Employment Standards TRIBUNAL

An appeal

- by -

Serendipity Winery Ltd.
("Serendipity Winery")

- 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 (as amended)

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE No.: 2015A/78

DATE OF DECISION: July 16, 2015

DECISION

SUBMISSIONS

Robert K. Smithson — counsel for Serendipity Winery Ltd.

OVERVIEW

1. On December 2, 2014, Richard Kanazawa ("Mr. Kanazawa") filed an unpaid wage complaint under section 74 of the *Employment Standards Act* (the "*Act*") in which he claimed $31,250 in unpaid wages as against the present appellant, Serendipity Winery Ltd. ("Serendipity Winery"). A delegate of the Director of Employment Standards (the "delegate") presided at a complaint hearing conducted on April 14, 2015. Mr. Kanazawa appeared on his own behalf at the hearing; Serendipity Winery was represented by legal counsel and Ms. Judith Kingston appeared as its sole witness.

2. On May 4, 2015, the delegate issued a Determination and accompanying "Reasons for the Determination" (the "delegate's reasons"). For the most part, the delegate found in Mr. Kanazawa's favour.

3. The delegate awarded Mr. Kanazawa the total sum of $27,627.82 on account of unpaid regular wages ($24,037.50) together with 4% vacation pay, one week's wages as compensation for length of service and section 88 interest. Further, and also by way of the Determination, the delegate levied five separate $500 monetary penalties (see section 98) based on Serendipity Winery's contraventions of sections 18 (payment of wages on termination of employment), 21 (unlawful wage deductions), 27 (failure to provide wage statements to employee), and 28 (failure to maintain employment records) of the *Act*, and section 46 of the *Employment Standards Regulation* (failure to produce records on demand). Thus, the total amount payable under the Determination is $30,127.82.

4. On June 11, 2015, Serendipity Winery appealed the Determination. In its Appeal Form, Serendipity Winery indicated that it was appealing the Determination on all three statutory grounds, namely, that the delegate erred in law, the delegate breached the principles of natural justice in making the Determination, and on the ground that it had new evidence that was not available when the Determination was being made (see subsections 112(1)(a), (b) and (c) of the *Act*). I should note that Serendipity Winery does not contest certain aspects of the Determination. Serendipity Winery's appeal solely concerns the following matters: i) the $24,037.50 unpaid wage award; ii) the award for 4% vacation pay on this latter amount; iii) the $500 penalty relating to Serendipity Winery's failure to pay the previously noted wages; and iv) the section 88 interest component related to the foregoing wage amounts.

5. Serendipity Winery also applied for a suspension of the Determination pending the adjudication of its appeal (see section 113 of the *Act*). By letter dated July 3, 2015, the Tribunal's Appeals Manager advised Serendipity Winery that, in view of an undertaking given by the Director, the Tribunal did not find it necessary to issue a suspension order.

6. At this juncture, I am considering whether this appeal should be summarily dismissed under one or more of the provisions of section 114 of the *Act*. In considering whether this appeal should be summarily dismissed, I have reviewed the Determination and the delegate's reasons, the subsection 112(5) record that was before the delegate when she issued the Determination and Serendipity Winery's submissions.

THE DETERMINATION

7. Serendipity Winery operates a winery in Naramata and Mr. Kanazawa worked for Serendipity Winery as a wine maker from July 3, 2013, to June 27, 2014. The parties' relationship was complicated by the fact that that there was a verbal employment contract (which the delegate ultimately determined provided for an annual $50,000 salary) as well as two separate commercial agreements. These agreements are not contained in the record before me (as previously noted, the employment agreement was a verbal agreement) but are described by the delegate as follows (delegate's reasons, page R2):

> The parties had a verbal employment agreement, the terms of which were that [Mr. Kanazawa's] compensation would include a salary (the amount of which is in dispute) as well as the ability to use [Serendipity Winery's] premises and equipment to produce 2,000 cases (or a custom crush) of his own wine at no cost. In addition to the employment agreement, the parties had two separate business agreements. Under the first business agreement, [Serendipity Winery] would bill [Mr. Kanazawa] for certain expenses in relation to wine he produced for himself in excess of 2,000 cases. Under the second business agreement, [Mr. Kanazawa] transferred an inventory of bottled wines he had previously produced under his own label from the licence of a former winery in which he held an interest to [Serendipity Winery's] licence. [Mr. Kanazawa] was also charged fees by [Serendipity Winery] for certain expenses in relation to this agreement.

8. The delegate determined that Mr. Kanazawa was paid until the end of December 2013 (save for a 2-week unpaid vacation) but Serendipity Winery withheld any further wages based on its argument that any wages due to Mr. Kanazawa were fully offset by business expenses due to Serendipity Winery under the first of their two commercial agreements.

9. Serendipity Winery terminated Mr. Kanazawa's employment by letter dated June 27, 2014, under the signature of Judy Kingston, who I understand is Serendipity Winery's sole director and officer. In her June 27 letter, Ms. Kingston stated: "Our working relationship is not working so I am terminating it effective immediately". Mr. Kanazawa's entitlement to one week's wages as compensation for length of service flowing from his without cause dismissal is, as noted above, not in question in this appeal.

10. However, there are matters in dispute that flow from the delegate's findings. Her principal findings are summarized, below:

- Mr. Kanazawa's annual salary was $50,000 (delegate's reasons, page R5);
- Mr. Kanazawa was entitled to one week's wages as compensation for length of service (page R5);
- Mr. Kanazawa was entitled to 4% vacation pay on all unpaid wages (page R5); and
- With respect to Serendipity Winery's argument that any unpaid wages were fully offset by amounts required to be withheld on account of income tax, Canada Pension Plan remittances and Employment Insurance remittances, the delegate held that she had no jurisdiction to address those matters and that these issues had to be determined by the Canada Revenue Agency (pages R5 – R6).

REASONS FOR APPEAL

11. Serendipity Winery's appeal is principally based on subsection 21(1) of the *Act*:

> 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.

12. Serendipity Winery's position with respect to this issue is as follows:

> [Serendipity Winery] hereby appeals the Determination to the extent that it required [Serendipity Winery] to pay [Mr. Kanazawa] the following amounts:
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> i. wages in the amount of $24,037.50;
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> ii. vacation pay at the rate of 4% on the above amount, being $961.50;
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> iii. the $500.00 penalty imposed for failure to pay the above amount; and
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> iv. accumulated interest on the amounts awarded in the Determination.
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> As set out above, [Serendipity Winery] appeals these portions of the Determination on the basis that the Delegate erred in law and failed to observe the principles of natural justice by flouting the plain language of s. 21(1) of the Act.

13. Serendipity Winery also advances an alternative argument:

> Serendipity Winery effectively paid [Mr. Kanazawa] most of the wages owed to him by way of a set-off against amounts he owed [Serendipity Winery] (pursuant to a separate business agreement).
>
> In or about September of 2014, [Serendipity Winery] set off the amount of $20,218.22 against amounts owed by Mr. Kanazawa to [Serendipity Winery], referring to that set off as being on account of Mr. Kanazawa's "paycheque".
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> …
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> Yet, the delegate did not set off the amount of $20,218.22 against the amount she found to be owing to Mr. Kanazawa ($24,037.50). The Delegate should have made the set-off such that the remaining amount owing to Mr. Kanazawa would have been only $3,819.28.
>
> There was no reason, in fact or in law, for the Delegate to have failed in the Determination to account for the $20,218.22 already paid to Mr. Kanazawa. As stated above, the failure to apply that set-off amounts to Mr. Kanazawa being *doubly* compensated (*italics* in original text).

14. Although not clearly expressed in its written argument appended to its Appeal Form, it would appear that Serendipity Winery's "new evidence" is a report dated June 9, 2015, prepared by a chartered accountant that addresses the following two matters: "1. Was the ability to use [Serendipity Winery's] premises and equipment, at no cost, to produce 2,000 cases of his own wine a taxable benefit to [Mr. Kanazawa]. 2. If it was a taxable benefit, is [Serendipity Winery] required to deduct and remit payroll withholdings on it." In his June 9 report, the accountant concluded: "The ability to utilize [Serendipity Winery's] facilities and equipment without paying for such use was a form of extra remuneration and should be treated as a taxable benefit". With respect to the value of the benefit, he concluded:

> Richard Kanazawa's remuneration was composed of (i) cash salary, and (ii) taxable benefits. In this type of situation, the CRA [Canada Revenue Agency] would require [Serendipity Winery] to increase the withholdings on the cash payment to reflect the total remuneration received.

