Employment Standards TRIBUNAL

An appeal

- by -

Honey Pot Enterprises Ltd. operating as Honeypot Pub & Restaurant
(the "Appellant")

- 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: Philip J. MacAulay

FILE No.: 2006A/93

DATE OF DECISION: October 12, 2006

DECISION

SUBMISSIONS

Chris Danroth	on behalf of Honey Pot Enterprises Ltd.
Ted Mitchell	on behalf of the Director of Employment Standards

OVERVIEW

1. This is the appeal of Honey Pot Enterprises Ltd. (the "Appellant") pursuant to section 112 of the *Employment Standards Act* (the "*Act*") against determination ER # 140-162 (the "Determination") issued by the delegate of the Director of Employment Standards (the "Delegate") on June 27, 2006.

2. The Delegate found that the Appellant had contravened sections 21 (deduction from wages) and 58 (annual vacation pay) and ordered the payment of wages to a former employee of the Appellant, Sean Fraser (the "Employee") as follows:

   (a) $926.88 for unauthorized deductions from the Employee's pay cheque;

   (b) $2,043.08 for annual vacation pay owing to the Employee.

3. The Delegate also determined that the Employee was entitled to interest on wages owed pursuant to section 88 of the *Act* and issued a Determination ordering the payment of wages under section 79 of the *Act*.

4. An administrative penalty of $500.00 was imposed regarding contravention of section 21 of the *Act* and an additional penalty of $500.00 was imposed with respect to a violation of section 58.

5. The Delegate also determined that the Employee was not entitled to compensation for length of service under section 63 of the *Act* having concluded that the Appellant had just cause to terminate the Employee's employment.

6. The total amount determined payable by the Appellant was $4,086.36.

7. The Appellant was also ordered to cease contravening sections 21 and 58 of the *Act* and to comply with all the requirements of the *Act* and the Employment Standards Regulations.

8. In the exercise of its authority under section 36 of the *Administrative Tribunals Act* as incorporated in section 103 of the *Act*, the Tribunal has concluded that an oral hearing is not required in this matter and that the appeal can be properly addressed through written submissions.

BACKGROUND

9. At the time of the Determination the Appellant operated a neighbourhood pub under the name Honey Pot Pub and Restaurant (the "Pub").

10. The Delegate found that the Employee was employed as Manager of the Pub from February 2, 2001 to September 9, 2005, at which time the Employee's employment was terminated.

11. Following his termination, the Employee filed a complaint under section 74 of the *Act* alleging that the Appellant contravened the *Act* by making unauthorized deductions from the Employee's pay cheque, failing to pay annual vacation pay and failing to pay compensation for length of service.

12. A Hearing was held regarding the complaint on April 26, 2006. The Employee did not attend the Hearing in person nor participate by telephone. The particulars of his complaint were set out in a self-help kit dated December 12, 2005, in a complaint and information form dated March 5, 2006 and in a letter to the Employment Standards Branch with attachments dated April 19, 2006.

13. The Appellant was represented at the Hearing by Chris Danroth, identified by the Delegate as the owner of the business as well as a director/officer.

14. The Employee had objected to deductions made from his final pay cheque which he alleged were "undocumented deductions without employee consent". The Appellant presented evidence that, after the Employee had been terminated, IOUs were discovered regarding funds the Employee had taken from the Appellant. The Appellant also alleged that the Employee owed money to the Appellant as a result of the Employee's failure to reimburse the Appellant for a refund the Employee had received on the Pub's behalf from a government liquor store for returned product. The Employee did not dispute these allegations in any detail.

15. The Appellant justified its final cheque provided to the Employee for $0.01 on the basis that it reflected the Employer's deduction of monies owed to the Employer regarding the Employee's outstanding IOUs.

16. Fundamental to the Appellant's appeal is its allegation that the Delegate had overlooked a specific document that the Appellant states had been provided to the Delegate during the Hearing. The Appellant maintains that this document constitutes proof that the Employee had granted written permission to the Appellant to deduct any monies owed by the Employee to the Employer from the Employee's wages. The Appellant has annexed what it refers to as "another copy" of that document for the Tribunal's "perusal" to the Appellant's Appeal Form.

