Citation: Retail Action Network and Anna Gerrard (Re)
2021 BCEST 5

EMPLOYMENT STANDARDS TRIBUNAL

Appeals

- by -

Retail Action Network

("RAN")

and

Anna Gerrard

(the "complainant")

- 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)

PANEL: Kenneth Wm. Thornicroft

FILE NOS.: 2020/116 and 2020/146

DATE OF DECISION: January 11, 2021

DECISION

SUBMISSIONS

Pamela Charron	on behalf of Retail Action Network and Anna Gerrard
Shelley Quinte	legal counsel for Boom and Batten Restaurant and Café Ltd.
Shane O'Grady	delegate of the Director of Employment Standards

INTRODUCTION

1. I have two essentially identical appeals before me, both concerning the same Determination. On June 26, 2020, Shane O'Grady, a delegate of the Director of Employment Standards (the "delegate"), issued a determination (the "Determination") with respect to a confidential complaint (see section 75 of the *Employment Standards Act* – the "*ESA*").

2. The delegate also issued, concurrently with the Determination, his "Reasons for the Determination" (the "delegate's reasons"). The delegate's reasons indicate that three separate complaints were filed against the Employer – "a confidential complaint, a 3rd party complaint, and an anonymous complaint" (delegate's reasons, page R2). The anonymous complaint made the following allegations: "[w]e are being bullied…it is not a safe environment…Managers are taking a large share of our tips". The confidential complaint was filed by Anna Gerrard, one of the present appellants, and alleged improper redistribution of gratuities. The 3rd party complaint was filed by the other present appellant, Retail Action Network ("RAN"). This latter complaint also alleged that gratuities were being improperly redistributed. The anonymous complaint and the confidential complaint were filed in November 2019 and the 3rd party complaint was filed in December 2019.

3. The delegate initiated a section 76(2) audit/investigation of the complaints in order to maintain the confidentiality of the confidential complainant. Ultimately, the delegate determined that the *ESA* "has not been contravened and no wages are outstanding" and that being the case, "no further action will be taken".

4. On August 4, 2020 (the last day of the statutory appeal period), RAN filed an appeal of the Determination, alleging that the delegate erred in law. In particular, RAN alleged that the delegate erred in his interpretation and application of section 30.4(2) of the *ESA* (this provision concerns the redistribution of gratuities). This appeal is now being adjudicated under Tribunal File Number 2020/116 (the "RAN Appeal").

5. On October 26, 2020, RAN filed a second appeal on behalf of the individual who was the "confidential complainant", Anna Gerrard (the "complainant" or "Ms. Gerrard"). This appeal is now being adjudicated under Tribunal File Number 2020/146 (the "Complainant Appeal"). Since this latter appeal was filed after the statutory appeal period expired, the complainant also seeks an extension of the appeal period under section 109(1)(b) of the *ESA*.

6. I am now issuing a single set of reasons addressing both appeals. As will be seen, I am not persuaded that either appeal is meritorious. In my view, the RAN Appeal is not properly before the Tribunal, while the Complainant Appeal does not raise any presumptively valid challenge to the Determination. I am dismissing both appeals under section 114(1) of the *ESA*.

THE RELEVANT *ESA* PROVISIONS

7. The key provisions of the *ESA* relating to this dispute are set out below.

8. A "gratuity" is defined in section 1(1) as follows:

> "gratuity" means
>
> (a) a payment voluntarily made to or left for an employee by a customer of the employee's employer in circumstances in which a reasonable person would be likely to infer that the customer intended or assumed that the payment would be kept by the employee or shared by the employee with other employees,
>
> (b) a payment voluntarily made to an employer by a customer in circumstances in which a reasonable person would be likely to infer that the customer intended or assumed that the payment would be redistributed to an employee or employees,
>
> (c) a payment of a service charge or similar charge imposed by an employer on a customer in circumstances in which a reasonable person would be likely to infer that the customer intended or assumed that the payment would be redistributed to an employee or employees, and
>
> (d) other payments as may be prescribed,
>
> but does not include
>
> (e) payments as may be prescribed, and
>
> (f) charges as may be prescribed relating to the method of payment used, or a prescribed portion of those charges…

9. The section 1(1) definition of "wages" specifically excludes "gratuities".

10. Section 21(2) prohibits an employer from passing on its business costs to an employee (except as permitted by regulation), and section 21(3) states that any business costs paid out from an employee's gratuities are deemed to be, and are recoverable as if, such monies were unpaid wages.

