

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C. 113

- by -

Gold Dollar Holdings Ltd. operating as
Fleetwood Mowhawk
("Gold Dollar")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NOS.: 97/859 & 97/860

DATE OF DECISION: February 19, 1998

DECISION

OVERVIEW

This is an appeal Gold Dollar Holdings Ltd. operating as Fleetwood Mowhawk (“Gold Dollar”), under Section 112 of the *Employment Standards Act* (the “Act”), against two Determinations dated November 3, 1997. One of the Determinations requires Gold Dollar to pay a former employee, Abdinasir Jama Elmi, the sum of \$3,399.62 (including interest) on account of unpaid overtime wages, statutory holiday pay, vacation pay and regular wages. The second Determination imposes a \$0.00 penalty on Gold Dollar for the contraventions of the *Act* and *Regulations* which were set out in the first Determination.

Gold Dollar’s appeal contains several reasons for its submission that the Determinations are wrong and should be cancelled.

I have reviewed the Determinations and have considered the parties’ written submissions in making this Decision.

ISSUES TO BE DECIDED

There are several issues to be decided in this appeal.

- Is Mr. Elmi entitled to overtime wages ?
- Is Mr. Elmi entitled to statutory holiday pay ?
- Is Mr. Elmi entitled to vacation pay ?
- Is Mr. Elmi entitled to receive regular wages ?
- Did Gold Dollar contravene Section 21 of the *Act* by making unauthorized deductions from Mr. Elmi’s wages ?
- Does Section 110 of the *Act* render the entire *Act ultra vires* ?
- Was the imposition of a \$0.00 penalty appropriate ?

FACTS

Mr. Elmi was employed by Gold Dollar as a cashier and gas station attendant from September 22, 1995 to July 18, 1997. He made a complaint under the Act on July 29, 1997 in which he claimed entitlement to:

- overtime wages for the period of September, 1995 to May, 1996;
- annual vacation pay for the period January, 1997 to July, 1997;
- statutory holiday pay for the period September, 1995 to May, 1996;
- Reimbursement of deductions made by Gold Dollar from his wages;

and

- reimbursement of his regular wages for the period of July 1, 1997 to July 18, 1997.

Mr. Elmi resigned his employment with Gold Dollar on July 18, 1997.

The cheque issued by Gold Dollar to Mr. Elmi on July 15, 1997 in the amount of \$416.52 was returned by Gold Dollar's bank when presented to it for processing. This cheque represented payment of Mr. Elmi's regular wages for the period July 1 - 15, 1997.

The Director's delegate who investigated Mr. Elmi's complaint issued a Determination on November 3, 1997. Her reasons for issuing the Determination included the following points:

The employer argued that there was monies missing from the shift that Elmi was responsible for. The employer has provided no evidence of provable theft or evidence to substantiate their claim. (Sic)

...

The cost of doing business must not be borne by the employee. Employers are prohibited from requiring employees, directly or indirectly, to contribute towards the costs of the employer's business by:

withholding their wages

requiring that wages be returned to the employer

requiring employee to pay any money to the employer

...

(Gold Dollar) argued that Elmi requested the overtime hours and agreed to work them at regular wage. The Employment Standards Act does not allow employers or employees to make any arrangement or contract that violates the Act.

...

(Gold Dollar's) accountant, Mr. Shiraz, reviewed (my) calculations. Mr. Shiraz argued that the meal breaks were not deducted from the daily hours work record. The employer's records show that he was paid regular wages for all hours worked including the meal breaks. Based on the records of the employer, I have determined that overtime pay, statutory holiday pay, vacation pay and regular wages are owing.

These reasons were given with the appropriate references to the applicable statutory provisions.

The Director's delegate included as an attachment to the Determination a lengthy Calculations Schedule which shows the calculations which support the amount of wages that were determined to be owed to Mr. Elmi.

J. S. Mangat, one of the principals of Gold Dollar, wrote to the Director's delegate on September 16, 1997 to advise her that "... there was a theft of \$1,100.00 during (Mr. Elmi's) shift on July 17, 1997. The company has reported this matter to the Surrey R.C.M.P." This confirmed similar information which Gold Dollar provided to the delegate on August, 14, 1997.

ANALYSIS

Overtime Wages

Gold Dollar submits, as one of its reasons why the Determination is wrong, that the Director's delegate failed to consider that Mr. Elmi volunteered to work overtime at his regular wage rate. It also submits that such a voluntary agreement operates as an estoppel against his claim.

I do not accept those as valid grounds for an appeal.

Section 4 of the *Act* prevents an employer or an employee from agreeing to waive any requirements of the *Act*:

The requirements of this Act or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61 and 69.

In my opinion, this express statutory prohibition against any agreement to waive the minimum requirements if the *Act* is a complete answer to these grounds for Gold Dollar's submission, I note that the Director's delegate considered the provisions of Section 4 of the *Act* on page 3 of the Determination.

I reject these grounds of Gold Dollar's appeal.