17. This issue is important on the question of the propriety of deductions from the Employee's final wages given the provisions of section 21 of the *Act* which provides:

> "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 any part of an employee's wages for any purpose."

18. Previous decisions of this Tribunal have determined that, in certain situations, section 21(4) of the *Act* may allow such deductions and would provide justification for an employer to make deductions from wages that would otherwise be unlawful pursuant to section 21(1). That section provides:

> "21(4). An employer may honour an employee's written assignment of wages to meet a credit obligation"

19. The document to which the Appellant refers and which is attached to its Appeal Form is on the letterhead of "C.N. Danroth Group of Companies" and bears a date of January 31, 2001. It purports to be signed by "Sean Fraser" under the employee signature portion of the document while the "management signature" portion has not been signed. The body of the document states:

> "I, Sean Fraser, agree that all goods that I charge to my account at the Honey Pot Pub shall be paid by payroll deduction from my pay cheque.
>
> I further agree that any charges I incur under special circumstances while employed in any capacity for Chris Danroth will also be paid by payroll deduction from my pay cheque. Examples of these charges are monthly truck deductions, bank service charge deductions, travel expense deductions, etc."

20. The document then has typed in on a line provided for such purpose, "State special circumstances if applicable". No special circumstances are listed. The document then ends with the statement,

> "It is a requirement of employment by C.N. Danroth that this form be signed in accordance with the *Employment Standards Act,* section 21".

21. I will refer to this document as the "Deduction Letter".

22. An additional complaint of the Appellant relates to the Employee's entitlement to vacation pay. In that regard, the Appellant takes issue with the fact that the Employee did not appear at the Hearing and therefore his evidence was not under oath and not subject to cross-examination.

23. Finally, the Appellant states that it had additional evidence that it could have provided to the Delegate on the issue of vacation pay "downstairs in the rear of our vehicle" but that the Delegate declined an offer to review it.

ISSUES

24. Prior to stating the issues I must interpret the grounds of appeal as filed by the Appellant.

25. In completing its Appeal Form the Appellant indicated by "x" in the appropriate box that its grounds of appeal were, firstly, "The Director of Employment Standards failed to observe the principles of natural justice in making the Determination", and, secondly, "Evidence has become available that was not provided at the time the Determination was made". The Appellant then added the words to this ground, "Evidence was provided but appears to have been overlooked".

26. A further review of the Appellant's submission reveals that the Appellant is of the view that it presented a written document to the Delegate (the "Deduction Letter") which buttressed the Appellant's argument that it was entitled to deduct monies owing by the Employee to the Appellant from the Employee's final pay cheque. The Appellant states that it provided the document to the Delegate. In his response, the Delegate states that no such document was provided.

27. Similarly with regard to the vacation pay issue, the Appellant states that it had prepared and provided to the Delegate the Appellant's own synopsis of its records of the Employee's vacation time. In its Appeal the Appellant says that, "We advised at that time that we had the back up documents downstairs in the

rear of our vehicle and could bring the boxes up at any time if anyone wished to see the documentation. The offer was declined."

28. As discussed below, I have concluded that the true substance of the Appellant's appeal concerns principles of natural justice and not "evidence that has become available" as that ground of appeal has been interpreted by the Tribunal.

29. Therefore the Issues are:

1. Did the Delegate fail to observe the principles of natural justice by overlooking evidence which had been presented to him, in not requesting additional documentation from the Appellant, and in accepting the written evidence of the Employee, the truth of which had not been sworn to by the Employee at the Hearing?

2. Has the Appellant raised any matters that appropriately fall under the section 112 (1)(c) ground of appeal which concerns evidence becoming available which was not available at the time of the Hearing?

ARGUMENT

30. The Appellant says that it provided a copy of the Deduction Letter to the Delegate at the Hearing. For his part, the Delegate says it was not provided.