> The payroll withholdings relating to the estimated taxable benefit are $28,463.59…To the extent the $28,463.59 exceeds the cash salary payment that would otherwise be paid (the "excess amount") to Richard Kanazawa, the excess amount should not be a required remittance to the CRA since there is nothing to withhold from.

FINDINGS AND ANALYSIS

15. Serendipity Winery appeals the Determination based on all three statutory grounds. In my view, none of the asserted grounds of appeal is meritorious and I see no reason to call on the respondent parties to file written submissions in response to this appeal. I am of the view that this appeal should be summarily dismissed as having no reasonable prospect of succeeding (subsection 114(1)(f) of the *Act*). I will address each ground in turn.

Breach of the Rules of Natural Justice

16. In my view, the so-called "natural justice" ground ("the Delegate…failed to observe the principles of natural justice by flouting the plain language of s. 21(1) of the Act") is wholly subsumed within Serendipity Winery's alleged error of law ground. Accordingly, I propose to address Serendipity Winery's "section 21" argument strictly as an alleged error of law. Clearly, if the delegate did not err in law regarding her treatment of section 21 of the *Act*, she equally did not breach the principles of natural justice insofar as her interpretation of that provision is concerned.

New Evidence

17. As I previously observed, Serendipity Winery did not clearly explicate what "new evidence" it was seeking to have the Tribunal consider although it appears its new evidence consists of the chartered accountant's June 9, 2015, report regarding "taxable benefits" and other evidence relating to the actual amount of the required remittance to the Canada Revenue Agency. In his memorandum appended to Serendipity Winery's Appeal Form, Serendipity Winery's legal counsel stated:

> [Serendipity Winery] submitted at the hearing of this matter that it had sought advice from the Canada Revenue Agency and had calculated that it was required to make the deductions (in the amount of $25,960.49) from wages earned by Mr. Kanazawa in order to satisfy an obligation to the CRA for remittances arising from [Serendipity Winery's] overall compensation arrangement with Mr. Kanazawa.
>
> [Serendipity Winery] has since recalculated that amount and has determined that it was required to deduct and remit a slightly lesser amount of $24,999.00 to CRA. As stated earlier, I am informed that [Serendipity Winery] has in fact made a remittance to CRA in this regard.

18. Serendipity Winery, who was represented by legal counsel at the complaint hearing, presented evidence and argument at the hearing relating to the "taxable benefits" issue. As is summarized in the delegate's reasons, Serendipity Winery paid Mr. Kanazawa his full $50,000 salary (although Mr. Kanazawa unsuccessfully argued that his annual salary was actually $60,000) through to the end of December 2013, but "withheld [Mr. Kanazawa's] wages from January to June 2014 in partial payment of [Mr. Kanazawa's] alleged business expenses without his written consent" (delegate's reasons, page R2). Serendipity Winery's June 27, 2014, termination letter, signed by Ms. Kingston, stated: "You still owe me $27,016.28 plus your share of the overhead costs for your 2,000 cases". In a memorandum prepared by Ms. Kingston and marked as Exhibit No. 5 at the complaint hearing, she indicated how she calculated this latter amount:

> The amount that [Mr. Kanazawa] owes me was calculated as:

> - As of June 27, 2014, all we were charging him was the total custom crush amount of $47,234.50 without tax which we were willing to absorb plus the $6000 loan, less the garnished wages of $26,218.22 for a total of $27,016.28. We were willing to forgo all other taxes and overhead costs provided we got our payment by July 1, 2014.

19. There are at least two points to be noted with respect to this "set-off" for business expenses. The first is that there is nothing in the record indicating that a court, or any other tribunal of competent jurisdiction, has ever ruled on whether Serendipity Winery was entitled to such a set-off for business expenses. Further, Serendipity Winery never obtained a garnishing order from the courts authorizing it to retain *all*, let alone a portion, of Mr. Kanazawa's wages on account of these alleged business expenses. The Tribunal's jurisprudence regarding section 21 is clear – an employer cannot unilaterally deduct its own business expenses from an employee's wages and an employer is not entitled to engage in a form of "self-help" remedy by unilaterally deducting any other sort of other monetary claim it asserts it has against an employee from that employee's wages (see, for example, *Al's Custom Autobody Ltd.*, BC EST # D299/01 and *United Specialty Products Ltd.*, BC EST # RD127/12; see also *Health Employers Assn. of B.C. v. B.C. Nurses' Union*, 2005 BCCA 343). The uncontroverted evidence before the delegate was that Serendipity Winery simply failed to pay Mr. Kanazawa his wages from January 1, 2014, to June 27, 2014, when his employment was terminated without cause.

20. Perhaps in light of these difficulties with Serendipity Winery's position regarding its non-payment of wages, Serendipity Winery's position shifted from a set-off for "business expenses" owed under one of the agreements to a set-off based on "taxable benefits". As recounted in the delegate's reasons (page R2): "Approximately one month prior to the hearing, [Serendipity Winery] issued [Mr. Kanazawa] a T4 form for 2014 alleging that his ability to make 2,000 cases of wine was a taxable benefit equivalent to $79,200.00 that should have been included in his taxable employment income from which she [*sic*] was required to remit statutory deductions in the amount of $25,960.49 for Income Tax, CPP and EI and that this amount exceeds any wages she [*sic*] owes [Mr. Kanazawa]." Ms. Kingston's evidence with respect to the "taxable benefit" appeared to be constructed on shifting sand. First, she indicated that this benefit was not included on Mr. Kanazawa's 2013 T-4 because she did not have any information about the value of the benefit; then the said that it was not included because she simply was too "busy with other matters" to attend to the matter. However, she ultimately acknowledged "she was unaware that this benefit was supposed to be included in [Mr. Kanazawa's] taxable income until approximately a month prior to the hearing when she spoke to her accountant" (delegate's reasons, page R4). Ms. Kingston also testified that she had not received a ruling from the Canada Revenue Agency regarding the matter and that "her accountant calculated the value of this benefit on her behalf" (delegate's reasons, page R4). Serendipity Winery's summary argument with respect to Mr. Kanazawa's unpaid wage claim was as follows (delegate's reasons, page R5):

> Ms. Kingston admits that wages are owed to [Mr. Kanazawa] but submits that she should have withheld statutory deductions for Income Tax, CPP and EI with respect to his employment income and benefits for the 2014 taxation year in the amount of $25,960.49 prior to [Mr. Kanazawa's] termination. She argues that the amount she was required to withhold for CRA statutory deductions exceeds the amount of wages owed [to Mr. Kanazawa]; therefore, no wages are owed to [Mr. Kanazawa]. Ms. Kingston clarified that she has not yet remitted any statutory deductions to CRA for the 2014 year but is "working on a payment plan with the Canada Revenue Agency".

21. "New evidence" is admissible in accordance with the criteria established in *Davies et al.*, BC EST # D171/03. In particular, the evidence tendered on appeal must meet the following four conditions (see *Davies*, page 3):

a. the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;

b. the evidence must be relevant to a material issue arising from the complaint;

c. the evidence must be credible in the sense that it is reasonably capable of belief; and

d. the evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

22. As is clear from the above discussion regarding Serendipity Winery's position at the complaint hearing, the question of "taxable benefits", and Serendipity Winery's argument that a proper accounting for these benefits fully eliminated its unpaid wage liability to Mr. Kanazawa, was a central issue before the delegate. Thus, had it wished to do so – and recall that Serendipity Winery was represented by legal counsel at the complaint hearing – Serendipity Winery could have obtained and presented an accountant's report at the complaint hearing. Serendipity Winery, in essence, now seeks to submit the June 9th accountant's report in an effort to supplement and bolster the case it presented to the delegate. On this basis alone, the report is inadmissible on appeal. Further, as will be seen, I am not satisfied that this report is even relevant and thus that is a further basis for refusing to admit the report on appeal.

