

**EMPLOYMENT STANDARDS TRIBUNAL**

In the matter of an appeal pursuant to Section 112 of the  
*Employment Standards Act S.B.C. 1995, C. 38*

- by -

492695 B.C. Ltd. Operating as Paloma Polynesian Bar & Restaurant  
("Paloma" or "the Company")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** John L. McConchie

**FILE NO.:** 96/602

**DATE OF HEARING:** FEBRUARY 26, 1997

**DATE OF DECISION:** MARCH 31, 1997

**DECISION**

**APPEARANCES**

Lizza Kong	on behalf of the Company
Tze-Yau Tse	on his own behalf
Chan-Shan Kwok	on his own behalf
Ka Lon Chan	on his own behalf
Dave Ages	for the Director of Employment Standards

**OVERVIEW**

The Company operates the Paloma Polynesian Bar & Restaurant. The complainants were employees of the Restaurant until March 17, 1996. After this date, they filed various claims against the Company under the *Employment Standards Act*. Dave Ages, an Employment Standards Officer and delegate of the Director, investigated the complaints and issued a determination on September 26, 1996 under No. CDET 004117. The Determination required the Company to pay the sum of \$1,928.53 in satisfaction of the claims. Specifically, the Determination required the Company to pay the following sums:

- . The sum of \$1,044.12 to Chan Shan Kwok (referred to by the parties as “Sam Kwok”) for certain wages and overtime owing as well as for compensation for length of service.
- . The sum of \$621.30 to Tze-Yau Tse (referred to by the parties as “Herman Tse”) as compensation for length of service.
- . The sum of \$178.94 to Ka Lon Chan for wages owing for March 16 & 17, 1996, minimum daily pay and vacation pay.
- . The sum of \$84.17 to Christopher L.K. Tse for wages owing for March 16 & 17, 1996, minimum daily pay and vacation pay.

The Company appealed the Determination under s. 102 of the Act. At the commencement of the hearing, the Company took the position that all elements of the Determination were under appeal. As the hearing proceeded, the Company limited its appeal to three central issues.

**ISSUES TO BE DECIDED**

The three issues which remain for decision are these:

- . Did Ka Lon Chan and Christopher L.K. Tse work on March 16 and 17, 1996 and thus earn the wages which are reflected in the Determination?
- . Did the Company have just cause for the termination without notice of Herman Tse and is therefore able to avoid paying him the monies allocated in the Determination to compensation for length of service?
- . Can the Company set off overpayments of vacation pay to dismissed employees against other monies which may be found to be owing?

**FACTS**

Prior to March 17, 1996, the Paloma restaurant had for some time been performing below expectations. On or about March 17, 1996 the kitchen staff at the Paloma restaurant underwent an almost complete turnover. There is no doubt on the evidence that this came about because of the Company's growing dissatisfaction with the performance of Herman Tse as its Head Chef. When the Company dismissed Herman Tse, the majority of the staff left with him. However, the only two terminations with which this proceeding is concerned are those of Sam Kwok and Herman Tse.

The Head Chef is a key position in the Restaurant. The Head Chef hires, schedules and disciplines staff. He is expected to ensure that they attend work regularly and pay attention to quality. He is expected as well to be creative in the important business of attracting and retaining customers for the restaurant. By March 1996 Company management was convinced that Herman Tse was not performing his job to an adequate standard. As it was expressed in the testimony of Louis Kong, Company President, Company management felt that kitchen costs were excessive and that no new ideas were being generated by the Head Chef for dealing with the situation.

Louis Kong testified that he spoke with Herman Tse on several occasions about the problems in the kitchen. He found his responses and attitude to be unsatisfactory. He was particularly upset about an incident in which a relative of Herman Tse was working in the kitchen and had injured another worker while engaged in horseplay. He testified that he discussed this with Herman Tse but Tse refused to take responsibility. On March 3<sup>rd</sup>, he spoke to Tse again about an alleged incident in which Tse and Kwok had left the kitchen and gone off premises to have drinks. On his own testimony, it was clear that Kong did not use harsh words in his discussions nor did he directly threaten Tse's job. He did not put his concerns in writing; he felt, however, that he had made them known to Tse. When he saw no improvement, he told Tse on March 17, 1996 that he was being replaced.

Sam Kwok worked under Herman Tse's direction in the kitchen. Kong was quick to say in his testimony that Kwok's dismissal was merely a consequence of Tse's departure. He was a good worker, said Kong, and he wanted to see him receive his pay for compensation for length of service. With this, the appeal in respect of Sam Kwok was withdrawn by the Company.

Herman Tse denied each and every allegation by Kong that they had ever had any discussions about performance issues. According to his testimony, his termination came as a complete surprise. He left because he had no other option; another Head Chef had been hired in his place.

The evidence also made it clear that the Company did not pay the wage claims of Ka Lon Chan and Christopher L.K. Tse for wages owing for March 16 & 17, 1996 simply because it did not have any written record of their working on those days. Normally, the Head Chef posts a schedule and payroll is generated from that schedule. In the transition to a new kitchen crew, the schedule pertaining to March 16 and 17 was either not posted or became lost. These were working days and so it is clear that some employees worked on those days. The Company simply does not have a record of who they were. The two employees did not complain about their final pay cheques until the Company received notice from the Director of Employment Standards that they had made a complaint. This made the Company somewhat skeptical about their claims.

