

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act RS.B.C. 1996, C. 113

-by-

Granville Island Seafood Company Ltd.
("GI")

and

Tapani J. Leiyo
("Lei YO ")

-of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lome D. Collingwood

Fn..E Nos.: 98/683 and 98/691

DATE OF HEARING: January 21, 1999

DATE OF DECISION: February 10, 1999

DECISION

APPEARANCES

Drake Kariotakis	For Granville Island Seafood Ltd.
Tap ani J. Leivo	On his Own Behalf
Mike Sparrow	Witness
Simon Mawhood	Witness
Bruce J. Bott	Witness

OVERVIEW

Granville Island Seafood Company Ltd. ("GI") appeals, pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), a Determination by a delegate of the Director of Employment Standards dated October 8, 1998. Tapani I. Leivo ("Leivo", also the "Complainant") appeals that same Determination dated October 8, 1998, pursuant to section 112 of the *Act*. The Determination is that GI employed Leivo for work and that it owes him minimum wages and interest totalling \$8,337.83.

ISSUES TO BE DECmED

The appeals by GI and Leivo raise four issues.

The matter of whether or not Leivo was GI's employee is at issue. The delegate considered the *Act's* definition of "employee", "employer" and "work" and decided that, while the relationship between GI and Leivo appeared to be one of friendship at the beginning, the relationship became one of employment. GI says it did not employ Leivo: That all it did was extend a helping hand to the guy in giving him food, a place to live, transportation, and pocket money in exchange for minor driving and odd jobs.

Should it be decided that Leivo is an employee, the extent of work then becomes an issue to decide. In the absence of any record of hours worked, but faced with evidence of work as he was, the delegate decided that Leivo is entitled to the minimum daily pay of the *Act* for all of the days that GI was open from September, 1995 to September 10, 1997. On appeal, GI claims that Leivo' s last day of work was in April of 1997. Leivo appeals the Determination and again claims that he worked 10 and 12 hours days and 7 day weeks.

The Complainant appeals the Director's delegate conclusion in respect to the rate of pay. Leivo claims that it is not the minimum wage to which he is entitled but \$12.00 an hour.

The last of the issues raised by the appeals goes to the amount of wages paid Lievo. The delegate decided that Leivo was paid \$20 a day on average. On appeal, GI claims that it paid much more than that. According to GI, he was paid \$50 on Fridays and Saturdays and other amounts when he needed money, that it provided him with room and board, gave him free trips to Mexico and Cuba, allowed him use of a company truck, and that it also bought him a truck.

FACTS

Granville Island Seafood Company Ltd. is a retail seller of fish and other seafood. It employs 8 people on average. GI is owned by Drake Kariotakis, who sometimes goes by the name "Drake Karr".

Tapani ("Tap") Leivo used to hang around the Granville Island market and it was there that he met Kariotakis in 1993. Kariotakis took a liking to him. On noticing that Leivo was living in his van, Kariotakis started to give him odd jobs to do, some cash, and a place to stay, a room in the basement of a house owed by Kariotakis. I am satisfied that Kariotakis was, at the start, only trying to help Leivo. Yet it is clear that, in the years 1995 through 1997, Leivo was performing work which would normally be performed by a GI employee in that it was a necessary parting of conducting the business that is GI. That work included icing fish, unpacking fish and other seafood, and making regular deliveries and pickups for GI.

Leivo and Kariotakis differ greatly on the extent of work in the relevant period. Kariotakis describes the work as minor driving and doing the occasional odd job. He says that the driving is now done by his father and amounts to an hour or so each day except for the odd day when 4 to 6 hours of driving is required. Leivo claims regular work of 10 to 12 hour days and six and seven day weeks. Neither of the men kept a record of hours worked. Various people say that they often saw Leivo around the Granville Island market and performing work for GI but none of them provide any indication of when it was that Leivo was at work.

Kariotakis claims that his arrangement with Leivo ended in April of 1997. According to him, it was at that time that Leivo moved out of his house and on to a boat owned by Mike Sparrow, and he says that from that point on Leivo was working for Sparrow. SpalTOW confirms that Leivo did some work for him but he goes on to tell me that while it was his understanding that Leivo would be paid "through him", Leivo wound up being paid by Kariotakis. Kariotakis tells me that he did give Leivo more money after April but he describes that in part as a loan. Sparrow was supplying Kariotakis and GI with fish in the summer of 1997 and according to Leivo it was he that delivered that fish and other seafood, all the while working for Kariotakis and GI. The Determination reflects the fact that a delivery slip shows that Leivo delivered fish from GI to the Custom Smoke House on September 10, 1998.

Leivo claims that Kariotakis agreed to pay him \$12.00 an hour for his work. denied by Kariotakis.

Bruce Bott, long time friend of Leivo, recounts that Leivo once asked him for money, and that as a result, he went to Kariotakis on Leivo's behalf and asked why Leivo wasn't being paid. Bott testifies that he understood Kariotakis to say that Leivo's rate of pay was \$12.00 an hour. Kariotakis denies saying that to Bott.

A Doug Mackie writes to say that he worked for GI in Leivo's absence. He says that his agreement with Kariotakis was that he would be paid \$10 an hour .

