

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1995, C. 38

- by -

The Purple Foot Winemaker Ltd.
("Employer")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Richard S. Longpre

FILE No.: 96/581

DATE OF HEARING: January 17, 1997

DATE OF DECISION: January 30, 1997

APPEARANCES

Byron Hill for The Purple Foot Winemaker Ltd.
Deidree Ellingham for herself
Diane MacLean for the Director of Employment Standards

OVERVIEW

This is an appeal of the Director’s Determination No. CDET 003952. In August 1995 the Employer terminated Deidree Ellingham’s employment. The Determination concluded that the Employer owed Ellingham one week of unpaid wages at the end of her employment. The total amount found to be owing, including interest, was \$637.60.

The Employer did not attend the hearing. It relied upon its written appeal submission to the Tribunal. Ellingham and the Director’s delegate (the “Director”) attended the hearing.

ISSUE TO BE DECIDED

The issue to be decided is whether Ellingham was owed one week of wages upon leaving the Employer in August 1995. Ellingham and the Director agree that the issue is the date Ellingham commenced work with the Employer. Ellingham says that she started work on August 23, 1994; the Employer says she started August 29, 1994.

FACTS

Ellingham started her employment with the Employer in August 1994. On August 21, 1995 the Employer gave Ellingham two weeks notice of termination. Ellingham filed her complaint on the basis that she was owed a week’s salary.

All employees were paid bi-weekly throughout the relevant period of time. The pay period ended every second Saturday. Ellingham’s salary was deposited into her bank account the Friday before the pay period ended. She would receive a pay stub that set out the date of payment and the ending date of the specific pay period. For example, Ellingham's first pay stub with the Employer shows a pay date of September 8, 1994 for the pay period ending September 9. Ellingham's bank records show the deposit of her bi-weekly salary to be consistent with the pay stubs.

In April 1995, the Employer changed its method of payment for hourly paid employees. A one week hold back of wages was introduced. The Employer initially took the position before the Director that Ellingham was included in that change. In a later submission, the

Employer took the position that Ellingham's wages were not put on the one week lag. The evidence supports the latter. Ellingham's bank records show that throughout her employment, Ellingham was paid every two weeks. The pattern of payment was never interrupted. The change imposed on hourly employees did not affect her bi-weekly schedule of payments.

The key event occurred after the April 22, 1995 pay period. Hourly employees were put on the one week hold back of wages. On May 5, Ellingham's pay stub indicated payment for a pay period ending on April 29, 1995. While the pay stub indicated that she was being paid for one week, and therefore was being put on a one week hold back, Ellingham's bank record confirms that was not the case. She was paid for a two week period consistent with her previous bi-weekly schedule.

Ellingham argued that the May 5, 1995 pay stub showed what had been happening since she was hired. She argued there was a one week hold back of her wages since August 23, 1994. On September 8, 1994 Ellingham was paid her two week salary for the period ending September 9, 1994. Ellingham argued that was the one week hold back of her wages earned the week of August 23, 1994.

Ellingham explained that she went on a three week vacation in late July 1994. She left knowing she would start work with the Employer on her return. She phoned Dave Vellar, the general manager of the store, while on her vacation. She was told to start work on August 23. On her first day of work she met Howie Waters, another employee. He told the Director that he recalled Ellingham starting work on August 23. They worked in the unfinished store until September 14 when the store opened

Ellingham acknowledged that the Employer's record of employment showed her starting on April 29, 1994. Ellingham argued that this is when she signed her employment documents; documents the Employer did not have prior to that date. She did not think that the date on the form would indicate the date she started work.

