

**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 -

Gerry Faux  
(" Faux ")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** David B. Stevenson

**FILE No.:** 2000/004

**DATE OF DECISION:** April 19, 2000

**DECISION**

**OVERVIEW**

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by Gerry Faux (“Ms. Faux”) of a Determination that was issued on December 15, 1999 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that the Act had not been contravened and it notified Faux that the investigation had been concluded.

**ISSUES TO BE DECIDED**

The issue is whether Ms. Faux has shown any part of the Determination to be wrong in law or in fact.

**FACTS**

Ms. Faux was employed by 488703 B.C. Ltd. (Humpty’s Family Restaurant) from June 1997 to June 1999. She was a server. In her complaint to the Director, she alleged that during her period of employment, the employer required her to contribute 1% (increasing to 2% in June 1998) of her total daily sales to a tip pool for the kitchen staff. The Determination makes the following findings of fact:

1. The employer states that no money regarding your allegations flowed to the employer.
2. The employer states that while they required you to pay into the tip pool, they had neither control over, nor involvement in the distribution of your required payment. As such, the employer has not kept a record of the payments made by you.
3. The Director of Employment Standards takes the position that the requirement to pay a monetary percentage of food sales into a tip pool; the proceeds of which are shared with employees, who do not receive tips, is not a contravention of part 3, section 21 of the Employment Standards Act.

Ms. Faux challenges the above conclusions, saying that some of the tip pool did flow to the employer and that the employer did keep a record of each server’s daily total and the required contribution was based on that figure.

**ANALYSIS**

The Determination relies on subsections 76(2)(b) and (d) as the reasons for concluding the investigation of the complaint. Those provisions state:

76. (2) *The director may refuse to investigate a complaint or may stop or postpone investigating a complaint if*
- (b) *this Act does not apply to the complaint,*
  - ...
  - (d) *there is not enough evidence to prove the complaint,*

While Ms. Faux challenges whether there was enough evidence to prove the complaint, nothing in the appeal addresses the conclusion that the *Act* does not apply. Generally speaking, Section 21 of the *Act* prohibits an employer from withholding, deducting or requiring payment of all or part of an employee's wages for any purpose. The Determination concludes that tip pool sharing, a common practice in the service industry, does not contravene Section 21. In light of the definition of "wages" in the *Act*, which does not include gratuities, or tips, as wages under the *Act*, I can see no error in that conclusion. That conclusion also provides a sufficient reason to stop the investigation, unless some other provision of the *Act* prohibits the practice of pool tip sharing. There are no others referred to in the Determination and I can think of none. As a result, there is no basis for concluding the Determination is wrong.

The conclusions of fact which are challenged by Ms. Faux in this appeal provide an additional reason, not the only reason, for ending the investigation of her complaint. Any consideration of the factual dispute raised by the appeal would only be an academic exercise as it would not alter the result. There is no reason in the circumstances of this case to conduct an academic exercise into the matters raised in the appeal and it is dismissed.

## **ORDER**

Pursuant to Section 115 of the *Act*, I order the Determination dated December 15, 1999 be confirmed.

**DAVID B STEVENSON**  
**David B. Stevenson**  
**Adjudicator**  
**Employment Standards Tribunal**