

**EMPLOYMENT STANDARDS TRIBUNAL**

In the matter of an appeal pursuant to Section 112 of the  
*Employment Standards Act S.B.C. 1995, C.38*

- by -

Park Hotel (Edmonton) Ltd and Hunters Grill Ltd  
Associated Corporations operating as  
Dominion Hotel

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

<b>ADJUDICATOR:</b>	John M. Orr
<b>FILE No:</b>	98/555
<b>DATE OF HEARING:</b>	November 23, 1998
<b>DATE OF DECISION:</b>	January 6, 1999

**DECISION****APPEARANCES**

Bruce Jordan	Counsel for Park Hotel (Edmonton) Ltd and Hunters Grill Ltd
Gerry Omstead	Delegate of the Director
Francis McKenna	On his own behalf
No one appeared	on behalf of Morgan Bensten

**OVERVIEW**

This is an appeal by Park Hotel (Edmonton) Ltd and Hunters Grill Ltd, related companies, operating as the Dominion Hotel and "Hunters", hereinafter collectively referred to as "Dominion", pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") from a Determination (File No. 059736) dated July 28, 1998 by the Director of Employment Standards (the "Director").

Dominion operates a pub/restaurant in Victoria locally known as "Hunters". Dominion employed Francis McKenna ("McKenna") and Morgan Bensten ("Bensten") as bartenders. Bensten was employed from December 1993 until his termination on April 12, 1997. McKenna was employed from April 21, 1996 until April 12, 1997. Both employees were terminated for theft. There were claims for compensation for dismissal without cause but these claims were withdrawn. There were also criminal charges of theft which were "Stayed". Both employees claim regular and overtime wages owing. They also claim that they were improperly required to repay "bar shortages". Dominion claims that both employees owe far more in monies misappropriated than they are owed in wages and that although both employees paid back bar shortages they were not "required" to do so.

The Director determined that Dominion had not provided adequate payroll records and after accepting the employees records found that wages and overtime were owing to both employees. The Director also found that Dominion did require the bar shortages to be repaid. Dominion appeals on the grounds that the employees should not be able to claim for wages during times that they were stealing from their employer and further that although there was a reporting policy about bar shortages there was never any requirement to repay these shortages.

**ISSUE TO BE DECIDED**

The issues to be decided in this case are whether the employer is entitled to withhold the payment of wages in relation to an employee or employees who have been found to be stealing from the employer. Secondly, whether the employee was "required" to pay back bar shortages and was therefore required to pay part of the employer's business cost as prohibited by section 21(2) of the *Act*.

**FACTS**

The facts were in dispute and I heard evidence from Steven Swannell ("Swannell"), the general manager of Hunters at the time of Mitchell's employment and now the Liquor Controller for the business, from Robert Mitchell and from Francis McKenna. Mr Bensten did not appear and therefore did not testify.

At the commencement of the hearing Dominion agreed that all the calculations of wages owing to McKenna and Bensten were conceded to be correct and payable if I found that the employer was liable to pay even where the employee was stealing from the company.

Swannell testified that bartenders were required to enter all sales into the "Squirrel" sales computer and to deposit all payments into a secure location. Each bartender had an identity card which allowed them access to the Squirrel system. At the end of each shift the Squirrel total should match the cash on hand (together with credit card amounts). I heard evidence that the balance was "blind" meaning that when the employees totalled the cash they did not know the Squirrel total. In a perfect world, if all sales were rung in accurately and all change made exactly, there should be perfect balance, whether or not the staff were aware of the Squirrel totals. However, if mistakes are made in ringing in the sales or in making change there will be "shortages" or "overages" in the cash.

Shortages would also occur if a bartender were dishonest and pocketed the cash after ringing in a sale but this would not be a very clever way of stealing because it would show up as a "shortage" in the cash. The other type of shortage which is directly the result of dishonesty is where a sale is simply not recorded in the Squirrel system and the cash is pocketed by the employee. This activity results in a shortage in "inventory" and not in cash. To avoid any confusion between the two types of shortage I will refer to the inventory shortage as "Leakage". Leakage is only going to be discovered by direct observation and very good inventory controls.

"Shortages" , i.e. differences in the Squirrel total and the cash total, are a concern to management because they indicate an issue of competence. They occur when sales are recorded inaccurately or change is made improperly. Dominion required all shortages to be recorded in a binder titled "Bar Shorts". Swannell testified that employees were encouraged to look at the bar shorts binder and to "try to stay on top of any problems". He testified that employees were never forced to repay shortages, it was never deducted from their pay, and no one was ever disciplined or dismissed for not paying back shortages.

Swannell admitted that in December of 1996, because of chronic shortages, he told employees that, if significant shortages continued, individuals would be progressively "written-up", suspended and possibly fired. He said that this was not referring to the past shortages but was in relation to any future shortages. He admitted that employees may have been encouraged to pay back past shortages and McKenna, Bensten, and Mitchell did so.

"Leakages" were of greater concern because they resulted directly from dishonesty i.e. the failure to enter a sale in the system and the pocketing of the cash. In the Spring of 1997 Dominion hired outside consultants to perform a service quality audit which turned up some concerns about integrity i.e. leakage. The consultants were asked to continue their investigation into this aspect and to prepare a report. When Dominion received the report from the consultants it contained

information that McKenna and Bensten had made a number of sales which they had not been seen to enter into the Squirrel system. They had been observed putting cash into their pocket. On the strength of this report and some further checking by Swannell, McKenna and Bensten were dismissed.

During the Director's investigation only part of the report was produced to the investigator because the balance referred to other issues and other employees.

## **RULINGS**

There were several procedural or evidentiary issues which I decided during this hearing and which I agreed to record in this decision.

### Application for Adjournment:

Dominion applied to adjourn this hearing because they wished to call as a witness the author of the report which led to the allegations of theft. Dominion said that as the author was not in their employ but was an independent consultant they had been unable to locate her until recently. They said that although they had now located the witness she was not available on today's date.

The respondent and the Director's Delegate opposed an adjournment as it would create further delay which would be unfair to the employees.

I denied the adjournment because in my opinion there had been ample time since the appeal was filed on September 03, 1998, for the employer to arrange for the attendance of the witness. The witness had not been summonsed to attend and no explanation was given for the non-attendance of the witness except that she was unavailable.

### Application by Director's Delegate to Strike the Appeal:

The Director's Delegate submitted that the appeal should be struck for failing to comply with the Tribunal's rules of procedure (the "*Rules*"). The *Rules* provide that the reasons for the appeal must, amongst other things, attach a copy of the Determination being appealed. In this case the appellant only attached part of the Determination but fairly extensive schedules were not included.

Although the Tribunal expects parties to comply with the *Rules* they are not statutory and therefore, in my opinion, I have discretion to proceed in the absence of strict compliance if it is in the interests of providing a fair and efficient means of resolving the dispute. In this case all the parties had received copies of the full Determination except for myself. A copy was provided to me for use in the hearing and in full at the conclusion of the hearing.

In my opinion the only person prejudiced initially by the non-compliance here was myself and that it was in the interests of fairness for the hearing to proceed. The application was dismissed.

### Admissibility of the Full Consultant's Report:

In the absence of the consultant who prepared the report, Dominion wished to tender the complete report at this hearing. The respondent and the Director's delegate objected on the basis that the document was not previously produced to the Delegate during the investigation. The Delegate noted that several requests had been made previously for production of documents and the full report was never produced.

I decided that the report was not admissible at this stage in the process. Dominion had ample opportunity to disclose the material to the Delegate but declined to do so. It is not appropriate to allow an employer to hold back relevant material until the appeal process when it was available at the time. In this case the author of the report was no longer available for examination and therefore it would be prejudicial to the Respondent to allow the report at this stage.

I did rule, however, that Dominion could refer to any part of the information in those portions of the report previously shared with the Director and that Swannell could testify about the basis for the allegations of theft including information in the report that formed part of the basis for termination. He could also testify about those things within his personal knowledge and his own actions taken as a result of information received.

## **ANALYSIS**

### Wages:

Prior to the issuing of the Determination both McKenna and Bensten withdrew their claims for wrongful termination but Dominion still asserts that there is strong evidence of theft and that the employees should not be allowed to draw wages while stealing from their employer.

While I agree that there is substantial evidence of theft, certainly enough to support just cause for termination, I do not believe that the employer is allowed to set-off such thefts against wages owing. When the employee works he is entitled to be paid.

Section 21 of the *Act* provides as follows:

### *Deductions*

21. (1) *Except as permitted 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.*

The employer's remedy is through the criminal or civil courts for restitution of the monies stolen if the actual amounts can be established. It is not open for the employer to refuse to pay wages earned.

### Shortages:

"Shortages" came about when transactions were recorded in the Squirrel system but at the end of the shift the actual cash (and credit card vouchers) did not equal the total recorded in the system. Dominion tried to pressure their staff to be as accurate as possible in the Squirrel transactions to avoid shortages. Shortages could arise simply through errors or dishonesty by not depositing all of the cash recorded. Dominion treated the shortages as a competency issue and not as dishonesty. Dominion indicated in December of 1996 that if chronic shortages continued that graduated discipline would ensue commencing with warnings and leading to possible dismissal.

The shortages incurred prior to the imposition of the December 1996 policy were totalled for each employee and posted in a shortages binder. The employees were encouraged to pay back these amounts although it was clear that they would not be disciplined in relation to these past shortages. McKenna paid Dominion \$408.75 toward the bar shortages occurring during his shifts. Bensten repaid \$375.18.

The repayment of shortages in this case were not withheld nor deducted from the employee's wages nor were they required to be paid from wages. Therefore, section 21(1) does not apply.

The next question is whether "shortages" are a "business cost". If a product is sold and the sale recorded in full but the equivalent cash is not on hand then the business profit shrinks accordingly. From the evidence I heard such shortages were not uncommon but they were offset to some extent by overage on other occasions. Thus the business cost is the difference between the overage and shortages which would be a pre-tax expense. If employees were "required" to re-pay such shortages, in my opinion, they would be paying part of the business cost.

The question then is whether the employees were "required" to re-pay these shortages. The evidence I heard was that there was encouragement and even some moral persuasion for employees to pay. It was clear from McKenna's and Mitchell's evidence, despite my prior finding of dishonesty, that they were asked to pay back some of the shortages from tips and that they felt that they would be penalised by reduction in hours or shifts if they didn't comply. However they both agreed that this had never happened at this particular job and that they had never been told that they would be disciplined or fired if they did not comply. Mitchell was asked in cross-examination whether anyone had ever been disciplined for not paying the shortages and he answered "No, they would never do that". He said that he feared such actions from his experience with other employers. He said that his fears were "subconscious" but agreed again that no-one had ever been disciplined at Hunters for failing to pay shortages.

McKenna testified that he felt there were implicit threats about repayment of the shortages contained in the new policy that future shortages could result in discipline and he repaid his shortages right away. He also agreed that he had never known any employees to be disciplined in any way for not repaying the shortages. We did not hear from Bensten.

The common meaning of "require" is to insist upon, command, order, compel, or demand authoritatively. All of these terms imply some form of coercion with consequences for non compliance. In my opinion a requirement is something more than a request and is backed with something stronger than moral suasion.

I am satisfied that if the employer required repayment of the bar shortages by staff it would be contrary to the *Act*.

Although the shortages were brought to the attention of staff in December 1996 Mitchell did not repay any of the shortages until March 24, 1997 and then only \$50.00 of several hundred short. He was not disciplined. His hours and shifts were not reduced. There were no negative consequences to him for not repaying the shortages. Bensten did not pay until April 03, 1997. Neither Mitchell nor McKenna were aware of any employees who were disciplined or in any way negatively treated by their employer for failure to pay back bar shortages. The stated concerns of Mitchell and McKenna were subjective and there is insufficient evidence for me to find that repayment was "required" by the employer, Dominion.

Conclusion:

In my opinion Dominion had no right to withhold wages against monies stolen. In addition, although McKenna and Bensten paid back bar shortages under some moral persuasion by the supervisor, they were not "required" to do so and are therefore not entitled to be re-imbursed for these amounts.

To the extent of the reimbursements of shortages the Determination will be varied but otherwise in relation to wages and overtime it will be confirmed.

**ORDER**

I order, under Section 115 of the *Act*, that the Determination is varied as follows:

The amount owing to Morgan Bensten is \$2735.80 plus interest.

The amount owing to Francis McKenna is \$1149.45 plus interest.

**John M. Orr**  
**Adjudicator**  
**Employment Standards Tribunal**