11. On May 30, 2019, the *Employment Standards Amendment Act, 2019*, came into force. This legislation included the definition of "gratuity" set out above, and also established new rules regarding the collection and distribution of gratuities:

> **Gratuities**
>
> 30.3 (1) An employer must not
>
> (a) withhold gratuities from an employee,
>
> (b) make a deduction from an employee's gratuities, or

(c) require an employee to return or give the employee's gratuities to the employer.

(2) Subsection (1) does not apply if an employer is authorized or required under a law of British Columbia or Canada or by a court to withhold gratuities from an employee, make a deduction from an employee's gratuities or require an employee to return or give the employee's gratuities to the employer.

(3) Subsection (2) does not apply if the law or court requires the employer to remit the gratuities to a third party and the employer fails to do so.

(4) If an employer contravenes subsection (1), the amount withheld or deducted from the employee or required to be returned or given by the employee to the employer is a debt due to the employee and may be collected by the director in the same manner as wages.

Redistribution of gratuities

30.4 (1) Despite section 30.3 (1), an employer may withhold gratuities from an employee, make a deduction from an employee's gratuities or require the employee to return or give the employee's gratuities to the employer if the employer collects and redistributes gratuities among some or all of the employer's employees.

(2) An employer must not redistribute gratuities under subsection (1) among prescribed employees or classes of employees.

(3) Subject to subsections (4) and (5), an employer or a director or shareholder of an employer may not share in gratuities redistributed under subsection (1).

(4) An employer who is a sole proprietor or a partner in a partnership may share in gratuities redistributed under subsection (1) if the employer regularly performs to a substantial degree the same work performed by

(a) some or all of the employees who share in the redistribution, or

(b) employees of other employers in the same industry who commonly receive or share in gratuities.

(5) A director or shareholder of an employer may share in gratuities redistributed under subsection (1) if the director or shareholder performs to a substantial degree the same work performed by

(a) some or all of the employees who share in the redistribution, or

(b) employees of other employers in the same industry who commonly receive or share in gratuities.

12. Section 30.3 of the *ESA* sets out the Employer's base obligation regarding gratuities. In essence, employees are presumptively entitled to retain their gratuities, and employers must not withhold or make deductions from an employee's gratuities, or require an employee to return any portion of their gratuities to their employer. However, section 30.4 relieves an employer from these restrictions if it has established a gratuity redistribution scheme (i.e., a "tip pool"). In this event, the employer may redistribute gratuities "among some or all of the employer's employees". Although, there are currently no "prescribed

employees or classes of employees" (section 30.4(2)) who may not participate in a tip pool, sections 30.4(3), (4) and (5) restrict, or otherwise place limits on, who may participate in a tip pool.

THE DETERMINATION

Deduction of gratuities

13. Following the receipt of the complaints referred to, above, the delegate conducted an investigation with respect to the various assertions set out in the complaints. As previously noted, the complaints alleged that the Employer's managers "are taking a large share of our tips"; that "gratuities were being unlawfully distributed"; and that workers "are being bullied". Further, as detailed in the delegate's reasons (at page R3) the complainants also "made additional allegations that kitchen staff were not paid overtime in accordance with the [*ESA*] and unauthorized deductions were made from gratuities for staff meals."

14. According to information provided by the Employer, and set out in the delegate's reasons at page R3, prior to about mid-November 2019, the Employer "utilized a gratuity redistribution system that included servers, bartenders, kitchen staff, managers and administrative staff." However, following a staff vote, this system was apparently abandoned, "and administrative staff and managers were no longer included in the gratuity redistribution program." The Employer established a new "tip pool" that was described as follows (delegate's reasons, page R3):

> Gratuities were collected by the service staff, including servers and bartenders, and paid into the "tip pool" at a rate of 6% of total sales for servers and 3% of total sales for bartenders. The tip pool, which amounted to approximately $4,000.00 or $5,000.00 each week, was calculated weekly from Tuesday to Monday, and redistributed to staff one day later.
>
> The tip pool was redistributed within the individual employee classes based on employee hours of work with some roles capped between 20 and 45 hours to better reflect the amount of time those roles spent performing administrative tasks.

15. All but 3% of the tip pool was distributed among various employee groups – office management (10%); kitchen staff (25%); "admin and shift leaders" (5%); bartenders (20%); support staff (20%); and café staff (17%). The remaining 3% was used to "round up" individual employees' entitlements to the nearest dollar. The gratuities were distributed in cash envelopes and employees were required to acknowledge receipt in writing upon receiving their individual envelope.

16. The delegate, at page R4 of his reasons, characterized the complaint as it related to gratuities, as follows: "The Complainant generally alleged that [the Employer] was making unauthorized deductions from gratuities by deducting from employee's [*sic*] gratuities the cost of meals that were purchased during the employees [*sic*] shift."

17. The Employer provided the following evidence regarding "staff meals" (at page R4):

> Kitchen staff receive free meals while on shift while support staff order meals directly form [*sic*] the bar and pay immediately. Servers and bartenders order meals though their own employee number and are provided with the option to pay by credit card which closes their order out or they can choose to settle with "cash" at the end of the day which would deduct the cash amount of the meal from their tips at the end of each shift.

18. Although the delegate determined that "it is clear…that a deduction was made from gratuities, in some situations, for the purchase of staff meals", the delegate also determined that "it was the employee who was making the deduction from gratuities for the cost of meals, not the employer" (page R4) and, accordingly, there was no section 30.3 contravention. The delegate reasoned (at page R5):

> An employer is not required to provide an employee with a meal, and it is not a condition of their employment that [the Employer's] employees purchase a meal while working. I find that a meal, purchased by a team member, is not an employer's business cost that is born by an employee. As a meal is not, at least in [the Employer's] case, a business cost, and as the employee is in control of the decision to make a meal purchase and select the method of payment, which includes an option to make the payment from their gratuities, I find the payment of the cost of meals is not a deduction from an employee's gratuities made directly, or indirectly, by an employer but rather an employee's choice of payment for a good or service they have elected to purchase through the authorization, exercised when they select the "cash" payment method, of their gratuities as the payment method. Accordingly, I find [the Employer] did not make unauthorized deductions, directly or indirectly, for the cost of meals purchased by staff.

Redistribution of Gratuities

19. The delegate made several findings of fact regarding section 30.4 of the *ES*A ("tip pools"). First, he found that section 30.4(3) was not contravened since "the owner/director of [the Employer] does not take part in the gratuity redistribution" (page R6).

20. Second, the delegate held that the Employer's tip pool did not contravene the *ESA*. As noted above, the Employer's tip pool was funded by a compulsory payment, from gratuities collected by servers and bartenders. This fund (i.e., the tip pool), in turn, was distributed among various categories of employees according to a formula that established different total percentage payouts for different classes of employees. The tip pool was created based on a payment of 6% of total sales for servers, and 3% of total sales for bartenders. The tip pool recipients included, among others, managers, shift leaders, administrative and support staff, and kitchen staff. However, as of November 2019, administrative staff and managers were no longer eligible to participate in the tip pool.

21. The delegate held, at pages R6 – R7:

> Core to the argument provided by the Complainants was [the Employer] redistributed gratuities among "prescribed" employees or classes of employees. The prescribed classes described by the Complainants are the managers and admin/office staff and, as argued by the Complainants, these employees did not actively participate in the services that contributed to the generation of gratuities such as the services provided by servers, baristas, and bartenders. While I understand that the Complainants believed there was an inherent "unfairness" in redistributing tips to managers and admin/office staff who, as the Complainants indicated, did not provide a service that directly contributed to the generation or collection of gratuities, I find the Act does not prohibit the redistribution of gratuities to employees who did not perform, to a significant extent, the service that generated the gratuity. The only reference in the Act to gratuity redistribution eligibility being contingent on performing work, to a significant degree, similar to those of the employees who generate the gratuities is regarding the director of a company and, as I have found, the [Employer's] director did not participate in gratuity redistribution.

