

An appeal

- by -

Cindee Grant operating as Small-A-Fare Café
("Grant" 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.: 2002/339

DATE OF DECISION: September 25, 2002

DECISION

APPEARANCES:

This is an appeal by an employer, Cindee Grant operating as Small-A-Fare Café (“Grant” or “Employer”), from a Determination dated May 27, 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 Delegate issued a Determination finding Jeffrey Grant, (the “Employee”), was entitled to statutory holiday pay in the amount of \$920.00, and wages of \$500.00 wrongfully deducted from wages, plus vacation pay in the amount of \$56.80, for a total of \$1,476.80. The Employer admits that the calculation is correct, but asserts its right to “offset” other amounts which the Employer says were advanced by the Employer to the Employee. The “offsets” were first raised as an issue by the Employer on appeal, and therefore this issue is not properly before me. The Tribunal exercises an appellate function, correcting Delegate error, and a party who failed to raise an issue before the Delegate is precluded from raising a fresh issue on appeal. The Employer has not demonstrated any error in the Determination, and therefore I confirmed the Determination.

ISSUES:

Did the Delegate err in finding that Mr. Grant was entitled to wages in the amount of \$1,476.80

FACTS

I decided this case after considering the submission of the Employer, and the Delegate.

The Delegate found that Mr. Grant was a head cook at the Employer’s restaurant, Small-A-Fare Café. The Employee advanced a claim for overtime pay, statutory holiday pay, and vacation pay, and disputed a deduction of \$500.00 made from his wages by the Employer. The Delegate dismissed the claim for overtime pay as neither party kept records of the hours worked by Mr. Grant. The Delegate, however, found that Mr. Grant was entitled to the sum of \$1,476.80. This amount included statutory holiday pay in the amount of \$920.00, wages of \$500.00 wrongfully deducted from wages, plus vacation pay in the amount of \$56.80.

Further, I note that in the Determination, the Delegate referred to a “guest check”. The copy in the possession of the Employee noted \$500.00 owing. On the Employer’s copy of the same document, the words are endorsed “owing for rent”. The Delegate found that the Employer had “tampered” with the payroll stub by endorsing the words “for rent”.

While the Employer has filed an appeal, the Employer has not disputed the calculation of the entitlement. She claims that she is entitled to “offset” monies against this entitlement under the *Act*.

The Employer submits a number of cheque stubs in support of her position which were not provided by the Delegate:

Number	Date	Amount	Description
0457	Oct	212.31	To Courtenay Lear re Jeff Grant
0524	undated	447.26	No description
412	Sept 23, 2001	125.00	Draw
451	Oct 10, 2001	1000.00	Re Buy truck

Employer's Argument:

The Employer submits that the Delegate made in an error in the facts, and that there is a different explanation of the facts. The Employer argues that she had a medical condition which prevented her from responding to the Delegate. The Employer submits that amounts advanced to Mr. Grant should be deducted from the Determination. I am setting out below the salient portions of the Employer's submission:

Although the determination of Mr. grant's position with the small a Fare Café states he was an hourly employee and i must pay him holiday back of over one year this part of the judgement I am not going to dispute. In connection with the monies deducted from Mr. Grant from his cheque this was done in front of witness more than once. The fact that mr. Grant signed a cheque stub stating the loan was for a vehicle and rent owed to me the advance of cheque #451 was for Mr. Grant as a loan from the small-a-fare. Mr. Grant was also given draws on his cheques and payments to loan companies drawn up on cheques from the Small a Fare. I have cheque stubs cheque #451 drawn up Oct 10th 2001 for 1,000 advances to Jeff Grant. The Monies recovered on march 01 were agreed upon in front of witnesses. This recovered amount still does not make good Jeff Grant advances to the Small a Fare. As the loan was made to the small a fare and intentions made for payment were to be deductions from his salary. I would like to have this amount removed from the judgement as it was done as instructed by Mr. Grant. I would also like to add that I have record of cheque stubs available for other advances made to Mr. Grant. Ie: Sept 23 2001 cheque #412 for \$125.00 ie cheque #524 for 447.26 this was made to loan till payday on behalf of Mr. Grant cheque # 457 insurance paid on behalf on Mr. Grant by the small-a-fare.

