

An appeal

- by -

KCC 229 Holdings Ltd. operating as Caravela Restaurant and Tapas Bar
("KCC")

- 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: Lorne D. Collingwood

FILE No.: 2002/517

DATE OF HEARING: December 20, 2002

DATE OF DECISION: January 6, 2003

DECISION

APPEARANCES:

Fatima Lima

For KCC

Luis Vasquez

On his own behalf

OVERVIEW

KCC 229 Holdings Ltd. operating a Caravela Restaurant and Tapas Bar (I will use “KCC” and “the Appellant” for ease of reference.) has appealed, pursuant to section 112 of the *Employment Standards Act* (“the Act”), a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on September 20, 2002. The Determination orders KCC to pay Luis Vasquez \$1,586.57 for work in 2002.

KCC, on appeal, claims that the Determination is wrong. According to the Appellant, Vasquez is not entitled to \$500 a week, he worked less 40 hours a week, and he has been paid \$500. It is claimed, moreover, that the employee knew that the restaurant lacked customers and that it could not pay him as agreed unless business improved.

I have decided to confirm the Determination. I am not shown that the delegate’s decision is in any way wrong or unreasonable. The employer does not have a case.

An oral hearing was held in this case.

ISSUES

The total amount earned is at issue. It is suggested that the employee is not entitled to \$500 a week but an hourly rate of pay and that the employee worked less than 40 hours a week.

The amount paid is an issue. The employer claims to have paid the employee \$500 in cash.

The above matters go to credibility and the delegate’s decision to believe the employee over the employer in regard to the rate of pay and the matter of cash payments. This being an appeal, it is not for me to second guess the delegate. It is the delegate that has had the benefit of hearing from the parties in the first instance. What I must decide is whether it is reasonable to reach such conclusions given the evidence that was before the delegate.

The employer argues in its written submissions that the amount of the Determination should be reduced because the employee raised his voice and was in other ways disrespectful to the employer. That ceased to be an issue when it was explained to the employer that it is completely irrelevant whether or not the employee raised his voice or was disrespectful.

What I must ultimately decide is whether the Appellant does or does not show that the Determination ought to be varied or cancelled, or a matter or matters referred back to the Director, for reason of an error or errors in fact or law.

FACTS

KCC operates the Caravella Restaurant. Its business has suffered because of Skytrain construction and it continues to suffer because the city is now in the process of repairing the roadway which leads to the restaurant.

KCC hired Luis Vasquez as its chef. The employment ran from March 27, 2002 to April 17, 2002, a three week period.

The employee on filing his complaint claimed that he was told that he would be paid \$500 a week and that he was not paid anything at all. The employer claimed a cash payment of \$500 and that the employee was owed about another \$600. The delegate was led to believe Vasquez over the employer. The employer had not produced clear evidence to the contrary. In fact, the employer did not produce any records at all and that is despite being ordered to do so (Demand for Employer Records issued by delegate). The delegate also notes in the Determination that the employer asked for a meeting with the delegate, then failed to attend the meeting, and that the employer indicated that it would pay Vasquez \$600, then it failed to pay him anything at all.

On appeal, the employer in effect argues that the employee is not entitled to a salary of \$500 a week but some unspecified hourly wage. This is not a new argument. It is consistent with arguing that the employee is only entitled to \$600, the employer's argument at the investigative stage.

Fatima Lima, co-owner of the restaurant, tells me that she can distinctly remember withdrawing \$250 from a bank account so that Vasquez would be paid and she claims another payment of \$250. I am not shown that the employer took \$250 from a bank account, never mind that the money was then turned over to the employee. And Vasquez continues to deny that he was paid anything at all.

The employer fails to provide clear support for any of its claims or a reasonable explanation for its failure to produce the records at the investigative stage. The employer, in fact, undermines its case in that it changes its story on appeal. It is no longer \$600 that the employee is said to be owed. Now it is \$375 plus vacation pay (\$390).

ANALYSIS

The employer disputes everything but it proves nothing.

There being a complete absence of records, the delegate had to decide between two competing claims in regard to rate of pay, total hours worked, and the amount paid. She chose to believe the employee over the employer. It is not for me to second guess that decision but only to decide whether her decisions are reasonable given the evidence before her.

Deciding credibility is seldom an easy task. There are many factors to consider. The manner of a witness is of some interest (Is the witness clear, forthright and convincing or evasive and uncertain?) but of

greater importance are factors like the ability of the witness to recall details; the consistency of what is said; reasonableness of story; the presence or absence of bias, interest or other motive; and capacity to know. As the Court of Appeal in *Faryna v. Chorny* (1952) 2 D.L.R. 354, B.C.C.A., has said, the essential task is to decide what is most likely true given the circumstances.

“The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities that a practical and informed person would readily recognize as reasonable in that place and in those conditions.”

As I see it, the delegate had no reason to have any faith in the employer. It had not produced a proper set of payroll records even though it was ordered to produce its records. The employer asked to meet the delegate, then it failed to attend the meeting. The employer said that it would pay Vasquez \$600, then it failed to pay him any money at all. And the employer was itself claiming cash payments. That is not how scrupulous employers act.

I have heard the appeal and find that the employer does not show that the Determination is in any way wrong or unreasonable. I am therefore led to confirm the Determination.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated September 20, 2002 be confirmed in the amount of \$1,586.57 and to that amount I add whatever further interest has accrued under section 88 of the *Act*.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal