

An appeal

- by -

Meadows Investments Ltd. operating as The Pantry Family Restaurant
(the "Appellant")

- 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: E. Casey McCabe

FILE No.: 2002/306

DATE OF DECISION: August 26, 2002

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) by Meadows Investment Ltd. operating as The Pantry Family Restaurant (the “employer”) from a Determination dated May 8, 2002. That Determination found the employer liable for outstanding wages to Darryl Stein (the “complainant”), statutory holiday pay, compensation for length of service plus interest in the amount of \$1,277.44. The delegate determined that the employer had breached Sections 17, 18, 21, 62 and 63 of the *Act*.

ISSUE(S) TO BE DECIDED

Did the employer have just cause to terminate the complainant?

FACTS

The employer operates a restaurant located in Pitt Meadows. The complainant was employed as a cook in the restaurant from May 8, 2001 until August 13, 2001. On that date the complainant was suspended pending a police investigation into alleged thefts that occurred at the restaurant. The police investigated the thefts but no charges were laid.

The Delegate determined that the suspension had become a termination due to the fact that 13 weeks had passed without a recall. The employer did not dispute that the complainant had not received his final pay cheque nor the fact that no vacation pay had been paid. The only issue was whether the employer had just cause to terminate the complainant. The employer stated that a number of employees had been the victims of theft at the restaurant while the complainant was working or had been in the restaurant. Further, the employer stated that on two separate occasions the “float” left in the cash register had gone missing. On both occasions the complainant was responsible for locking the restaurant up for the night. The complainant denied any involvement with the alleged thefts.

ANALYSIS

It appears from the employer’s submission that the only issue in dispute is whether the employer had just cause to terminate the complainant. In any event, it is clear that the employer does not have the right to withhold the complainant’s pay cheque for the given reason. Section 21 of the *Act* states:

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.
2. An employer must not require an employee to pay any of the employer’s business costs except as permitted by 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.

It is well established that even where it is shown that an employee has stolen money from an employer that money is not deductible from the amount the employer owes the employee. The remedy for the employer is through the Courts. (Re Park Hotel (Edmonton) Ltd. (c.o.b. Dominion Hotel), BCEST #D539/98, varied on other grounds BCEST #D257/99). In situations such as this, even if I were to find that the complainant had stolen the money, the employer cannot claim an offset as its claim does not fall within s. 21 of the *Act*.

The real substance of the issue is whether the employer can prove that the complainant stole the money as alleged. The allegations against the complainant are of a criminal nature. While the standard of proof remains one of a balance of probabilities, it is well established that in order to substantiate such serious charges the employer must present clear and cogent evidence that the complainant was responsible for the thefts.

In examining the appeal forms filed by the employer it is apparent that the evidence against the complainant is of a circumstantial nature. There is no evidence that there are any witnesses that actually saw the complainant take the money either from the cash register or from the other employee's bags and lockers. The fact that the evidence is circumstantial does not mean that the allegations cannot be proved. Circumstantial evidence will be enough to prove allegations, even allegations of a criminal nature, if it can be said that the evidence is not subject to any other rational explanation. In other words, if on the whole of the evidence the only likely explanation is that the complainant took the money, the allegations would be made out.

In the case at hand I agree with the finding of the Delegate that the employer has not met the onus of proving just cause. In essence, the evidence relied on by the employer at best shows that the complainant had the opportunity to steal the money. Even if I accept that the complainant was the only employee who had the opportunity to take the money, there would have to be some evidence to show that only an employee could have taken the money. In the present case the employer has led no evidence, either to the Delegate, or to the Tribunal, showing that the theft of money could not have been done by a customer or some other person. While it does appear from the evidence that the money taken from the employees was taken from areas reserved to employees and not public areas, there is no evidence before me to show that members of the public could not access such areas.

Further, employees have been known to attend the workplace on their days off. The employer does not record these visits. The only example given relates to the complainant showing up on a day off and a subsequent finding that another employee's money had been taken on that day. While this can be viewed as evidence that may lead a reasonable person to being suspicious of the complainant it can also be viewed as indicating that employees felt free to show up at the premises on days off. If this were the case, then the evidence that on the other occasions the complainant was the only person to have worked on all the shifts where money was taken loses much of its strength. In other words, if employees show up at work on their days off and this fact is not recorded, we cannot say that the complainant was the only employee who had the opportunity to take the money. In any event, I find that the evidence linking the complainant to the thefts does not meet the legal tests of proof. As such, I can find no reason to overturn the finding of the Delegate.

ORDER

The Determination dated May 8, 2002 is confirmed.

E. Casey McCabe
Adjudicator
Employment Standards Tribunal