

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-

Old Country Restaurant
(the "Restaurant ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: C. L. Roberts

FILE NO: 98/639

DATE OF DECISION: December 16, 1998

DECISION

The appeal is based on written submissions by Franz Kreiger on behalf of Old Country Restaurant Ltd..

OVERVIEW

This is an appeal by the Old Country Restaurant Ltd. (the "Restaurant"), pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued September 18, 1998. The Director found that the Restaurant contravened Section 21 of the *Act* in making unauthorized deductions from Paul Desroches ("DesRoches"). Pursuant to Section 28 of the *Act*, the Director Ordered that the Restaurant pay \$2,753.55 to the Director on behalf of DesRoches.

ISSUE TO BE DECIDED

At issue on appeal is whether The Restaurant made deductions from DesRoches wages contrary to the *Act*.

FACTS

DesRoches worked at the Restaurant from August 10, 1994 to September 6, 1997 as a waiter/server.

On August 28, 1997, DesRoches filed a claim with the Employment Standards Branch regarding overtime and statutory holiday pay. He also alleged that the Restaurant had made a deduction from wages. By the time the Director's delegate made her determination, the parties had resolved the issues of overtime and statutory holiday pay.

After reviewing the payroll records provided by the Restaurant and the daily time sheets provided by DesRoches, the Director's delegate determined that an initial amount of \$.50, and later \$1.00, per hour was deducted from DesRoches' wages. The parties advised her that the deductions represented a "tip pool" for kitchen staff. The Restaurant advised the Director's delegate that this was based on a verbal agreement with staff.

The Director's delegate found this practise to be contrary to Section 21 of the *Act*. She also found that this practise resulted in DesRoches being paid less than minimum wage for hours worked.

The Restaurant argued that it had paid DesRoches compensation pay he was not entitled to, and that it subsequently wanted to offset the wages owed by way of the overpaid compensation. The Director's delegate found that although the Restaurant had paid compensation for length of service, that did not discharge liability for wages owed. The Director's delegate stated

Therefore, as a result the company's position to have the monies determined to be owed to Mr. DesRoches cannot be factored into as payments received for another entitlement to wages

under the Act. The company can not offset wages determined to be owed against the compensation pay that the company has paid.

ARGUMENT

The Restaurant contends that the "tip pooling" system is to ensure that all staff involved in the presentation and service of food and beverages receive a tip, whether or not they are the recipients of the gratuity. Mr. Kreiger argues that servers are capable of earning between \$20.00 to \$25.00 per hour when tips are factored into the earnings.

Mr. Kreiger also stated that he had the servers' best interests in mind when they were offered the option of contributing 10% of gratuities or \$1.00 of reported earnings to the "tip pooling" system. He states that the servers all opted to have the deduction taken from their wages. Mr. Kreiger also stated that the deductions involved only kitchen staff and servers, and was not used to pay any business costs.

Finally, Mr. Kreiger states "I realize my error in taking deductions from wages and no longer contravene this section of the *Employment Standards Act*. To pay Paul DesRoches I feel to be unjustified because Paul had already profited from our error which has since been rectified."

DECISION

The burden of establishing that a determination is in error rests with the Appellant. This appeal is unusual in that the Appellant has acknowledged violating the *Act*.

Section 21 of the *Act* provides that

- (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.
- ...
- (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.

The Restaurant admits to making wrongful deductions, although it claims it did so in error. The Restaurant goes on to argue however, that because it has rectified this error, DesRoches should not receive the compensation the Director's delegate has awarded.

The Tribunal is a creature of statute. Its powers are defined and limited by the *Employment Standards Act*. Those powers do not include remedying errors made by an employer, or making awards to correct situations of unjust enrichment. In this instance, the employer seeks to have the Tribunal "right the balance" in light of a perceived unfairness. I have no jurisdiction to do so, even where I might agree such an award is appropriate.

Consequently, the appeal is dismissed.

ORDER

I order, pursuant to Section 115 of the Act, that the Determination dated September 18, 1998 together with whatever interest may have accrued since that date, be confirmed.

Carol Roberts
Adjudicator
Employment Standards Tribunal