

An appeal

- by -

Silver Chalice Neighborhood Pub Ltd.  
("Silver Chalice" or the "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:** Ib S. Petersen

**FILE No.:** 2000/758

**DATE OF HEARING:** January 26, 2001

**DATE OF DECISION:** February 7, 2001



week). Silver Chalice also says that Shepherd would leave the kitchen to talk to suppliers and customers, and would, in fact, have drinks while on shift. The Employer says that, unlike other employees, Shepherd had a bar and food tab. The Employer also says that Shepherd ordered supplies for the kitchen, something, says the Employer, an employee would not do. The Employer says that Shepherd brought his own tools--"his own papers to cost menus etc."--and purchased his own tools such as kitchen utensils and chef's linen (jacket and hat).

In cross examination of Laudio, Shepherd asked the Employer to produce particulars of the bar and food tab he was alleged to have run up. The Employer did not have those details at the hearing.

Shepherd took issue with much of what the Employer stated. He explained that he was, indeed, hired to develop a new menu for the pub and to train staff. He fulfilled his part of the bargain. He knew that it was going to be a short term engagement, perhaps six months. Moreover, he said he was hired as an employee--he pointed among others to the payroll and the T-4 issued by Silver Chalice. He explained that the terms of his engagement were negotiated with and approved by Daniels. Laudio agreed that he was not involved in the negotiation of the terms of the arrangement with Shepherd and that, in fact, he "didn't deal with Shepherd when he was there." He explained that he did order basic cooking equipment, such as pans and spoons and the like, for the pub because this was lacking. The pub paid for it and kept it. He says, as well, that he brought some of his own chef's linen and other minor utensils. It is normal for chefs to bring such equipment.

Shepherd also explained that he quit when, after the termination of Daniels, and the hiring of a new general manager, the Employer cancelled half of the food he had ordered, his pay cheque bounced and the Employer "fired all the good people."

The main issue before me is whether Shepherd was an employee or an independent contractor. The delegate, after setting out the Employer's and Shepherd's positions, applied the common law tests in making his determination that the latter was an employee.

The *Act* defines an "employee" broadly (Section 1).

"employees" includes

- (a) a person ... receiving or entitled to wages for work performed for another,
- (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee,

An "employer" includes a person

- (a) who has or had control or direction of an employee, or
- (b) who is or was responsible, directly or indirectly, for the employment of an employee;

“work” means the labour or services an employee performs for an employer whether in the employee’s residence or elsewhere;

It is well established that the definitions are to be given a broad and liberal interpretation. The basic purpose of the *Act* is the protection of employees through minimum standards of employment and that an interpretation which extends that protection is to be preferred over one which does not ( *Machtinger v. HOJ Industries Ltd.*, <1992> 1 S.C.R. 986). Moreover, my interpretation must take into account the purposes of the *Act* (*Interpretation Act*). The Tribunal has on many occasions confirmed the remedial nature of the *Act*. Section 2 provides (in part):

2. The purposes of this Act are as follows:

- (a) to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment;

As noted in a recent decision of the Tribunal,:

“Deciding whether a person is an employee or not often involve complicated issues of fact. With the statutory purpose in mind, the traditional common law tests assist in filling the definitional void in Section 1. The law is well established. Typically, it involves a consideration of common law tests developed by the courts over time, including such factors as control, ownership of tools, chance of profit, risk of loss and “integration” (see, for example, *Wiebe Door Services Ltd. v. Minister of National Revenue* (1986), 87 D.T.C. 5026 (F.C.A.) and Christie et al. *Employment Law in Canada* (2<sup>nd</sup> ed.) Toronto and Vancouver: Butterworth). As noted by the Privy Council in *Montreal v. Montreal Locomotive Works*, <1947> 1 D.L.R. 161, the question of employee status can be settled, in many cases, only by examining the whole of the relationship between the parties. In some cases it is possible to decide the issue by considering the question of “whose business is it”.”

It is clear from the Determination that the delegate considered these tests in making his determination that Shepherd was an employee. In my view, the delegate did not err.

With respect to the amount awarded, I am not persuaded that the delegate erred. Insofar as the Employer’s position is that it is able to deduct the food and bar tab, I disagree. Not only do I have grave reservations about the actual tab, keeping in mind that the Employer did not produce any particulars of same at the hearing, I am also of the view that the Employer may not deduct any such amount from wages owed under the *Act* (see Sections 20 and 21).

Section 21(1) of the *Act* proscribes unauthorized deductions from wages and reads (in part):

21. (1) Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of the employee wages for any purpose.

(2) An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations.

Insofar as there actually is an amount owed, the Employer must pursue such a claim elsewhere.

In short, I am not persuaded to interfere with the Determination.

**ORDER**

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated September 29, 2000 be confirmed.

***IB S. PETERSEN***

**Ib S. Petersen  
Adjudicator  
Employment Standards Tribunal**