

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 -

Silver Rush Enterprises Ltd.
("Silver Rush")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE NO.: 97/662

DATE OF HEARING: November 28, 1997

DATE OF DECISION: January 5, 1998

DECISION

OVERVIEW

The appeal is by Silver Rush Enterprises Ltd. (“Silver Rush”) pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) against two Determinations issued by delegates of the Director of Employment Standards (the “Director”). In one Determination, dated August 1, 1997, Silver Rush is to found have terminated Kimberly Houle without just cause and owes compensation for length of service as a result. It is also found to have contravened section 21 of the *Act* in deducting \$150 from Houle’s pay. The second Determination is dated August 11, 1997 and it imposes a penalty of \$0.00 for contravention of the *Act*.

APPEARANCES

Mark Perl	Owner of Silver Rush
Candice Todesco	Manager of Silver Rush
Kimberley Houle	On Her Own Behalf
Dennis Morgan	Assisting Houle

ISSUES TO BE DECIDED

At issue is the matter of whether or not Silver Rush had just cause for the termination. Silver Rush argues that the Determination is wrong, that it had just cause, either for reason of theft or gross negligence.

At issue is the finding that Silver Rush contravened the *Act* in deducting \$150 from Houle’s pay. Silver Rush says that it did so with the employee’s agreement.

At issue is the Determination which imposes a penalty.

FACTS

Silver Rush operates kiosks in shopping malls and sells jewellery. Kimberly Houle began work for Silver Rush on August 20, 1996 as a retail clerk in its kiosk in the Guildford Towne Centre. Silver Rush terminated her employment on March 10, 1997.

Some weeks before being terminated, Houle dropped a plexiglas display case while packing up for the day. Houle attempted repairs but according to Silver Rush, there is a need to replace the display case and a new unit costs \$150. That amount was deducted from Houle's last paycheque. Houle is said to have agreed to the deduction.

Houle worked alone. At the end of each work day, it was her job to remove display cases from kiosk counters, deposit garbage in bins near the kiosk, count the daily take in cash and credit card receipts, and put the latter, and the daily float, in the safe.

Mark Perl would normally pick up the week's take on Sundays. He went to do that on Sunday, March 9, 1997. On arriving at the kiosk, he found Houle distressed and in tears. She said that cash and credit card receipts were missing. The sales deposit for the 9th and the float were accounted for but \$922.00 in cash and \$102.60 in credit card receipts, the take for the period March 3, 1997 to March 8, 1997, were gone. Both Perl and Houle looked for the missing money without success.

Houle reported for work the next day. She called police.

Perl cannot understand how the money was lost. He says that it represents a very significant part of Silver Rush's income. On considering how the money might have gone missing, he concluded that either Houle took the money or she was grossly negligent in her duties. Either way, he decided that he could no longer trust Houle to run the kiosk and she was terminated.

The report of the Surrey detachment of the RCMP shows that the investigating officer "found no evidence to suggest that any employee of Silver Rush was involved in theft/loss of moneys or credit card receipts". The file is concluded.

A delegate of the Director has imposed a penalty of \$0.00 for contravention of a specific part of the *Act*. The Determination states that Silver Rush contravened Sections 21 and 44 of the *Act* but does not provide reasons for the decision to impose a penalty.

ANALYSIS

Section 63 of the *Act* sets out that employers are liable for compensation for length of service where employment is beyond 3 consecutive months. That the liability for compensation for length of service can be discharged is set out in section 63 (3). That section of the *Act* is as follows:

- (3) *The liability is deemed to be discharged if the employee*
 - (a) *is given written notice of termination as follows:*
 - (i) *one week's notice after 3 consecutive months of employment;*

- (ii) 2 weeks' notice after 12 consecutive months of employment;
- (iii) 3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice;
- (b) is given a combination of notice and money equivalent to the amount the employer is liable to pay, or
- (c) terminates the employment, retires from employment, or is dismissed for just cause.

A single act may be of such a serious nature that it justifies termination. Examples of less serious misconduct, when considered together, may also constitute just cause for dismissal as may the chronic inability of an employee to meet the requirements of a job. In all cases the onus is on the employer to show just cause.

Silver Rush argues that it has just cause for reason of theft. But there is no hard evidence of that. Indeed, the evidence is all to the contrary.

Silver Rush argues that, if not theft, there had to be gross negligence. But the absence of one does not prove the existence of the other. It is entirely possible that Houle did not neglect her duties at all. The theft might reflect nothing more than cunning on the part of the thief or thieves against a quite unsuspecting person. As that is a possibility, before Silver Rush can have just cause, it must actually show that Houle was particularly careless. It has not done that.

Given no proof of any culpability on the employee's part, I find myself in agreement with the delegate. Compensation for length of service is owed the complainant.

Silver Rush has deducted the cost of replacing a broken display case from the employee's wages. That sort of deduction is not permitted by the *Act* and is contrary to s. 21 (1) of the *Act*. And no agreement can alter that.

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.* (my emphasis)
- (2) *An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations.*

Section 21 (2) of the *Act* provides that business costs cannot be deducted from an employee's earnings. Where the display cases are lifted up and down on a regular basis, there is always the possibility that one might be dropped and damaged. People make mistakes. In respect to tasks like handling display cases, an employer can expect reasonable diligence from an employee but it cannot demand perfection. The cost of repairs or replacement is just a part of doing business.

An employee cannot agree to pay his or her employer's business costs or to accept less than the minimum provisions of the *Act*. Where that is done, the agreement is null and void.

Section 4 of the *Act* states:

4 The requirements of this Act or the regulations are minimum requirements, and an agreement to waive any of those requirement is of no effect, subject to sections 43, 49, 61 and 69.

Sections 43, 49, 61 and 69 apply to employees who are members of unions.

A penalty has been assessed against Silver Rush in the amount of \$0.00. Silver Rush is found to have contravened the *Act*. As Superior has contravened a requirement of the *Act*, the Director may impose a penalty, that is clear. But for reasons set out at length in *Randy Chamberlin and Sandy Chamberlin operating as Super Save Gas*, BCEST No. D374/97, and *467226 B.C. Ltd. operating as Superior Beauty Supplies and Equipment*, BCEST No. D581/97, I am cancelling the Determination to impose the penalty.

The penalty is imposed through a Determination and as such there must be a statement of reasons. The *Act*, s. 81 (1) (a) requires it. Moreover, as I read s. 98 (1) of the *Act*, it requires two things of the Director in regard to penalties. It requires that discretion be exercised. And where the discretion is exercised, there must be a statement of reasons for that. Because the Determination of August 11, 1997 fails to provide any reasons for the decision to impose a penalty on Silver Rush, I am cancelling the Determination.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated August 1, 1997 be confirmed in the amount of \$663.92 together with whatever further interest has accrued pursuant to Section 88 of the *Act*, since the date of issuance.

I order, pursuant to section 115 of the *Act*, that the Determination which is dated August 11, 1997, and which imposes a penalty of Silver Rush, be cancelled.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal

LDC:lc