Statutory Holiday Pay

An employee's entitlement to statutory holiday pay is set out in Part 5 of the *Act*. In particular, Section 45 of the *Act* sets out the method of calculating statutory holiday pay for an employee who is given a day off on a statutory holiday. The Director's delegate included in the Calculation Schedule a detailed explanation of the statutory holiday pay to which Mr. Elmi is entitled.

I note that Gold Dollar's appeal does not expressly challenge the findings or the calculations which the Director's delegate made on this issue.

I conclude that there are no grounds on which to disturb the Determination concerning Mr. Elmi's entitlement to statutory holiday pay.

Vacation Pay

An employee's entitlement to Vacation Pay is set out in Section 58 of the *Act*. My comments above concerning the calculations made by the Director's delegate and Gold Dollar's appeal apply equally to this aspect of the Determination.

I conclude that there are no grounds on which to disturb the Determination concurring Mr. Elmi's entitlement to statutory holiday pay.

Regular Wages

In the Calculation Schedule attached to the Determination, the Director's delegate shows in detail the calculation of regular wages earned by Mr. Elmi during his employment. It also includes in the total amount owing the amount of the cheque which Gold Dollar issued on July 15, 1997 but which its bank did not process.

Gold Dollar submits that the Director's delegate failed to deduct 1/2 hour lunch break for each day when Mr. Elmi worked overtime. However, the Director's delegate notes that her calculation of wages owing to Mr. Elmi is based on Gold Dollar's payroll records. Section 28 of the *Act* sets out the requirement for an employer to keep a variety of records for each employee. In particular, Section 29(1)(d) requires an employer to record the number of hours worked by an employee on each day. It was these records, prepared by Gold Dollar, on which the Director's delegate relied in making her calculations.

I can find no errors in this methodology and Gold Dollar's appeal does not point to any. Therefore, I confirm this aspect of the Determination.

Unauthorized Deductions

Section 21 of the *Act* contains the following provisions:

- (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.

Gold Dollar submits that the Director's delegate "... failed to make a deduction for the loss of money during (Mr. Elmi's) shift that he was responsible for." It also submits that the Director's delegate was "fully informed about the theft." Gold Dollar's submissions and its reasons for making its appeal do not distinguish between "fully informing" the Director's delegate about the disappearance of money during Mr. Elmi's employment and establishing Mr. Elmi's responsibility for that disappearance. I decline to make any findings about Mr. Elmi's culpability. However, I should note that since Gold Dollar has reported the incident to the RCMP, any decision to lay charges or to prosecute lies with the Police. In any event, this Tribunal is not the forum in which to resolve this matter since

Section 21 of the *Act* prohibits any employer from attempting to recover missing cash from an employer's wages.

Privative Clause

Statutory provisions such as those which are found in Section 110 of the *Act* are commonly known as privative clauses. Section 110 states:

A decision or order of the tribunal under this Act or the regulations on any matter in which it has jurisdiction is final and conclusive and is not open to question or review in a court on any grounds.

Gold Dollar makes the following submission without citing any authorities in support of it:

The privative clause in the Labour Standards Act (sic) of the Province of B.C. by imposing a prohibition on an aggrieved party against seeking a judicial remedy in the higher courts is an unreasonable restriction on the constitutional rights of the appellants in this case, therefore, renders the said Act ultra vires the Legislative of the Province of British Columbia, as it gives unwarranted and unregulated discretionary powers to the decision makers.

With respect, I do not agree with that submission. Privative clauses such as that found in Section 110 of the *Act* are contained in many statutes under which specialized administrative tribunals are created. The purpose of such clauses is to recognize the special expertise which tribunals have within their jurisdiction and to limit or prevent interference by the courts in that jurisdiction. The general trend over the past decade has been for the courts to respect privative clauses as one important aspect of a tribunal's autonomy and independence. For example, in *Kuntz v. Workers' Compensation Board* (1986, 22 Admin L.R. 226) the court said:

The judicial attitude to tribunals has changed. Restraint has replaced intervention as judicial policy. Courts now recognize the legitimate role of administrative tribunals in the development and execution of economic, social and political policies ordained by the Legislature. Judges also recognize that tribunals bring to bear in their decisions knowledge and expertise in their particular fields beyond the usual experience of the courts. The new judicial attitude towards tribunals is sometimes described as curial deference.

\$0.00 Penalty Determination

This Determination was issued as a result of the finding that Gold Dollar contravened Section 18, 21, 40 and 58 of the *Act*. Those sections of the *Act* are “specified provisions” in the context of Section 29 of the *Employment Standards Regulation* (B.C. reg 396/95).

Section 29(2) of the *Regulation* sets out the various penalties for contravening a “specified provision”, with a \$0.00 penalty being imposed on an employer who has not contravened a “specified provision” previously.

Gold Dollar’s appeal does not contain any submission on why this Determination is wrong or should be varied. For all these reasons I confirm this Determination.

ORDER

I order, under Section 115 of the *Act*, that the Determinations issued on November 3, 1997 be confirmed.

Geoffrey Crampton
Chair
Employment Standards Tribunal

GC:sr