EMP**LOYMENT 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 -

Pousada Holdings Ltd. Operating The Kelowna Q Club
("Q Club")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE NO.: 97/148

DATE OF HEARING: June 16, 1997

DATE OF DECISION: June 26, 1997

DECISION

APPEARANCES

for the Appellant:	Debra Waluk Donna Ouimet
for Melanie Atkinson:	in person
for Rhonda Laszlo (Crowe):	no one appearing

OVERVIEW

Pousada Holdings Ltd. operating the Kelowna Q Club ("Q Club") appeals under Section 112 of the *Employment Standards Act* (the *"Act"*) parts of a Determination of a delegate of the Director of Employment Standards (the "Director"), dated February 12, 1997. The Director found the Q Club to have contravened Sections 18, 21, 40, 58 and 63 of the *Act* in respect of four employees or former employees of the Q Club, Melanie Atkinson, Debra Laszlo (Crowe), Nicole Brown and Dean Sayers. The Q Club was ordered to pay an amount of $2195.48. The Q Club appeals several aspects of the Determination respecting Melanie Atkinson ("Atkinson") and one aspect of the Determination respecting Debra Laszlo (Crowe) ("Crowe"). Q Club says the conclusions of the Director that Atkinson was entitled to length of service compensation, annual vacation pay and a return of deductions made from her final pay are incorrect. It also says the conclusion of the Director that Crowe was owed any overtime was wrong and that the calculation of annual vacation pay owed to Crowe was wrong.

ISSUES TO BE DECIDED

The issues are framed by the above areas of appeal: was Atkinson entitled to length of service compensation, did she receive annual vacation pay, was the Q Club entitled to deduct any amount from her wages for the tab she had accrued, did Crowe accrue any overtime and was the annual vacation pay she received properly calculated.

FACTS

Melanie Atkinson

Atkinson commenced employment with Q Club on June 9, 1995. She was employed as a bartender at the second location of the Q Club, appropriately called Q Club II. Her last day of

work was July 26, 1996. The facts relevant to that part of the appeal applying to her occurs in the last month of her employment.

On July 22, 1996 Atkinson was given a written notice of termination/layoff. In the notice she was given two weeks notice of temporary layoff. On the same day, Debra Waluk ("Waluk"), the sole officer, director and shareholder of Pousada Holdings Ltd., had reason to communication with the Employment Standards Branch office in Kelowna and was advised she did not need to give notice of temporary layoff. On July 23, 1996 another letter was prepared for (but not given to) Atkinson telling her she was laid off. Atkinson says she found out she was to be laid off without two weeks notice when she saw her name removed from the schedule for the week ending August 5. Atkinson never returned to work for the Q Club. The location where she primarily worked was sold.

While some attempt was apparently made by Waluk in September to contact employees of the Q Club II to advise them of a possible sale of the location, no attempt was ever made in the thirteen weeks following her layoff to return Atkinson to work at either location of the Q Club.

In early July, Atkinson requested a payout of her accrued annual holiday pay. She was told it could only be paid out in conjunction with her scheduling and taking vacation time off. When Atkinson was notified she was to be laid off she renewed her request for annual vacation pay. Initially, Waluk agreed to pay it to her but later decided the Q Club was not required to pay annual vacation pay while Atkinson was on temporary layoff. On August 1, 1996 Waluk prepared a letter to Atkinson which read:

> Here is the cash for your last paycheque in the amount of $342.93 less tabs equaling $83.21 with a balance owing of $259.72.
>
> With regards to your holiday pay we are not required to remit same, do [sic.] to a temporary leave with expected date of recall being anticipated within 13 weeks.
>
> I will however loan you $350.00 against your holiday pay to assist you in your tuition cost but unfortunately this cannot be done until Wednesday August 8, 1996.

This letter was given to Atkinson on the same day.

On July 26, Atkinson was given a paycheque for the period July 6 to July 20. When she attempted to cash the cheque the bank refused to honor it. This circumstance was apparently typical as the Q Club was having some cash flow problems. When a cheque was refused by the bank, employees would notify either Waluk, Donna Ouimet ("Ouimet"), the bookkeeper for the Q Club, or Pamela Kilpatrick, the manager for Q Club II. Arrangements would be made to provide the employee with cash and the cheque was returned. On this occasion, Atkinson

notified Kilpatrick her cheque had not been accepted. She was told to attend the club on August 1 and she would be paid cash.

At the same time she also asked for her annual vacation pay. On August 1 she was given an envelope containing cash for her non-negotiable pay cheque, but no annual vacation pay. The above letter explains why. On August 2, 1996 Atkinson filed a complaint with the Employment Standards Branch and the issue of annual vacation pay was turned over to the Branch.

The Q Club says the cash paid to Atkinson on August 1 was part of her annual vacation pay and the balance was given to her in cash on August 3. There is no evidence which, on balance, persuades me to that conclusion and I do not accept that Atkinson was paid annual vacation pay on August 1 or at any other time.

The Q Club made certain deductions from Atkinson's final paycheque, including amounts for shortages, tabs for food and drink consumed by Atkinson at the club and shirts provided by the Q Club for its employees. The Q Club had charged Atkinson $25.00 each for a number of shirts she had been issued and $56.70 for shortages attributed to her. Following her layoff Atkinson returned three shirts to the Q Club. She says she was issued four but one had been lost. In any event the complaint and the investigating officer identified only two shirts and the issue was addressed on the basis that Atkinson had been charged for two shirts, both of which had been returned to the Q Club. During the investigation of the complaint, the Q Club had paid $86.70, representing the full amount of the shortages charged to Atkinson and $30.00 for the shirts. There remained an issue of whether the Q Club could withhold $20.00 for "wear and tear" and for cleaning the shirts which had been returned.

At the hearing Atkinson acknowledged that some or all of the $83.21 withheld from her last paycheque were for food and drink consumed by her in the club in the latter part of July. She agreed that to the extent the amounts owed by her could be verified she would pay them. It was clear on the evidence that some amount was owed by Atkinson for food and drink, but only $71.10 could be verified.

Rhonda Laszlo (Crowe)

Crowe commenced employment with the Q Club on September 11, 1995 and ended her employment on May 9, 1996. From the commencement of her employment to December 31, 1995 Crowe earned, according to the payroll records kept by the Q Club, $4460.60. As of January 1, 1996 the Q Club moved from a manual payroll system to a computer payroll system. When the system was changed, the annual vacation pay entitlement of Crowe (as well as other employees) was calculated to the end of 1995 for the purpose of identifying that amount in the new system. According to Ouimet, annual vacation pay accrued to the end of 1995 could not be entered in the computer system as 1995 annual vacation pay so it was converted to hours and entered in the computer payroll system as "banked time". The amount entered into the computer payroll system and identified as "banked time" was $178.24, which is exactly 4% of Crowe's wages to December 31, 1995.

By the time Crowe left her employment she had earned $10861.62, not including the $178.24 identified in the payroll system as "banked time" or an amount of $213.32 identified in the computer payroll system as "vacation". On leaving, Crowe was paid the amount of $178.24 on a cheque which identified the amount as "banked time". She also received a cheque which included an amount of $213.32 which was identified as "vacation". I find those two amounts represent the annual vacation pay entitlement for Crowe during her employment and they total $391.56.

Based on her wages, Crowe was entitled to receive $434.46 annual vacation pay. An amount of $42.90 remains payable.

ANALYSIS

Melanie Atkinson

The burden of persuading me that the Determination of the Director is wrong is on the Q Club. They have not met that burden in respect of Atkinson.

An employee who satisfies the conditions of Section 63(1) and/or (2) of the *Act* is entitled to length of service compensation upon termination unless the employer is deemed discharged by application of Section 63(3) of the *Act*. An employee who is laid off for a period longer than a temporary layoff, which in the circumstances is a 13 week period of layoff in a 20 week period, is deemed to have been terminated. The Q Club says it tried to communicate with Atkinson during the temporary layoff. I am not sure they did, but even if some attempt to communicate with her was made, it was not for the purpose of recalling her to work. No attempt was made to recall Atkinson to work during the period of temporary layoff. She is deemed to have been terminated and is entitled to length of service compensation.

I also find Atkinson was not paid annual vacation pay. The evidence of the employer supporting its assertion Atkinson received a cash payout, part on August 1 and the balance on August 3, is not accepted. The evidence supports a conclusion that any cash payments made on those days were referable to Atkinson's final regular pay period, not annual vacation payout. The letter given to Atkinson on August 1 is also inconsistent with a conclusion she received any annual vacation pay on that day.

The Q Club withheld $83.21 and $20.00 for "wear and tear" and cleaning of two shirts she had returned from Atkinson's final paycheque. Even though Atkinson acknowledges some indebtedness to the Q Club for food and drink consumed, the *Act* prohibits a deduction of this indebtedness from her wages. Section 21(1) of the *Act* states:

> *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.*

In the hearing Atkinson agreed she would pay any proven indebtedness incurred by her. It would seem unfair and inconsistent with the purposes of the *Act* to simply allow the matter to be resolved on a strict application of Section 21(1). Accordingly, during the collection process, the Director may be able to assist the parties in reaching an agreeable solution to this issue.

Rhonda Laszlo (Crowe)

I am persuaded by the Q Club the Determination is in error in concluding Crowe is owed overtime. On balance, I conclude the 22.28 hours identified and paid by the Q Club as "banked time" does represent annual vacation pay accrued to December 31, 1995 and converted to hours for the purpose of entering that amount into the computer payroll system initiated on January 1, 1996. That conclusion adjusts both the amount of total wages and the amount of annual vacation pay paid to Crowe. The result is that Crowe is owed $42.90 annual vacation pay. Interest will attach to that amount.

ORDER

Pursuant to section 115 of the *Act*, I order the Determination of the Director, dated February 12, 1997, be varied to show the amount owed to Crowe as $42.90 plus interest. The Determination is confirmed in all other respects.

David Stevenson
Adjudicator
Employment Standards Tribunal