31. The Appellant says, as well, that it advised the Delegate that it had additional back-up documents relating to the Employee's entitlement to vacation pay "downstairs in the rear of our vehicle" which "could be brought up at any time if anyone wished to see the documentation" and that this offer was declined.

32. In response, the Delegate acknowledges the offer but argues that the Appellant:

> "did not identify a specific document or documents assumedly in the vehicle which, if they were produced, may be critical to the Delegate's findings in the Determination. Danroth made no request for a recess or an adjournment at the Hearing in order that he might search for any particular document or documents which may be in the vehicle. Danroth's offer to the Delegate of an opportunity to peruse the boxes of documentation said to be in the vehicle was declined by the Delegate at the Hearing."

33. The Delegate goes on to note the numerous directions provided to parties to a hearing concerning the need for them to organize and present documents as evidence.

34. The Delegate refers to the Notice of Complaint which had been sent to the Appellant which advised that determinations would be "based on information before them [i.e., the Director]. . .". As well, the information sheet which accompanied the Notice stated that "all documents to be used at the hearing must be provided in advance. The Branch Adjudicator may refuse to consider any documents introduced at the hearing itself".

35. The Delegate also references the Branch's "Demand for Employer Records" delivery of which preceded the Hearing which, *inter alia*, under the heading "IMPORTANT INFORMATION – PLEASE READ" was the requirement that "all documents you will be relying on to support your position at the hearing"

must be received by the Branch's office by a specified date prior to the Hearing. The cover letter which accompanied the Demand reiterated the necessity that:

> "both parties must:
>
> - provide all documents or evidence that each party intends to enter at the hearing.
> - provide all documents required in the Demand for Employer Records, if one was issued."

36. Importantly, the Delegate also notes that, when dealing with the vacation pay entitlement issue, he had been presented with two separate "employer records" on the topic by the Appellant. One was a chart prepared for the hearing which showed that the Employee had taken specific vacation time subsequent to 2003 while the other document included the comment "DID NOT ADVISE" over the chart constructed after the Employee's termination. The Delegate notes that, as between the two employer documents presented to him by the Appellant, the Delegate preferred the latter and based his award of vacation pay on that finding.

37. Finally, the Appellant complains that the Delegate "placed too much weight on the credibility of Mr. Fraser". The Appellant notes that Mr. Fraser did not participate in the Hearing, either in person or by telephone. As well, letters submitted by third parties on Mr. Fraser's behalf (primarily concerning the question of whether or not Mr. Fraser had taken vacation time) were from friends of his and were unsigned and not notarized.

38. Perhaps not directly related to this credibility issue, but in that portion of its appeal submission, the Appellant states that it never gave permission to the Employee to advance himself funds by leaving an IOU.

ANALYSIS

39. The appellate powers of this Tribunal are set out in, and are limited by, section 112 (1) of the *Employment Standards Act* which provides:

40. "112(1) subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:

> (a) the director erred in law;
>
> (b) the director failed to observe the principles of natural justice in making the determination;
>
> (c) evidence has become available that was not available at the time the determination was being made."

41. As stated earlier, the Appellant, on its Appeal Form, has indicated, firstly, that its appeal is brought on the grounds of 112(1)(b) [failure to observe principles of natural justice]. Secondly, it further bases its appeal upon section 112(1)(c) [evidence now available]. However, in respect to this latter ground the Appellant added the words,

> "Evidence was provided but appears to have been overlooked"

42. With regard to ground 112(1)(c), it is clear in the Appellant's submission that the Appellant is not alleging that there is any new evidence that has come to light that was not available at the time of the Delegate's Hearing but that:

(a) on the issue of the permissibility of deductions from wages; there was a document (the Deduction Letter) submitted to the Delegate which the Appellant asserts entitled the Employer to make deductions from the Employee's wages but, the Appellant says, was apparently overlooked by the Delegate in making his Determination. In his submission the Delegate denies that the document was provided to him as alleged.