In conclusion the small a fare café is still owed 1,000 for advances made to Mr. Grant Cheque #451. Recover was made for #412 cheque and #457 off cheque #524 this action of previous recovery methods is the same as the last pay and recovery of debts owed to the small-a-fare

Grant re: **Advances from the small-a-fare to Mr. Grant**

consider this letter my appeal to the decision of the 500. deducted from finale cheque. My position is that whatever M Grant used the monies for it was advanced on his wages through this cheque namely #451 on October 10 2001. **I am submitting my stubs to you.**

The reasons I am late in submitting this is that I have been under a doctors care and am under a great deal of stress. When I was approached at work on the phone I was only able to come up with the receipt that Mr. Grant got as a payment. I was very busy doing all the cooking etc. I have since located these cheque stubs for monies owed to the small-a-fare The reason for Mr. Grant to get his cheque like he hid is because he needed cash to go to Nanaimo said he had another job , it was after bank hours he had no monies at all so I told him I would only deduct 500. Of the monies owed namely 1500 as stated on the restaurant stub signed by jeff Grant. I did this and cashed the remaining to him so as he could be on his way. I am now made aware that the 500.00 for the room at my house is not a advance but a debt owed to me personally. The cheque #451 was an

advance from the small-a-fare for 100.00 since only 500.00 was deducted from off his final pay this employee would still owe an additional 500.00 on this basis. Since it was an advance to wages please apply this amount owing to his account to offset the remaining 976.80 in holiday pay. I agree to pay the remaining amount of 476.80 of accrued holiday pay and to absorb the debt of rent to the courts.

Delegate's Argument

The Delegate submits that the documents submitted by the Employer are questionable, and should have been submitted at the time of the investigation. The Delegate further submits that one of the documents submitted has been altered by the Employer, since it was provided to the Employee.

Employee's Argument

The Employee disputes that Ms. Grant lent him \$1000 to buy a truck. The Employee says that the company van broke down, and he and Ms. Grant agreed to buy a truck, and he would run the kids around in the truck, getting back and forth to school, and that Ms. Grant paid the insurance and took the truck back when he quit. After he quit she got angry and decided that he owed her money for rent.

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 major issue before the Delegate was whether Mr. Grant was a manager. The only deduction issue was \$500.00 owing for rent. There is an admission by the Employer that the numbers found in the Determination are correct.

The Employer now seeks a credit for monies which she claims were advanced to the Employee. The Employee has made written submissions, and does not admit these amounts as due and owing. I have recited the arguments of the parties above under argument. It is unnecessary for me to determine these disputed facts, for the purpose of considering this appeal.

The Employer has for the first time, raised new issues in this appeal, which were apparently not raised before the Delegate, and has submitted new evidence on those issues which was not submitted to the Delegate. When the Tribunal exercises its jurisdiction under the *Act*, it is exercising an appellate function and correcting errors that were made by the Delegate. An issue raised on appeal for the first time by a party who failed to raise the issue before the Delegate, is not properly before the Tribunal. I am not prepared to admit or consider new evidence advanced by the Employer in support of new issues which were not raised before the Delegate. This is an appeal not a first instance Determination.

Further, while it is not necessary for me to consider the merits of the Appellant's arguments related to deductions, given that these are new issues raised for the first time in this appeal, I note that the Employer seeks a "credit" against the Determination for other amounts which she claims are owing by the Employee and which are disputed by the Employee. There appears to have been some mixing in the business and personal affairs of Ms. Grant and Mr. Grant. Ms. Grant believes that she has some entitlement to offsets. Employees may give authorizations for wage deductions only for limited purposes,

and it is for the Employer to show that the deduction of wages falls within the ambit of the legislation. It is clear from section 21 and 22 of the *Act*, that an Employer may not withhold money from wages in the absence of an authorization :

- 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.
- 22(1) An employer must honour an employee's written assignment of wages ...
 - (d) to an insurance company for insurance or medical or dental coverage, and
 - (e) for a purpose authorized under subsection (2).
- (4) An employer may honour an employee's written assignment of wages to meet a credit obligation

As a general principle, the Employer is not entitled to help itself to the Employee's pay packet, by withholding amounts it claims are due and owing by the Employee, unless the amount of the deduction is authorized in writing by the Employee and falls within section 22 of the *Act*. Section 22 of the *Act* exists to prevent exactly the situation which Ms. Grant has created, or alternatively the situation that both parties have created, by mixing personal and business affairs. I note further that the documents which Ms. Grant seeks me to consider fall far short of a "written assignment" given by the employee. If Ms. Grant has claims against Mr. Grant for rent, or other matters, this is a matter for her to pursue in another venue.

For all the above reasons, I dismiss the Employer's appeal, and confirm the Determination.

ORDER

Pursuant to s. 115 of the *Act* I order that the Determination dated May 27, 2002 is confirmed with interest in accordance with s. 88 of the *Act*.

Paul E. Love
Adjudicator
Employment Standards Tribunal