

Citation: The Piano Room Bistro & Lounge Ltd. (Re)
2018 BCEST 35

An appeal

- by -

The Piano Room Bistro & Lounge Ltd. carrying on business as Café Ca Va
("The Piano Room" or the "Employer")

- of a Determination issued by -

The Director of Employment Standards

pursuant to section 112 of the

Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: Shafik Bhalloo

FILE NO.: 2017A/143

DATE OF DECISION: April 18, 2018

DECISION

SUBMISSIONS

Amin Leo Sabounchi	on behalf of The Piano Room Bistro & Lounge Ltd. carrying on business as Café Ca Va
Alain Rayé	on his own behalf
Micah Carmody	on behalf of the Director of Employment Standards

OVERVIEW

1. On April 15, 2017, Alain Rayé (“Mr. Rayé”) filed an unpaid wage complaint under section 74 of the *Employment Standards Act* (the “*ESA*”). In his complaint, Mr. Rayé alleged that his former employer, The Piano Room Bistro & Lounge Ltd. carrying on business as Café Ca Va (“The Piano Room” or the “Employer”), contravened the *ESA* by failing to pay him regular wages, overtime wages, vacation pay, statutory holiday pay, compensation for length of service, and by making unauthorized deductions (the “Complaint”).
2. The Complaint was the subject of a hearing (the “Hearing”) before a delegate of the Director of Employment Standards (the “delegate”) on July 25, 2017. The delegate issued the Determination now under appeal on November 3, 2017, including his Reasons for the Determination (the “Reasons”). By way of the Determination, the delegate found the Piano Room contravened sections 18 (wages), 21 (“Deductions”), and 58 (annual vacation pay) of the *ESA* in respect of the employment of Mr. Rayé and ordered The Piano Room to pay Mr. Rayé wages in the total amount of \$770.72 inclusive of accrued interest. The Determination also levied two administrative penalties against the Employer totaling \$1,000 for breaches of sections 18 and 21 of the *ESA*. The total amount of the Determination is \$1,770.72.
3. Pursuant to section 112 of the *ESA*, The Piano Room appealed the Determination on the grounds that the Director erred in law and failed to observe the principles of natural justice in making the Determination.
4. The deadline to file the appeal of the Determination was 4:30 p.m. on December 11, 2017. On December 12, 2017, after the expiry of the appeal period, the Tribunal received the Employer’s Appeal Form together with written submissions on the merits of the appeal and the application for an extension of time to appeal.
5. The Employer’s submissions on the merits challenged the Director’s findings of contraventions of sections 18 and 21 of the *ESA*.
6. On February 21, 2018, I issued reasons for decision (see 2018 BCEST 16) dismissing the Employer’s appeal of the Director’s finding of contravention of section 18 of the *ESA* under section 114(1)(f) because the appeal submissions of the Employer were not persuasive and in the nature of a re-argument of submissions previously, unsuccessfully, made at the Hearing.

7. With respect to the Employer's challenge of the delegate's finding of contravention of section 21 of the *ESA*, I noted that while The Piano Room advanced the same argument made at the Hearing, namely, that the Employer did not make any deduction for "jacket" from Mr. Rayé's wages, on a closer examination of the findings of the delegate in the Determination and my review of the wage statements in the section 112(5) record ("Record"), I was unable to dismiss Mr. Sabounchi's argument as having no reasonable prospect of succeeding. More particularly, I noted that the delegate made a finding of fact in the Determination that "Mr. Rayé negotiated a wage increase to \$2,500 'net of deductions' per biweekly pay period". While the last 5 wage statements issued by the Employer to Mr. Rayé showed a deduction of \$15 each time for "jacket" for a total of \$75, the same wage statements also showed he was paid a net amount of \$2,500 (except for the very last wage statement that also deducted an additional amount of \$678.51 for "DEMAND NOTICE EXECUTION"). In the circumstances, I decided that the Director and Mr. Rayé should be afforded an opportunity to make submissions on the merits of the Employer's appeal with respect to the matter of wage deductions and I invited them to do so. I also invited the Director and Mr. Rayé to make submissions on the timeliness of the appeal, if they wanted to.
8. On February 21, 2018, the Tribunal sent correspondence to the Director and Mr. Rayé requesting submissions from each on the matters of the deduction from wages and the timeliness of the appeal no later than March 7, 2018. The Tribunal did not receive any submissions from Mr. Rayé by the said deadline except some unsolicited and unrelated submissions on December 28 and January 2, 2017, which submissions pertain to the subject of overtime and not the matter of wage deductions or the timeliness of the Employer's appeal. I do not find these submissions relevant to the matter at hand and, therefore, do not find it necessary to delineate them here.
9. On March 2, 2018, the Tribunal received the Director's submissions. The submissions are limited to the matter of the wage deductions by the Employer as the Director took no position on the timeliness of the Employer's appeal.
10. In the submissions, the Director contends that there is no dispute that the Employer deducted \$15.00 from Mr. Rayé's gross wages on each of the five wage statements in question without a written assignment from Mr. Rayé approving the deductions. The Director also submits that while these actions of the Employer may be as a result of an innocent mistake, they nevertheless constitutes a breach of section 21 of the *ESA* which prohibits any deductions by the employer from the employee's wages "[e]xcept as permitted or required by this Act". In the result, the Director requests the Tribunal to "dismiss the balance of the appeal and confirm the balance of the Determination". In support of the foregoing arguments, the Director reasons as follows:
 3. In the Determination, I found that the Employer's wage statements showed it had deducted \$15.00 from the Complainant's wages in each of the last five pay periods. As noted at page R10 of the Determination, Section 21 of the Act prohibits an employer from requiring an employee to pay any of the employer's business costs and from withholding part of an employee's wages for any purpose without statutory authorization. Section 22 of the Act allows an employer to honour an employee's written assignment of wages to meet a credit obligation. The Employer did not produce a written assignment of wages. I therefore found that the Employer had contravened section 21 of the Act and applied a mandatory administrative penalty.