As testified to by David Yu, the Company's controller, the Company's belief that the employees did not attend work on the two days is derived solely from the absence of any records substantiating their attendance. In his testimony, Herman Tse said that he had scheduled both employees to work on those days and was able to personally confirm that they did so. His evidence was not contradicted by the evidence of any other witness.

## **ANALYSIS**

I will deal with each of the issues in its turn.

- . Did Ka Lon Chan and Christopher L.K. Tse work on March 16 and 17, 1996 and thus earn the wages which are reflected in the Determination?

The burden of proof in this proceeding is on the Company as the appellant. The Company's case was that it had no records to confirm the attendance of these two employees on the days in question and therefore it did not pay wages to them for those days. In the turmoil surrounding the events of March 16 and 17, 1996, the usual schedules were either not posted or, if posted, were lost. Herman Tse's evidence, which I accept, is that these two employees worked as scheduled on the dates in question. The Company has not satisfied its burden of proof on this aspect of the case and this ground of the appeal is dismissed.

Did the Company have just cause for the termination without notice of Tze-Yau Tse and is therefore able to avoid paying him the monies allocated in the Determination to compensation for length of service?

There is a conflict in the testimony between Louis Kong and Herman Tse. However, it is not necessary to deal with that conflict in the usual detail. That is because even if I accept the testimony of Mr. Kong in its entirety, it falls short of establishing that the Company had just cause for dismissing Mr. Tse on March 17, 1996 without providing the required notice under the Act.

The burden on the Company in this circumstance was explained in the Tribunal's decision in *Hall Pontiac Buick Ltd.* BCEST #D073/96; File No. 95/198:

“[para25] The burden of proof for established that there is just cause rests with Hall, the employer. It is generally accepted in common law that for an employer to establish that there is just cause to dismiss an employee, it must meet the following test:

1. That reasonable standards of performance have been set and communicated to the employee;
2. That the employee was warned clearly that his/her continued employment was in jeopardy if such standards were not met;
3. That a reasonable period of time was given to the employee to meet such standards; and
4. That the employee did not meet those standards.

[para26] It is clear from the various "correction notices" that Hall did not find Chopyk's work performance to be satisfactory. However, there is nothing in Hall's submission to the Tribunal which shows that Chopyk was warned clearly that his continued failure to meet Hall's performance standards would result in his employment being terminated.

[para27] The concept of "just cause" requires an employer to inform an employee, clearly and unequivocal, that his or her performance is unacceptable and that failure to meet the employer's standards will result in their dismissal. The principal reason for requiring a clear and unequivocal warning is to avoid any misunderstanding, thereby giving an employee a false sense of security that their work performance is acceptable to the employer.”

As in the Hall decision, there is no evidence in this proceeding that Company representatives ever provided Herman Tse with a clear and unequivocal warning that his performance was unacceptable and that failure to meet Company standards would result in dismissal. It was clear from his testimony, which I found to be frank and honest testimony, that Mr. Kong was not given to threats. It was clear that he did not wish to humiliate Mr. Tse; he simply wished to correct his performance. Well-intentioned concerns to maintain the personal dignity of the employee sometimes appear to collide with the requirements of the law that the employee be told in no uncertain terms that he is going to be fired if he does not improve his performance. This may be one of those occasions. The Company has not met the requirements of the Act in its attempt to establish just cause for dismissal of Mr. Tse and this aspect of the appeal must be dismissed.

. Can the Company set off overpayments of vacation pay to the terminating employees against other wages which may be found to be owing?

Although the records were not immediately available at the time of the proceeding, Lizza Kong testified for the Company that the Company had overpaid vacation pay to the departing employees as a gratuitous measure to assist them in the transition to new employment. The Company argued that the overpayment should be taken into account in calculating any amounts owing to the complainants. Mr. Ages for the Director argued that I should not take overpayments of vacation into account in considering the amounts owing to the complainants. It was argued that it was open to the Company to exceed its obligations in one area (i.e. vacation pay); this did not permit it to avoid its obligations in another area (i.e. severance pay).

The *Act* is remedial, not punitive. One of its purposes is to ensure that employees receive the full measure of wages to which they are entitled. Section 21 of the Act safeguards this purpose by restricting the circumstances in which an employer may deduct monies from an employee's pay. One of the exceptions as a matter of practice is with respect to overpayments of wages. The Act does not require the Company in these circumstances to satisfy the same wage entitlement twice. Accordingly, the Company is entitled to have any overpayment of vacation pay taken into account in determining the amount owing to the complainants.

**ORDER**

Pursuant to Section 115 of the Act, I order that Determination CDET 004117 be confirmed with the following modification. The issue of overpayment of vacation pay will be referred to the Director's delegate, Mr. Ages, to determine whether and to what extent the Company has overpaid vacation to the complainants. The amount so determined, if any, shall serve to reduce the amount owing under the Determination to the individual complainant affected by the overpayment.

I will reserve jurisdiction to deal with any issues arising from this direction.

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John L. McConchie  
Adjudicator  
Employment Standards Tribunal

JLM:jel