> Section 30.4(2) states that an employer must not redistribute gratuities under subsection (1) among prescribed employees or classes of employees. The Complainants argued that managers and admin/office staff fell under the 'prescribed employees or classes of employees' definition. Sections 30.3 and 30.4 are new sections of the Act, having gone into effect almost at the same time that [the Employer] opened its restaurant and started its tip pool system in June 2019. There are currently no provisions in the Employment Standards Regulation that prescribe which type of employees would be prohibited from participating in a tip pool.
>
> Where deductions are made from gratuities by an employer to cover business costs, such as to cover dine and dash situations or to pay a portion of another employee's salary, those gratuities may be recovered under the Act. There is no evidence that the gratuities redistributed to managers or admin staff formed a portion of their regular compensation structure or that they were otherwise redirected to cover any of [the Employer's] business costs.
>
> Based on the above, I find that [the Employer's] redistribution of gratuities to managers and admin/office employees to be permitted under the Act.

Overtime wages

22. The delegate very briefly dispatched the complainants' assertions regarding unpaid overtime as follows (at page R5):

> My review of [the Employer's] payroll records show that [the Employer] paid overtime wages to kitchen staff in accordance with the Act for the pay periods covered by the audit. Accordingly, I find that no outstanding overtime wages are owed to employees of [the Employer] as alleged by the Complainant.

23. Having determined that the Employer had not breached any provisions of the *ESA* relating to the collection or distribution of gratuities, and that all earned overtime pay was actually paid, the delegate issued the Determination, stating "no further action will be taken."

THE RAN APPEAL (TRIBUNAL FILE NUMBER 2020/116)

24. On August 4, 2020, RAN filed an appeal in its own right under section 112(1)(a) of the *ESA*, alleging that the delegate erred in law. In a written submission appended to its Appeal Form, RAN stated that it did not dispute the delegate's findings "with respect to unauthorized deductions, ESA, s. 30.3, or failure to pay overtime wages in respect of the ESA, s. 35." RAN asserted the delegate erred in finding that the Employer's gratuity redistribution policy did not contravene section 30.4(2) of the *ESA*.

25. The delegate, in a submission filed on September 17, 2020, submitted that RAN has "no standing to bring this appeal", inasmuch as RAN had not indicated it was formally representing any of the original employee complainants, and because it was attempting to bring a "third party appeal".

26. Somewhat confusingly, Ms. Gerrard filed a submission on September 30, 2020, in which she stated: "I did provide RAN with permission to act as third-party on my behalf, and to pursue clarification for this decision appeal." Whether or not this is an accurate statement, the RAN Appeal was clearly filed by RAN, and solely in its own right. There is nothing in RAN's submission stating that it is expressly acting on behalf of Ms. Gerrard, or any other person. As is discussed in greater detail, below, Rule 3 of the Tribunal's *Rules*

of Practice and Procedure permit a party to be represented by an agent, but a party's designation of a particular agent must be communicated in writing to the Tribunal. RAN did not file the requisite written authority when it purported to appeal the Determination.

27. On August 11, 2020 (about one week after RAN filed its Appeal Form), the Tribunal's Registry Administrator sent an e-mail to RAN's "legal advocate" – the person who prepared and filed the RAN Appeal and who is representing RAN in its appeal – with the following request:

> It appears you wish to file an appeal of a determination issued by the Director of Employment Standards. It is unclear from the materials provided whether the appeal is being filed by the Retail Action Network or on behalf of a complainant.
>
> If the appeal is being filed on behalf of a complainant, the Tribunal requires the name of the complainant (the "Appellant") as well as their written authorization for you to act on their behalf.

28. RAN's legal advocate sent the following reply, by e-mail, on August 13, 2020:

> As my last conversation with the Employment Standards Tribunal Registry Administrator, [name omitted], it has come to my attention that Retail Action Network is appealing the determination issued by the Director of the Employment Standards Branch as a third party complainant and not on behalf of an individual complainant. [*sic*]

29. In its submission filed October 14, 2020, the Employer, echoing the position taken by the delegate in his September 17th submission, maintained that since RAN was "not a party in its own right", it had no standing to appeal the Determination. The Employer also asserted that since there is no proper appeal before the Tribunal, RAN could not participate in the appeal as an interested party (and, in any event, RAN never applied to the Tribunal for "party" status – see section 33 of the *Administrative Tribunals A*ct and section 103(d) of the *ESA*). Finally, the Employer says that the RAN Appeal is wholly misconceived on its merits and constitutes an abuse of process.

