

February 1999

Tribunal File No. 1998/502
CDET

**TO INTERESTED
PARTIES**

Re: Employment Standards Act -Part 13
Appeal of a Determination issued by the Director of Employment Standards on July 17, 1998
Amalia G. Toroy -and- Ely's Boutique & Gift Shop Ltd.
Tribunal Decision Number: DO60/99

Decision

This letter sets out the Tribunal's decision regarding the amount of wages owed by Ely's Boutique & Gift Shop Ltd. ("Ely's) to Amalia Toroy ("Toroy").

On September 17, 1998, the Tribunal conducted an oral hearing to decide the above-noted appeal. On October 5, 1998, the Tribunal issued Decision Bcest #D437/98 (the "Decision") which referred the matter back to the Director of Employment Standards (the "Director") to determine the amount of wages owed by Ely's to Toroy. c

In the Decision, the Adjudicator at page 5 stated as follows:

On balance, I conclude that Toroy performed work on all those days she claims to have been at the shop

...I will do nothing more than apply the minimum daily requirements, found in Section 34 of the Act, to those days where I have concluded work was performed. That provision requires an employer to pay an employee a minimum 4 hours at the regular wage, except where the circumstances described in subsection 34(2)(b) and 34(3) are present, for each day an employee starts work. The regular wage for the purpose of the calculation is \$7.00 an hour. This conclusion will not apply to those weeks for which the Director has already made a finding relating to the hours of work as that finding has not been appealed by either party .

In response to the Determination being referred back to the Director, the Tribunal received a submission from the Director's delegate on December 12, 1998. The Director's delegate found that Toroy was owed \$7 ,557.31 (before interest).

In a letter dated December 17, 1998, the Tribunal invited the other parties to reply to the submission of the Director's delegate. Submissions were received from Ely's dated November 23, 1998, January 10,1999 and January 23, 1999, and from Toroy dated January 4,1999.

The issue to be decided is whether the Director's delegate correctly calculated the amount of wages owed to Toroy. This issue has been decided based on the written submissions received by the Tribunal.

In his Decision, the Adjudicator gave clear directions on how the Director's delegate was to calculate the wages owed to Toroy. The Adjudicator specifically indicated the rate of pay (\$7.00 per hour), the number of hours per day (4 hours), and the days of work. After weighing the evidence of Toroy

and Eleanor Santos ("Santos"), the owner of Ely's, the Adjudicator accepted Toroy's evidence regarding her days of work. Those days are set out in the first paragraph at page 2 of the Decision. The Adjudicator also stated that his direction concerning the number of hours per day did not apply to those weeks for which the Director's delegate had already made a finding on hours of work. The latter is contained in the calculation sheets attached to the Determination issued on July 17, 1998.

The Directors' delegate found that Toroy was owed \$7,557.31 (before interest). I have reviewed his calculations and I find that he correctly calculated the wages in accordance with the directions given by the Adjudicator, with one exception. In his calculations, the Director's delegate indicated that Toroy worked on September 20, 1997. The Adjudicator did not make this finding in his Decision. Therefore, the total owed must be reduced by \$29.12 (\$7.00 X 4 hours + vacation pay) to \$7,528.19 (before interest).

In her submissions, Santos, for the most part, attempts to re-argue her case concerning Toroy's days and hours of work. Her submissions focus on the findings of fact and assessment of credibility made by the Adjudicator. Where she does provide calculations, she excludes certain days that the Adjudicator indicated should be included in the calculations. Further, her calculations fail to include statutory holiday pay. She does, however, identify September 20, 1997 as being incorrectly included in the delegate's calculations.

In her submission to the Tribunal, Toroy does not dispute the calculations of the Director's delegate. She wants, however, to correct evidence that she gave to the Adjudicator regarding one of her days of work. She now states she worked on September 20, 1997. As indicated above, the Director's delegate included this day in his calculations.

The purpose of referring the appeal back to the Director was to establish the exact amount of wages owed to Toroy given an established rate of pay and established days and hours of work. It was not to provide Toroy and Santos with an opportunity to re-argue their cases concerning Toroy's days and hours of work.

As indicated above, the Director's delegate calculated the wages in accordance with the rate of pay and days and hours of work which were established by the Adjudicator, with the exception of one day. Beyond that, there is absolutely no information before me that the Director's delegate has erred in his calculations.

Order

Pursuant to Section 115 of the *Employment Standards Act* (the "Act"), and further to Tribunal Decision BC EST#D43 7/98, I order that the Determination dated July 17, 1998 be varied in the amount of \$7,528.19 together with whatever interest that may have accrued, pursuant to Section 88 of the Act.

Norma Edelman
Registrar
Employment Standards Tribunal

Interested Parties:

Amalia Toroy
Ely's Boutique & Gift Shop Ltd.
Director of Employment Standards (Delegate: Ed Wall)