explanations advanced by the Employee to the Delegate, I reject the Employee's explanation because it was not advanced at the time of the Employer's investigation.

I note that Mr. Tironese did not appear in this process, and did not file a written submission. A party who does not appear does so at his or her peril. While the persuasive burden lies with the Employer, as the Employer bears the burden in this process of demonstrating error, the Employer's case remains unanswered. The only rational conclusion to draw in all the circumstances is that Mr. Tironese stole tips on January 23, 2002. I am satisfied on a balance of probabilities that Mr. Tironese did steal tips on January 23, 2002.

In coming to this conclusion, I have not considered Mr. Tironese's prior discharge for dishonesty from an earlier employment relationship with a lessee employer of the Café. I cannot infer that he was dishonest on January 23, 2002, because he had been discharged for dishonesty in the past.

Necessity for Warnings:

Theft is a matter that goes to the heart of the employment relationship. One incident of theft can be just cause for dismissal of an employee: *Kenneth Kruger*, (1996), BC EST No. D379/96. It is clear from the evidence before me that the employer proved at least one incident of theft of tips on January 23, 2002. It may be that the Employer did not warn Mr. Tironese not to steal tips at earlier times. In my view, it is an error to treat an incident of theft as a matter which requires warning and correction prior to termination. Theft is wilful misconduct, and it is unnecessary for an employer to warn an employee of a duty of honesty, prior to a discharge for theft. An employee owes a duty of honesty and fidelity to the employer. It is clear from the evidence before me that Mr. Tironese was aware that the Employer was investigating allegations of theft, and that he was a person under suspicion for theft. In my view one proven incident of theft will suffice, as it is a revelation of the character. Further, in the circumstances of this particular case, it is disheartening for any staff member to have to work in an environment where theft takes place, where the Employer does nothing. I note that after Mr. Tironese was discharged Ms. Mighton's tips went up. I further note that the Employer's problem with cash shortages at the till ceased, after the discharge of Mr. Tironese.

Board of Referees Decision:

In my view, no weight should have been placed on the Board of Referees Decision, by the Delegate. It is clear that the Delegate placed some weight on this Decision from the comments in the Determination. The Tribunal set out the law related to issue estoppel in *Polycryl Manufacturing (1998) Inc.*, BCEST # D360/01. Issue estoppel relates to the relitigation of an issue between the parties which has been decided in a previous process. In order to establish issue estoppel the following conditions must be satisfied:

1. the same question was decided previously;
2. the previous decision was a final judicial decision; and
3. the parties to the previous decision, or their privies, were the same persons as the parties to the proceedings in which the estoppel is asserted.

The Board of Referees decision was not filed in these proceedings, so I have no knowledge of the witnesses before that Tribunal, the evidence tendered or the particular procedure used. The Delegate referred to a sketch prepared by Mr. Tironese, which was apparently relied upon by the Board of Referees in making their decision. I say apparently because that sketch was not before me. Assuming the Delegate's description of the sketch is correct, Mr. Tironese appears to have mislead the Board of Referees with regard to the sketch that he prepared. While it may be true that a person on the restaurant side of the counter would have a difficulty seeing the tip jar, from the photograph it is apparent that one could see around the side of the counter. Further the waist to shoulder area of a person would not be obscured by the counter. A customer may have been in a position to observe Mr. Tironese put money in his pocket, depending on where the customer was sitting or standing in the restaurant. Certainly Ms. Mighton was in a position to observe this. The Delegate appears to have relied to a great extent on the Board of Referees decision, and facts presented in that matter, and in my view that was an error that made a difference in the Delegate's investigation and decision making in this Determination.

Credibility of Witnesses:

I note that the Delegate did not make any assessment as to the credibility of witnesses, but rather decided the case on the basis of the insufficiency of proof tendered by the Employer. I note that I had before me, clear and credible evidence of Ms. Mighton to a theft on January 23, 2002, and no evidence to the contrary. I find that the employee, Gino Tironese, was dismissed by the Employer for just cause.

ORDER

Pursuant to s. 115 of the *Act*, I cancel the Determination dated August 2, 2002.

Paul E. Love
Adjudicator
Employment Standards Tribunal