30. By way of reply to the delegate's and Employer's submissions regarding RAN's standing to file an appeal, RAN now says the delegate accepted that it was the complainant's representative throughout his investigation. RAN also says that its statement to the Tribunal that it was appealing the Determination "as a third party complainant and not on behalf of an individual complainant" was predicated on a "misunderstanding", as it believed the Tribunal would recognize RAN as a proper party with the legal right to appeal the Determination, both in its own right and on behalf of the complainant.

31. In light of the Director's and Employer's submissions regarding RAN's standing to file an appeal, I will first address whether this appeal is properly before the Tribunal.

FINDINGS AND ANALYSIS - THE RAN APPEAL (TRIBUNAL FILE NUMBER 2020/116)

32. Although not identified by name in the delegate's reasons, it is clear from my review of the section 112(5) record that RAN filed the "third party complaint" with the Employment Standards Branch. RAN's "legal advocate" was also the confidential complainant's authorized representative with respect to the "confidential complaint". Further, the record also shows that the delegate communicated with RAN's "legal advocate" (who also represents RAN in this appeal), on behalf of both the confidential and 3rd party

complainants, during the course of his investigation into the substance of the complaints. Further, the delegate provided copies of the Determination and his reasons to RAN, identifying it as the "authorized representative for the Complainant".

33. RAN is not an individual complainant who asserts that their rights under the *ESA* have been infringed. Nevertheless, RAN, as an "other person" within section 74 of the *ESA*, was entitled to file a complaint. Once the Determination was issued, RAN was provided with a copy of the Determination as the representative of the employee whose rights and entitlements were adjudicated by way of the Determination. The delegate notes that RAN was never formally "served", as a party, with a copy of the Determination. Rather, RAN was served as the representative of the confidential complainant. RAN is not a party whose rights, entitlements, or obligations under the *ESA* were determined in accordance with section 79.

34. Although RAN could have properly filed an appeal of the Determination on behalf of the confidential complainant whose rights, entitlements, or obligations were adjudicated by way of the Determination, RAN did not purport to be acting as the authorized representative for that individual. If it were RAN's intention to appeal on behalf of the confidential complainant, it was incumbent on it to identify that individual and, in accordance with Rule 3 of the Tribunal's *Rules of Practice and Procedure*, file the necessary written consent from those individuals authorizing RAN to act as their representative in this appeal. While RAN could seek status to appear before the Tribunal as an intervener under section 33 of the *Administrative Tribunals Act* and 103 of the *ESA*, an intervener can only participate in an existing application properly before the Tribunal – in my view, section 33 does not create a free-standing third party right to appeal (see also *Director of Employment Standards and Construction & Specialized Workers' Union, Local 1611*, 2020 BCEST 12 and *Myrah*, BC EST # D265/01 regarding "third party" appellants).

35. In this case, RAN is not seeking standing or intervener status in an extant validly filed appeal proceeding. RAN was not acting as the authorized representative of individuals who had section 112 appeal rights when it filed its appeal. Rather, RAN appears to have appealed the Determination as an *amicus curiae* (or "friend of the court"). As the Tribunal observed in *Aquilini et al.*, 2020 BCEST 90, the right to appeal a determination is reserved to those persons whose "rights and/or obligations under the *ESA* are addressed in a determination" (para. 212). RAN does not fall within this latter class of potential appellants.

36. In my view, if the Tribunal allowed third parties to file section 112 appeals, even though such parties do not have any direct interest in the determination being appealed, the Tribunal would be countenancing an abuse of process (see *Toronto (City) v. C.U.P.E., Local 7*9, [2003] 3 S.C.R. 77, where the court observed that an abuse of process could arise where there is a "misuse of procedure"). I do not think the interests of justice are well served by an administrative scheme where anyone, despite not having any direct interest in the matter, can appeal a determination. Allowing such third-party appeals would potentially undermine the actual parties' interests in having certainty and finality. If neither party wishes to appeal a determination, I do not believe it is appropriate to enmesh those parties in an appeal process that neither party invoked or formally authorized.

37. In some statutory schemes, parties that do not have any direct interest in the subject matter of the appeal nonetheless have appeal rights. For example, the *Assessment Act* allows persons who are neither the property owner, nor the assessor, to appeal an assessment decision made by the Property Assessment Review Panel to the Property Assessment Appeal Board. However, there is no express provision in the *ESA* allowing third party *appeals* (although the *ESA*, as noted above, does permit "third party" *complaints*).