Error of Law

23. Serendipity Winery's principal argument under this ground concerns section 21(1) of the *Act* (reproduced above, and which states that employers must not make unauthorized deductions from an employee's wages) and, in particular, the qualifier contained in that provision: "Except as permitted or required by this Act or any other enactment of British Columbia or Canada…". Serendipity Winery says that the delegate "[failed] to exercise its jurisdiction to determine if the opening words of [subsection 21(1)]…applied to Mr. Kanazawa's situation and had been satisfied". Counsel for Serendipity Winery submits "the Delegate treated s. 21(1) as if the opening words…*did not exist*" (*italics* in original text). Serendipity Winery says that the delegate erred in making the following finding (at pages R5 – R6):

> Ms. Kingston submitted that [Serendipity Winery's] obligation to pay these wages is extinguished by its superseding obligation to withhold them in payment of statutory deductions for income tax, CPP and EI. However, this argument is based on the premise that I have the jurisdiction to find that [Serendipity Winery] was entitled to add $79,200 to [Mr. Kanazawa's] taxable income for 2014. The Act confers on me as a delegate of the Director, the jurisdiction to determine only if wages are owed; it does not confer on me the jurisdiction to resolve a dispute between the parties as to whether or what amount should have been added to [Mr. Kanazawa's] employment income (if any) by [Serendipity Winery] for a taxable employment benefit. That issue is a matter yet to be determined by the Canada Revenue Agency.

24. Counsel for Serendipity Winery says that the delegate should have proceeded as follows:

> …[Serendipity Winery] submitted at the hearing of this matter that it had sought advice from the Canada Revenue Agency and had calculated that it was required to make the deductions (in the amount of $25,960.49) from wages earned by Mr. Kanazawa in order to satisfy an obligation to the CRA for remittances arising from [Serendipity Winery's] overall compensation arrangement with Mr. Kanazawa.
>
> [Serendipity Winery] has since recalculated that amount and has determined that it was required to deduct and remit a slightly lesser amount of $24,999.00 to CRA…I am informed that [Serendipity Winery] has in fact made a remittance to CRA in this regard.
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> …

> Having heard [Serendipity Winery's] submission that the withholdings and remittances were required by CRA, the delegate had an obligation to determine if, in fact, that was the case. That was not a matter of discretion – the Delegate must, based on the wording of s. 21(1), determine if the deductions were "permitted or required by this Act or any other enactment of British Columbia or Canada".
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> If the Delegate wasn't in a position to issue a ruling based on the state of her expertise or on the strength of the evidence submitted by the parties, the Delegate had available to her the practical option of adjourning the hearing and providing the parties with the opportunity to make detailed submissions or to otherwise inform herself as to the impact of the provision of the taxable benefit on [Serendipity Winery's] remittance obligations.

25. I do not accept that the delegate should have adjourned the complaint hearing. Mr. Kanazawa's complaint was the subject of an adjudicative hearing, not an investigation. It was incumbent on the *parties* to bring to the hearing all of the relevant evidence they wished the delegate to consider when rendering her decision. As I previously noted, if Serendipity Winery wished to file an accountant's report about "taxable benefits" it should have brought that report to the hearing – although, in my view, such a report would have had no probative value. If Serendipity Winery wanted an adjournment, it should have applied for one – it did not do so.

26. In my view, Serendipity Winery's counsel's argument regarding subsection 21(1) is legally misconceived. In section 1 of the *Act*, "wages" are defined in "gross", rather than "net" terms (see *Baer Enterprises Ltd.*, BC EST # D252/00). The delegate's obligation is to determine the gross wages that are owed to an employee based on the employment contract or, where applicable, the minimum wage fixed by regulation. In issuing a determination, a delegate is not required to take into account the tax consequences of the gross unpaid wage payment order and issue a "net of tax" (or net of any other statutory deductions) award. Further, the Director cannot "gross up" an unpaid wage award to account for non-wage taxable benefits (for example, the private use of a company-leased vehicle) and, equally, cannot reduce an unpaid wage award to account for any taxable benefits that the employee may have received. Counsel for Serendipity Winery's argument appears to ignore the fact that if Mr. Kanazawa's wages are to be increased to account for the taxable benefits he allegedly received, then logic dictates that his unpaid wage award should have been calculated on a salary that took into account the economic value of those benefits. As noted, in my view, the *Act* does not permit the Director to gross up an unpaid wage award to reflect the value of taxable benefits nor does it permit the Director to reduce an unpaid wage award to account for the value of taxable benefits the employee received. Many employees receive non-wage benefits such as insurance coverage, use of a company vehicle, or stock options. The definition of "wages" in section 1 of the *Act* does not take these "non-wage" benefits into account even though they may be "taxable benefits", and therefore taxable income, for purposes of the *Income Tax Act* (see *Tahtsa Timber Ltd.*, BC EST # D029/99). Wage payment orders must be based on the direct monetary compensation to which an employee is entitled.

27. The question of deductions and remittances (say, for income tax, Canada Pension Plan or Employment Insurance contributions), as well as taxable benefits, is a matter for the employer, the employee and the Canada Revenue Agency to sort out. When it comes to the Director's *collection* of a wage payment order that has been crystallized in a determination (see Part 11 of the *Act*), the Director will allow the employer that is paying the unpaid wages to pay a "net of tax and other deductions" amount to the Director (this amount, in turn, will be paid to the employee) provided the Director is satisfied that the appropriate deductions and remittances have been made. This flows from subsection 21(1) of the *Act* that authorizes these sorts of withholdings from the employee's wages.

28. In my view, subsection 21(1) is simply not implicated in this case. The facts are that Serendipity Winery did not keep and therefore was unable to produce proper payroll records. The delegate determined that Serendipity Winery paid Mr. Kanazawa, based on an annual $50,000 salary, from July 3, 2013, through to the

end of December 2013 and thereafter did not pay him any wages whatsoever. If Serendipity Winery had paid Mr. Kanazawa his salary (which was supposed to be paid every 2 weeks), then it would have been entitled to deduct income tax, CPP and EI in accordance with the applicable federal statutes and remit those deductions (along with its own legislatively-mandated contributions) to the Canada Revenue Agency to be credited to Mr. Kanazawa's federal tax account. Had it proceeded in this manner, the wage deductions would have been lawfully made in accordance with subsection 21(1) of the *Act*. However, since this is manifestly *not* what transpired, subsection 21(1) has no application whatsoever.

29. Mr. Kanazawa's evidence at the complaint hearing was that Ms. Kingston informed him in late January 2014 that Serendipity Winery was not paying him any further wages because "he owed her [*i.e.*, Serendipity Winery] more in expenses for his wine making activities under their business agreement than she owed him for wages and she provided him with a bill for $47,234.50 to the end of January, 2014" (delegate's reasons, page R3). Ms. Kingston's evidence on this point was essentially identical – "Ms. Kingston withheld [Mr. Kanazawa's] wages from January 1, 2014 to June 27, 2014 [*i.e.*, the date of Mr. Kanazawa's without cause termination] to offset business expenses that [Mr. Kanazawa] owed her" (delegate's reasons, page R4).

30. In other words, on the basis of this testimony from both Mr. Kanazawa and Ms. Kingston, Serendipity Winery simply engaged in a form of unilateral self-help and took a 100% deduction (to its *own credit* – not for income tax or any other federally-mandated deduction) from Mr. Kanazawa's wages. This deduction was in relation to a separate claim under a contact that had not been adjudicated by a court of competent jurisdiction. Serendipity Winery could *perhaps* (I make no firm finding in this regard) have been permitted to make such a deduction, at least in part, provided it had Mr. Kanazawa's "written assignment of wages to meet a credit obligation" under subsection 22(4) but clearly there was no such assignment in place. As things stood in January 2014 (and continuing for the balance of Mr. Kanazawa's employment during which time none of his wages were paid to him), this 100% wage deduction was not permitted under any provision of the *Act*.

