

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act

- by -

Trev-Cher Enterprises Ltd. operating Fynnigan's Pub
(“ Fynnigan's ”)

- of a Determination issued by -

The Director Of Employment Standards
(the “Director”)

ADJUDICATOR: Hans Suhr

FILE NO.: 96/105

DATE OF DECISION: May 14, 1996

DECISION

OVERVIEW

This is an appeal by Fynnigan's pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against Determination No. CDET 000583 issued by the Director on December 21, 1995. In this appeal Fynnigan's claims that the Director erred in determining that overtime wages and compensation for length of service were owed to Carolyn May Bishop ("Bishop") and that there was an illegal deduction from her wages.

Consideration of this appeal falls under the transitional provisions of the *Act*. Section 128 (3) of the *Act* states:

If, before the repeal of the former *Act*, no decision was made by the director, an authorized representative of the director or an officer on a complaint made under that *Act*, the complaint is to be treated for all purposes, including section 80 of this *Act*, as a complaint under this *Act*.

I have completed my review of the written submissions made by Fynnigan's and the information provided by the Director.

FACTS

Bishop was employed as a clerk in the beer store operated by Fynnigan's from November 22, 1993 to October 19, 1995.

Bishop filed a complaint with the Employment Standards Branch on October 27, 1995 alleging that she was owed overtime wages, severance pay and that illegal deductions had been taken from her pay.

The Director investigated Bishop's complaint and, subsequently, Determination # CDET 000583 was issued.

ISSUES TO BE DECIDED

The issues to be decided in this appeal are:

1. Was Bishop owed any overtime wages and if so, over what period are they to be calculated ?
2. Was Bishop entitled to compensation for length of service ?
3. Were deductions taken from Bishop's pay contrary to the provisions of the *Act* ?

ARGUMENTS

Fynnigan's argues that:

- Bishop had been repeatedly warned with respect to her tardiness and work performance and had been informed that her job was in jeopardy
- Bishop's employment was terminated for just cause therefore no compensation for length of service is owed
- because Bishop's employment was terminated under the provisions of the former *Act*, any overtime wages owing should only be calculated for the 6 months provided for under the former *Act*

The Director contends that:

- there was no documented evidence of any discipline issued to Bishop for the alleged incidents
- the payroll records clearly indicate that overtime rates of pay were not paid for overtime hours worked
- the provisions of the current *Act* apply to the calculations of overtime wages owing pursuant to the transitional provisions of the *Act*
- the deduction of \$100.00 was contrary to the provisions of the *Act*

ANALYSIS

With respect to issue #1, it is clear from reviewing the payroll records that Bishop worked overtime hours and was not paid the overtime rates of pay as required by the provisions of the *Act*. Furthermore, section 128 (3) makes specific reference to section 80 of the *Act*, which is the section that sets forth the limits on wages required to be paid, in this case, up to 24 months prior to the date of Bishop's termination.

I conclude therefore, based on the evidence provided that Bishop is entitled to overtime wages for the period as calculated by the delegate of the Director.

With respect to issue #2, the burden of proof for establishing that Bishop was dismissed for just cause rests with Fynnigan's.

It is widely accepted that in order to sustain a dismissal for just cause, the employer must establish that:

1. Reasonable standards of performance have been set and communicated to the employee;
2. Same discipline has been given to the employee for failure to meet such standards, which includes ensuring that the employee has been made clearly aware that their continued employment is in jeopardy if such standards are breached.

3. A reasonable period of time has been given to the employee to meet such standards;
4. The employee did not meet those standards.

In this case, Fynnigan's has not established that it has complied with any of these four standards.

Specifically, there is no credible evidence to support Fynnigan's contention that Bishop had been repeatedly warned in regard to her work performance or that her continued employment was in jeopardy.

The concept of "just cause" obliges an employer to inform an employee clearly and unequivocally, that their standard of performance or behavior is unacceptable and that failure to meet the employer's standards will result in dismissal. The main reason for issuing such a warning is to avoid any possibility of misunderstanding and to ensure that the employee is not under any false sense of security that their performance or behavior is acceptable to the employer.

For these reasons, I conclude, on the balance of probabilities, that Fynnigan's has not established that Bishop's employment was terminated for just cause.

With respect to issue #3, the *Act* in section 21 deals with deductions from an employee's wages by an employer. Section 21 states:

"Deductions

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 an employee's 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.

(3) Money required to be paid contrary to subsection (2) is deemed to be wages, whether or not the money is paid out of an employee's gratuities, and this *Act* applies to the recovery of those wages."

I conclude that the actions of Fynnigan's in deducting shortages from Bishop's wages is contrary to section 21 of the *Act*.

I am satisfied that the calculations of the amounts owed to Bishop by the delegate of the Director are correct.

ORDER

Pursuant to Section 115 of *Act*, I order that Determination No. CDET 000583 be confirmed in the amount of \$1,261.98

"Hans Suhr"

Hans Suhr
Adjudicator
Employment Standards Tribunal

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