(b) on the issue of unpaid vacation pay; there were backup documents held by the Appellant relating to time taken on vacation which were not presented to the Delegate. The Appellant says that "we had the back-up documents downstairs in the rear of the vehicle and could bring the boxes up at any time if anyone wished to see the documentation". The Delegate declined the offer.

43. A previous decision of this Tribunal has interpreted section 112(1)(c) as being similar to the ground of appeal available in this Province with respect to appeals to the appellate courts based on "new evidence".

44. In *Davies et al*, BC EST #D171/03 the Tribunal states:

> "We take this opportunity to provide some comments and guidance on how the Tribunal will administer the ground of appeal identified in paragraph 112(1)(c). This ground is not intended to allow a person dissatisfied with the result of a Determination to simply seek out more evidence to supplement what was already provided to, or acquired by, the Director during the complaint process if, in the circumstances, that evidence could have been provided to the Director before the Determination was made. The key aspect of paragraph 112(1)(c) in this regard is that the fresh evidence being provided on appeal was not available at the time the Determination was made. In all cases, the Tribunal retains a discretion whether to accept fresh evidence. In deciding how its discretion will be exercised, the Tribunal will be guided by the test applied in civil Courts for admitting fresh evidence on appeal. That test is a relatively strict one and must meet four conditions:
>
> (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."

45. Based on the above, I conclude that this 112(1)(c) ground of the Appellant's appeal does not really concern any such "fresh" evidence but, rather, relates to the question of whether documents which the Appellant says were before the Delegate were "overlooked", or regarded other documents which did exist at the time of the Hearing but which the Appellant did not present as evidence and, which the Delegate declined to review when the offer was made to retrieve them from "downstairs."

46. In summary, I conclude that the Appellant's grounds for appeal truly relate to section 112(1)(b) concerning principles of natural justice and not the emergence of "fresh" evidence contemplated by section 112(1)(c) and I so find.

Evidence regarding deductions from wages:

47. In this case the Appellant says that it, in fact, did provide the Deductions Letter to the Delegate at the Hearing and alleges that the Delegate then "overlooked" it in making his Determination. For his part, the Delegate denies that allegation.

48. Based upon a review of the Determination, it is clear that the issue of written authorization to deduct from wages was before the Delegate.

49. In the body of his determination the Delegate notes:

(a) Page 4 – in reference to the testimony of one of the Appellant's witnesses:

> "However, he said employees signed authorizations permitting deductions from wages when they incurred the cost of a drink or borrowed small amounts from the safe float. [Witness] said it was after Fraser's firing when he discovered Fraser's IOUs. He said Fraser's very small final cheque reflected the employer's deductions of monies owed to the employer per Fraser's outstanding IOUs. This final cheque was in the amount of $0.01."

(b) Page 5 – in reference to the testimony of another of the Appellant's witnesses:

> "[Witness] said no long-term loans from petty cash were permitted but tabs could be incurred for small amounts arising from such things as the cost of meals or the odd drink. Cash advances required the approval of a senior manager. She identified a waiver which authorized the employer to make deductions from wages where bills left in the till bore the employee's signature. As Fraser began his employment at about the same time as her, [Witness] said she presumed Fraser had signed a similar waiver" (my underlining).

(c) Page 8 – in the words of the Delegate:

> "There was no documentation before me to show that Fraser had provided the employer with written consent to make other than the usual statutory deductions from his wages. That said, both [Witness] and [Witness] testified that at the time of their hiring, they provided the employer with written authorization to make certain deductions from their wages. [Witness] said Fraser was hired at approximately the same time as her and so she presumed he had provided similar written authorization for certain employer payroll deductions. However, a copy of such documentation concerning any employees was not presented into evidence. . ."
>
> ". . . There is no reason for me to doubt that [witness] and [witness] were comfortable with certain non-statutory deductions being made by the employer from their wages. However, in the absence of any evidence that Fraser gave written authorization to the employer for such deductions from his wages, I find Fraser is owed unauthorized deductions as shown on his final wage statement …"
>
> (my underlining)

50. The Delegate has provided the Record he compiled from the Hearing and copies of the documents referred to therein. A review of this Record does not reveal that either the Deduction Letter or a similar document to it that may have been in reference to another employee were provided to the Delegate.