GI claims that Leivo was fully paid for his work. Kariotakis claims that he paid Leivo \$50 cash on Fridays and Saturdays but he cannot show me what was paid to Leivo. All payments were in cash and there is no record of what payments were made. Leivo acknowledges that he was paid cash, \$20 a day on average.

Kariotakis claims that he provided Leivo with trips and room and board. Leivo agrees that he took trips to Mexico and Cuba but claims that he paid his own way for the most part. In regard to the trip- to Cuba, he says -that he was sent there for the purpose of buying 15 boxes of high quality Cuban cigars for Kariotakis and his cigar business.

ANALYSIS

Neither GI nor Leivo like the Determination but neither party show that it is obviously or clearly wrong.

Section 1 of the *Act* defines "employee" as including the following:

- (a) a person, including a deceased person, receiving or entitled to wages for work performed for another,*
- (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee,*
- (c) a person being trained by an employer for the employer's business, and a person on leave from an employer, and*
- (d) a person who has a right of recall. (my emphasis)*

It is clear that Leivo performed work: The parties agree on that point. And it is clear to me that GI allowed Leivo to perform work normally performed by an employee and that Leivo therefore clearly fits the *Act*'s definition of "employee". That being the case, it follows that Leivo is entitled to the protection of the *Act*, the payment of at least the minimum wage included.

Kariotakis appears to be of the view that his arrangement with Leivo was of such a casual nature that it is not governed by the *Act*. He is wrong on that. The *Act* sets out the minimum standards under which a person may work.

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

The exceptions apply to employees who are covered by a collective agreement.

The Complainant claims that the Determination is wrong in its conclusion that he is to be paid the minimum wage. Leivo says he was earning \$12 an hour. But he does not show that to me. It is not enough that Bott and Mackie tell me that they believe that pay is as alleged. They were not present when the agreement on pay was reached, that is, if there ever was such an agreement. Even that is not made clear to me. Bott may genuinely remember that Kariotakis said that pay was \$12 an hour but he may have misunderstood Kariotakis and I must consider the fact of his relationship with Lievo, which is clearly that of good friend. It does not, moreover, necessarily follow that just because Mackie was paid \$10 an hour that Leivo was paid that or a higher wage. And I find it most unlikely that Leivo would work 10 and 12 hour days, and seven days a week, at \$12-an hour and yet continue on working month after month for handouts of only \$20 a day on average. All considered, I, like the delegate, find that the evidence does not clearly indicate a rate of pay which is greater than the minimum wage.

The Complainant claims that he worked far more than 4 hours a day. Yet there is no record of that. Various people write and/or testify that they saw Leivo at the market and working for GI but they do not tell me what hours Leivo was at work, and they are clearly not in a position to know that. As matters are presented to me, there is nothing to show that the delegate erred in deciding that Leivo's work was the four hour daily minimum of the *Act*. Indeed, from what I can see, the delegate has reached what is the only reasonable conclusion on the extent of work.

Leivo is certainly entitled to at least four hours of pay for each day that he was at work. Section 34 of the *Act* provides for that and it is as follows:

- 34 (1) *If an employee reports for work on any day as required by an employer, the employer must pay the employee for*
- (a) at least the minimum hours for which the employee is entitled to be paid under this section, or*
 - (b) if longer, the entire period the employee is required to be at the workplace.*
- (2) *An employee is entitled to be paid for a minimum of*
- (a) 4 hours at the regular wage, if the employee starts work unless the work is suspended for a reason completely beyond the employer's control, including unsuitable weather conditions, or*
 - (b) 2 hours at the regular wage, in any other case, unless the employee is unfit to*

work or fail to comply with the Industrial Health and Safety Regulation of the Workers' Compensation Board.

GI claims that the Determination is wrong in that the last day of work is not a day in September but April of 1997. Yet I find that GI just does not show me that to me. When I consider the delivery slip which shows that Leivo made a delivery from GI to another company on the 10th of September, that Sparrow says that Leivo was to be paid "through him", Sparrow's understanding that it was Kariotakis that paid Leivo, and that Kariotakis was still providing Leivo with additional moneys after April, I am led to the conclusion that the delegate correctly identified the 10th of September, 1997, as Leivo's last day of work for GI.

The last of the issues before me is one that goes to what has been paid. Section 20 of the *Act* requires that wages be paid in Canadian currency. The *Act* does not allow work to be in exchange for room and board, the use of something, free trips or trucks. Certain deductions are allowed, including room and board and credit obligations, but that is only under certain circumstances and none are present in this case.

GI complains that it paid Leivo more than \$20 a day, but it does not show that. What I am shown is that there is no record of payments to Leivo, and that GI really has no idea of what it paid Leivo. GI simply fails to challenge, in any material respect, the delegate's conclusion on what Leivo was paid.

In summary, I find that the Determination is not shown to be in error. From what I can see of matters, the delegate has applied the *Act* in a way which is fully consistent with its intent and purposes.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated October 8, 1998 be confirmed.

Lorne Collingwood
Adjudicator
Employment Standards Tribunal