4. The Employer states that it indicated on the wage statements a \$15.00 charge for the jacket for its “own internal documentation” and increased the Complainant’s wages by a corresponding amount. The Complainant still received at least \$2,500.00 net wages in each of those pay periods (with the exception of the final pay period in which the Complainant’s employment was terminated and which included a “demand notice execution”).
5. The background section of the Determination noted that in October 2016 the Complainant negotiated a wage increase to \$2,500.00 “net of deductions” per bi-weekly pay period (R2). This lends some persuasiveness to the Employer’s argument that it did not contravene the Act because it paid the Complainant what he bargained for. However, it is not unusual to find an employer has contravened the Act despite satisfying its contractual obligations to its employee.
6. An agreement to pay a given amount of net wages is not something the Act appears to contemplate. An employee’s net wages will vary with fluctuations in statutorily-authorized deductions (such as when an employee reaches the maximum level of contributions for CPP, or when income tax rates are changed). Net wages may also change in response to changes in payments to insurers and funds under section 26. For the Complainant, between the last pay period in 2016 and the first pay period in 2017, his bi-weekly gross wage was reduced from \$3,340.38 to \$3,319.23 as a result of reductions in income tax, CPP and EI (Record, pp. 141-142). The Employer benefited by paying him a lower gross wage when taxes were reduced.
7. Agreements to pay net wages are also problematic when an employee reaches his or her fifth year of employment and becomes eligible for 6% vacation pay instead of 4%. Vacation pay is paid on “total wages” (i.e., gross wages), pursuant to section 58 of the Act. In order to continue paying the same net wage, the employer will reduce the employee’s gross wage. Having a fluctuating salary also creates confusion for employees and bookkeepers alike (see evidence of James Zhang, R6).
8. In order to comply with section 27 of the Act, an employer must provide a wage statement for each pay period, stating among other things the employee’s wage rate, gross and net wages, and the amount and purpose of each deduction. Because the parties’ agreement to pay a given amount of net wages resulted in a variable gross wage, the best evidence of the Complainant’s wage was the “salary” amount on each wage statement. Section 21 of the Act prohibits unauthorized deductions from wages. “Wages” is defined in section 1 of the Act to mean, among other things, “salaries, commissions or money, paid or payable by an employer to an employee for work.” It does not appear to mean “net wages” in the context of section 21.
9. Examining the wage statement for 16-01-2017 to 29-01-2017 (Record, p. 142), it is clear that the Employer paid the Complainant gross wages of \$3,341.15 and vacation pay of \$133.65 (totalling \$3,474.80). It deducted for income tax (\$737.48), EI (\$56.63) and CPP (\$165.34), leaving \$2,515.35. From this, a further \$15.00 was deducted for the jacket, before paying a net wage of \$2,500.35. Though it may have been for “internal documentation”, \$15.00 was deducted from the Complainant’s gross wages in each of the final five pay periods.

10. It is true that the Employer increased the Complainant's bi-weekly wage to offset the deduction for the jacket. The Complainant earned \$3,319.23 in the previous pay period, and earned \$3,341.15 in the first pay period that included the \$15.00 jacket deduction. But it was not unusual for the Complainant's gross wage to fluctuate. The new bi-weekly wage of \$3,341.15 was similar to the Complainant's previous bi-weekly wage in late 2016 of \$3,340.38. At the risk of prioritizing form over substance, increasing an employee's gross wage to account for a deduction that is prohibited by section 21 does not mean an employer has complied with section 21.
11. On March 13, 2018, the Tribunal sent the Director's submissions to Mr. Rayé for informational purpose only and to the Employer with a specific direction to make its final reply by March 27, 2018. The Employer did not make any final submissions.
12. I have considered the Director's submissions carefully and I find them compelling. I am persuaded that although the Employer, likely mistakenly, made the deductions for "jacket" totalling \$75 from Mr. Rayé's gross wages, it was without a written assignment from Mr. Rayé authorizing the deductions and therefore in breach of the letter of section 21 of the *ESA*. Whatever the Employer's purpose may have been for recording or making the deductions it did from Mr. Rayé's wages (and allegedly adding comparable amount to the gross wages at the front-end to provide Mr. Rayé' the agreed upon net amount of \$2,500 every pay period), the *ESA* is clear that "except as permitted... by this *Act* ... an employer must not, directly or indirectly ... deduct all or part of the employee's wages for *any purpose*" [italics mine]. In the circumstances, I find no reason to interfere with the Director's Determination that the Employer contravened section 21 of the *ESA*.

ORDER

13. Pursuant to section 115(1)(a) of the *ESA*, I confirm the Determination as concerns the finding of contravention of section 21 of the *ESA*, and dismiss the Appeal.

Shafik Bhalloo
Member
Employment Standards Tribunal