The Determination's conclusion resulted from three main points. First, the Employer gave inconsistent explanations in support of its position. The Director understood the Employer to say that it terminated Ellingham's one week hold back of wages in April 1995 with an extra weeks payment of wages in that month. The evidence did not support that an extra week of salary was paid in April. Second, the Employer agreed there was no change in the payment of her wages after April 29, 1995. After April 29, 1995 every pay stub showed a one week lag in her payment of wages. If the lag in wages was correct after April 29, it was a correct interpretation of the records prior to April 1995. Finally, Ellingham's explanation of events were supported by Waters' explanation of the events. On the balance of probabilities, the Determination concluded that Ellingham had started work on August 23 and was owed the one week of wages upon termination.

ANALYSIS

Ellingham was paid for 50 weeks of work. If she started her employment on August 29, 1994 she was not owed a week of wages upon termination. The issue, therefore, is whether she commenced work on August 23 or 29, 1994.

Ellingham provided the Panel with all of her available documents. Her bank records were consistent with her pay stubs prior to April 29, 1995. These records indicated that her bank account was credited with her salary the day before every two week pay period concluded. For example, the records showed that her bank account was credited with \$762.08 on Friday, November 4, 1994 for the two week pay period that ended Saturday November 5, 1994. Similarly, Ellingham was paid on April 21, 1995 for the pay period ending on April 22.

The problem began two weeks after the April 22 pay period. Ellingham was paid her normal two week salary on May 5, 1995; however, the pay stub indicated a pay period ending April 29. The pay stub indicated that Ellingham was given the one week lag that was given to hourly employees. That did not happen. Her bank records confirmed that her bi-weekly schedule of salary payments did not change after April 22, 1995.

The Employer says that it did not change its method of paying Ellingham. The confusion arose because after April 22, Ellingham's pay stubs were in error. [I note the Employer's submission mistakenly refers to "August" and not "April."] The mistake started with the time lag that was noted on hourly paid employees. The same date was put on Ellingham's pay stub. The pay stub indicates a pay period ending "April 29" when it should have read "May 6." The error continued until she left in August 1995.

Ellingham says that the Employer's records after April 22 were correct. Just as the pay stub on May 5 indicates it was for the pay period ending April 29, her payment of salary on September 9, 1994 was for a pay period ending September 5. In other words, the change on April 29, 1995 was a *correction* of the notation of the payment schedule and not a *mistake*. The wages owing for her first week of employment with the Employer had never been paid.

Ellingham was a most credible witness. The Director's positive view of Water's evidence must also be respected. The Director investigated the matter carefully. The Determination relied on the divergent explanations given by the Employer and the explanations provided by Ellingham and Waters. Records after May 5, 1995 were given greater weight than records before May 5. Accepting that both version of events had some strengths and weaknesses, the Determination was based on the balance of probabilities.

To find that Ellingham commenced employment on August 23, I would have to find that the payment of her salary was on a one week hold back from the outset. All records indicate her salary was not so delayed. All records show that the payment of her wages occurred every two weeks from the beginning of her employment to the end of her employment. The only change was in the pay period set out on her pay stub after May 5, 1995. The only way her salary could have been delayed from the outset of her employment is if the pay stubs were incorrect from September 9 until April 29, 1995.

Further, for the first six months of her employment, the date her wages were paid and the pay period itself, were clearly stated on Ellingham's pay stub. Each pay stub indicated that she was paid up to date. None of the pay stubs indicated a hold back in wages. Ellingham never raised this "error" with the Employer. Finally, the Employer imposed a one week lag of wages on hourly employees in April 1995. There is little likelihood that this hold back would have been imposed on a salary employee six month earlier.

Bank records and pay stubs from September 1994 to April 1995 were made available to me during the hearing. It appears that these were not available at the time the Determination was made. These records give no support for Ellingham's argument that the Determination's conclusion was probable. A hold back in salary from the outset of her employment is neither apparent nor inferred on the evidence before me. Ellingham was paid for fifty (50) weeks without a lag in salary. Being paid every two weeks, commencing on September 8, means a start date of August 29

ORDER

Pursuant to Section 115 of the *Act*, I order that Determination No. CDET 003952 be canceled.

Richard S. Longpre
Adjudicator
Employment Standards Tribunal

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