51. The appellant says the specific Deduction Letter it has attached to its Appeal Form was, in fact, provided to the Delegate, an assertion the Delegate denies.

52. Was the document given to the Delegate but he, thereafter, neglected to include it in his Record and "overlooked" it in coming to his determination or, was the document not provided, but only references made to such a document and others similar to it as indicated in the Delegate's written Determination?

53. In my opinion, if it were the case that the document was provided, but either misplaced or forgotten or otherwise overlooked by the Delegate, such a result could lead to the conclusion that the Delegate had not adhered to the principles of natural justice such that this appeal should succeed on that point and the matter be dealt with thereafter by either this Tribunal hearing evidence on the point or by a referral back to the Delegate.

54. However, for the following reasons, I do not find it necessary to come to a firm view on the question of whether the letter was provided to the Delegate or not as I find that, even if the Deduction Letter was before the Delegate, the result would have remained the same in the disallowance of the deductions.

55. The overall purposes of the *Act* are set out in section 2. This section notes that, among these purposes, are that there be fair and efficient procedures for resolving disputes over the application and interpretation of the *Act;* that employees receive at least basic standards of compensation and conditions of employment; that the fair treatment of employees and employers is promoted; and that open communication between employees and employers is encouraged.

56. Section 115 provides that, after considering whether the grounds for appeal have been met, the Tribunal may, by order, confirm, vary or cancel the Determination under appeal or refer the matter back to the Director.

57. Implicit in these section 115 powers is the Tribunal's ability to consider the evidence which was before the Delegate. This is particularly so in the interpretation of documents or the provisions of the *Act*. In this case, and in advancing efficient procedures for resolving disputes, I will assume for the purposes of this appeal that the Deduction Letter was, in fact, before the Delegate.

58. The general intent of the scope of the protection of employees under the *Act* is further revealed in section 4 which stipulates that the requirements of the *Act* and the Regulations are minimum requirements and an agreement to waive any of those requirements (except in specific circumstances) has no effect.

59. In protecting employees' wages, section 21(1) specifically provides that :

> "21(1). Except as permitted or required by this *Act* or any other enactment of B.C. or Canada, an employer must not, directly or indirectly, withhold deduct or require payment of all or any part of an employee's wages for any purpose. (my underlining)

60. As interpreted by Tribunal decisions, section 21(4) provides a limited, in my view, exception to the prohibition on deductions from wages in providing:

> "21(4). An employer may honour an employee's written assignment of wages to meet a credit obligation."

61. The Tribunal has previously held that a written contract that provided that a specific amount of an employee's compensation would be allocated to rent constituted a valid "written assignment". *Sophie Investments Inc.* BC EST #D527/97 and #D528/97 (reconsidered in *The Director of Employment Standards*, BC EST #D447/98).

62. In the *Sophie* Reconsideration the Adjudicator stated that:

> "The decisions of the Tribunal dealing with issues of whether an employee had made a written assignment of wages under section 21 of the *Act* have not found that technical perfection is required, only clarity."

63. In my mind, the critical requirement is the "clarity" of the assignment before one is to set aside the protection to the employee provided by section 21(1).

64. The assignment should be sufficiently specific and explicit so as to make it "clear" that the employee has granted his consent to the deduction. An employer who wishes to rely upon a section 20(4) written assignment to justify deductions from wages must provide clear and specific evidence to that effect in order to do so.

65. In this case, the Deduction Letter makes no reference to repayment of IOUs as existed in this case, nor to the sort of obligation to repay a refund the employee may have received from a supplier that the Appellant asserts. In fact, the Appellant's own witness testified (and as is set out in the Appeal Form) that no long term loans were permitted from petty cash, only that "tabs" could be incurred for small amounts arising from such things as the cost of meals or the odd drink. It was said that cash advances required the approval of a senior manager. Logically, the purported authorization set out in the Deduction Letter prepared by the employer for the employee's signature should not be construed to include that which the employer has forbidden the employee to do, i.e., the taking of significant amounts of money without prior management approval.