38. As previously noted, RAN can file an appeal on behalf of a person whose direct pecuniary interests are affected by the Determination. However, before RAN can file an appeal as the authorized representative for a party that has section 112 appeal rights, RAN must first obtain the appropriate written authorization from that person and file it with the Tribunal. Although section 75 of the *ESA* allows for confidential complaints, there is no provision in the *ESA*, or in the Tribunal's *Rules of Practice and Procedure*, allowing appellants to file confidential appeals to the Tribunal.

39. There is no statutory path that would allow this appeal to proceed and, as such, it has no reasonable prospect of succeeding.

40. In my view, and pursuant to sections 114(1)(a), (c) and (f) of the *ESA*, it follows that the RAN Appeal must be dismissed.

41. I now turn to the Complainant's Appeal (Tribunal File Number 2020/146).

THE COMPLAINANT'S APPEAL (TRIBUNAL FILE NUMBER 2020/146)

42. RAN filed an appeal of the Determination, in the name of the complainant, on October 26, 2020. The statutory deadline for appealing the Determination expired on August 4, 2020. It appears that this appeal was filed in anticipation that the RAN Appeal might be dismissed because RAN had no standing to appeal the Determination in its own right.

43. The appeal documents in the Complainant Appeal consist of an Appeal Form, naming the complainant as the appellant and RAN as her agent, an appended written submission, dated August 4, 2020, setting out the reasons for appeal (the appeal is based on the "error of law" ground of appeal), additional written submissions dated October 14 and 26, 2020, and a copy of an e-mail dated September 30, 2020, from the complainant to the Tribunal stating: "I did provide RAN with permission to act as a third-party on my behalf, and to pursue clarification for this decision appeal." In addition, the appeal documents also include a letter dated October 21, 2020, signed by the complainant stating: "I am writing to advise the Tribunal of my intention that the Retail Action Network (RAN) act as my council [*sic*] to appeal the decision made regarding my complaint, and to act on my behalf throughout the appeal process for case 146."

44. The August 4th submission appended to the Appeal Form is identical to the written submission appended to the Appeal Form filed in the RAN Appeal. The appeal, as noted above, is based on the assertion that the delegate erred in law in making the Determination (section 112(1)(a) of the *ESA*). In particular, the complainant says that the delegate erred in interpreting and applying section 30.4(2) of the *ESA*.

45. Although reproduced, above, for ease of reference, I will set out this latter provision once again: "An employer must not redistribute gratuities under subsection (1) among prescribed employees or classes of

employees." Despite there being no "prescribed employees or classes of employees", the complainant asks the Tribunal to nevertheless create some "prescribed classes" based on an interpretation of the definition of "gratuity" set out in section 1(1) of the *ESA*. Although the complainant seemingly accepts that it is appropriate for gratuities to be distributed among employees within a pool that includes, for example, servers, bartenders and kitchen staff, the complainant says that managerial or administrative staff should not be permitted to share in the pool. In advancing this argument, the complainant places particular reliance on this phrase in the definition of gratuity: "…a payment voluntarily made to or left for an employee by a customer of the employee's employer in circumstances in which a reasonable person would be likely to infer that the customer intended or assumed that the payment would be kept by the employee or shared by the employee with other employees" (complainant's underlining).

46. The complainant says, with respect to this latter phrase contained in the definition of "gratuity":

> This definition establishes a test of reasonableness that has been ignored by the delegate in the determination. It is submitted that a reasonable person would infer that a gratuity left by a customer dining at [the Employer's restaurant] would be intended as payment to those employees who participated in industry standard roles that have customarily received gratuities as a part of their regular job duties (servers, bartenders, kitchen staff and café staff). A reasonable person would *not* be likely to infer that the customer intended that the payment should be collected by the employer and a portion redistributed to management and office administration.
>
> As it is not an industry standard practise, or a regularly held view of dining customers more broadly, that gratuities left for servers and bartenders would go to pay office management and administration, a reasonable person, would not be likely to infer that the customer intended or assumed that the gratuity would be shared with classes of employees outside of those employees who perform industry standard service roles that customarily receive gratuities.

