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-

Creme de la Creme Coffee/Pastries Limited

(the "employer")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR:	Kenneth Wm. Thornicroft
FILE No.:	99/138
DATE OF HEARING:	May 26th, 1999
DATE OF DECISION:	June 2, 1999

DECISION

APPEARANCES

Rosemary Chorney	for Creme de la Creme Coffee/Pastries Limited
Erlana Townsend	on her own behalf
Dave MacKinnon	for the Director of Employment Standards

OVERVIEW

This is an appeal filed by Rosemary Chorney, on behalf of Creme de la Creme Coffee/Pastries Limited (the "employer"), pursuant to section 112 of the *Employment Standards Act* (the "*Act*") from a Determination issued by a delegate of the Director of Employment Standards (the "Director") on February 19th, 1999 under number CDET 009349 (the "Determination").

The Director's delegate determined that the employer owed its former employee, Erlana Townsend ("Townsend"), the sum of $4,483.40 on account of unpaid wages and interest. In addition, by way of the Determination, a $0 penalty was issued pursuant to section 98 of the *Act* and section 29 of the *Employment Standards Regulation.*

The employer's appeal was heard at the Tribunal's offices in Vancouver on May 26th, 1999 at which time I heard the testimony of Ms. Chorney, the employer's sole officer, director and shareholder, and of Ms. Townsend. The Director's delegate also attended the hearing and made a submission in support of the Determination.

ISSUES TO BE DECIDED

Ms. Townsend's claim, as set out in the Determination, consists of four separate components: compensation for length of service (section 63); minimum daily pay (section 34); overtime pay (section 35); and unauthorized payroll deductions (section 21). The employer, in its appeal documents, asserts that the Determination ought to be cancelled.

FACTS AND ANALYSIS

Unauthorized Deductions and Redirected Gratuities

The employer operates a "tea shop" in New Westminster. Ms. Townsend was employed as a server at the tea shop from May 1993 until August 1998. Townsend was first hired at the prevailing minimum wage; in addition, she was entitled to retain 100% of her gratuities or "tips".

This arrangement continued until September 1996 when the employer posted a note which stated that, henceforth, servers were required to remit 10% of their tips to the cook. Townsend disagreed with this new policy but thereafter followed the policy and paid over 10% of her tips to the cook. This latter arrangement continued until February 1998 when the percentage to be remitted to the cook was increased from 10% to 25%--this new policy was communicated to the staff by way of a handwritten "Notice" dated February 26th, 1998 and signed by Ms. Chorney. Ms. Townsend was not prepared to work under those conditions and thus she tendered her resignation in late February or early March 1998, to take effect on March 12th, 1998. I will have more to say about Townsend's resignation when I address her claim for compensation for length of service.

The delegate awarded Townsend $2,085.01 by way of recovery of such "redirected" gratuities. This latter amount also included $38.74 on account of actual deductions from Townsend's wages but at the appeal hearing it was conceded by all parties that the correct figure is $19.07. There were two separate deductions; in each case, the monies were deducted as "till shortages". However, whether there was or was not a shortage in the cash register at the end of the shift, such deductions are prohibited by section 21(1) of the *Act*--see *e.g., Gold Dollar Holdings Ltd.*, B.C.E.S.T. Decision No. 080/90; *Fleetwood Coffee House Inc.,* B.C.E.S.T. Decision No. 080/96; *S & A Enterprises,* B.C.E.S.T. Decision No. 284/97.

Of course, the "redirected" gratuities cannot be recovered by Townsend as unauthorized "deductions" from wages inasmuch as "gratuities" are specifically excluded from the definition of "wages" set out in section 1 of the *Act.* Accordingly, the delegate allowed recovery of the "redirected" gratuities on the footing that the employer was requiring, through the redirection policy, its servers to pay certain of the employer business costs--namely, a portion of the wages that would ordinarily be paid by the employer to the cook. It is clear from the evidence before me that the employer did not allow its servers any discretion vis-à-vis the sharing of tips. By way of its notices--first in September 1996 and later in February 1998--the employer clearly mandated that its servers share their tips with the cook. The employer was not making a suggestion about sharing tips; it was imposing a rule. Equally clearly, the policy was implemented as a way of increasing the cook's take-home pay. Wages are obviously a business expense and via this "tip-sharing" rule, the employer was simply passing on some its payroll costs to its servers, including Ms. Townsend.

I find that the employer breached section 21(2) of the *Act* by imposing this rule and, accordingly, any monies paid by Ms. Townsend in accordance with the rule are properly recoverable from the employer.

Minimum Daily Pay and Overtime

The employer did not dispute this aspect of the Determination at the appeal hearing and, in effect, conceded that there were occasions when Townsend was not paid the "4-hour minimum" set out in section 34, or was not paid overtime in accordance with section 35. As noted by the delegate in the Determination, any purported agreement whereby Townsend would be paid overtime at "straight-time" rates is void by reason of section 4 of the *Act.* Accordingly, the award of $880.34 on account of minimum daily pay and overtime is confirmed.

Compensation for Length of Service

As noted above, when the percentage of tips to be paid to the cook was increased from 10% to 25%, Townsend objected and then submitted her resignation. In light of the circumstances giving rise to her resignation, one can certainly argue that it was not a resignation at all but, rather, a "constructive dismissal". In such circumstances, Townsend was entitled, pursuant to section 66 of the *Act*, to be paid compensation for length of service. I might add that Townsend's resignation letter specifically stated that she was tendering her resignation because of the reduction in the percentage of tips that she would be allowed to retain.

In any event, as circumstances unfolded, Townsend did not, in fact, end her employment on the date set out in her letter, namely, March 12th, 1998. She was persuaded by Ms. Chorney to continue her employment past March 12th on an indefinite basis since Ms. Chorney was about to leave on a vacation. It was understood, however, that after March 12th Townsend would be actively engaged in a search for alternative employment. After Ms. Chorney returned from her vacation at the end of April 1998 Townsend continued to be employed until August 1st, 1998 when Chorney purported to "accept" Townsend's resignation. However, since the resignation letter had, in effect, become null and void by reason of Townsend's agreement to continue her employment on an indefinite basis, the employer's purported acceptance of Townsend's resignation was, in fact and in law, a termination. I should add that the substance of the employer's August 1st letter strongly suggests that it was issued on the basis that the employer had just cause for dismissal rather than it being a simple acceptance of a tendered resignation. The employer did not lead any evidence, or make any argument, however, that it had "just cause" to dismiss Townsend.

Since the employer's August 1st letter was, in effect, a termination without notice (nor was the letter accompanied by termination pay in lieu of notice), I find that the delegate quite properly made an award in Townsend's favour on account of 5 weeks' wages as compensation for length of service.

ORDER

Pursuant to section 115 of the *Act*, I order that Determination be varied. Townsend is awarded **$4,302.48** together with interest to be calculated by the Director in accordance with section 88 of the *Act* as and from August 6th, 1998.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal