

An appeal

- by -

Kate Roberts dba Flaming June Day Spa
("Roberts" 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.: 2001/680

DATE OF DECISION: December 27, 2001

DECISION

OVERVIEW

This is an appeal by an employer, Kate Roberts operating as Flaming June Day Spa. (“Roberts ” or “Employer ”), from a Determination dated August 31, 2001 (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”), concerning two employees, Claire Sriranpong and Nancy Brook. The Employer attempted to “re-capture” a bonus by deducting the amount of the bonus from Ms. Sriranpong’s last pay cheque. The Delegate determined that the Employer could not “re-capture” a Christmas bonus paid by the Employer, from the last pay cheque of the Employee. The Employer appealed the Determination, but did not provide a detailed appeal submission. The “bonus” was not a wage because it was paid at the discretion of the employer and was not related to hours of work, production or efficiency. Section 21 of the *Act* prohibited the deduction of the bonus from wages. The Delegate made no finding whether the payment of the bonus was a “mistake” as alleged by the Employer or a “change of heart” as alleged by the Employee.

The Delegate determined that an employee, Nancy Brook was entitled to wages in the amount of \$363.29 which included wages, vacation pay on the wages and interest. The Employer filed an appeal indicated that there was an error on the facts, and that commission should be calculated at 40 % not 50 %. Ms. Roberts also noted that she would be able to provide substantiation of the error by October 28, 2001 because the files were not accessible due to a household move. Ms. Roberts filed no further submission with the Tribunal. I am not persuaded that the Delegate erred in the factual finding with regard to the commission structure.

ISSUE:

Did the Delegate err in finding that the Employer was not entitled to deduct a bonus, alleged to be paid in error, from the last paycheque of the Employee?

Did the Delegate err in calculating the wage entitlement of Ms. Brook?

FACTS

I decided this case after considering the written submission of the Employer, the Delegate, Claire Sriranpong and Nancy Brook.

The Determination in this matter was in respect of two employees Claire Sriranpong and Nancy Brook. These employees were employees of the employer’s day spa business , Flaming June Day Spa. I set out the facts in respect of each employee below:

Claire Sriranpong:

Ms. Sriranpong was employed as a receptionist at the Employer's Spa between November 20, 2000 and January 3, 2001. She was paid \$9.00 per hour. In the Determination the Delegate found that the Employer wrongfully attempted to "re-capture" a Christmas bonus paid by the Employer to Ms. Sriranpong by deducting it from Ms. Sriranpong's last paycheque. The Employee earned \$126.36 in wages during the last pay period, and the Employer issued a cheque for \$1.22, and the employer withheld \$125.14 for the bonus, which the Employer claims the Employee was ineligible. The Delegate held that the Employer withheld the amount of \$125.14 in an attempt to recapture the voluntarily paid bonus.

The Employer's rather bare appeal submission states :

I am appealing based on an error in interpretation of the law

I believe that if money was wrongfully given that an employer may deduct it at a later date as a correction to the mistake.

This is the only submission made by Ms. Roberts. There is no allegation in the appeal submission why the Employer believes that the "bonus" was wrongfully given.

Nancy Brook:

Ms. Brook worked as a masseuse on a commission basis at the employer's day spa between February 14, 2000 and October 7, 2000.

Ms. Roberts filed an appeal indicated that there was an error on the facts, and that commission should be calculated at 40 % not 50 %. Ms. Roberts also noted that she would be able to provide substantiation of the error by October 28, 2001 because the files were not accessible due to a household move. Ms. Roberts filed no further submission with the Tribunal.

ANALYSIS

In an appeal under the *Act*, the burden rests with the appellant, in this case the Employer, to show that there was an error in the Determination such that I should vary or cancel the Determination. I will deal with the two employees separately below.

Claire Sriranpong:

It appears that the Delegate was confronted with two possibilities during the investigation. The first possibility is that the Employer gave the bonus, and then changed her mind about giving the bonus by the date of the last pay cheque. This was the evidence of the Employee. The other possibility is that the Employer erred in giving the bonus. The Delegate did not come to a conclusion in the Determination as to whether the payment of the bonus was an error or, whether the Employer changed her mind about the bonus after paying the bonus. The Employer's appeal

submission was bare. I am not satisfied from the material before me that this is a case of “error” as alleged by the Employer.

In the absence of a contract between the parties, providing for a bonus structure as part of compensation, there is no requirement for an Employer to issue a bonus. In this case, the payment of the bonus was purely voluntary or gratuitous. The finding by the Delegate was that the bonus was paid “at the discretion of the employer and is not related to hours of work”. In the definition of “wages”, in s. 1 of the *Act* is broadly defined but the definition does exclude “(g) money that is paid at the discretion of the employer and is not related to hours of work, production or efficiency”. Given the finding of fact made by the Delegate, it is my view that the bonus at issue in this case is not a wage within the meaning of the *Act*.

When an Employee works, the Employee is entitled to be paid wages. Section 17 of the *Act*, requires that the Employer must pay to the Employee all wages earned by the employer during a pay period. When that Employee is terminated the Employer must pay all wages owing to the Employee within 6 days after the Employee terminates the employment (s. 18). Ms. Sriranpong was entitled to wages in the amount of \$126.36.

By virtue of s. 21(1) of the *Act* an Employer “*may not directly or indirectly withhold or deduct or require payment of all or part of an employee’s wages for any purpose*”. The “re-capture of the bonus” would fall within this prohibition. I therefore dismiss the Employer’s appeal as it relates to Ms. Sriranpong.

Nancy Brook:

The Employer has filed a bare allegation that there was an error in the calculation of commission at 40 % rather than 50 % as set out in the Determination. Ms. Brook filed a document in her submission indicating that the commission was 50 %. Given that the burden is on the Employer, and given the lack of submission by the Employer, I find that the Employer has not shown that the Delegate erred in the Determination as it concerns Ms. Brook.

ORDER

Pursuant to s. 115 of the *Act* I order that the Determination dated August 31, 2001 is confirmed, with interest in accordance with s. 88 of the *Act*.

Paul E. Love
Adjudicator
Employment Standards Tribunal