47. The complainant alleges that by redirecting some of the monies in the tip pool to managers and other administrative staff, the Employer is "simply…passing on some of the employer's business cost [*sic*] to employees who customarily participate in the tip pool." Presumably, the "business costs" in question are salaries payable to managers and administrative staff. In other words, by allowing these latter classes of employees to participate in the tip pool, the Employer is perhaps able to "subsidize" (at least to a degree) its labour costs from monies that should be reserved for non-managerial and non-administrative staff. The complainant's argument continues:

> …a plain language reading of the statute clearly sets out a reasonable test under the definition of gratuity and holds that employers "must not" redistribute gratuities among prescribed classes of employees. The express purpose of section 30.4(2), supported by the definition in section 1 of the ESA, is to restrict who the employer is permitted to redistribute gratuities to.

FINDINGS AND ANALYSIS - THE COMPLAINANT'S APPEAL (TRIBUNAL FILE NUMBER 2020/146)

48. There are several fundamental – and in my view, fatal – problems with the complainant's underlying reasons for appeal.

49. First, there is no limiting language in the definition of "gratuity" regarding which particular "employees" may "share" the gratuity. The definition simply does not speak to the question of who is, or is not, entitled

to *share* in a gratuity that a customer may have paid (or that an employer may have levied by way of a "service charge"). Although the legislative intent underlying section 30.3 is to ensure that customer "tips" are not clawed back from employees, this principle is qualified by section 30.4.

50. Second, while I accept that section 30.4(2) was, as is asserted by the complainant, designed to limit the classes of employees who could participate in a tip pool (for example, by excluding managers), the stubborn fact is that, as yet, there are no "prescribed employees or classes of employees". That being the case, there is nothing in the *ESA* prohibiting a tip pool that includes, for example, managers and administrative staff. In my view, this flows precisely from section 30.4(1): "…an employer may withhold gratuities from an employee, make a deduction from an employee's gratuities or require the employee to return or give the employee's gratuities to the employer if the employer collects and redistributes gratuities among some or all of the employer's employees" (my underlining). The only restriction embedded in this latter provision is that the persons receiving redistributed gratuities must be *employees* (thus, for example, independent contractors, creditors, suppliers, sole proprietors, shareholders, directors, or partners cannot share in the pool – subject, of course, to sections 30.4(4) and (4) of the *ESA*).

51. Third, and creative as the complainant's argument may be, I am unable to conclude that a lawful tip pool, that includes managers and administrative staff within its ambit, nonetheless constitutes an unlawful passing on of the employer's business costs. If one were to characterize a tip pool as a mechanism to reduce the Employer's labour costs, then it could be equally argued that its labour costs are being reduced with respect to *any* employee who participates in the pool (to the extent that the employee accepts a lower wage in exchange for the right to participate in the employer's tip pool).

52. In the absence of a valid section 30.4 gratuity redistribution scheme, an employer cannot require an employee to surrender any of their gratuities (subject to subsections (2) and (3)) – those monies belong to the employee and, as provided in section 30.4(4), any wrongfully surrendered gratuities may be recovered as if they were wages. However, where there is a valid section 30.4 redistribution scheme, these precepts no longer apply.

53. It must also be noted that in this case, no employee was asked to surrender a portion of their earned regular or overtime *wages* since, by definition, gratuities are not wages. I agree with the delegate (at page R6) that if, for example, the Employer used tip pool funds to pay for "dine and dash" losses, or to recover the cost of broken dishes, or to pay for its employees' "special clothing" (section 25), that would contravene section 21(2), and the monies in question would be recoverable as if they were unpaid wages pursuant to section 21(3). But that is not the situation here.

54. In my view, this appeal, as a matter of law, is wholly misconceived, and thus must be dismissed as having no reasonable prospect of succeeding (section 114(1)(f) of the *ESA*). In light of my finding in this regard, I do not find it necessary to rule on the complainant's section 109(1)(b) application to extend the appeal period.

ORDERS

55. Pursuant to sections 114(1)(a), (c) and (f) of the *ESA*, the RAN Appeal is dismissed.

56. Pursuant to section 114(1)(f) of the *ES*A, the Complainant's Appeal is dismissed.

57. Pursuant to section 115(1)(a) of the *ESA*, the Determination is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal