

EMPLOYMENT 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 -

Alfredo's Neighbourhood Pub Ltd.
(“Alfredo's”)

- of a Determination issued by -

The Director Of Employment Standards
(the “Director”)

ADJUDICATOR:	Hans Suhr
FILE No.:	97/581, 97/584
DATE OF HEARING:	October 1, 1997
DATE OF DECISION:	October 22, 1997

DECISION

APPEARANCES

Joe Spoletini	on behalf of Alfredo's Neighbourhood Pub Ltd.
Cal Mitten	on behalf of the Director
Benjamin Cantin	on his own behalf
Debbie Cantin	on behalf of Benjamin Cantin
Cindy Darin	on her own behalf
Michael Gray	on his own behalf
Del Bulman	observer
Berhane Semere	observer

OVERVIEW

This is an appeal by Alfredo's Neighbourhood Pub Ltd. ("Alfredo's") under Section 112 of the *Employment Standards Act* (the "Act"), against 2 Determinations dated July 10, 1997 issued by a delegate of the Director of Employment Standards (the "Director"). Alfredo's alleges that the delegate of the Director erred in the first Determination by concluding that wages in the total amount of \$2,378.35 were owing to certain various employees for illegal deductions, vacation pay, overtime wages and compensation for length of service. Alfredo's further alleges that the delegate of the Director erred in issuing the second Determination in the amount of \$500.00 for failure to keep records.

ISSUES TO BE DECIDED

The issues to be decided in this appeal are:

1. Are the certain employees owed wages for illegal deductions, annual vacation pay, overtime and compensation for length of service ?
2. Did Alfredo's fail to provide records as requested ?
3. Was it appropriate for the delegate of the Director to issue the "Penalty" Determination?

FACTS

There are 4 different former employees, each with specific issues so I will deal with each employee separately and then deal with the “Penalty” Determination.

Michael Gray

Michael Gray (“Gray”) was employed by Alfredo’s as a bartender from March 28, 1995 until October 5, 1995. Gray alleges that he was not paid overtime rates of pay for overtime work performed, that Alfredo’s deducted charges for spillage and shortages from his wages and that he is entitled to compensation for length of service as his employment was terminated without just cause.

Joe Spoletini (“Spoletini”) testified and stated that:

- Gray went to Vancouver and did not return for his scheduled shift and then did not show up for a second scheduled shift;
- Alfredo’s was not contacted by Gray with regard to not being able to report for work;
- Alfredo’s considered that Gray had quit his job because he did not show up as scheduled;
- he cannot recall if Gray spoke to him about why he was not at work as scheduled;
- employees signed in and out on a daily basis and no one worked more than 8 hours in a day;
- no deductions other the statutory deductions were ever taken from an employee and the pay statements show this;

In response to cross examination by the Director, Spoletini conceded that as cheques were issued to Gray and another employee for overtime wages after the Determination was received by Alfredo’s, overtime must have been worked by those employees. Spoletini further stated that statements of fellow employees submitted alleging that Gray had stayed late in Vancouver and had no concern about returning in time for his scheduled shift should be considered. Spoletini further stated that he was not able to provide a schedule for after October 7, 1995 to indicate when Gray was next scheduled to work.

Gray testified and stated that:

- he was asked by Sonya Spoletini when he commenced employment if he preferred to have any shortages taken off his cheque or from his tips at the end of each shift;
- he agreed to have the shortages taken off his cheque as that would be easier and he assumed that this was normal practice in a pub;
- at the end of each shift he was advised of how much the shortages were and if he did not have enough in tips to cover the shortage, the management would take it from their cheques;

- the management would keep track of the shortages, cash my paycheque and give me the balance after taking out any shortages owing;
- he was never provided with a cheque stub or statement of his earnings which showed the deductions for shortages;
- he was required to report for work 1/2 hour prior to the scheduled start time to prepare for the shift and to remain 1/2 hour after the scheduled end time to cash out and clean up;
- he and the other employees had been told by Sonya Spoletini that they would be fired if they took time off work for any reason;
- he approached management and arranged to have some vacation time over the Thanksgiving weekend;
- his last scheduled shift prior to the weekend was October 5 and his next scheduled shift was October 10, 1995;
- he traveled to the lower mainland for the holiday weekend;
- he left Vancouver at midnight on October 9 and while in the Fraser Canyon his truck broke down;
- it took him a long time to arrange for repairs to his truck repaired and by the time he returned to Prince George at approximately 10 p.m. on October 10, his shift was almost over;
- he went into Alfredo's the next day and spoke to Sonya Spoletini to explain what had happened and ask when his next shift was;
- Sonya Spoletini informed him that he was fired because he missed the shift as he, as well as the other employees, had been told if they missed a day for any reason, they would be fired;
- he then followed Sonya Spoletini around the pub for a while to try to get her to change her mind and when he was unable to do so, he left the pub;
- he did not speak to any other employee either at the pub at that time or later in regard to his termination.

Spoletini did not ask any questions of Gray on cross examination.

Cindy Darin

Cindy Darin ("Darin") was employed by Alfredo's as a server and as a clerk from September 3, 1994 to March 23, 1995. Darin alleges that she was not paid overtime rates for overtime work performed, that Alfredo's deducted from her wages for shortages, spillage and missing product.

Spoletini testified and stated that:

- no deductions were taken from Darin except statutory deductions.

Darin testified and stated that:

- her immediate supervisors were Joe Spoletini and Sonya Spoletini;
- she was instructed to keep her tips separate from Alfredo's money;
- she was required to enter sales into the computerized system as each sale was made;
- if she spilled any drinks , she was required to pay for them;
- at the end of each shift either Spoletini or Sonya Spoletini would get the total from the computer and if there was a shortage she was required to pay the amount from her tips or if she did not have enough tips, the amount was recorded and then taken from her pay;
- she was never shown the total from the computer;
- Sonya Spoletini would normally cash her pay cheques before she even saw it and all she was shown was a piece of paper with the totals and the amounts deducted for shortages etc.;

In response to cross examination by the delegate of the Director, Darin stated that she had never met any of the other former employees until the day of this hearing. Darin further stated that she did not have the opportunity to take her pay cheque and have it cashed elsewhere as Alfredo's had already cashed it and made the deductions for shortages etc. Darin further stated that she kept track of the amounts deducted by Alfredo's on her calendar for a while and has calculated the total amount of the deductions from that. Darin finally stated that if there was an overage after cashing out, Alfredo's kept this amount but if there was a shortage, she was required to pay the amount.

In response to cross examination by Spoletini, Darin stated that it was almost impossible to be "dead on" at the end of the shift when cashing out.

Benjamin Cantin

Benjamin Cantin ("Cantin") was employed by Alfredo's as a clerk in the Beer & Wine Store portion of the operation from December 6, 1995 to January 6, 1996. Cantin alleges that Alfredo's deducted from his wages for shortages and for stolen merchandise.

Spoletini testified and stated that:

- Cantin was only employed for 1 month
- Cantin would have been evaluated but can't recall this;
- he doesn't know the information with regard to Cantin

Cantin testified and stated that:

- this was his first job ever working on a till or handling cash;
- Spoletini and Sonya Spoletini were his supervisors;
- on one occasion his till was short approximately \$20.00 and he was told that he would have to pay this amount, so he did;

- shortly afterwards he was advised that a couple of bottle of wine had been stolen and that he would have to pay for them;
- he refused to pay for the wine as he felt there was no proof that the wine had been stolen on his shift;
- as a result of refusing to pay for the stolen wine, Sonya Spoletini changed the shift schedule, after it had been posted and without letting him know of the changes and consequently he missed a shift;
- when he went in to work to find out when he was supposed to work, he found his name removed from the schedule and Sonya Spoletini told him she thought he had quit because he did not show up for his last shift;
- when he asked for his final pay, Sonya Spoletini would not sign the cheque until he had endorsed it and then she cashed it there;
- he had asked his mother to come with him as a witness as he was concerned about how Sonya Spoletini would pay him;

In response to cross examination by Spoletini, Cantin stated that he was not told any specifics of what was stolen except it was 2 bottles of wine. Cantin further stated that the shift schedule was changed after he had checked to see when he was next scheduled to work.

In response to cross examination by the delegate of the Director, Cantin stated that he had never met nor spoken to the other former employees until he arrived at this hearing.

Debbie Cantin testified and stated:

- she accompanied her son as a result of what he had told her about Alfredo's practice of deducting for shortages;
- she was an office manager and was aware that it was illegal to deduct from an employee for shortages or missing merchandise;
- she told Sonya Spoletini she was there as a witness and observed Sonya Spoletini request her son to endorse the cheque and then he would be given the change;
- she pointed out to Sonya Spoletini that this was illegal to which Sonya Spoletini replied "OK" and gave the cheque to her son;
- upon examining the cheque she noticed that it was not signed by someone from Alfredo's and when this was pointed out to Sonya Spoletini she replied "Oh well");
- she asked Sonya Spoletini if she was refusing to pay her son to which Sonya Spoletini replied "No, he has to sign the cheque and then I'll give him his money."
- Sonya Spoletini had prepared a tape which indicated that the cost for the stolen wine was \$30.00;
- when it became clear that Sonya Spoletini would not sign the cheque, her son signed it so he could at least have some of his money.

Spoletini declined to ask any questions of Debbie Cantin on cross examination.

Tammy Curtis

Tammy Curtis (“Curtis”) was employed by Alfredo’s as a clerk/cashier in the Beer & Wine Store portion from July 2, 1996 to August 12, 1996. Curtis alleges that she was not paid for time spent training and further that Alfredo’s deducted from her wages for shortages and stolen merchandise.

Spoletini testified and stated that:

- Curtis is only trying to get paid for attending her initial job interview;
- denies that Curtis was not paid properly;
- Alfredo’s pays all employees for attending training sessions;
- he disagrees with the information provided by the delegate of the Director;
- he has no knowledge of other allegations made by Curtis.

Curtis was not in attendance at this hearing so I am left to consider the information provided in the material sent to the Tribunal.

“Penalty” Determination

Spoletini stated that Alfredo’s supplied all of the records that they had. Spoletini further stated that Revenue Canada had been examining some records and lost the records which pertained to Darin. Spoletini further stated the delegate of the Director had been advised by Alfredo’s about the problem caused by Revenue Canada in regard to the missing records. Spoletini further stated that he did not know what had happened to the back up disk for the missing records. Spoletini further stated that there were no records of the alleged deductions as there had been no deductions taken from these former employees. Spoletini finally stated that there had been no evidence presented at this hearing to prove that any deductions had been taken.

The delegate of the Director stated that a “Demand for Employer Records” was issued on February 4, 1997 naming the 4 employees contained in this Determination. The delegate of the Director further states that all the records requested were not provided. The delegate of the Director issued another “Demand for Employer Records” on April 25, 1997 specifically requesting “*all records of employee cash shortages, including a black book which was stored, at least sometimes, in the back of the Cold Beer and Wine Store*”. The delegate of the Director stated that no records were produced in response to this “Demand for Employer Records”. The delegate of the Director subsequently issued the “Penalty” Determination.

ANALYSIS

The burden of proving that the delegate of the Director erred in the Determinations rests with Alfredo's.

Alfredo's argues that in the absence of any documentary proof that deductions were taken from the former employees for shortages etc, I must find that no such deductions were taken. Alfredo's also argues that the former employees all met in advance of this hearing to concoct their evidence. Alfredo's then argues that I must therefore cancel both Determinations.

The purposes of the *Act* as set forth in Section 2 (a) "*ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment*" would, in my view, be rendered meaningless if an employer could refuse to maintain records as required by the *Act* and then, use as a defense for allegations of a contravention of the *Act*, the argument that there are no records to prove that a contravention had occurred. I do not accept the premise that a contravention of the *Act* by a person in respect of one requirement somehow relieves that person of their requirement to abide by the provisions of the *Act*.

In the absence of documentary evidence, I must carefully consider the evidence of the parties provided at the hearing. The evidence of Gray, Darin, Cantin and Debbie Cantin was presented in a credible manner and, with some minor exceptions, was not challenged by Alfredo's representative, Spoletini. Gray, Darin and Cantin all recounted similar experiences with Alfredo's with respect to the circumstances surrounding the issues of this appeal. The fact that these former employees who all worked at different times for Alfredo's first met at this hearing lends additional credibility to their evidence. Spoletini's evidence was simply just not credible in the face of the confirmed contradictory evidence provided by the delegate of the Director and the former employees.

Section 28 of the *Act* requires that an employer keep certain records with respect to an employee and states:

Section 28, Payroll records

(1) For each employee, an employer must keep records of the following information:

(a) the employee's name, date of birth, occupation, telephone number and residential address;

(b) the date employment began;

(c) the employee's wage rate, whether paid hourly, on a salary basis or on a flat rate, piece rate, commission or other incentive basis;

(d) the hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis;

- (e) the benefits paid to the employee by the employer;*
- (f) the employee's gross and net wages for each pay period;*
- (g) each deduction made from the employee's wages and the reason for it;***
- (h) the dates of the statutory holidays taken by the employee and the amounts paid by the employer;*
- (i) the dates of the annual vacation taken by the employee, the amounts paid by the employer and the days and amounts owing;*
- (j) how much money the employee has taken from the employee's time bank, how much remains, the amounts paid and dates taken.*

(2) Payroll records must

- (a) be in English,*
 - (b) be kept at the employer's principal place of business in British Columbia, and*
 - (c) be retained by the employer for 7 years after the employment terminates.*
- (emphasis added)*

Based on the evidence provided and on the balance of probabilities, I conclude that Alfredo's took deductions from each of the employees in this appeal and did not keep the records of those deductions as required by Section 28 of the *Act*.

The nature and type of deductions that an employer is permitted to take from an employees wages is set forth in Section 21 of the *Act* which states:

Section 21, Deductions

- (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 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.*

Based on the evidence provided and on the balance of probabilities, I conclude that the deductions taken by Alfredo's from each of the employees in this appeal were not deductions permitted by the *Act*, therefore the amount of those deductions is deemed to be wages and pursuant to Section 21 (3) of the *Act*, those wages are subject to recovery.

Michael Gray

Based on the evidence provided and on the balance of probabilities, I conclude the following with respect to Gray:

1. Gray did work overtime hours and did not receive the overtime rates of pay.
2. Gray did have deductions taken from his gratuities and his wages by Alfredo's to cover shortages or spillage.
3. Gray's employment was terminated without just cause by Alfredo's and Gray is therefore entitled to compensation for length of service.
4. The calculations performed by the delegate of the Director in regard to wages owing to Gray are correct in all respects.

Cindy Darin

Based on the evidence provided and on the balance of probabilities, I conclude the following with respect to Darin:

1. Darin did work overtime hours and did not receive the overtime rates of pay.
2. Darin did have deductions taken from her gratuities and her wages by Alfredo's to cover shortages or spillage.
3. The calculations performed by the delegate of the Director in regard to wages owing to Darin are correct in all respects.

Benjamin Cantin

Based on the evidence provided and on the balance of probabilities, I conclude the following with respect to Cantin:

1. Cantin did have deductions taken from his wages for shortages and missing merchandise;
2. The calculations performed by the delegate of the Director in regard to wages owing to Cantin are correct in all respects.

Tammy Curtis

Based on the information provided by the delegate of the Director and on the balance of probabilities, I conclude the following with respect to Curtis:

1. Curtis did have deductions taken from her wages for shortages and missing merchandise;
2. Curtis was not paid for all hours worked.

“Penalty” Determination

Based on the evidence provided and on the balance of probabilities, I conclude that the “Penalty” Determination in the amount of \$500.00 was appropriately issued by the delegate of the Director. I have concluded that Alfredo’s failed to keep and produce employee records as required by Section 28 of the *Act*. Section 28 of the *Employment Standards Regulation* (the “*Regulation*”) provides that a contravention of Section 28 of the *Act* results in a penalty of \$500.00 for each contravention.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated July 10, 1997 in the amount of \$2,378.35 be confirmed in all respects. I further order that the “Penalty” Determination dated July 10, 1997 in the amount of \$500.00 be confirmed in all respects.

Hans Suhr
Adjudicator
Employment Standards Tribunal

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