Employment Standards TRIBUNAL

An appeal

- by -

Asia – North America International Trading Ltd. operating as Gourmet House Restaurant

("Gourmet House" or "Employer")

- 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

ADJUDICATOR: Paul E. Love

FILE No.: 2002/174

DATE OF DECISION: June 25, 2002

DECISION

OVERVIEW

This is an appeal by an employer, Asia - North America International Trading Ltd. operating as Gourmet House Restaurant ("Employer"), from a Determination dated March 5, 2002 (the "Determination") issued by a Delegate of the Director of Employment Standards ("Delegate") pursuant to the *Employment Standards Act*, R.S.B.C. 1996, c. 113 (the "*Act*"). The Employer withheld monies from the Employee's paycheque as a result of its view that the Employee had stolen money. The Delegate found that the Employer had not proven that the Employee had stolen monies, and had not "proven" an authorization given by the Employee to deduct the stolen monies from wages. This was a case where the Employer and the Delegate filed a submission, but the Employee did not. It was apparent from a review of the Employer's submission, the Determination, and the Delegate's submission, that the Delegate did not consider admissions that the Employee made during a workplace meeting where the Employee was confronted with evidence of the theft, and where the Employee "begged" the Employer not to call the police, and agreed to pay back the monies from her wages. Such an admission in my view, and the circumstances of the admission, was cogent evidence of theft, and therefore the Delegate erred in finding that the allegation of theft was unproven. Nevertheless, s. 21 of the *Act* does not authorize an Employer to deduct monies stolen by an Employee from wages earned by the Employee.

ISSUE

Did the Employer establish any error in the findings of the Delegate with regard to the application of s. 21 of the *Act*?

FACTS

I decided this case after considering the submission of the Employer and the Delegate. The Employee, Colleen Clarke failed to file an appeal submission.

Ms. Clarke was employed at the Gourmet House Restaurant in Terrace, B.C. from November 12, 2001 through to November 30, 2001. She was discharged by the Employer because the employer discovered "cash discrepancies" during her shift. The Employer confronted Ms. Clarke with a $100.00 cash discrepancy on November 23, 2001. The Employer continued to monitor her conduct and on November 29, 2001 the Employer discovered that Ms. Clarke was not imputing some of her bills into the cash register and the money paid by customers related to food served was missing. The Employer had duplicate copies of bills which were submitted by Ms. Clarke to the kitchen, for which food was delivered, but the food was not "rang in to the till", nor was the money deposited into the till. The Employer met with Ms. Clarke on November 30, 2001 and during the course of the meeting after Ms. Clarke initially denied her involvement in the theft of monies, but admitted to it after being shown the evidence, and begged the Employer not to call the RCMP. She signed a written agreement authorizing a deduction of the monies stolen from her pay cheques.

The Delegate, from reviewing the documentary evidence, found that the theft was unproven. He also accepted the complainants' version of events that she had been "bullied" into signing the authorization. The Delegate found that Ms. Clarke was entitled to the sum of $184.96 plus interest in the amount of $2.10, for a total of $187.06. The Delegate found this was unauthorized deduction from the December 24, 2001 pay cheque.

Employer's Argument:

The Employer submits that the Employee has stolen money, and it is entitled to recover those monies from an authorization given in writing by the Employee.

Employee's Argument:

The Employee did not file a submission on this appeal.

Delegate's Argument

The Delegate submitted that the Employer has not proven theft of monies. The Delegate submitted that the Employer has not proven an authorization given by the Employee to deduct monies from wages. The Delegate says that if he were satisfied that the Employee had received the money due to theft, the Delegate would have "no interest in seeing her benefit from the return of the monies deducted".

ANALYSIS

In an appeal under the *Act*, the burden rests with the appellant, in this case, the Employer to show that there is an error in the Determination, such that the Determination should be canceled or varied.

I note that the evidence on this appeal, consists of the evidence of the Employer. The Employee chose to file no submission. The Delegate who investigated, is in a position to transmit evidence concerning his investigation, but the Delegate has no "first hand" evidence as to whether there was employee theft or not. The Delegate has made a finding that "there was no evidence of theft", and that factual finding has been challenged by the Employer. Further, the Employer challenges its obligation to pay the Employee the monies stolen.

In my view the Delegate erred in failing to find that a theft occurred. While the Delegate did not accept that there was proof with a "paper trail", there was a clear oral admission by the Employee of the theft to the Employer on November 16 and November 30, 2001. A further admission in writing can be inferred from the authorization signed by the Employee. While this document was not in the "clearest form", it is still some evidence of an admission of theft. If the Employee did not steal the money from her Employer, I think it would be unlikely that she would agree to a deduction from her wages. Her explanation for why she chose to sign an authorization, is not before me, and I place no weight on what the Delegate submits that she said to him during his investigation. In my view, an admission by the Employee at the work site, after being confronted with evidence concerning the theft, having made a request to the Employer not to call the police, is a very strong and cogent admission of guilt. I also note that Ms. Clarke's complaint and information form submitted to the Employment Standards Branch, dated December 6, 2001 , does not allege that she was wrongfully terminated or unjustly dismissed by the Employer.

Interestingly, the Determination, and the submission of the Delegate, is silent on the point of the work place meeting between the Employee and Employer. I would have thought if this was "new evidence" or a "recent invention" of the Employer, the Delegate would have pointed this out in his submission. I find that the failure of the Delegate to consider the evidence of admissions made at the workplace meeting, the Determination is an error.

Nevertheless it is my view that I cannot set aside or cancel the Determination, based on the Delegate's error in this case. The legislature has seen fit to limit the circumstances in which an Employer may recover an "offset" or "set-off" from an Employee's pay. Section 21 states as follows:

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

Section 22 specifies a limited number of circumstances in which an Employer can deduct monies from an employee, and pursuant to a written assignment. Repayment of monies stolen is not included in that list. There are strong policy reasons for limiting the circumstances in which an Employer may recover claims it makes against an Employee's pay. Principles of debtor/creditor law provide that any creditor, must have a judgement, and a garnishing order issued by the Courts, before wages or other funds can be attached to pay a judgement. Section 21 and 22 is consistent with the policy that the Employer may not "help themselves" to wages, when they have a claim against the Employee.

This Tribunal has determined in previous cases that there is no jurisdiction in the Tribunal to permit an employer to recover "cash shortages" or "theft of monies" from wages: *Park Hotel (Edmonton) Ltd. , (c.o.b. Dominion Hotel)*, BC EST # D539/98, *Vancast Investments Ltd.*, BC EST # D010/96. An Employer cannot recover "stolen monies" from pay otherwise owing to an employee.

In an employee theft situation, the Employer is left in the position of "going to civil court" to persuade that court to issue a judgement for the monies stolen, and then recover those stolen monies using the remedies available under debtor/creditor law. This is obviously a more expensive and more difficult remedy, than simply "scooping" or recovering the stolen monies from wages owing to the Employee. While one may have sympathy for an Employer who has suffered from Employee theft, there is simply no assistance that the Tribunal can give to an Employer in that situation, given s. 21 of the *Act*, with the following exception.

In my view the Delegate has a discretion as to "whether to issue a Determination or not" in the event of employee theft, pursuant to his power under s. 76(2)(c) to "cease investigating" where the complaint is not made in good faith: *Warner*, BC EST # D305/00. The Director is not, however, "compelled" to cease investigating where there is "bad faith": *Provident Security and Event management*, BC EST # D279/01. While I do not agree with the findings of the Delegate concerning theft, I cannot find that the Delegate's decision to investigate and issue a Determination was "an unreasonable exercise of discretion". In my view, the Delegate's error in interpreting the evidence, during the course of the investigation, does not make the decision to investigate or continue the investigation an unreasonable exercise of discretion. For the above reasons, I dismiss this appeal.

ORDER

Pursuant to s. 115 of the Act I order that the Determination dated March 5, 2002 is confirmed.

Paul E. Love, Adjudicator
Employment Standards Tribunal