31. Counsel for Serendipity Winery submits that my decision in *Lea*, BC EST # D137/03, is apposite and that "precisely the same reasoning applies here". In my view, the *Lea* decision is not even remotely analogous to the case at hand. In *Lea*, the employee appealed a $468.18 determination arguing that he should have been awarded nearly ten times that amount. His appeal was entirely dismissed save for one issue, which was referred back to the Director. This issue is set out in the following excerpt from my reasons for decision (at pages 4 – 5):

> Mr. Lea claims that: "...when I filled out the TD-1 for [the Employer], who is a first nation contractor, I claimed tax-exemption by providing my first nation status number on the form". Mr. Lea says that given his status he is exempt from "having income tax and CPP deductions taken from [his] earnings".
>
> Without accepting the correctness of the above assertions, I find that the delegate improperly fettered his jurisdiction with respect to this issue which, in turn, amounts to an error of law. With respect to this matter, the delegate's position (March 3rd, 2003 submission to the Tribunal, at p. 4) is as follows:
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> > A pay stub submitted by the Employer indicates that he made statutory deductions from the appellant's wages (see attachment #2). The appellant claims he is of First Nation status and objects to these deductions.
> >
> > *Matters relating to taxes are outside the jurisdiction of the Employment Standards Act.* (my *italics*)
>
> I do not agree that "matters relating to taxes" are beyond the ambit of the *Act*. Section 21(1) states that an employer is not entitled to withhold or deduct all or part of an employee's wages for any purpose except as permitted or required by the *Act* or some other provincial or federal statute. Income tax and pensions are governed by federal statute law. If (and I make no finding in this regard) the Employer improperly deducted income tax and pension payments from Lea's wages, then section 21(1) is implicated. Since the delegate made no finding on this point – by reason of his, in my view erroneous,

> conclusion that he had no jurisdiction to do so – this matter is referred back to the Director for determination.
>
> I might further add that this issue was specifically raised by Mr. Lea before the delegate – see the bottom of page 3 of the delegate's Reasons (Part V, second subheading) – but was not, so far as I can tell, specifically addressed in the Determination. The delegate's position on jurisdiction was gleaned from a subsequent submission to the Tribunal. The delegate's failure to formally address an issue that was put before him could, as well, arguably be characterized as a failure to observe the principles of natural justice.

32. I made the referral back order for two reasons. First, it was alleged that the employer improperly deducted income tax and Canada Pension Plan contributions from his wages and that these deductions were *not* authorized by federal law due to his aboriginal status. Accordingly, the deduction was not protected by subsection 21(1) of the *Act*. It is important to note that I did not make any affirmative finding as to the correctness of the employee's position. However, and second, since this issue was specifically raised before the delegate, but never addressed by the delegate, the matter was referred back to the Director so that it could be adjudicated. In the case at hand, as I previously noted, the employer took a 100% wage deduction, not on account of income tax or any other federally mandated deduction, but rather on account of a claim – not yet adjudicated – that arose under a separate business arrangement between the parties. This deduction was not protected by subsection 21(1), or by any other provision, of the *Act*.

33. I now turn to Serendipity Winery's alternative argument advance under the "error of law" ground. Counsel for Serendipity Winery says that Mr. Kanazawa "had already been compensated for (largely) the amount of wages which were ultimately ordered by the Delegate to be paid". More particularly, counsel submits: "[Serendipity Winery] effectively paid Mr. Kanazawa most of the wages owed to him by way of a set-off against amounts he owed [Serendipity Winery] (pursuant to a separate business agreement)".

34. I do not find this ground of appeal to have any merit. The short answer to this submission is that wages must be paid in accordance with the provisions of section 20 of the *Act* – either in Canadian currency, by a bill of exchange drawn on a savings institution or, where the employee agrees in writing, by direct deposit. Subsection 22(4) of the *Act* states: "An employer may honour an employee's written assignment of wages to meet a credit obligation." However, this provision cannot apply here since there is no "written assignment". Further, Serendipity Winery's "set-off" has never been confirmed by a court of competent jurisdiction and so far as I can determine from the record before me, there is a dispute between the parties with respect to this "set-off". As I noted earlier in these reasons, the *Act* does not permit employers to engage in a unilateral "self-help" exercise by deducting monies from wages otherwise payable to an employee.

35. In my view, none of the grounds of appeal advanced has any reasonable prospect of succeeding and, accordingly, this appeal must be summarily dismissed.

ORDER

36. Pursuant to subsection 114(1)(f) of the *Act*, this appeal is dismissed. Pursuant to section 115(1)(a) of the *Act*, the Determination is confirmed as issued in the amount of $30,127.82 together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal