

An appeal

- by -

John D. Edwards
("Edwards")

- 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: Cindy J. Lombard

FILE No.: 2002/103

DATE OF HEARING: June 20, 2002

DATE OF DECISION: July 15, 2002

DECISION

APPEARANCES:

The Appellant, John D. Edwards, appeared on his own behalf. No one appeared for the Respondent.

OVERVIEW

This is an appeal by the employee, John D. Edwards (“Edwards”) pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) against a Determination of the Director of Employment Standards (the “Director”) issued on February 11, 2002.

The Determination was issued following a complaint by the former employee, Edwards, whose employment was terminated after just three weeks by the employer/respondent, 488718 B.C. Ltd. operating as Burrowing Owl Pub and Beer & Wine Store (“Burrowing Owl Pub”). Edwards complained that Burrowing Owl Pub had:

- 1) induced him to move to Osoyoos from Whistler and thereby incurred moving expenses
- 2) did not give him the position promised as an assistant manager
- 3) made an unauthorized deduction of \$50.00 from his wages

The Determination found:

- 1) Edwards was not induced to move to Osoyoos as he was moving there in any event;
- 2) No offer of an assistant manager position was made
- 3) No unauthorized deduction was made according to the cheque receipts provided for by the Burrowing Owl Pub

and therefore the *Act* had not been contravened (the “Determination”).

ISSUES TO BE DECIDED

Had the *Act* been contravened by any of the allegations raised by Edwards, namely:

1. Had the employer induced, influenced or persuaded Edwards to become an employee by misrepresenting the availability of a position of assistant manager and hours of work available contrary to Section 8 of the *Act*;
2. Were unauthorized deductions made by the employer from Edwards’ wages contrary to Section 21 of the *Act*;

FACTS

According to Edwards:

Edwards was employed by the Burrowing Owl Pub between October 2, 2001, and October 25, 2001, as a bartender earning \$9.00 per hour.

Edwards says that just prior to commencing his position with Burrowing Owl Pub he was residing and working in Whistler, British Columbia. Edwards was considering relocating to the Osoyoos area to be closer to his parents who reside in Penticton. Edwards says that in a conversation with Ralph Oakes, the owner of the Shaunessy Pub in Summerland, British Columbia, Mr. Oakes told him that there may be an assistant manager position available at the Burrowing Owl Pub in Osoyoos and that he should contact “Dee”. Edwards never saw the newspaper advertisement referred to in the Determination.

Edwards telephoned from Whistler and spoke with “Dee” (Denora Tilson), general manager of the Burrowing Owl Pub. “Dee” told Edwards that she was possibly looking for an assistant manager and that he should come in to see her.

Edwards did travel to Osoyoos and met with Dee who told him that she would hire him as assistant manager at an hourly rate of \$9.00 but that he should keep it “under his hat” in so far as the other employees were concerned. Dee, says Edwards, told him that the owner of the Burrowing Owl Pub was building another pub and that she would likely move there to be general manager. In the event of that move occurring she would train him to be the general manager.

Edwards says that he and Dee also discussed the fact that he would need 90 hours every two week period in order to make sufficient income to meet his expenses and she assured him that this would occur.

Edwards therefore proceeded he says to rent a house and move to Osoyoos.

Once he commenced his employment Edward says that:

1. He never got more than 32 hours per week although he persisted in reminding Dee what she had promised.
2. Dee did not train him as an assistant manager although he asked her several times about her promise. In the last week of his employment Dee called a staff meeting at which she proclaimed that another employee, “Kathy”, was the new assistant manager.
3. On one occasion when the cash was short \$50.00, Dee did not deduct it from Edward’s pay but rather insisted that he pay her \$50.00 cash and he did.

According to the Burrowing Owl Pub

No one appeared to give evidence on behalf of Burrowing Owl Pub.

ANALYSIS

1. Had the employer induced, influenced or persuaded Edwards to become an employee by misrepresenting the availability of a position of assistant manager and hours of work available contrary to Section 8 of the *Act*;

Section 8 of the Act provides:

8. An employer must not induce, influence or persuade a person to become an employee, or to work or to be available for work, by misrepresenting any of the following:
- a) the availability of a position;
 - b) the type of work;
 - c) the wages;
 - d) the conditions of employment.

Based on the sworn evidence of the Mr. Edwards who gave credible sworn evidence, we find that the employer did contravene Section 8 in that Edwards was induced, influenced and persuaded to become an employee by the following promises which did not materialize:

- a) Edwards was to be the assistant manager
- b) Edwards was to be given at least 90 hours of work in every pay period

Section 79 provides remedies for a breach of Section 8 of the *Act* as follows:

79. (1) On completing an investigation, the director may make a determination under this section.
- (3) If satisfied that a person has contravened a requirement of this *Act* or the regulations, the director may do one or more of the following:
- a) require the person to comply with the requirement;
 - b) require the person to remedy or cease doing an act;
 - c) impose a penalty on the person under section 98.
- (4) In addition, if satisfied that an employer has contravened a requirement of Section 8 or Part 6, the director may require the employer to do one or more of the following:
- a) hire a person and pay the person any wages lost because of the contravention;
 - b) reinstate a person in employment and pay the person any wages lost because of the contravention;
 - c) pay a person compensation instead of reinstating the person in employment;
 - d) pay an employee or other person reasonable and actual out of pocket expenses incurred by him or her because of the contravention.

Edwards did incur moving costs which were submitted to the Director but were not forwarded to the Tribunal for the purpose of this appeal.

2. Were unauthorized deductions made by the employer from Edwards' wages contrary to Section 21 of the *Act*;

Edwards says that he was required by Dee Tilson to go the bank and withdraw \$50.00 to pay to Tilson for a cash shortage with a clear implication by the employer that if he did not do so his job was in jeopardy and he did so. Edwards says that this practice was applied to other employees in the case of a cash shortage occurring.

Section 21 of the *Act* provides:

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 requirement payment of all or part of an employee's wages for any purpose.
- (2) An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations.
- (3) Money required to be paid contrary to subsection (2) is deemed to be wages, whether or not the money is paid out of an employee's gratuities, and this *Act* applies to the recovery of those wages.

Burrowing Owl breached Section 21(2) in requiring Edwards to pay the \$50.00 shortfall being a business cost of the employer.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination be cancelled and the following Orders are made:

1. The matter be remitted back to the Director to determine the quantum of damages to which Edwards is entitled under Section 79 of the *Act*;
2. Burrowing Owl Pub pay to Edwards the sum of \$50.00 plus any interest which may have accrued pursuant to Section 88 of the *Act* since October 25th, 2001.

Cindy J. Lombard
Adjudicator
Employment Standards Tribunal