Employment Standards TRIBUNAL

An appeal

- by -

Carol F. Anderson
("Anderson")

- 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: James Wolfgang

FILE No.: 2001/465

DATE OF DECISION: September 24, 2001

DECISION

OVERVIEW

This is an appeal by Carol F. Anderson ("Anderson") pursuant to Section 112 of the *Employment Standards Act (the "Act")* of a report to the Tribunal issued by the Director of Employment Standards (the "Director") dated June 19, 2001.

The Determination dated November 30, 2000 found Anderson had been terminated for just cause and was owed $42.05 which represented payment of 4.0 hours for Anderson's last shift (June 9) and 1.5 hours for breaks she did not take and 4% vacation pay on that amount. In Anderson's appeal, the Adjudicator, in Tribunal Decision #D172/01, cancelled the Determination and referred the matter of the proper amounts to be paid Anderson for early starts, working through breaks and for cashing out on her own time back to the Director. The Decision further found Anderson had been terminated without just cause and the matter of compensation in lieu of notice was also referred back for the calculation of the proper amount.

The report by the delegate spelled out in some detail the method used by Denny's to track the employee's start and stop time and missed meals.

The delegate found:

1. the "time cards" were not time cards the employer or employee completed on a daily basis per se, and they were not the basis on which the payroll was calculated. (They) were actually daily and/or weekly computer-generated listings of the employee's punch-in, punch-out transactions; they were generated automatically and given to the employees at shift's end and week's end for their information and records. The time cards were not records of actual start/work/stop times.

2. …..the computer rounded employee's punch-in/ punch-outs to the nearest quarter hour….

3. …after the time cards were generated for and given to an employee, the computer system by default deducted one half an hour off each shift over 5 hours for a presumed meal break. This computer default had to be overridden by a manager to restore the 30 minutes pay if the meal break was not taken. And the manager would not do the override without the change noted by the employee on her time card. No time card handed in, no pay for the missed meal break.

4. Further, Denny's did not keep the time cards that any employee did, in fact, hand in from time to time as support for the manager's overrides….They were kept in batches for about three months, and then routinely disposed of…..

5. The time cards gave some warning to employees about adjustments for meal breaks; the note "may not reflect unpaid breaks" appeared at the bottom of each one.

6. The manager also went in after the time cards were generated, and made his/her own set of revisions to the payroll database, to change the data on which pay was based so that the employee's hours conformed to the schedule. This notwithstanding punch-in/punch-out history records.

7. An employee would have had to be very sophisticated or extremely knowledgeable about the computer system to know that a start time of, say 9:45 a.m. as she was reading from her time card, which may have been her actual start time, had to be manually reported as an early start and adjusted or otherwise her start time for payroll would later be revised to pay her from 10.

8. The Denny's manager during the majority of Anderson's employment said that all employees were taught during orientation and reminded periodically by memo and in staff meetings to make their revisions on their time cards and turn them in promptly to ensure proper pay. Because that manager is no longer with Denny's, and jher records had been lost or discarded, the employer could not provide copies of memos to prove the previous manager's contention.

9. Dencan's records, being the records relied on in the investigation, always confirmed that Carol Anderson was paid properly. Anderson did not submit revisions on her time cards as employees were allegedly told to do if their time varied from the schedule. Even if she had, the company didn't keep them.

10. Regardless, the time cards were misleading in terms of creating an expectation on pay (as per the foregoing discussion). Based on this, Dencan has concluded that it cannot say for sure what hours Anderson worked or that she was paid properly.

11. Flowing from this secondary investigation, Denny's has identified and acknowledged there were flaws in its time recording/reporting procedures, and has instituted system-wide revisions. For instance, all defaults now favour the employee rather than Denny's, all employees sign-off their hours on a semi-monthly basis before payroll is run.

Following this latest investigation, the report of the delegate of the Director found Anderson, in addition to the $42.05 awarded in the Determination, was entitled to a total of $1,412.25. This was broken down as follows: $167.00 for early starts, $333.98 for late stops/cash-outs and $856.95 for missed meal breaks plus vacation pay of $54.32. In addition, the delegate found Anderson was entitled to $437.02 as compensation for length of service.

Anderson has accepted the calculation by the delegate for the early starts, late stops/cash-outs, missed meal breaks and vacation pay. She is requesting interest on the total amount owed, as there is no reference to interest in the report. She is appealing the amount of compensation for length of service.

Dencan Restaurants Inc. operating as Denny's ("Denny's") has accepted the calculation of the delegate for early starts, late stops/cash-outs, missed meal breaks and vacation pay. Denny's have asked the Adjudicator to review the decision in respect to Anderson's dismissal however, if the final decision finds Anderson is entitled to compensation for length of service they agree with the calculation of the delegate in respect to that amount.

The delegate, in his report, stipulated the Director would be asking the Employer to place the associated wages in trust.

ISSUE

Should the Tribunal make any adjustment in respect to the compensation for length of service awarded to Anderson in the Decision dated April 11, 2001?

THE FACTS AND ARGUMENT

In respect to Anderson's dismissal, Denny's, in a letter to the Tribunal dated July 11, 2001 stated, in part:

> Prior to awarding severance we would ask that the Adjudicator carefully review the facts surrounding Ms. Anderson's dismissal and if necessary obtain further information re the events surrounding Ms. Andersons dismissal from the parties prior to issuing a final decision.

Anderson is seeking additional compensation for length of service based on a number of points including the circumstances surrounding her dismissal, the black mark on her character and employment record, hardship and the question of her continued employment in the service industry and the fact she was unable to find employment for six and one half months and then at a position less than the position she held at Denny's. Anderson feels she should receive more than the minimum

ANALYSIS

The submission by Denny's to the Tribunal dated July 11, 2001 requests the adjudicator to carefully review the facts in respect to the discharge of Anderson. That material has been reviewed as requested and I find no reason to change the decision in respect to compensation for length of service. Neither Anderson nor Denny's have provided any new evidence in respect to Anderson's dismissal.

One must recall the reason the Determination supported the termination of Anderson. There is no doubt McKay terminated Anderson for theft. The delegate, in his investigation, clearly indicated he was not supporting the termination for theft but for the violation of the November 26, 1999 memo.

The Determination stated:

> While Denny's characterized Anderson's transgression as theft, the issue for me is not whether Anderson is a thief or whether she stole, but more simply whether Anderson's alleged transgression gave Denny's just cause for her dismissal…..
>
> I cannot accept Denny's conclusion that servers who violate the procedure are, in fact, necessarily and automatically thieves, and I have no evidence to suggest Anderson stole. But I do have sufficient evidence to conclude that she was dismissed for just cause, and so is not owed compensation……(emphasis added)
>
> On reviewing the facts, I find the employer took the proper steps to establish the matter of ringing in beverages as a fundamental job criteria, and one which brought with it sufficient clarity and warning of the inevitable consequences, dismissal, for its violation, that a single act of misconduct thereon would bring about dismissal without further warning or chance. (emphasis added)
>
> …..The notice did not allow for innocent mistakes as a defence for violating the policy. Intent was not a consideration. (emphasis added)

The decision found using Kruger (BC EST #D003/97), the violation of the rules of the November 26, 1999 memo was not sufficient to warrant termination without warning. It found the policy in the memo was not fair and reasonable and provided no opportunity for progressive discipline. It was for that reason the decision found Anderson had been terminated without just cause.

I have not only carefully reviewed that material but have also carefully reviewed the reporting system and hope the revisions to that system will eliminate what appeared to be a situation which could easily allow an employee to be mislead. Hopefully, this should correct the problems properly identified by Anderson.

Anderson has requested additional compensation for length of service based on a number of factors she outlined in her submission to the Tribunal. The Tribunal is limited by Section 63 of the *Act* as to the amount of compensation for length of service it can award. The delegate has correctly calculated that amount.

I believe Anderson has applied for and has now received all monies paid into trust as outlined in the report except for compensation for length of service. If this is not the case, the monies in trust should be released and paid to Anderson immediately.

Anderson has claimed interest on the amount of $1,412.25.for early starts, missed meal breaks and cash outs agreed upon in her letter to the Branch dated July 10, 2001. We have no indication that interest was calculated in accordance to Section 88 of the *Act* and the amount owed Anderson is to be adjusted to reflect that calculation.

Denny's has not requested, to my knowledge, reconsideration by the Tribunal. The delegate, in the June 19, 2001 submission to the Tribunal, indicated that may occur. That avenue is still available to the Employer if they choose to seek reconsideration.

ORDER

In accordance with Section 115 of the *Act* I confirm the re-calculation by the Director's delegate as outlined in the report dated June 19, 2001 including the calculation of compensation for length of service. Additional interest is to be calculated in accordance with Section 88 of the *Act.*

James Wolfgang
Adjudicator
Employment Standards Tribunal