66. I find that, in this case, even if the Deduction Letter was before the Delegate, it was not sufficiently specific, clear, or inclusive so as to justify deductions such as the IOUs from wages. The Appellant may have other legal recourse in other legal forums to attempt to recover both the alleged debt represented by the IOUs or the reimbursement of money received for product returned, but this *Act* does not allow for the type of set-off of claims argued by the Appellant without a clear written assignment as contemplated by section 21(4).

Evidence regarding vacation pay:

67. The Appellant states that it had additional evidence on the vacation pay issue "downstairs in the rear of the vehicle" which it invited the Delegate to peruse. The Delegate declined the offer.

68. As argued by the Delegate, ample opportunity was given to the Appellant to provide all documentation to him prior to the Determination. In fact the Demand to Employer requires its production.

69. I find it unreasonable for the Appellant to expect that it might ignore the various admonitions to provide documentation to support its case prior to a hearing to then expect a Delegate to look through boxes of document in the middle of a hearing in support of the Appellant's case. The Delegate's refusal of the offer to do so was appropriate.

70. Moreover, in this case, the Delegate found that the documents the Appellant had provided to him were apparently contradictory on the matter of vacation pay taken by the Employee.

71. It is to be noted that, under the *Act*, it is the duty of an employer to keep accurate records of employee vacation time. Section 28(1)(i) specifically requires that an employer "must" keep records of "the date of the annual vacation taken by the employee, the amounts paid by the employer and the days and amounts owing".

72. In this case, the records the Appellant did provide to the Delegate were inconsistent. If there were other documents germaine to the issue, the Appellant failed to provide them. Given the responsibility placed upon an employer to keep accurate records under the *Act*, I find the Delegate's determination that vacation pay was owed to the Employee to be valid and is confirmed.

The credibility and form of evidence of the Employee:

73. The Appellant states that the fact that the Employee did not attend the Hearing and that letters on the Employee's behalf considered by the Delegate were "unsigned and unnotarized" leads to the conclusion that the Delegate placed too much weight on the Employee's credibility.

74. In passing, it should be noted that, on the question of whether or not the Employee was entitled to wages or compensation for length of service, the Appellant succeeded on that point on the basis that the Delegate found that the Employee's dismissal was for "just cause" as referred to in section 63(3)(c). The Employee was not present to dispute the facts which led to that conclusion and the result was a ruling in favour of the Appellant.

75. On the other hand, regarding the section 21 and section 58 issues, the *Act* itself requires that the Employer provide evidence that it was entitled to make deductions from wages or that vacation pay had been paid to avoid the result which, in this case, led to both being questions being determined in favour of the Employee. For the reasons stated above, the Appellant as Employer failed to do so in each case.

76. In conducting an investigation there is no requirement that a Delegate restrict himself to sworn testimony. If an investigation is conducted, reasonable efforts must be made to give a person under investigation an opportunity to respond. This requirement is set out in section 77 of the *Act*. The opportunity to respond has been given in this case to the Appellant and the requirements of the *Act* in that regard have been met.

77. The principles of natural justice do not require perfection in process but do require that the procedures are fair and that the affected parties have had made known to them the details of the case against them and have had a chance to respond. The Delegate complied with the evidenciary requirements of the *Act* as discussed above. The Delegate did not exhibit bias in making his decision. He provided adequate reasons for his determination.

78. In my view, for the reasons aforesaid, the Delegate has observed the principles of natural justice in making his determination. As well, the Appellant has not successfully shown that evidence has become available that was not available at the time the determination was made as is set out in section 112(1)(c) of the *Act*.

79. Given this result and the mandatory requirements of the *Act* where contravention of its provisions have been found, the two administrative penalties of $500.00 each are also appropriate.

ORDER

80. Pursuant to section 115 of the *Act*, I order that the Determination dated June 27, 2006, be confirmed.

Philip J. MacAulay
Member
Employment Standards Tribunal